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Trial By Survey: From Fact to Opinion

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When the topic of “expert survey evidence” is discussed in legal circles, some people refer to the survey itself as though it were the evidence. If the survey is indeed the evidentiary object, then it may as well be treated as fact evidence, and not expert opinion.” A survey was done. 400 people were interviewed. These were the questions. Here are the answers people gave. Here is a summary table of the answer frequencies.

Courts usually want much more. They want to know whether the reported answers can be taken as people’s true perceptions, what the answers mean, what else can be inferred, and above all whether the conclusions can be supported by principles, theories, or knowledge of the social sciences. Surveys for litigation are ultimately not the evidence, they are vehicles for the evidence. Knowledge and inference, pertinent to the issues in dispute, ride in on the survey vehicle. At that point, the evidence has moved from operational fact to expert scientific opinion.

So what role is to be played by the expert witness, the driver behind the wheel of that vehicle?

In the June issue of *Vue*, John Gelder wrote a thought-provoking article entitled “The researcher as consultant.” He articulated the opportunities for market researchers to go beyond their data to make a meaningful impact on clients’ welfare. Referring to corporate management clients, he recommended learning to “speak their language”, exhibiting sensitivity and empathy to the surrounding circumstances, and focusing on the opportunity to make a positive difference.

These recommendations take on a different nuance in the courtroom. As expert advisors to the court, while survey researchers are expected to understand the language of the law, they are encouraged to interpret findings in the language of their own scientific expertise. The relevance to legal concepts and precedents is a matter for counsel to argue. The expert witness may nonetheless provide the assumptions under which the court might connect the findings to legal issues in dispute. For example, the term “confusion” has a special meaning in law, defined by Section 6(2) of the Trade-marks Act and interpreted in hundreds of past cases. Surveys designed to test the hypothesis of confusion have frequently operationalized that legal term as including “a misapprehension by members of the relevant population that two goods or services originate from the same source.” A survey question to test whether or not such a misapprehension exists is straightforward to design. But the link back to “confusion” is a matter for legal argument and the court’s discretion.

Exhibiting sensitivity and empathy to the surrounding circumstances (the second of Mr. Gelder's recommendations) can also be reasonable advice to providers of expert survey evidence, as long as they remember that their ultimate client is the court. They should understand the broad context in which the survey fits, in the dilemma to be resolved by the judge. Appreciation for such understanding was frequently exhibited by Justice John Gomery when he presided over the Copyright Board. Transcripts of hearings show him occasionally chastising witnesses who offered only criticism of an opponent's surveys and no helpful guidance on how the Board could best use the data.

Mr. Gelder's advice for striving to make a positive difference should also be interpreted with the understanding that the Court, not the party who paid for the research, is the ultimate client. A positive contribution to objective, relevant information available to a judge is a worthy goal. Displaying a positive disposition to the welfare of the party paying the research bills is unhelpful. It risks becoming advocacy, which is a mission to be left to the lawyers. In a significant trial concerning the branding significance of the size, shape and colour of the pharmaceutical Prozac, Justice Barbara Reed expressed dissatisfaction with what she perceived as advocacy by certain witnesses. She reprimanded one of the witnesses mid-testimony, for arguing with the cross-examining lawyer, with a reminder to the effect that "you are here to help the court, and not to advocate for your client." Her written decision referred to certain of the survey conclusions as "overstated." Although she accepted that experts should be allowed to give evidence respecting the overall issues in a case, they should stop short, she said, of presuming to express a direct conclusion - which is the judge's ultimate prerogative. In particular, she criticized one survey witness for drawing conclusions about the fame of Prozac's name and appearance which constituted, she said, "a leap of logic not supported by the data."

She further discounted the evidence of another survey that had come out of a magazine article, observing that insufficient effort had been made to find the original data and make it available for independent scrutiny:

"The results of the survey... of pharmacy customers, as reported in the December 1995 edition of the magazine *Pharmacy Practice* is not reliable evidence. While of copy of the questionnaire that was used was put in evidence, the raw data and the tabular results were not available, nor were concerted efforts made by the plaintiffs' witness to obtain those results... While the plaintiffs called [the survey designer] to give evidence that the magazine article fairly reflected the tabular result, in the absence of the actual survey documentation, I am not prepared to accept that evidence as reliable."

In summary, a survey is just the vehicle. The ultimate evidentiary requirement is an informed opinion about the people behind the numbers. When appearing as an expert responsible for a survey, a researcher appears as a social scientist whose opinions and conclusions are rooted in data and supportable inference. Experience suggests the following four guidelines for where expert opinion from survey researchers - beyond the mere facts of the collected data - may be most helpful to the court.

1. Survey experts will be expected to supply a statistical opinion of the extent to which the results may be generalized to the pertinent population. While confidence intervals and margins of error arise from routine "factual" calculations, those are based on an unattainable ideal of perfect random sampling. Expert opinion is required to advise the court on when inferential statistics are still appropriate to the imperfect sampling situations of everyday life. These may be situations where one can rely on the known robustness of certain sampling techniques, or on industry experience, or on informed judgment, or on proven effectiveness of a particular sampling technique in other situations.
2. Experts will be expected to testify on the extent of the quality controls in the survey, which presumably provided the foundation for scientific integrity and statistical reliability.
3. An opinion on the validity of the measurement instrument is also in order - does it measure what it set out to measure? Some witnesses have argued that only a real shopping environment offers a truly valid context for a survey of consumer perceptions. This view is to be debated against the advantages of a scientifically controlled environment for testing perceptions, attitudes, knowledge, and expectations. The standard in law is also relevant to this debate. For example, the Trade-marks Act defines confusion as an "inference" and not a "mistaken purchase", so that survey validity would not require a consumer intercept at the point of purchase. (That is, such a survey might be sufficient, but it would not be necessary.)

4. Conclusions from the survey are now the final cap on the expert's opinion. How far to go? There is a certain security in restricting one's evidence to the facts of what was actually found in the survey, assurances arising from the quality controls, and advice regarding appropriate statistical techniques. It would also be appropriate, if asked, to comment on the relationship between the survey results and other surveys the witness has done, or on other experience the witness has had. Finally, a witness may have other pertinent expertise in psychology, or brand equity management, or corporate governance, which qualifies him or her offer an opinion beyond the scope of the survey data. But unsupported speculation, when it comes to expert opinion, is an invitation for trouble.

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