

1991

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Susan J. Becker
Cleveland State University, s.becker@csuohio.edu

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Original Citation

Susan J. Becker, Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility, 70 Oregon Law Review 463 (1991)

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Citation: 70 Or. L. Rev. 463 1991

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1991

VOLUME 70

NUMBER 3

OREGON LAW REVIEW

SUSAN J. BECKER*

Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility

PUBLIC opinion polls and other survey data have attained a unique status in the world of evidence. Once scorned as inadmissible hearsay, survey evidence is now not only routinely admitted in many cases, but assigned such high probative value as to be largely determinative of key issues in litigation.

In motions in limine, sidebar conferences, post trial motions, and appellate briefs, litigants debate the relevance and reliability, and hence the admissibility and weight, of survey results. Refereeing the debate inevitably requires a detailed and sometimes onerous analysis of the methodology used to produce the survey data which rests at the center of the controversy.

* Assistant Professor of Law, Cleveland-Marshall College of Law. B.A. 1977, Eastern Kentucky University. J.D. 1983, Cleveland-Marshall College of Law. The author wishes to thank Chris Lakin Hurlbut and Barbara Kacir, whose unfailing support and inspiration made this Article possible.

Despite an abundance of judicial opinions and scholarly works published on the subject of survey results as evidence,¹ a number of issues remain unresolved. The exact "rules" governing the conduct of litigants and their respective counsel in commissioning and executing a survey and those governing the courts' refereeing of evidentiary disputes over polling data remain unclear. The specific areas of confusion or conflict which this Article addresses are: (1) the appropriateness of the "weight versus admissibility" standard used in some instances to admit seriously flawed survey results; (2) the utility of Federal Rule of Evidence 703 as a vehicle for streamlining the admission of survey data; (3) the wisdom of requiring mandatory disclosure of a litigant's intent to commission a survey prior to planning and execution; (4) the ramifications of prohibiting attorney involvement in the design of the survey questionnaire and other aspects of the polling process; (5) the propriety of conditioning admissibility of survey data upon a "showing of necessity," i.e., that it is the most probative evidence on a particular point; and (6) the value of establishing different standards of admissibility for polls which measure objective data and those which record subjective impressions of the respondents.² These unresolved issues are discussed seriatim in Section II. Suggestions for moving toward a

¹ See, e.g., Davis, *Identifying Uses of Custom Consumer Research in Products Liability*, 9 J. PROD. LIAB. 329 (1986); Evans & Gunn, *Trademark Survey Evidence*, 20 TEX. TECH L. REV. 1 (1989); Glassman, *Community Standard of Patent Offensiveness: Public Opinion Data and Obscenity Law*, 42 PUB. OPINION Q. 161 (1978); Lipton, *A New Look at the Use of Social Science Evidence in Trademark Litigation*, 78 TRADEMARK REP. 32 (1988); Robin & Barnaby, *Trademark Surveys—Heads you Lose, Tails They Win*, 73 TRADEMARK REP. 436 (1983); Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322 (1960); Note, *Public Opinion Surveys as Evidence: The Pollsters Go To Court*, 66 HARV. L. REV. 498 (1953) [hereinafter Note, *Public Opinion Surveys*]; Note, *Opinion Polls and the Law of Evidence*, 62 VA. L. REV. 1101 (1976) [hereinafter Note, *Opinion Polls*]; see also, Annotation, *Admissibility and Weight of Surveys or Polls of Public or Consumers' Opinion, Recognition, Preference, or the Like*, 76 A.L.R.2d 619 (1961).

² This Article does not address all unresolved issues relating to the use of polling and survey evidence. For example, the issue of whether polls or surveys conducted for litigation are discoverable, regardless of whether the commissioning party intends to introduce the results at trial, is still open to debate, but is not addressed here. This problem was recognized at least as early as 1960, see *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 430 (1960), and courts continue to wrestle with it. See, e.g., *Karan v. Nabisco, Inc.*, 82 F.R.D. 683, 686 (W.D. Pa. 1979) ("If and when defense counsel determine that they intend" to use results of a survey of female employees at trial of an employment discrimination claim, defendant is compelled to produce survey results to plaintiffs); see also FED. R. CIV. P. 26(b)(4)(B) (limiting discovery of facts known and opinions held by a non-testifying expert retained in anticipation of litigation or preparation for trial to situations where a showing is made of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means").

more uniform and more practical method of evaluating the admissibility and weight of survey data are set forth in Section III.

