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Addressing Low Response Rates In Expert Surveys

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Testifying experts commonly rely on survey evidence to establish, or refute, claims about peoples' beliefs, attitudes and behaviors.

Along with gauging consumer perception in intellectual property disputes, surveys are also used to determine labor patterns in employment cases, to identify cross-shopping behavior in antitrust cases, and to certify or challenge proposed classes in class actions.[1]

Federal Rule of Evidence 703 confirms that expert testimony may depend on surveys or sampling, so long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject."[2]

Just last month, Chief U.S. District Judge Richard Seeborg of the U.S. District Court for the Northern District of California emphasized in Montera v. Premier Nutrition Corp. that the general rule for the use of surveys in litigation is that "as long as the survey is conducted according to accepted principles and is relevant" any potential inadequacies "bear on the weight of the evidence, not its admissibility."[3]

At the same time, courts have recognized that the failure to ensure that a survey is reliably designed and administered may result in the survey's exclusion where its methodology is flawed.[4]

Among the measures by which the quality or reliability of a survey has historically been judged is its response rate — the number of completed surveys as compared to the number of potential survey takers in any given sample.[5]

And the issue of whether a survey is influenced by a nonresponse bias is regularly raised to challenge its use by experts in litigation.[6] But the standard for what constitutes an acceptable response rate is not clear.

Over 50 years ago, the former U.S. Office of Statistical Standards quantified response rates of 90% or higher as reliable, in that they can be treated as random samples of the overall population. Rates between 75% and 90% were seen as usually yielding reliable results, but with some check of the samples for representativeness.

Values between 75% and 50% were considered more susceptible to bias, and required a more thorough check of the sample. Lower response rates were regarded with much caution for sampling bias, warranting proof that the nonresponse pattern was random, and that the lower rate was typical for that type of survey.[7]

Survey response rates today continue to decline, due to an increased refusal to participate, and difficulty contacting participants because of call screening devices and email filters.[8] And the old benchmarks for reliability are increasingly outdated for modern survey methods.[9]

Recent research shows that response rates above 30% are difficult to achieve for telephone surveys, and are estimated to be 11% lower for online surveys than other survey modes.[10] Moreover, contrary to earlier assumptions, several studies have highlighted the lack of direct correlation between response rates and survey validity.[11]

As the leading treatise, the Reference Guide on Survey Research, notes:

> Contrary to earlier assumptions, surprisingly comparable results have been obtained in many surveys with varying response rates, suggesting that surveys may achieve reasonable estimates even with relatively low response rates.[12]

Despite these changes, courts have not set specific standards for what constitutes an acceptable response rate for expert surveys. And surveys with historically lower response rates have been found to be admissible to support expert testimony in a range of cases.[13]

Here, we address three cases involving surveys with response rates around or below 10%. In each, while the surveys were given varying weight, none were found inadmissible, and are instructive of what is required of survey experts to address lower response rates.

1. University of Kansas v. Sinks

In University of Kansas v. Sinks, the University of Kansas sued the operators of Joe-College.com in the U.S. District Court for the District of Kansas for allegedly selling over 200 T-shirt designs that infringed on the university and athletic program's trademarks.[14] The defendants commissioned an email survey sent to consumers listed in the university's directory or living in the region.

The survey asked respondents to compare photos of licensed shirts with unlicensed shirts bearing the school's marks. The response rate was 2.16% — 253 usable responses out of 11,695 emails.

The plaintiffs challenged the survey on several methodological issues, including the reliability of the survey, because of its 2.16% response rate, based on the old 50% benchmark from the Office of Statistical Standards. The plaintiffs also claimed that there were no steps taken by the defendants to reduce the effect of nonresponse, or explain why it might not apply.

In her 2008 ruling, U.S. District Judge Julie A. Robison agreed that the response rate was "quite low" and that the low rate "could point toward non-response bias or diminish the validity of the results."[15] Even so, the court refused to apply the 50% response rate benchmark from telephone surveys because it was "not necessarily translatable to internet surveys" and "outdated."[16]

At the same time, the court also recognized that the failure to address the potential nonresponse bias could be used as evidence before the jury to show that sample use was not representative.

