Techniques in Crossing the Survey Expert
Advocacy Before the Courts in Intellectual Property Matters: The Art of Cross-Examination

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What You Need To Know

1. Who are the survey experts?
2. Ruth Corbin is the most experienced
3. No one survey expert dominantly successful
<table>
<thead>
<tr>
<th>Name of Expert</th>
<th>Acceptability of Survey</th>
<th>Total Surveys</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Accepted</td>
<td>Completely Discounted</td>
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<tr>
<td>Chuck Chakrapani</td>
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<td>David J. Pye</td>
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<tr>
<td>David Thexton</td>
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<td>Donald Mayo</td>
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<td>0</td>
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<td>Environics (no expert named)</td>
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<td>0</td>
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<td>Gerald L. Ford</td>
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<td>George Mantis</td>
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<tr>
<td>Gillian Humphreys</td>
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<td>IFOP Canada Market Research</td>
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<tr>
<td>Ivan Ross</td>
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<td>Jean-Bernard Belisle</td>
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<tr>
<td>John P. Liefeld</td>
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<td>1</td>
</tr>
<tr>
<td>John P. Liefeld and Ian D Fenwick</td>
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</tr>
<tr>
<td>John W. Senders</td>
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<td>1</td>
</tr>
<tr>
<td>Market Facts of Canada</td>
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<td>0</td>
</tr>
<tr>
<td>Maurice Guertin (Saine Marketing Inc.)</td>
<td>0</td>
<td>1</td>
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<tr>
<td>Ruth Corbin</td>
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<td>5</td>
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</table>
4. Traditional Flaws in Survey Design/Evidence

a) Error in survey design: questionnaire and flow of questions

b) Survey overexposed

c) Relevant universe: appropriate purchasers or consuming public
   • In *Ron Matesalum & Matusa of Florida, Inc. v. Havana Club Holding Inc., S.A.*, supra, Court gave little weight to survey partly because only 48% of those surveyed could be considered rum consumers.
4. Traditional Flaws in Survey Design/Evidence

d) Cities/locations:
   • min. of 4 regions spread across the country is advisable (National Hockey League v. Pepsi–Cola Canada Ltd. (1992), 42 CPR (3d) 390) (BCSC)
   • at least 1 survey location should be chosen in Quebec and should be bilingual (NHL v. Pepsi).
4. Traditional Flaws in Survey Design/Evidence

e) Sampling size:
   - <200 = noted disapprovingly by the Court
   - 200–1000 = not commented on positively or negatively by the Court
   - 1000 = noted approvingly by the Court

f) No or wrong control: *Bojangles’ International LLC v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (F.C.) → no control risks to discount weight of survey
4. Traditional Flaws in Survey Design/Evidence

g) Type of survey: mall intercept, retail store intercept, telephone, internet

- mall = good place to find diverse people (*Walt Disney Productions v. Triple Five Corp.* (1992), 43 CPR (3d) 321 (Alta QB)) vs. risk of intercepting “mallies” (*Elli Lilly & Co. v. Novopharm Inc.* (1997), 73 C.P.R. (3d) 371 (Fed TD)) and fails to account for rural and urban differences (*NHL v. Pepsi*)

h) Other technical issues:

- Using out-of-date survey evidence from previous proceedings
- Using data from general marketing surveys
- Full disclosure must be made (questionnaire, survey screener, interviewer instructions, coding guidelines, raw data)
5. Cross-Examination Fundamentals

i. The problem is rarely with the science/expertise but rather its legal application / how science “legally” applied

ii. The judge has to understand points you are trying to make on cross-examination

iii. Keep the judge interested by keeping the cross-examination short and sweet
6. Cross-Examination Techniques to Obtain Result Looking For

i. Question to ask oneself: Should I be asking questions?

ii. Focus on limited number of targets.

iii. Sometimes the question is more important than the answer.

iv. The issues that are most likely to succeed are the easiest for a judge to understand.
6. Cross-Examination Techniques to Obtain Result Looking For

Flaws:  
4a. Error in survey design: questionnaire and flow of questions  
4b. Survey overexposed  
4c. Relevant Universe  
4d. Cities/locations  
4f. Wrong or no control  

- Have to be very well prepared to be able to get straight to the point for those difficult/technical issues.
Thank You

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