To understand fully the implication of these issues, which repeatedly confront modern courts and litigants, an understanding of the growth in the use and acceptability of surveys, among both social scientists and legalists, is useful if not necessary. Accordingly, Section I provides a basic overview of public opinion polls, beginning with a brief explanation of the current popularity of this type of data, followed by a discussion of the courts' historic treatment of survey evidence and a review of modern standards which courts use in evaluating the weight and admissibility of polling data.³

I

HISTORIC OVERVIEW AND MODERN STATUS OF PUBLIC OPINION POLLS

A. The Growing Popularity of Survey Data

"The measurement of public opinion is, in its simplest form, finding out what people think."⁴ This task, at first blush, seems an elementary one, especially to the generations of Americans for whom names like "Gallup" and "Roper" are household words. But closer study reveals that the task of accurately measuring and analyzing public perception of an event, a tangible item, or a controversial issue is indeed a difficult one, filled with traps capable of ensnaring the seasoned veteran as well as the novice pollster.⁵

Concerted efforts by academicians and researchers from a variety of disciplines, including sociology, psychology, marketing, economics, advertising, anthropology, journalism, political science, and statistics, have greatly advanced the "science," and arguably the

³ At the outset, a distinction should perhaps be drawn between polls designed to elicit public opinion or perception ("subjective" responses) and surveys which collect information which is, at least in theory, capable of external verification ("objective" data). This distinction is illustrated by a comparison of cases wherein survey results reflecting "objective" data were at issue, such as *Baumholser v. Amax Coal Co.*, 630 F.2d 550 (7th Cir. 1980) (survey offered through the testimony of a geologist purported to demonstrate the number of homes damaged by defendant's blasting operation and the extent of damage to each), and decisions where the survey being scrutinized by the court compiled subjective data, such as *Meese v. Keene*, 481 U.S. 465 (1987) (public's perception of the use of the word "propaganda" in statute sought). Further discussion is provided in Section II on the rationale for declining to make the objective/subjective distinction.

⁴ B. HENNESSY, *PUBLIC OPINION* 59 (2d ed. 1970).

⁵ The prediction that Dewey would defeat Truman in the 1948 presidential election represents a classic case of pollster error. For a thorough discussion of this event, see W. ALBIG, *MODERN PUBLIC OPINION* 222-26 (1956).

accuracy, of polling techniques.⁶ Despite these advances, one writer still defines public opinion polling as "a partial quantification of some aspects of what some people say their opinions are about certain questions about which they have been asked."⁷ Even more insightful in the context of using polling data as evidence is the skepticism which led another author to opine that "[i]t is possible to make a survey prove anything. It is just a matter of picking the right people or establishments to survey, and framing the questions so that the desired answers will be obtained."⁸

Notwithstanding skepticism about public opinion polls and similar surveys, their popularity continues to grow primarily because they are efficient.

Despite repeated criticisms, polls and surveys continue to flourish in number and influence. The reason for their success is simple. They combine two things: the ancient but extremely efficient method of obtaining information from people by asking questions; and modern random sampling procedures that allow a relatively small number of such people to represent a much larger population.⁹

Moreover, as social scientists have improved survey accuracy and trustworthiness, the courts have become increasingly receptive to the use of survey evidence. Indeed, the courts' attitudes have changed drastically since the early 1950s, when one commentator observed: "[T]hus far polls have not been generally accepted by the courts."¹⁰ In sharp contrast, the following passage, explaining the

⁶ A. BLANKENSHIP, *CONSUMER AND OPINION RESEARCH: THE QUESTIONNAIRE TECHNIQUE* ix (1st ed. 1943); B. HENNESSY, *supra* note 4, at 84-92. As one social scientist explains:

Survey research is not itself an academic discipline, with a common language, a common set of principles for evaluating new ideas, and a well-organized professional reference group. Lacking such an organization, the field has evolved through the somewhat independent and uncoordinated contributions of researchers trained as statisticians, psychologists, political scientists, and sociologists.

R. GROVES, *SURVEY ERRORS AND SURVEY COSTS* 1 (1989) (footnote omitted). For a comprehensive view of social scientists' approaches to and opinions of modern surveying techniques, see 1 *SURVEYING SUBJECTIVE PHENOMENA* (C. Turner & E. Martin eds. 1984) (Volumes I and II).

