

# IPI Newsletter

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## What Patent Lawyers Can Learn from Trademark Law The New Use of Surveys in Patent Litigation

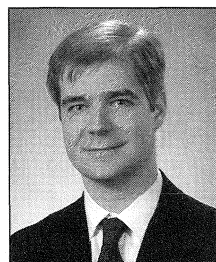
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Two recently decided Federal District Court cases show that patent litigators can learn from some of the techniques employed in trademark litigation. Most experienced intellectual property lawyers understand the significant role surveys play in trademark infringement and other Lanham Act cases, but relatively few are likely to have considered using such research in patent infringement matters other than those involving design patents. Historically, surveys have generally not been used often in court other than for Lanham Act cases because of hearsay issues. However, as advances in surveys and other forms of public opinion research over the past 25 years have created a well-developed scientific and professional community supporting their use, litigators and the courts are beginning to recognize their utility beyond the traditional confines of Lanham Act litigation.

Survey evidence was admitted into evidence in the patent infringement case *Applera Corporation v. MJ Research, Inc.*<sup>1</sup> The survey evidence, which showed that 96 percent of the defendant's customers used its products to perform a patented process, was admitted as evidence in support of a claim

of inducement to infringe. The court admitted the survey into evidence over various objections by the defendant, who also argued that without the survey evidence the inducement claim could not be proven.

Although the survey evidence in *Applera v. MJ Research* was admitted as relevant to a determination of liability, the potential exists for surveys to provide evidence relevant to the determination of damages as well. Surveys could potentially provide relevant evidence on numerous aspects of patent damages assessment. For example, market demand, user preferences for the patented features and the attractiveness of alternatives are all areas in which surveys could provide useful information in the formation of an expert opinion on patent damages.

Courts have already begun to encourage the use of properly conducted surveys in patent infringement cases. In *Advanced Medical Optics, Inc. v. Alcon, Inc.*,<sup>2</sup> the court refused to allow testimony from a medical expert about the preferences of other surgeons because the expert had *not* conducted a survey about those preferences. In that same matter, the court excluded survey-

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# Surveys in Patent Litigation

(continued from page 1)

related testimony because the survey did not ask respondents sufficiently precise questions about the patented feature. The fact that the court both supported the need for a survey to support certain testimony and articulated standards for what would constitute an appropriate or adequate survey indicates that the potential exists for the use of well-constructed surveys to assess damages in patent infringement litigation.

## I. Use of Surveys in Litigation

The use of surveys in litigation increased throughout the twentieth century. The trend will likely continue during the twenty-first.<sup>3</sup> With the increase in the use of surveys in litigation, marketing academics took notice. Within the academic sphere scholars developed standards for surveys specially tailored to address the concerns of the courts.<sup>4</sup> Guidelines were developed that included emphasis on the importance of doing the following correctly: universe definition and sample selection, design of the survey instrument, administration of the survey instrument, the qualification and technique of the interviewer, data analysis, and presentation and administration of the overall project.

Surveys have been used in Lanham Act cases for decades to assist in determining liability. Surveys have also been used fairly often in design patent cases, which tend to resemble Lanham Act cases with respect to determining the importance of customer perception of the uniqueness and associations of an otherwise nonfunctional property. In such cases, surveys have been used to show confusion, fame, genericness, secondary meaning and conveyance of false information through advertising. These surveys are not only regularly accepted as scientific evidence but are often an important part of proving liability.