Thus, while the expert's survey testimony was admissible despite the low response rate, any potential flaws in the survey methodology would go to the weight of the expert's testimony and could be "adequately brought to the jury's attention through rigorous cross-examination and the presentation of plaintiffs' rebuttal expert."[17]

2. Kinetic Concepts v. Bluesky Medical Corp.

Kinetic Concepts Inc. v. Bluesky Medical Corp. was decided by the U.S. District Court for the Western District of Texas in 2006. In this case, which dealt with the infringement and validity of patents related to a medical device for applying suction for difficult-to-heal wounds, the plaintiffs' expert conducted an online survey of physicians and wound-care nurses seeking impressions of Bluesky's advertisements.[18]

The plaintiffs contend that the survey showed that 73.3% of responding physicians and 92% of the nurses believed that the Bluesky advertisements "conveyed some level of cost savings" over Kinetic's product, and that 67.7% of the physicians and 35.5% of the nurses expected that both devices "provided the same therapy."[19]

To obtain these responses, the plaintiffs' expert applied a "convenience sampling" method, meaning the physicians and nurses contacted for the survey were not selected at random.[20] Rather, the expert contacted a select group to complete an online survey to obtain a rough indicator of how the general physician and wound-care nurse population might feel about the devices.[21]

Ultimately, the plaintiffs' survey received completed responses from 60 nurses and 75 physicians. The expert estimated that the universe of nurses was around 650, but the expert could not estimate the size of the relevant physician universe.[22]

The defendants asserted that a 10% response rate for nurses and an unknown response rate for physicians created "impermissible nonresponse bias" in the survey, rendering it inadmissible.[23]

U.S. District Judge Royal Ferguson rejected the defendants' argument, because the plaintiffs' expert took additional precautions to reduce likelihood of bias, such as "ensuring the distribution of physician participants correlated with the percentage of users of the technology in question by specialty."[24] Thus, it was left to the jury to assess the survey's weight.[25]

3. Wellshire Financial Services v. TMX Finance

Wellshire Financial Services LLC v. TMX Finance LLC was an unfair competition dispute, decided in the U.S. District Court for the Southern District of Texas in 2019. The plaintiffs alleged that their competitor in the title loan business conspired to collect customer information, including the license plate numbers of the plaintiffs' customers, so that the defendants could contact and solicit their business.[26]

The plaintiffs claimed that the defendants' conduct led to the loss of thousands of customers to the defendants. The plaintiffs' expert designed a telephone survey seeking to contact each person from a list of Texas residents who had loans with the plaintiffs and later had loans with the defendants, which included 8,867 customers.

Of those contacted, the group was also limited to qualified individuals, defined as those who had been a customer during the relevant period and taken out the specified type of short-term auto loan when the parties were competitors. About 74% of the broader list could not be contacted, and another 12% did not meet the qualifying criteria.

Of the remaining 1273 potential respondents, only 150 completed the questionnaire.[27] Thus, the response rate was 1.69% of the 8,867 customers, or 11.8% of the qualified individuals who could be contacted.

The survey's questions sought to identify factors that prompted customers to change from one company to the other. The expert determined that between 23.9% and 38.7% of respondents changed from the plaintiffs to the defendants because they received a letter, flyer or telephone call from the defendants.

The defendants argued this expert survey testimony was inadmissible based on the low response rate. U.S. Magistrate Judge Frances Stacy rejected this claim, noting that the nonresponse rate was outside the expert's control, and was "more than likely a function of the unique characteristics of the target population."[28]

The court explained that among groups seeking short-term auto loans, "[m]any do not have permanent addresses, stable employment, or even historically reliable telephone numbers."[29] It was "not entirely surprising," according to the court, that only 150 respondents completed the survey.[30] As a result, while the overall rate was low, the court refused to exclude the survey and the expert's conclusions.

Conclusion

These cases collectively show that a low response rate — even as low as 2% — is simply not enough to disqualify a litigation survey as reliable expert evidence. While a low response rate might warn of potential sample bias, each survey and the reasons for the nonresponse must be judged in the context of each case.[31]

That said, when relying on such a survey, experts should analyze the potential reasons for nonresponse, and assess how it may have affected the results.[32] Even if admitted, the survey's usefulness may be undermined if a low response rate accompanies methodological issues that could cause the survey to hold less weight in the judge or jury's decision.

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[1] Shari Seidman Diamond, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence 364–67 (3d ed. 2011).

[2] Fed. R. Evid. 703, advisory committee's note; see also Diamond, Reference Guide on Survey Research 363–64 ("Early doubts about the admissibility of surveys centered on their use of sampling and their status as hearsay evidence" but "[Rule] 703 settled both matters for surveys by redirecting attention to the validity of the techniques employed").

