

The Oregon State Bar's 2022 Economic Survey Has Been Released

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The Oregon State Bar recently released its latest economic survey. The 2022 Economic Survey, which relies on data collected from Oregon lawyers in 2021, reports a number of important findings; these include a relative decrease in the number of new lawyers of color joining the bar, an increase in mean lawyer compensation statewide, and a decrease in reported attorney career satisfaction over the previous five years. In this brief article, I address only the survey results regarding the hourly rates Oregon attorneys charged for their time in 2021.

As many Oregon practitioners are aware, both state and federal judges routinely use the hourly rates reported in the Bar's economic surveys as a critical benchmark for assessing the reasonableness of Oregon attorneys' hourly rates. For example, a judge deciding a fee petition might need to determine the appropriate rate to use in calculating reasonable compensation for work performed in 2023 by a Lower Willamette Valley attorney with 25 years' experience in private practice. The judge would likely start with Table 36 of the 2022 Economic Survey, which provides statistics on Oregon private practitioners' 2021 hourly billing rates broken down by years admitted to practice and geographical region. Table 36 indicates that in 2021, private practitioners with 21-30 years' experience in the Lower Willamette Valley on average charged \$315 per hour for their services, with a median rate of \$313 and a 95th percentile rate of \$422. The judge might use those data to determine a reasonable rate falling somewhere on that spectrum, and

then rely on inflation information provided by the US Bureau of Labor Statistics to adjust the 2021 buying power of that hourly rate to 2023 dollars.

The first and most salient way that the 2022 Economic Survey differs from its predecessors is that the Bar no longer reports 25th or 75th percentile billing rates. The survey is silent as to the Bar's reasons for the change, but the omission of 75th percentile rates,¹ in particular, can fairly be characterized as unfortunate from the practitioner's perspective. Many judges have treated the 75th percentile rates as more important than any others in crafting reasonable fee awards, see, e.g., *Garcia v. Waterfall Cmty. Health Ctr., Inc.*, No. 6:20-cv-1800-MC, 2022 U.S. Dist. LEXIS 160119, at *3 (D. Or. Sep. 6, 2022), and the absence of those rates from the 2022 Economic Survey may result in inconsistencies in Oregon fee awards going forward.

The 2022 Economic Survey also reflects significant and unexpected divergences from the "expected" rates that would be predicted through adjusting the rates reported in the most recent previous survey for inflation. Some of these divergences are greater in magnitude than any we have previously seen in the Bar's economic surveys of the past two decades.

As one example, the 95th percentile rate for Portland-based practitioners in private practice for three years or fewer increased from \$305 in 2016 to \$538 in 2021, a 76% increase over five years; adjusting the buying power of the \$305 2016 rate to 2021 dollars would yield an "expected" rate of only \$344, a significantly smaller increase of less than 13%. This constitutes the greatest divergence from inflation reflected in any of the Bar's fee surveys of the 21st century. By contrast, the median rate for Portland-based practitioners in private practice for three years or fewer only modestly outperformed inflation, increasing from \$235 to \$300 (as compared to an "expected" rate of \$265).

A similar phenomenon is observable at the other end of the attorney-experience spectrum.

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The 95th percentile rate for Portland-based practitioners in private practice for more than 30 years increased from \$610 in 2016 to \$798 in 2021, outperforming inflation by a wide margin (the “expected” 2021 rate would have been \$688), while the median rate for such practitioners remained flat at \$425 over the same period, significantly underperforming relative to inflation (the “expected” 2021 rate would have been \$479).

These divergences from inflation may reflect the fact that 2021 was a pandemic year. That is, it is possible that the COVID-19 pandemic impacted different sectors of the Oregon legal market differentially. It is perhaps a plausible inference that attorneys charging rates at or near the median of the legal market may have faced a slowdown in the demand for their services, while attorneys charging rates at the high end of the market faced significantly different conditions. In any event, it appears that experienced Oregon practitioners charging approximately median rates declined to adjust their rates to keep pace with inflation over the period from 2016 to 2021, while many attorneys already charging relatively high prices in 2016 were able to adjust their rates faster than was necessary to keep pace with inflation, in some cases to a previously unprecedented degree.

Oregon attorneys who litigate fee petitions - whether in support or in opposition - are likely to find fodder in the 2022 Economic Survey for creative arguments both for and against the courts’ strict reliance on the survey data. It is possible that the Bar’s election not to report 75th percentile rates and uncertainty about how to estimate appropriate prevailing rates may increase the potential relevance of the sometimes-controversial Morones Survey of Commercial Litigation Fees (a survey of Portland-area commercial litigation attorney billing rates compiled by CPA

Serena Morones). It is, at the very least, an interesting time to be an attorney fee litigator.

Points to remember when litigating a fee petition:

- The 2022 Economic Survey reports prevailing rates from 2021. Those rates should be adjusted for inflation when litigating fee petitions in subsequent years. To adjust historical rates for inflation, the US Bureau of Labor Statistics maintains a user-friendly Consumer Price Index Inflation Calculator at www.bls.gov/data/inflation_calculator.htm.
- The 2022 Economic Survey data are relied on by judges of both state and federal courts in Oregon.
- Although the survey data are of critical importance in determining appropriate and reasonable hourly rates, there is also significant value in proffering expert opinion as to prevailing market rates, whether in support of or in opposition to a fee petition.
- Where a party’s entitlement to award of fees is a creature of state law, all of the factors set forth at Or. Rev. Stat. §20.075 remain applicable to determining an appropriate fee award. The economic survey data are used within the Section 20.075 framework, and do not replace it.

Endnotes

1 At time of writing (June 15, 2023), I am aware of one judicial opinion citing the 2022 Economic Survey, namely US Magistrate Judge Hallman’s decision granting a fees motion in *Owens v. State Farm Fire and Casualty Company*, No. 2:22-cv-119-HL (D. Or. June 14, 2023). At Footnote 4 of that opinion, Judge Hallman notes the omission of 75th percentile rates from the 2022 Economic Survey, stating that the court would approximate the 75th percentile rate by utilizing “a rate between the mean and 95th percentile.”