⁷ W. ALBIG, *supra* note 5, at 198.

⁸ A. BLANKENSHIP, *supra* note 6, at 215 (quoting *THE SALES MANAGER'S HANDBOOK* 225 (J. Aspley ed. 1934)).

⁹ H. SCHUMAN & S. PRESSER, *QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS ON QUESTION FORM, WORDING, AND CONTEXT* 1 (1981).

¹⁰ Note, *Public Opinion Surveys*, *supra* note 1, at 499. One court expressed its skepticism thusly: "Surveys and polls are inconclusive enough at best . . . [even] under optimum conditions." *Rimmeir v. Dickson*, 107 So.2d 372, 374 (Fla. 1958).

court's approval of the admission of survey evidence to establish consequential damages in a complex breach of contract case, reflects the attitude of the modern courts:

In arriving at this conclusion, we recognize that statistically reliable surveys are an acceptable tool used regularly in formulating highly sophisticated business decisions. They are an accepted method of determining truth as perceived through the collective judgement of enormous segments of the population. Given the verity that surveys are accorded in everyday life, we see no reason to exclude them from the consideration of the trier of fact in a complex case such as the one at hand.¹¹

In civil and criminal cases alike, survey evidence today enjoys a fairly high degree of success in terms of admissibility and probative value. It has been proffered to resolve a plethora of factual and legal issues, including, but by no means limited to, the amount of damages suffered due to defendant's violation of antitrust laws,¹² deceptive or unfair advertising in Federal Trade Commission proceedings and private causes of action;¹³ the constitutional validity of federal statutes;¹⁴ the proper definition of E.P.A. regulations;¹⁵ the American public's distrust of political action committees;¹⁶ the unrepresentative nature of a particular grand jury selection;¹⁷ the allegedly "adulterated" nature of the orange juice sold by defendant;¹⁸ the impact which defendant-columnist's alleged defamatory statements had on plaintiff's reputation and career as a political science professor;¹⁹ the inherent bias of potential jurors against a criminal defendant which would negate the possibility of a fair

¹¹ *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 55 (Mo. Ct. App. 1984).

¹² *American Bearing Co. v. Litton Indus., Inc.*, 540 F. Supp. 1163, 1174-75 (E.D. Pa. 1982), *aff'd*, 729 F.2d 943 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984).

¹³ *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312 (2d Cir. 1982); *Litton Indus., Inc. v. F.T.C.*, 676 F.2d 364, 372-73 (9th Cir. 1982).

¹⁴ *Meese v. Keene*, 481 U.S. 465 (1987).

¹⁵ *Harley-Davidson Motor Co. v. E.P.A.*, 598 F.2d 228, 231 n.18 (D.C. Cir. 1979).

¹⁶ *Democratic Party of the United States v. National Conservative PAC*, 578 F. Supp. 797, 824-27 (E.D. Pa. 1983), *aff'd in part and rev'd in part sub nom. Federal Election Comm'n v. National Conservative PAC*, 470 U.S. 480 (1985).

¹⁷ *United States v. Van Allen*, 208 F. Supp. 331, 334-36 (S.D.N.Y. 1962), *aff'd in part and rev'd in part sub nom. United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

¹⁸ *United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F.2d 967, 974-75 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951).

¹⁹ *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir. 1983), *aff'd on rehearing*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

trial in the challenged venue;²⁰ and the community standards against which material should be judged obscene.²¹

In addition to giving due consideration to surveys conducted expressly for litigation, courts and other entities seeking guidance on issues touching on public policy and/or community standards often consult existing polling data²² or, in rare instances, resort to commissioning polls themselves.²³

The foregoing list of survey uses shows the variety of applications for this type of evidence. However, the reader should not be misled

²⁰ *Paradis v. Arave*, 667 F. Supp. 1361, 1368-69 (D. Idaho 1987); *Irvin v. State*, 66 So.2d 288 (Fla. 1953) (en banc), *cert. denied*, 346 U.S. 927 (1954).

²¹ *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, *cert. denied*, 449 U.S. 888 (1980).