Because courts are mindful of the potential for unreliability in hearsay evidence, in the past some have, somewhat unnecessarily, been reluctant to accept surveys as scientific evidence. Several projects regarding the use of surveys have been sponsored by the Federal Judicial Center, an arm of the federal judiciary whose purpose includes "conduct[ing] programs of continuing education and training for personnel of the judicial branch of the Government. . . ."<sup>5</sup> For example, with funding from the Federal Judicial Center, in 1999, the State Justice Institute published *A Judge's Deskbook on the Basic Philosophies and Methods of Science* which includes an entire chapter about the use of surveys in litigation. In essence, the chapter states that although many judges are reluctant to admit survey evidence, they should do so if it is helpful and properly designed.<sup>6</sup>

In addition, the Federal Judicial Center has published its *Reference Manual on Scientific Evidence*, which includes Shari Diamond's chapter on survey research. The manual establishes standards which it recommends that survey researchers follow. Diamond also clearly

states that "[e]arly doubts about the admissibility of surveys centered on their use of sampling techniques and their status as hearsay evidence. Federal Rule of Evidence 703 settled both matters for surveys by redirecting attention to the 'validity of the techniques employed.'" <sup>7</sup> Notwithstanding the support that surveys have gained in the governmental branch tasked with educating the judiciary, some courts continue to examine survey evidence as hearsay in patent cases.

## II. Legal Hurdles to the Admission of Surveys

Survey expert testimony can face challenges to admissibility based upon its status as scientific testimony and based upon the potential hearsay status of the underlying survey data. When viewed solely as possible hearsay evidence, surveys may have serious hurdles to admission as evidence. However, when viewed as scientific evidence, the risks associated with hearsay evidence may be minimized.

Surveys are out-of-court statements and one of the most compelling reasons for using them is to save the time, expense, and possible bias of burdening the court with a large number of witnesses to testify to an issue that can be addressed more efficiently through survey evidence. Out-of-court statements, however, may be inadmissible hearsay if they are used to show the truth of the matter asserted and are not subject to any of the hearsay exceptions.<sup>8</sup> Recent case law suggests that as long as surveys are designed properly, they can avoid the risks of untrustworthiness against which the hearsay rule protects.<sup>9</sup> Thus, surveys may be admissible under several exceptions to the hearsay rule, provided they are designed correctly. Before examining the purpose and applicability of the hearsay rule, we discuss the basis for admitting expert testimony based on surveys.

### A. Expert Testimony

When offered as expert testimony, the testimony of survey experts should generally be admissible as long as it is probative and proper methodologies and protocols have been followed. The following Federal Rules of Evidence define when experts may testify:

#### Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>10</sup>

#### Rule 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are



otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.<sup>11</sup>

Scientific evidence is generally admissible if it is trustworthy, reliable, and will be helpful to the finder of fact. As will be discussed below, many issues of both damages and liability in patent cases may be clarified in a manner helpful to the finder of fact through the use of a survey expert.

Whether survey evidence is seen as "scientific" as opposed to "technical" knowledge in the wake of *Daubert*<sup>12</sup> and *Kumho Tire*<sup>13</sup> does not matter much. The somewhat flexible *Daubert* standards apply to both types of knowledge. Generally, the factors to be considered when determining whether expert testimony is admissible are: (1) whether the theory or technique can be tested, (2) whether the theory has been subjected to peer review and publication, (3) for particular techniques, whether there is a high known or potential rate of error and whether there are standards controlling the technique's operation, and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community.<sup>14</sup>

The academic and professional basis for survey research has become quite well developed. Public opinion research through the use of surveys rests on a mature scientific community with numerous professional organizations<sup>15</sup> (e.g., The American Association for Public Opinion Research, The Council of American Survey Research Organizations and The Marketing Research Association) with professional standards, codes of conduct and peer-reviewed journals<sup>16</sup> (e.g., *Public Opinion Quarterly* and the *Journal of Marketing Research*).

The professional organizations require members to agree to adhere to codes of conduct that tend to require surveys to conform to certain reasonable methodologies and maintain a certain level of confidentiality to protect the reputation of the profession.<sup>17</sup> The codes of conduct require, for example, that the surveyor select samples that well represent the population to be studied, take great care in matching wording to the concepts being measured and the population studied, construct quality checks for each stage of the survey, use statistical analytic and reporting techniques appropriate to the data collected, and disclose all methods of the survey to permit evaluation and replication.<sup>18</sup> The codes of conduct also have lengthy sections regarding confidentiality and privacy concerns.<sup>19</sup> This is a necessary concern to protect the confidentiality of participants in survey research and the ability of the profession itself to continue to get volunteers. It does, however, prevent the possibility of bringing survey respondents into court to be cross-examined on their answers.

