



GUIDELINES FOR SURVEY SAMPLING IN EVIDENTIARY MATTERS

Courtesy of:

CorbinPartners Inc.

Phone: 1-416-413-7600

Web: www.corbinpartners.com

Email: info@corbinpartners.com

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Guidelines for Survey Sampling in Evidentiary Matters

Consumer surveys have long been relied upon as a tool of expert evidence in litigation, arbitration, mediation, and pre-testing before a complaint or action is launched. To ensure the value of survey evidence, it must be “reliable,” “valid” and “relevant.” These three criteria arise both from the tenets of good science, as well as from the guidance of the Supreme Court of Canada (*Mattel, Inc. v. 3894207 Canada Inc.* 2006 SCC 22).

A survey’s “reliability” refers to the degree of stability exhibited when that measurement is repeated under identical conditions. Reliability is a matter of degree. It is measured in terms of a percentage “margin of error”, that is, the maximum extent to which the results of a sample would vary from the true result in the overall population. For example, you often hear election polling results described as follows: Candidate A is predicted to capture 54% of the vote, plus or minus 3% (the margin of error), with 95% confidence (the level of confidence being dictated by the statistical calculation.) In order to be able to measure reliability in this way, it is necessary to start with a random representative sample—or one that is defensibly close to being random and representative. Then you choose the sample size that you can afford, to achieve as small a margin of error as possible.

Triers of fact have shown comfort with sample sizes of 300 to 400. This range of accepted sample size for survey evidence has appeared frequently in case law precedents and published regulatory guidelines. A sample size of 300 to 400, based on random sampling, would yield a maximum margin of error of approximately 5%-6%. Smaller samples may suffice for sub-groups—like age groups, geographic regions, purchasers vs. non-purchasers, or any other segment of interest. A smaller sample may also be used for so-called control conditions, which are used only as a benchmark to establish statistical significance. How small can a sub-sample be? The theoretical minimum according to textbooks is 30; experience suggests that a minimum of 50 would be a safer bet for instilling confidence in users of the statistical results.

The Table that follows assembles guidelines from different published authorities on survey sample size, including references to margin of error and confidence level, and geographic distribution where indicated.

For further information, please refer to....

- ▶ [“Canadian Trademark Law Benchbook”](#), Carswell, 2019 (Chapter 9)
- ▶ [“Practical Guide to Comparative Advertising – Dare to Compare”](#), Corbin / Bleibaum / Jirgal / Mallen / Van Dongen, Elsevier, 2019 (Chapter 5)

Note – The margins of error shown below do not necessarily apply to Internet surveys. Industry guidelines are consistent in their caution that a “margin of error” should not be assigned to online surveys based on web-panels, without appropriate clarification of the population from which they have been drawn.

SOURCE	SAMPLE SIZE	MARGIN OF ERROR (MOE) / CONFIDENCE LEVEL	GEOGRAPHIC DISTRIBUTION
<p>Report on Best Practices in Conducting Surveys In Trademark Matters - 2013 (INTA – Courts and Tribunals Subcommittee) https://docplayer.net/15115168-Inta-courts-tribunals-subcommittee-report-on-best-practices-in-conducting-surveys-in-trademark-matters.html (Pgs. 19-20)</p>	<p>Minimum 300</p>	<p>No reference</p>	<p>Appropriate representation</p>
<p>Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims – 2012 (Ad Standards - Canada) https://adstandards.ca/wp-content/uploads/2018/04/guidelinesCompAdvertising-en.pdf (Pgs. 5-6)</p>	<p>Minimum 300 for a test condition, and (if applicable) minimum 100 for a control condition</p>	<p>Max MOE of +/- 6% at a 95% confidence level</p>	<p>In person survey in Canada: At least 4 regions Mail, Internet or telephone survey in Canada: All regions, excluding territories</p>
<p>Survey Methods and Practices – 2010 (Statistics Canada) http://www.statcan.gc.ca/pub/12-587-x/12-587-x2003001-eng.pdf (Pgs. 152-155)</p>	<p>Minimum 400</p>	<p>Max MOE of +/- 5% at a 95% confidence level</p>	<p>No reference</p>
<p>Advertising Substantiation and Standards for Conducting Research for Advertising Claims – 2015 (Insights Association – U.S.) http://www.marketingresearch.org/issues-policies/best-practice/advertising-substantiation-and-standards-conducting-research</p>	<p>Minimum 300 (minimum 100 for subgroup /control group)</p>	<p>Max MOE of +/- 6.5% at a 95% confidence level</p>	<p>No reference</p>