[3] Montera v. Premier Nutrition Corp., No. 16-CV-06980-RS, 2022 U.S. Dist. LEXIS 75843, at *10, 2022 WL 1225031, at *4 (N.D. Cal. April 26, 2022) (denying a motion to exclude an expert survey due in part to purported deficiencies in the survey's sample size).

[4] In re ConAgra Foods Inc., 90 F. Supp. 3d 919, 951 (C.D. Cal. 2015) (excluding survey based in part on the failure to adequately address a low response rate); see also Sec. Alarm Fin. Enterprises LP v. Alder Holdings LLC, No. 3:13-CV-00102-SLG, 2017 WL 5248181, at *4 (D. Alaska Feb. 21, 2017) (same).

[5] The response rate should not be confused with a survey's cooperation rate — which shows how much individuals cooperated with a request to participate in a survey — or its completion rate — which is found by taking the fraction of individuals who successfully completed a survey from all the individuals who began taking it. See American Association for Public Opinion Research, Standard Definitions: Final Dispositions of Case Codes and Outcome Rates for Surveys 4 (2016), https://www.aapor.org/aapor_main/media/publications/standard-definitions20169theditionfinal.pdf.

[6] See Lax v. APP of New Mexico ED PLLC, No. CV 20-264 SCY/JFR, 2022 U.S. Dist. LEXIS 42466, at *20, 2022 WL 715735, at *6 (D.N.M. March 10, 2022) (rejecting claim by the defendants that a survey's "results are not objective and reliable because Plaintiffs do not account for the high rate of non-responses").

[7] Joseph L. Gastwirth, Statistical Reasoning in Law and Public Policy: Tort Law, Evidence and Health 502–03 (1988).

[8] Céline Plante et al., Comparability of Internet and Telephone Data in a Survey on the Respiratory Health of Children, Can. Respiratory J., Jan.-Feb. 2012, at 13 (citing Edith Desiree de Leeuw et al., Trends in Household Survey Nonresponse: A Longitudinal and International Comparison, in Survey Nonresponse 41–54 (Robert M. Groves et al. eds. 2002); Roger Tourangeau, Survey Research and Societal Change, 55 Ann. Rev. Psych. 775–801 (2004); John Ehlen & Patrick Ehlen, Cellular-Only Substitution in the United States as Lifestyle Adoption, 71 Pub Op. Q. 717–33 (2007)); see also Tourangeau, Survey Research and Societal Change 783 ("Rising rates of nonresponse reflect mounting difficulties in reaching people, persuading them to take part, and making it possible for them to complete an interview").

[9] Diamond, Reference Guide on Survey Research 384; see also Univ. of Kan. v. Sinks, No. 06-2341-JAR, 2008 U.S. Dist. LEXIS 23763, at *14, 2008 WL 755065, at *4 (D. Kan. March 19, 2008) (noting that old benchmarks for telephone surveys are "not necessarily translatable to internet surveys" and are "outdated").

[10] Amany Saleh & Krishna Bista, Examining Factors Impacting Online Survey Response Rates in Educational Research: Perceptions of Graduate Students, J. Multidisciplinary Evaluation, Sept. 27, 2017, at 63–74; Daniel M. Merkle & Murray Edelman, Nonresponse in Exit Polls: A Comprehensive Analysis, in Survey Nonresponse 243–57 (finding minimal nonresponse error associated with refusals to participate in in-person exit polls).

[11] Susan M.B. Morton et al., In the 21st Century, What is an Acceptable Response Rate?, 26 Austl. & N.Z. J. Pub. Health 106, 107 (2012) (citing examples showing that "studies with lower response rates (as low as 20%) can yield more accurate results than studies with higher rates (60% to 70%)" and an evaluation of "national surveys with response rates ranging from 5% to 54%" that concluded "that studies with a much lower response rate were often only marginally less accurate than those with much higher described response rates") (citations and quotation marks omitted).

[12] Diamond, Reference Guide on Survey Research 384 ("even a survey with a high response rate may seriously underrepresent some portions of the population, such as the unemployed or the poor").

[13] Hostetler v. Johnson Controls Inc., No. 3:15-CV-226 JD, 2016 U.S. Dist. LEXIS 89278, at *45, 2016 WL 3662263, at *13 (N.D. Ind. July 11, 2016) (explaining that surveys with low response rates "are commonplace and do not necessarily invalidate a survey, but they do require an analysis as to the reasons for the nonresponses and the effect they may have on the results").