²² Existing polling data is generally proffered into evidence as material on which an expert relied in reaching his conclusion. In *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 541-42 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986), for example, the appellate tribunal affirmed the trial court's decision that mandatory busing would not help abate segregation problems in the city schools. The court's finding was based primarily on the results of a Gallup Poll, and on an expert's interpretation thereof, showing that parental involvement was the "most significant factor" in the well-being of the students and that busing would further exacerbate the lack of parental involvement. *Id.* at 529. See also *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 476 U.S. 1145 (1986) (public opinion data on death penalty cited in challenge to systematically excluding jurors who expressed moral qualms about the penalty); *United States v. Van Allen*, 208 F. Supp. 331, 334-35 (S.D.N.Y. 1962), *aff'd in part and rev'd in part sub nom. United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966) (Gallup and Roper surveys showing area demographics submitted in unsuccessful challenge to composition of grand jury).

Members of Congress have specifically instructed the Federal Trade Commission to include an analysis of existing "public opinion polls and other relevant information" in the agency's biannual report on cigarette labeling and advertising required by Section 8(a) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1337(a) (1990). See S. REP. NO. 566, 91st Cong., 1st Sess. 11, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 2652, 2662-63.

On another front, legal scholars have commissioned surveys in an effort to influence lawmakers and judicial officers to rethink long-held positions in particular areas of law. See, e.g., Dressler, *Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) is Discharge?*, 10 U. DAYTON L. REV. 599 (1985).

For a comprehensive listing of sources of existing survey data, as well as a discussion of special problems which may arise when existing survey data is used, see K. KIECOLT & L. NATHAN, *SECONDARY ANALYSIS OF SURVEY DATA* (1985).

²³ In *Triangle Publications v. Rohrlrich*, 167 F.2d 969, 976-77 (2d Cir. 1948) (Frank, J., dissenting), one member of the three judge panel sought guidance in resolving the issue of the likelihood of confusion between *Seventeen* magazine and girdles marketed under the name "Miss 17" by posing the question to women at random. This approach was apparently not accepted by the majority, as the "survey" results are reported in a dissent. See also *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954) (antitrust case in which Court selected and contacted about 3% of the shoe manufacturers listed in an industry directory).

into thinking that the courts' struggle with the utility and credibility of public opinion polls and surveys has ended. In January, 1991, an Iowa appellate court noted that it had searched the law of that jurisdiction in vain for a standard against which the trial court's admission of certain public opinion poll evidence should be measured.²⁴ The challenged survey was admitted in this personal injury/negligence action to demonstrate the public's general lack of awareness of the danger associated with electrical power lines. The court ultimately adopted the standards for survey trustworthiness articulated by the Eighth Circuit in *Lutheran Mutual Life Insurance Co. v. United States*,²⁵ and found that the survey in question satisfied those standards.²⁶ And, as recently as 1985, an Indiana court described the admissibility of public opinion polls as an issue of first impression in that jurisdiction.²⁷

The modern courts' continuing struggle with the admissibility and weight to be accorded survey evidence is deeply rooted in the common law prohibition against admission of hearsay evidence. The historic underpinnings of the lengthy battle fought by proponents of survey data to gain respect for this type of evidence still surface in continued skirmishes over contemporary applications of survey evidence. The evolution, perhaps more aptly phrased the revolution, in judicial thinking on the issue of survey evidence is recounted immediately below.

²⁴ *Decker v. Iowa Illinois Gas & Elec. Co.*, No. 0-401/89-1737, slip op. at 6 (Iowa Ct. App. Jan. 29, 1991).

²⁵ 816 F.2d 376, 378 (8th Cir. 1987).

²⁶ *Decker*, No. 0-401/89-1737, slip op. at 6-7. For a survey to be trustworthy, it must be shown:

(1) that a proper "universe" was examined and a representative sample was chosen; (2) that the persons conducting the survey were experts; (3) that the data were properly gathered and accurately reported; (4) that the sample design, the questionnaires, and the manner of interviewing met the standards of objective surveying statistical techniques; and (5) that the interviewers, as well as the respondents, were unaware of the purpose of the survey.

Id. (citations omitted). These standards track closely those set forth in *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978).