SOURCE	SAMPLE SIZE	MARGIN OF ERROR (MOE) / CONFIDENCE LEVEL	GEOGRAPHIC DISTRIBUTION
<p>Best Practices in Sensory Advertising Claim Substantiation – 2012 (American Society for Testing and Materials - ASTM)</p> <p>https://4af02ab6-d153-465a-9114-bee006e9f927.filesusr.com/ugd/08eb6e_07e3643721694c7cae3708d8553ea700.pdf</p> <p>Also see ...</p> <p>https://books.google.ca/books?id=yrLfrVgU6CsC&pg=PA111&lpg=PA111&dq=astm+300+sample+size+claim+test&source=bl&ots=hsNHEqd713&sig=cRDcYU_o_eQX3bPSbiPPcftfrKtl&hl=en&sa=X&ved=0ahUKEwiCYaUqenMAhXE4IMKHRcxCywQ6AEIGzAA#v=onepage&q=astm%20300%20sample%20size%20claim%20test&f=false (ASTM 2008)</p> <p>http://materialstandard.com/wp-content/uploads/2019/10/E1958-16a.pdf (ASTM 2019)</p>	300-400	Max MOE of +/- 5% at a 95% confidence level	Representing all major regions, with a minimum of 2 markets in each region
<p>Reference Manual on Scientific Evidence (Third edition) - 2011 (Federal Judicial Center / National Research Council)</p> <p>https://www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1 (Pg. 381)</p>	No reference	95% confidence level	No reference
<p>Conducting Community Surveys - A Practical Guide for Law Enforcement Agencies -1999 (U.S. Department of Justice – Bureau of Justice Statistics)</p> <p>http://www.bjs.gov/content/pub/pdf/ccspglea.pdf (Pg. 14)</p>	Minimum 200-250	No Reference	No reference

SOURCE	SAMPLE SIZE	MARGIN OF ERROR (MOE) / CONFIDENCE LEVEL	GEOGRAPHIC DISTRIBUTION
<p>U.S. case in BBB National Programs Archive – 2017 decision by National Advertising Division (NAD), administered by Counsel of Better Business Bureaus</p> <p>https://bbbprograms.org/archive/nad-recommends-unilever-discontinue-certain-claims-for-suave-essentials-body-wash-advertiser-to-appeal</p>	<p>Minimum of 300 (to substantiate a parity claim)</p>	<p>No Reference</p>	<p>No reference</p>
<p>‘Recent Cases and Developments before the National Advertising Division’ – 2014 U.S. decision re: The MOM Brands Company (Malt-O-Meal Cereals), NAD Case No. 5782</p> <p>https://www.americanconference.com/resolving-litigating-advertising-disputes-733115-nyc/wp-content/uploads/sites/422/2016/08/dayTWO_bezikos_calevski_lebed_malloj_sacks_mallen.pdf</p>	<p>No reference</p>	<p>No Reference</p>	<p>Minimum of 2 markets in each of 4 regions</p>
<p>Product Testing Design for Claims Substantiation and Advertising Challenges - 2015</p> <p>(Proskauer Rose LLP – Presented at Brand Activation Association’s 2015 Marketing Law Conference)</p> <p>http://www.proskaueronadvertising.com/files/2015/11/BAA-presentation-Claims-substantiation-Testing.pdf (Pgs. 21, 27)</p>	<p>No reference</p>	<p>95% confidence level</p>	<p>All major regions. Two locations per region.</p>
<p>What IP Attorneys Should Know About Expectations and Costs for Survey Research - 2016</p> <p>(The TASA Group – Technical Advisory Service for Attorneys)</p> <p>http://www.tasanet.com/knowledgeCenterDetails.aspx?docTypeID=1&docCatID=13&docID=43</p>	<p>Minimum 200-300</p>	<p>95% confidence level</p>	<p>At least 4 regions</p>

SOURCE	SAMPLE SIZE	MARGIN OF ERROR (MOE) / CONFIDENCE LEVEL	GEOGRAPHIC DISTRIBUTION
<p>Legal Review : 9 out of 10 regulators prefer substantiated preference claims – 2013 (Venable LLP)</p> <p>http://www.lexology.com/library/detail.aspx?g=62243951-bc78-40ea-8940-b564b2b972b0</p>	Minimum 250	No Reference	At least 4 regions
<p>Advertising Guidelines – 2019 (NBC Universal)</p> <p>http://nbcuadstandards.com/files/NBCUniversal_Advertising_Guidelines.pdf;jsessionid=E2E8E4D202DFFFD599ABC56C8AE6F618 (Pgs. 29-31)</p>	Minimum 300 for superiority claims. Minimum 500 for parity claims.	90-95% confidence level	At least 4 regions; At least 2 markets per region
<p>Advertising Standards and Guidelines – 2016 (ABC Television Network)</p> <p>https://abcaccess.com/app/uploads/2017/01/Advertising-Guidelines-2016.pdf (Pgs. 11-15)</p>	Minimum 200 for superiority claims. Minimum 500 for parity claims.	95%	At least four geographically dispersed and representative regions of the country.

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Address: University Centre, 393 University Ave., Suite 2000, Toronto ON, M5G 1E6
Phone: 416-413-7600 | Website: www.corbinpartners.com | Email: info@corbinpartners.com