[14] University of Kansas v. Sinks, 2008 U.S. Dist. LEXIS 23763, at *2–3.

[15] Id. at *14.

[16] Id.

[17] Id. at *19.

[18] Kinetic Concepts Inc. v. Bluesky Medical Corp., No. SA-03-CA-0832, 2006 U.S. Dist. LEXIS 60187, at *7, 2006 WL 6505346, at *1 (W.D. Tex. Aug. 11, 2006); see also Kinetic Concepts v. Blue Sky Med. Group Inc., 554 F.3d 1010, 1013–15 (Fed. Cir. 2009).

[19] Kinetic Concepts, 2006 U.S. Dist. LEXIS 60187, at *7.

[20] Convenience samples are different from probability samples, which are drawn randomly to minimize bias. Selection bias can be an issue with convenience sampling, and may result in the sample not representing "any definable population larger than itself." David Freedman, "Sampling," University of California, https://www.stat.berkeley.edu/~census/sample.pdf. Yet probability samples may be prohibitively expensive when "in-person interviews are required, the target population is dispersed widely, or members of the target population are rare." Diamond, Reference Guide on Survey Research 382. Convenience samples are regularly admitted in litigation as they are "used widely in marketing research" and "results of these studies are used by major American companies in making decisions of considerable consequence." Id. (noting that experts must "justify the method used to select respondents" and take precautions to reduce bias).

[21] Kinetic Concepts, 2006 U.S. Dist. LEXIS 60187, at *12–13; see also Diamond, Reference Guide on Survey Research 382–83 ("quantitative values computed from [convenience] samples (e.g., percentage of respondents indicating confusion) should be viewed as rough indicators rather than as precise quantitative estimates"). The court in Kinetic Concepts provided an instruction to the jury on the differences between probability and convenience samples and the type of estimates obtained from each to assist the jury to determine what weight, if any, should be given to the survey and its findings. Kinetic Concepts, 2006 U.S. Dist. LEXIS 60187, at *14–16.

[22] In general, a response rate must be included "to assess the reliability and the generalizability of the data collected." Fish v. Kobach, 309 F. Supp. 3d 1048, 1060 (D. Kan. 2018).

[23] Kinetic Concepts, 2006 U.S. Dist. LEXIS 60187, at *26–27.

[24] Id.

[25] In Kinetic Concepts, the court also noted that the test group the expert relied on was "sufficiently large to provide meaningful results." Id. at *5. The court distinguished MasterCard International Inc. v. First National Bank of Omaha Inc., where a court found that a test group of 27 respondents was misleading and too small to accurately gauge confusion when "the 15.3% level of confusion allegedly measured" represented just 5 responses. 2004 U.S. Dist. LEXIS 2485, at *27–28, 2004 WL 326708, at *9 (S.D.N.Y. Feb. 23, 2004). Thus, the absolute number of relevant responses may be relevant when especially small and there is no effort to address the issue of non-response bias.

[26] Wellshire Financial Services, LLC v. TMX Finance, No. 4:17-cv-2786, 2019 U.S. Dist. LEXIS 45568, at *3–4, 2019 WL 1177728, at *1 (S.D. Tex. Feb. 5, 2019).

[27] 2019 U.S. Dist. LEXIS 45568 at *11.

[28] Id. at *10 (report and recommendation adopted by No. 4:17-cv-02786 (S.D. Tex. Feb. 21, 2019), ECF No. 183 (Hanen, J.)).

[29] Id.

[30] Id.

[31] Medlock v. Taco Bell Corp., No. 1:07-CV-01314-SAB, 2015 WL 8479320, at *6, 2015 U.S. Dist. LEXIS 165235, at *20 (E.D. Cal. Dec. 9, 2015) ("[A] lower response rate does not necessarily mean that the survey is invalid, but a lower response rate generally requires an analysis of the determinants of nonresponse") (quotation marks omitted).

[32] Hurt v. Com. Energy Inc., No. 1:12-CV-00758, 2015 WL 410703, at *5, 2015 U.S. Dist. LEXIS 10566, at *14 (N.D. Ohio Jan. 29, 2015) (excluding survey where "there was no serious testing to determine whether the respondents were representative of the entire class" and "did not account for potential bias in the results").