²⁷ *Saliba v. State*, 475 N.E.2d 1181, 1189 (Ind. App.), *petition for transfer denied*, 484 N.E.2d 1295 (Ind. 1985). The novelty of the evidence at issue resulted in a lengthy analysis by the appellate court of the historical treatment of survey evidence and modern rationales for its admission, and a separate concurrence by one of the three appellate judges. *Id.* at 1191-92 (Sullivan, J., concurring). The Chief Justice of the Supreme Court of Indiana, joined by one of his colleagues, wrote a stinging dissent when the majority of that court refused to review the appellate tribunal's treatment of the survey evidence. 484 N.E.2d at 1295 (Givan, C.J., dissenting).

B. The Historic Perspective—Overcoming the Hearsay Objection

An individual's response to a question posed by a pollster arguably falls within the classic definition of "hearsay" evidence.²⁸ Accordingly, the traditional objection to polling evidence was (and in some cases remains) that such evidence is inherently untrustworthy due to its hearsay nature.²⁹ In the 1928 decision *Elgin National Watch Co. v. Elgin Clock Co.*,³⁰ for example, a plaintiff claiming trademark infringement attempted to introduce, through an affidavit prepared by an advertising firm executive, the results of a mail survey of 2000 retail jewelers throughout the United States. According to the affidavit, the survey results conclusively demonstrated that "Elgin," used in connection with the manufacture and sale of time pieces, meant a product manufactured by the plaintiff.

While the court acknowledged the "practical difficulties" of calling "numerous witness from all the different parts of the United States" to establish what a nationally-known trade name denotes,³¹ it nonetheless refused to accept plaintiff's "innovation with respect to such proof."³² In essence, the *Elgin* court feared that it might deliver the fatal blow to the rule prohibiting admission of hearsay evidence if the survey results, representing out-of-court statements by 2000 declarants, were admitted.

Other courts viewed polling evidence as presenting multiple hearsay problems. For example, in the 1953 case of *Irvin v. State*,³³ Florida's highest court upheld the trial court's exclusion at a venue hearing of a poll conducted by the Roper organization. The results of the poll purportedly established that a black defendant accused of raping a white woman could not get a fair trial in the county where the alleged crime was committed. The defendant sought to offer the survey results through the testimony of the Roper research executive who supervised the study. Since defendant proffered neither the testimony of the persons who actually conducted the

²⁸ FED. R. EVID. 801(c), as well as state rules modeled after the federal set, define hearsay evidence as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

²⁹ See, e.g., *Landstrom v. Thorpe*, 189 F.2d 46 (8th Cir.), cert. denied, 342 U.S. 819 (1951); *United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F.2d 967 (3d Cir.), cert. denied, 342 U.S. 861 (1951); *American Coop. Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir.), cert. denied, 329 U.S. 721 (1946).

³⁰ 26 F.2d 376 (D. Del. 1928).

³¹ *Id.* at 377.

³² *Id.*

³³ 66 So.2d 288 (Fla. 1953) (en banc), cert. denied, 346 U.S. 927 (1954).

interviews, nor the testimony of individuals who responded to the questions, the Roper executive's testimony was, in the court's opinion, properly excluded as "hearsay based upon hearsay."³⁴

Attempts to avoid exclusion of polling evidence on hearsay grounds proved cumbersome for the parties and the courts. In one trademark infringement case, the party which proffered the polling evidence called forty-five of the survey respondents to testify at trial, along with the persons who conducted the interviews.³⁵ Based upon this parade of witnesses, an exasperated court concluded that "[t]he hearsay objection is not well taken."³⁶ In another trademark action, the defendant overcame the hearsay objection by subpoenaing seventeen respondents to testify as to the method in which a survey was conducted.³⁷

Certainly, parading dozens of interviewers and respondents through the witness stand proved to be an inefficient and unwieldy method of dispelling the untrustworthiness concern underlying the prohibition of "hearsay" survey evidence. Indeed, it may have been more efficient to abandon the survey altogether in favor of calling the would-be respondents to answer the survey questions under oath during trial.

In order to overcome the courts' hearsay concerns, advocates of survey evidence espoused several theories of admissibility to which the courts responded with varying degrees of acceptance. One argument was that survey results are not hearsay because they are not offered to establish the truth of the matter asserted, but rather to establish the respondents' beliefs as to the particular matter asserted.³⁸ This argument was used in a condemnation case brought by the United States government against a beverage distributor for alleged adulteration of its product.³⁹ In that case, the defendant surveyed consumers by having them taste the beverage at issue and then asking what the beverage was. The majority of respondents

³⁴ *Id.* at 291.