#### B. Hearsay Rule Analysis

Despite the recommendations of such publications as the *Reference Manual on Scientific Evidence*, surveys are still subjected to hearsay rule analysis. The Second Circuit performed a thorough analysis of the applicability of hearsay

objections to several surveys in *Schering v. Pfizer*<sup>20</sup> in which it explored situations in which survey evidence would survive a hearsay challenge. The court identified the four classic risks associated with admitting out-of-court statements for the truth of the matter as: "(1) insincerity, (2) faulty perception, (3) faulty memory and (4) faulty narration."<sup>21</sup> It identified a fifth risk associated with surveys: "[P]arties usually offer surveys to support statistical inferences. These inferences can be subject to methodological error and can sometimes be manipulated through artful data collection or presentation."<sup>22</sup>

The *Schering* court further suggested that proper survey methodology reduces the risk that statistical inferences will be manipulated as well as reducing the risks of insincerity and faulty narration.<sup>23</sup> For example, "the risk of insincerity can ordinarily be reduced if the interviewers and those questioned lack knowledge of the litigation and the purpose of the survey."<sup>24</sup> Additionally, "surveyors can reduce the risk of faulty narration by framing questions in a clear, precise and non-leading manner."<sup>25</sup> The court must balance the remaining risks of faulty memory and faulty perception when determining the trustworthiness of the survey at issue. Surveys that measure only present impressions or mental states substantially reduce the risk of faulty memory and fall within the enumerated exceptions. Where no stated exception applies, the court must balance the trustworthiness of the survey considering all of the risk factors with the probative value of the survey. The following hearsay exceptions are most likely to be used to overcome a hearsay objection to the admission of a survey:

Rule 803(1): "present sense impression"

Rule 803(3): "then existing mental, emotional, or physical condition."

Rule 807: "Residual Exception" (To be admissible under this exception, the survey must be trustworthy, provide evidence of a material fact, be more probative than other evidence and be in the interest of justice to admit.)

So long as a survey is properly designed (including design to account for memory and perception), its results should be trustworthy. Thus, the residual exception seems to throw the analysis of survey evidence back into the realm of Rule 702/703 analysis. Quite appropriately, in the two cases discussed, even where hearsay analysis is employed, the underlying concern is whether the surveys were properly designed to provide trustworthy information from which the finder of fact could make a more informed determination.

### III. Application in Recent Patent Cases

As stated at the beginning of the article, surveys are beginning to be used and recommended in patent cases. Two such recent cases are instructive about the issues raised by using surveys in patent cases.

#### A. Applera v. MJ Research

In 2005, the Federal District Court for the District of Connecticut refused to grant the unsuccessful defendants

in a patent case a new trial. Notably, in its ruling on the defendants' request for a new trial, the *Applera* court remarked upon several reasons why the surveys used in the plaintiff's case were deemed admissible. The defendants argued the plaintiff's surveys should be excluded because proper notice was not given pursuant to Fed. R. Evid. 807 and because the expert's methodology was flawed. The court specifically addressed the survey methodology, stating that a review of the surveys "reveals rigorous methodological standards applied by an experienced survey researcher using a double blind survey protocol."<sup>26</sup> The court also addressed the design of the questions, finding they were "clear, precise, and predominately non-leading."<sup>27</sup> The court also emphasized that the questions addressed topics likely to be remembered by the respondents, stating, "[T]he questions pertained in part to experiences learned by direct perception and to events that are unlikely to be forgotten, namely the usage of thermal cyclers in respondent's lab during a period not exceeding six years, and were posed to individuals who by self-report were the most knowledgeable in the lab about such usage."<sup>28</sup> The court found the surveys to be admissible because they were designed in such a manner that the risks of faulty narration, faulty memory, and faulty reporting were minimized.

