



## Three Tips for Asking the Right Questions in Litigation Surveys

In past decades, consumer surveys have become an established form of evidence in trademark and false advertising litigation, particularly in matters such as those involving confusion, secondary meaning, or false or misleading advertising.<sup>1</sup> However, parties that provide surveys almost always face the risk of a motion to exclude under *Daubert v. Merrill Dow Pharmaceuticals*<sup>2</sup>—which, if successful, would mean that the party cannot use the survey evidence they commissioned, or the expert they commissioned it from. This makes it important to present a survey without flaws that would warrant exclusion.

Several widely cited authorities address the proper conduct of litigation surveys, including topics such as the design of the research, the use of controls, the management of the interview process, or the selection of relevant respondents. Another important issue is the phrasing of survey questions, which is an issue that courts often examine. Below, we provide three tips that can aid in properly designing survey questions and help decision-makers determine whether survey questions are likely to produce reliable and relevant data.

### Tip 1: Survey questions must be written in a clear and understandable manner.

The first rule for writing litigation survey questions is fundamental: they must be written in a way that can be clearly understood by respondents taking the survey.<sup>3</sup> Although this guideline is straightforward, it has several profound implications, such as:

- Survey items must be written using language and phrasing that can be understood by respondents for that **particular survey**. For example, a survey written to ask questions of medical professionals may phrase questions differently than one written for primary grocery shoppers. The phrasing of survey questions should also be designed in a manner that does not assume that respondents have a lawyer's understanding of the law.<sup>4</sup>

- Survey questions must **ask about a single construct**, so that when respondents answer the question, respondents and experts know what topic they were addressing in their answer.<sup>5</sup>

This second rule is also known as a prohibition on “double-barreled” questions. One authority provides an example: “Do you regularly take vitamins to avoid getting sick?” Although this seems simple, it may ask two questions: “Do you regularly take vitamins?” and “Do you take them to avoid getting sick?”<sup>6</sup> Unless established by a prior question, this question assumes that the respondent takes vitamins to avoid getting sick. A respondent who has some other reason to take vitamins may answer no, which might be incorrect as to taking vitamins, or yes, which might be incorrect as to their reasons for taking vitamins.

## Tip 2: Survey questions must be phrased to address the issues in dispute.

Another important guideline for survey questions is that they should be phrased to address the specific issues in dispute.<sup>7</sup> For example, a confusion survey may measure a variety of different types of confusion, which might include:

- **Confusion as to source:** When a consumer mistakenly believes that the company that made one product also made another product
- **Confusion as to connection:** When a consumer mistakenly believes that the companies that make two products are connected, perhaps by means such as sponsorship, affiliation, permission, or endorsement<sup>8</sup>



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The questions for an Eveready survey typically begin in a manner similar to the original survey upon which this format is based, which asked, “Who do you think puts out the [product] shown here?” and followed up with, “What makes you think so?” Since then, Eveready-format surveys have asked about other types of confusion, such as authorization, permission, sponsorship, or approval.<sup>9</sup> For example, *Starbucks Coffee Company v. Marshall S. Ruben* involved a survey focused on company names. The first question asked for the name of the company, and follow-up questions asked, “Do you think the company that owns this retail establishment is connected or affiliated with any other company? What other company?” A final set of questions asked about confusion as to authorization, permission, or approval.<sup>10</sup>

Surveys conducted for matters involving secondary meaning often conform to the anonymous source rule, which was described in *GMC v. Lanard Toys* as indicating that “knowledge that a product comes from a single source, even without naming that source, is sufficient to establish

secondary meaning.” In other words, when following the anonymous source rule, survey answers are examined to determine whether respondents associate a trademark with one source, even if they cannot identify the source.<sup>11</sup>

In surveys conducted for false or deceptive advertising disputes, one important rule is to ask about what consumers believe the advertisement says about the product—not what consumers themselves believe about the product.<sup>12</sup> This is important because advertisers are liable only for reasonable consumers’ interpretations of their ads.<sup>13</sup> Consumers may come to surveys with preexisting beliefs about products, but these are a form of bias that survey designers typically control for, so that preexisting beliefs are often measured and accounted for in false advertising cases.<sup>14</sup>

### Tip 3: Survey questions must be phrased in a non-biased and non-leading manner.

The need for litigation survey questions to avoid biased and leading language can impact the survey’s design and implementation in several ways. To avoid biased or leading questions, survey design might include elements such as the following:

- **Rotate responses** to reduce bias on key questions
- **Use neutral phrasing** to balance positives and negatives and to prevent respondents from interpreting survey wording as subtle cues
- **Include “Don’t know/Not sure” response options to discourage guessing**

First, the responses to significant questions are often rotated. When the order of response options is randomized, it reduces the effect of biases that may occur if some respondents tend to pick responses in a certain position, such as the first or last option. With rotation, each response appears first or last an equal percentage of the time.<sup>15</sup>

Secondly, the survey question should be phrased in a neutral manner. Often, this means that survey questions include both positive and negative phrasing. For example, in a false advertising study, researchers might want to investigate whether a commercial implies a certain message. The question to ask about that message would likely start with phrasing similar to “Does or does not the commercial communicate or imply that ...” This phrasing, and others like it, are equally balanced between the positive and the negative.<sup>16</sup>

Similarly, a survey must not imply or suggest that the researchers are seeking a particular type of answer. Some survey respondents may try to be helpful in answering questions. Just as in everyday conversation, respondents expect the communications they receive in survey questions to be informative and relevant; however, unlike in an everyday conversation, their

ability to ask clarifying questions is limited during an interview. As a result, some respondents may infer cues or clues from interview question, even when the inference they received was not actually intended by the interviewer. Respondents may obtain such cues from the way products are presented, the order of question phrasing, and even how responses are presented. Interviewers must be careful to minimize these cues and make sure that they do not unduly influence the data gathered.<sup>17</sup>

A third, perhaps underappreciated, implication of this “non-biased and non-leading” guideline is the importance of providing a “don’t know” response to discourage guessing for all key questions in a survey. In the absence of this option, respondents might select a response they may not actually prefer over “don’t know.” Not only is providing a “don’t know” response option important to reduce guessing, but it lets respondents know that “don’t know” is an acceptable response, which is also important.<sup>18</sup> As one source has written, “By signaling to the respondent that it is appropriate not to have an opinion, the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply.”<sup>19</sup>



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## In Summary

Litigation surveys can offer critical insights in disputes involving consumer perception—whether the issue is confusion, secondary meaning, misleading advertising, or some other topic. When thoughtfully designed with clear, relevant, and unbiased questions, these surveys can provide compelling evidence that supports key claims and withstands judicial scrutiny. To maximize reliability and relevance, survey questions must be clearly understandable to respondents, directly aligned with the legal issues at hand, and carefully phrased to avoid bias or leading language.

Given the complexity and high stakes of intellectual property litigation, partnering with experienced professionals is essential. The Litigation Surveys & Consumer Science team at IMS Legal Strategies brings deep knowledge of survey methodology, legal standards, and courtroom expectations. We ensure that surveys are not only methodologically sound but also tailored to the goals of each case. From designing robust survey instruments to preparing defensible expert testimony, working with our trusted specialists will help you present compelling, admissible evidence that can influence outcomes in trademark disputes.

Visit [imslegal.com](https://imslegal.com) to meet our experts and request a consultation.

## References

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