³⁵ *Standard Oil Co. v. Standard Oil Co.*, 252 F.2d 65 (10th Cir. 1958).

³⁶ *Id.* at 75; *see also* *Life Savers Corp. v. Curtiss Candy Co.*, 87 F. Supp. 16 (N.D. Ill. 1949), *aff'd*, 182 F.2d 4 (7th Cir. 1950) (in trademark action, seventy-five or eighty witnesses testified that they had accidentally picked up defendant's product when they meant to buy Life Savers).

³⁷ *Quaker Oats Co. v. General Mills, Inc.*, 134 F.2d 429 (7th Cir. 1943).

³⁸ *See* *United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F.2d 967, 974 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951); *Sunbeam Corp. v. Sunbeam Furniture Corp.*, 134 F. Supp. 614, 619 (N.D. Ill. 1955); *Household Fin. Corp. v. Federal Fin. Corp.*, 105 F. Supp. 164, 166 (D. Ariz. 1952).

³⁹ *88 Cases*, 187 F.2d at 974.

answered, "Orange juice." The court rejected the government's hearsay objection to survey evidence, since statements of the persons interviewed were not offered for the truthfulness of the assertions as to the composition of the beverage at issue, but were offered to establish "as a fact the reaction of ordinary householders and others of the public generally when shown a bottle" of the beverage.⁴⁰

Other courts criticized the "non-hearsay" argument because survey evidence is frequently offered to prove the truth of the matter asserted. This is especially true where the survey is designed to prove the existence of a specific attitude or belief held by members of the public.⁴¹ Accordingly, when the public's belief or perception is at issue, litigants proffering survey results have relied upon application of exceptions to the hearsay rule. The "state of mind" exception, now codified as Federal Rule of Evidence 803(3),⁴² has often been chosen as an appropriate vehicle for admission of such survey results.⁴³

In *Zippo Manufacturing Co. v. Rogers Imports, Inc.*,⁴⁴ a case which was a turning point in the judiciary's perception of survey

⁴⁰ *Id.* Another court branded a survey as "non-hearsay" because the primary purpose for which it was offered was to impeach the opponent's survey evidence. See *Bradley v. Booz, Allen & Hamilton, Inc.*, 67 Ill. App. 3d 156, 163, 384 N.E.2d 746, 751 (1978) (survey offered by defendant to impeach credibility of plaintiff's survey "would not have been offered to prove its truth," thus "the survey would not constitute hearsay").

⁴¹ See *Zippo Mfg. Co. v. Rogers Imports*, 216 F. Supp. 670, 682-83 (S.D.N.Y. 1963); see also *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 522 n.5 (10th Cir. 1987) (distinguishing between responses to survey, such as "this is a Zebco reel," which are not hearsay because they are not offered to prove the truth of the matter asserted, and "this looks like a Zebco reel," which is hearsay because it is offered for the truth of the matter asserted on the critical issue of whether the public perceives defendant's reel as closely resembling the reel manufactured by plaintiff).

⁴² FED. R. EVID. 803(3) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

⁴³ See, e.g., *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 930-31 (7th Cir. 1984); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 520 (10th Cir. 1976); *Zippo*, 216 F. Supp. at 682; *Bradley*, 67 Ill. App. 3d at 164, 384 N.E.2d at 752.

⁴⁴ 216 F. Supp. 670 (S.D.N.Y. 1963).

evidence, the manufacturer of the popular "Zippo" cigarette lighter sued an importer of lighters for trademark infringement and unfair competition. Plaintiff had the burden of showing that the copied features in defendant's lighters were likely to cause prospective purchasers to think defendant's lighters were manufactured by plaintiff. To meet this burden, plaintiff proffered three surveys, including one in which respondents were shown the lighter imported by defendant and asked to identify the manufacturer of the lighter. A significant number of respondents identified defendant's lighter as a "Zippo" lighter.⁴⁵

Even though the *Zippo* court agreed that the survey evidence was hearsay, defendant's efforts to exclude the survey results from evidence were unsuccessful. In its oft-cited decision, the court explained:

The answer of a respondent that he thinks an unmarked lighter is a Zippo is relevant to the issue of secondary meaning only if, in fact, the respondent really does believe that the unmarked lighter is a Zippo. Under this view, therefore, answers in a survey should be regarded as hearsay.