The other objection the defendants raised to the admission of the surveys was that they did not have sufficient notice. The court pointed out that the defendants had possessed the surveys since September 2002 to prepare for a March 2004 trial. The court was required to balance the literal requirements of Fed. R. Evid. 807 with the general purpose of the rules of evidence expressed in Fed. R. Evid. 102 and the survey expert's professional obligations of nondisclosure. Fed. R. Evid. 807 states, "[A] statement may not be admitted under this [the residual] exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." The plaintiffs were put on notice that the surveys were to be used a year and a half before trial. The defendants were not given the names of the survey respondents because the survey expert was, as the court acknowledged, "prohibited by ethical rules from disclosing the actual individual identities of the survey respondents and instructed to defend against Court orders compelling disclosure."<sup>29</sup>

The court reasoned that because the population from which the survey sample was taken came from the defendants' own invoice database as produced in discovery, the defendants had the names and addresses used by the expert and could have conducted their own survey. Accordingly, because the defendants had sufficient information with which to conduct their own survey and given the facts and the circumstances of the case, the court allowed the survey. To "hold otherwise would require exclusion of trustworthy evidence on material

facts . . . and violate the mandate of Fed. R. Evid. 102 to construe Rule 807 and the other rules of evidence 'to secure fairness. . . in promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.'"<sup>30</sup>

#### *B. Advanced Medical Optics v. Alcon*

In 2005 in the District of Delaware, the court in *Advanced Medical Optics*<sup>31</sup> excluded testimony from an expert about user preferences and market conditions with respect to the allegedly infringing device where the expert based his opinion solely on a discussion with one other doctor.<sup>32</sup> The court refused to admit that portion of the expert's testimony, explicitly stating that because he had not conducted a survey, his opinion was too speculative.<sup>33</sup> In short, the court implied that expert testimony about user preferences for a medical device could be based upon a properly designed survey, while it could not be based merely upon the interaction of two doctors.

Additionally, the court excluded testimony about a survey that the expert had conducted because, among other reasons, the survey did not specifically mention the patented feature of the device and did not ask whether the patented feature was enabled.<sup>34</sup> The court determined that because the questions were not sufficiently precise and well-formulated, the survey results could not form a reliable basis on which an opinion could be based. The *Advanced Medical Optics* court revealed a willingness, and even desire, to accept survey evidence, coupled with an appropriate level of scrutiny of the methodologies employed.

#### **IV. General Admissibility Standards for Surveys**

The basic standards for the admissibility of surveys are compiled in the *Reference Manual on Scientific Evidence*,<sup>35</sup> published by the Federal Judicial Center. Although these basic standards have primarily been applied to surveys used in the context of trademark infringement actions, the same or similar standards might be argued as appropriate for the design and execution of surveys applied to matters involving claims of patent infringement. The criteria are as follows:

- The population must be properly chosen and defined
- The sample chosen must be representative of that population
- The methodology for gathering data must be established to create accuracy and objectivity and the appropriate control groups must be instituted
- The questions must be clear and developed so as to be result-neutral, not leading, and not suggestive of any answer
- The respondents must be allowed to explain the reasons for their answers
- The survey must be conducted by qualified persons following proper interview procedures
- The process must be conducted so as to ensure objectivity
- The data must be analyzed in accordance with accepted statistical standards



<b>Panduit Criteria</b>	<b>Question(s) Addressed Through Surveys</b>
<b>Demand</b>	<ul style="list-style-type: none"> <li>• Is there explicit demand for the patented feature?</li> <li>• Is the patented feature important to the sale of the product?</li> <li>• What concessions (distance, price, etc.) would customers be willing to accept to obtain the patented feature?</li> </ul>
<b>Alternatives</b>	<ul style="list-style-type: none"> <li>• What do customers consider to be alternatives to the patented product or feature?</li> <li>• Do customers consider these alternatives to be acceptable? If so, under what circumstances? If not, why not?</li> <li>• Which product(s) would customers purchase if the infringing device was not available?</li> <li>• What are the price sensitivities of demand for the patented product and any alternatives?</li> </ul>
<b>Manufacturing Capacity</b>	<ul style="list-style-type: none"> <li>• Do the plaintiff's suppliers have sufficient capacity to support the plaintiff's claimed incremental sales volumes?</li> </ul>
<b>Marketing Capacity</b>	<ul style="list-style-type: none"> <li>• Are the defendant's customers aware of the plaintiff's products?</li> <li>• Do customers consider the plaintiff's and the defendant's companies/products to be comparable? On what basis?</li> <li>• What do customers consider to be the distinguishing features of the two parties' products?</li> <li>• Would customers buy from either the plaintiff or the defendant? If not, why not?</li> </ul>
<b>Quantification</b>	<ul style="list-style-type: none"> <li>• To what extent is the patented feature actually used or activated by customers?</li> </ul>

## V. Key Damages Aspects for Patent Cases

Although there are more published cases and more decisions setting general standards for assessing damages in patent cases than in trademark cases, the use of surveys is more common in trademark law than in patent law. Trademark law has recognized the value of surveys for decades, yet patent law is just beginning to accept such surveys as a tool for assisting the trier of fact in determining liability and monetary damages. It appears that surveys may be an overlooked tool in patent litigation.

A patent holder is entitled to collect "damages adequate to compensate for an infringement"<sup>36</sup> but in no event less than a reasonable royalty. When determining adequate damages, it is necessary to conduct an analysis of what would have occurred within the relevant market had the infringement not occurred. Such an analysis is referred to as a "but for" test.

In conducting a but-for test, the plaintiff typically attempts to determine the level of sales it would have achieved had the defendant not infringed its patents. If the plaintiff is able to meet its burden of proof in that regard, it may be entitled to an award of "lost profits" equal to the amount of additional profit it would have earned had the defendant not infringed its patents. If the plaintiff is not able to establish a claim for lost profits, then consistent with Section 284, it is entitled to a reasonable royalty. Typically (although not always) reasonable royalty damages are less than lost profit damages for a given level of infringing sales.

Specific case law and generally consistent standards

of practice exist to guide an expert's analysis and the formation of his or her opinion with respect to either lost profits or reasonable royalty claims. A review of that case law reveals specific considerations for which surveys might be used to provide additional support. In the sections that follow, we discuss the potential role of surveys in assessing lost profit and reasonable royalty damages based on the existing case law.

### A. Surveys to Establish Lost Profits

One of the most common methods for establishing but-for causation of lost profits is to satisfy the elements set forth in *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*<sup>37</sup> To prove causation under *Panduit*, a patentee must prove there was demand for the patented product; there were no suitable noninfringing alternatives; the patentee had the manufacturing and marketing capacity to sell the number of patented products for which it claims lost profits; and that the amount of lost profits can be quantified with a reasonable degree of certainty.<sup>38</sup>

Typically, in patent infringement litigation, each of the *Panduit* criteria is evaluated by experts based on a review of the documents produced by both parties, an evaluation of external third-party research sources, a review of fact and expert testimony provided by supporting witnesses, and/or discussions with other independent experts. In many cases, survey evidence may provide a useful addition to these more common bases. More specifically, based on the facts and circumstances of the particular case, surveys could be used to provide evidence in support of one or more of the *Panduit* criteria as the examples above show.<sup>39</sup>

### *B. Surveys for Reasonable Royalty Determination*

To the extent the plaintiff is unable to satisfy the elements of *Panduit* (either as stated or as modified by subsequent case law) so as to recover lost profits on all or some portion of the defendant's sales, damages will be determined based on a reasonable royalty. In such an event, it is necessary for a damages expert to determine the reasonable royalty that would be appropriate to compensate the plaintiff for the defendant's infringement of the patent. In the absence of an established royalty, royalty rates in patent infringement matters are often based on the concept of a hypothetical negotiation between a willing licensee and a willing licensor at the time infringement began.

In *Georgia-Pacific Corp. v. United States Plywood Corp.*<sup>40</sup> a 15-factor framework was identified as a basis

for experts to perform such an analysis and determine a reasonable royalty. The *Georgia-Pacific* framework is broadly recognized by the courts and patent damages experts almost invariably give it consideration when forming a reasonable royalty opinion. Although the *Georgia Pacific* framework outlines 15 factors, we provide here examples of seven in which surveys might be used. However, the use of surveys is not necessarily limited to these examples.

### **Conclusion**

Although the standards for determining damages in patent infringement cases are reasonably well established, the specific means of meeting those standards can vary considerably from case to case. In many cases, the use of sur-

<b>Georgia Pacific (GP) Factor Description</b>	<b>Question(s) Addressed Through Surveys</b>
<b>GP Factor #5:</b> What is the commercial relationship between the licensor and licensee?	<ul style="list-style-type: none"><li>• Do customers consider the plaintiff and the defendant (as well as third-party alternative providers) to be competitors for their business?</li></ul>
<b>GP Factor #6:</b> Does selling the patented product contribute to sales of nonpatented items?	<ul style="list-style-type: none"><li>• Are purchasers of the patented product influenced to buy other (nonpatented) products from the same seller as a result of purchasing the patented product?</li></ul>
<b>GP Factor #8:</b> What is the commercial success of the product made under the patent and its current popularity?	<ul style="list-style-type: none"><li>• What are usage rates of the product?</li></ul>
<b>GP Factor #9:</b> What are the advantages provided by the patented product relative to previous products that were used for working out similar results?	<ul style="list-style-type: none"><li>• What products do customers consider to be similar in purpose to the patented product?</li><li>• How do those products compare to the patented product?</li><li>• Do customers consider those similar products to be acceptable alternatives?</li></ul>
<b>GP Factor #10:</b> What is the nature of the patented product and what are the benefits provided by the product to those who use it?	<ul style="list-style-type: none"><li>• What benefits do customers perceive from the use of the patented product?</li><li>• Which of the benefits identified by customers do they associate with the patented feature?</li></ul>
<b>GP Factor #12:</b> What portion of the profit or of the selling price is customary in comparable businesses to allow for the use of the invention or analogous inventions?	<ul style="list-style-type: none"><li>• How much more would customers be willing to pay for the patented feature?</li><li>• Would customers be willing to purchase the alleged infringer's product without the feature? If so, would a price concession be necessary?</li></ul>
<b>GP Factor #13:</b> What portion of the profit earned on the patented product should be credited to its patented versus nonpatented elements?	<ul style="list-style-type: none"><li>• What features other than the patented feature are important to the consumer?</li><li>• What are the relative weights of importance of those features?</li><li>• What do customers say about the value of the patented feature as compared with other features identified as important to the purchase decision?</li><li>• What relative impact does each of the features have on the customers' purchase decision?</li></ul>

veys may provide additional, objective evidence to be considered in combination with sources of evidence more commonly relied on by damages experts. Whether surveys are used to demonstrate or rebut claims of demand based on the patent, user preferences, the presence and influence of nonpatented factors or a host of other aspects of market and consumer behavior, the information they generate could be used to help provide a more robust picture of what would have happened in the relevant market had the infringement not occurred. Because well-constructed surveys may provide such useful information, and because this utility has already been recognized by the courts, it is possible that we will see an expanded use of surveys in patent infringement litigation.

## Endnotes

1. Applera Corporation v. MJ Research, Inc., 389 F. Supp. 2d 356 (D. Conn. 2005) and Applera Corp. v. MJ Research, Inc., 389 F.Supp. 2d 344 (D. Conn. 2005).
2. Advanced Medical Optics, Inc. v. Alcon, Inc., 2005 U.S. Dist. LEXIS 5803 (D. Del. 2005).
3. See generally Fred W. Morgan, *Judicial Standards for Survey Research: An Update and Guidelines*, 54 J. OF MARKETING 1 at 59 (Jan. 1990).
4. *Id.*
5. 28 U.S.C. § 620 (b)(3).
6. *A Judge's Deskbook on the Basic Philosophies and Methods of Science*, State Justice Institute, Mar. 1999.
7. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 2d ed., Federal Judicial Center, 2000. SHARI SEIDMAN DIAMOND, REFERENCE GUIDE ON SURVEY RESEARCH at 233.
8. Federal Rules of Evidence 801–807.
9. See, e.g., Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999), discussed below.
10. Federal Rules of Evidence 702.
11. Federal Rules of Evidence 703
12. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
13. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999).
14. *Id.*
15. For example, in no particular order, AAPOR: The American Association for Public Opinion Research, WAPOR: The World Association for Public Opinion Research, MRA, Marketing Research Association, ESOMAR: The World Association of

Research Professionals, CMOR: The Council for Marketing and Opinion Research, Inc., CASRO: The Council of American Survey Research Organizations, COPAFS: Council of Professional Associations on Federal Statistics, ASA: American Statistical Associations, COSSA Consortium of Social Science Associations, and NCPP: The National Council on Public Polls.

16. For example, in no particular order, PUBLIC OPINION Q., J. MARKETING RESEARCH, ADVANCES IN CONSUMER RESEARCH, J. MARKETING, J. CONSUMER RESEARCH, J. PUBLIC POL'Y & MARKETING, J. CONSUMER AFFAIRS, and the J. ECON. SOCIAL MEASUREMENT.

17. See, e.g., [www.casro.org/joining.cfm](http://www.casro.org/joining.cfm) (stating that as a condition of membership, members must abide by the CASRO Code of Standards and Ethics for Survey research) and [https://secure9.rolet.com/aapor/default.asp?page=membership/join\\_aapor](https://secure9.rolet.com/aapor/default.asp?page=membership/join_aapor) (requiring as a condition of membership that applicant has read and subscribes to the conditions of membership).

18. [www.aapor.org/pdfs/best\\_pra.pdf](http://www.aapor.org/pdfs/best_pra.pdf).
19. [www.casro.org/codeofstandards.cfm](http://www.casro.org/codeofstandards.cfm).
20. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999).
21. *Id.* at 232.
22. *Id.* at 233.
23. *Id.* at 233.
24. *Id.* at 233 (citations omitted).
25. *Id.* at 234 (citations omitted).
26. *Applera Corp. v. MJ Research, Inc.*, 389 F. Supp. 2d 344, 350 (D. Conn. 2005).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Advanced Medical Optics, Inc. v. Alcon, Inc.*, 2005 U.S. Dist. LEXIS 5803 (D. Del. 2005).
32. *Id.* at \*10.
33. *Id.* at \*12.
34. *Id.* at \*10.
35. See generally REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 2D ED., FEDERAL JUDICIAL CENTER, 2000.
36. 35 U.S.C. § 284.
37. *Panduit Corp. v. Stahl Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978).
38. *Id.*
39. However, these are examples only. Not all of these questions may be relevant to a given case and conversely, there are many additional questions that could be usefully informed by surveys.
40. *Georgia-Pacific v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

## Going Global?

(continued from page 12)

70, at 177–79.

75. Finnegan Henderson Global IP Database and Legal Metric Database (on file with Michael C. Elmer).

76. Finnegan Henderson Global IP Database (on file with Michael C. Elmer).

77. Potential infringers can also use the global win rate data to employ their own “first strike” strategies by initiating pre or post-grant opposition proceedings or reexaminations (where appropriate) in the most convenient fora for them (low patentee win rates) and then use the proceedings to negotiate a settlement which may be global with their adversary. In addition, in the wake of the celebrated NTP v. RIM and MercExchange v. eBay litigations the reexamination option in the United States may be given new life.

## Corrections

In the Winter 2006 issue, we misidentified one of the newsletter's advertisers, Chemical Abstracts Service.

Also, in “Supreme Court Denies Certiorari in *Contessa*,” by Elizabeth L. Plitzuweit, we misspelled the author's firm name, Bromberg & Sunstein LLP.

We regret the errors.