Regardless of whether the surveys in this case could be admitted under the non-hearsay approach, they are admissible because the answers of respondents are expressions of presently existing state of mind, attitude, or belief. There is a recognized exception to the hearsay rule for such statements, and under it the statements are admissible to prove the truth of the matter asserted therein.⁴⁶

In addition to the existing state of mind exception,⁴⁷ other recognized exceptions to the hearsay rule, primarily the "present sense impression"⁴⁸ and residual hearsay exceptions,⁴⁹ have been cited as

⁴⁵ *Id.* at 680-81.

⁴⁶ *Id.* at 683 (footnote omitted).

⁴⁷ For text of the codified version of the state of mind hearsay exception, FED. R. EVID. 803(3), see *supra* note 42.

⁴⁸ FED. R. EVID. 803(1) allows admission of "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." This exception is readily applicable to situations where respondents are questioned on their perception of, or reaction to, a physical object or objects displayed to them by the interviewer. The respondents' "contemporaneous reports would be allowable under Rule 803(1)." MANUAL FOR COMPLEX LITIGATION, SECOND § 21.484, at 89 (1985) (hereinafter 1985 MANUAL).

⁴⁹ FED. R. EVID. 803(24) provides for admission of:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;

grounds for the admission of survey evidence.⁵⁰ In its seminal decision on the admissibility of polling evidence, *Pittsburgh Press Club v. United States*,⁵¹ the Court of Appeals for the Third Circuit aptly summarized the modern view of the hearsay rule as it applies to public opinion polls:

While some polls are not hearsay in that they are admitted to show the beliefs or attitudes of the respondents (as opposed to the truth of the respondents' answers), other polls are unquestionably hearsay.

Such hearsay polls are not necessarily inadmissible as evidence in that they may fall into a recognized class exception to the hearsay rule, as, for example, when they involve a present sense impression or a presently existing state of mind. If a survey or poll does not fit into one of the class exceptions to the hearsay rule, it may nevertheless be admissible under Fed. R. Evid. 803(24). In other words, the survey is admissible if it is material; if it is more probative on the issue than any other evidence; and if it has "circumstantial guarantees of trustworthiness" equivalent to those of the class exceptions. . . . The proponent of such evidence, of course, has the burden of establishing these elements of admissibility.⁵²

In recognition of the conceptual difficulties involved in the hearsay/non-hearsay classification of survey evidence, the advisory committee notes to Federal Rule of Evidence 703, which rule allows the admissibility of expert opinion testimony even where the opinion is based on non-admissible hearsay matters,⁵³ suggest that Rule 703 offers "a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence."⁵⁴ However, Rule 703 has not proven a viable route for the admissibility of survey evidence.⁵⁵

Regardless of which vehicle the proponent of survey evidence chooses, a court confronted with whether to admit a particular survey usually engages in a detailed analysis of the many steps involved in conducting the survey, seeking to identify sources of error or bias

and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

⁵⁰ Although only applicable in limited circumstances, some surveys qualify for admission under the business records exception to the hearsay rule. See, e.g., *Bradley v. Booz, Allen & Hamilton, Inc.*, 67 Ill. App. 3d 156, 165, 384 N.E.2d 746, 752 (1978); see also FED. R. EVID. 803(6).

⁵¹ 579 F.2d 751 (3d Cir. 1978).

⁵² *Id.* at 757-58 (footnotes and citations omitted).

⁵³ FED. R. EVID. 703 allows the admission of expert testimony if the expert's opinion is based on data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"

⁵⁴ FED. R. EVID. 703 advisory committee's note.

⁵⁵ See *infra* notes 157-169 and accompanying text.

which would taint the proffered results or even render them irrelevant. Evidentiary standards against which the reliability of a particular survey is measured are set forth in the following section.

C. *Modern Standards Governing Admissibility: Searching for Circumstantial Guarantees of Trustworthiness*

1. *General Case Law Standards*

No single authority governs the admissibility and weight of polling data in either state or federal courts. When evaluating the admissibility of survey evidence over hearsay objections, modern courts frequently rely on the general guidelines set forth in the *Zippo* decision,⁵⁶ the 1960 *Handbook of Recommended Procedures for the Trial of Protracted Cases*,⁵⁷ the five subsequent editions of the *Manual for Complex Litigation* published by the Federal Judicial Center,⁵⁸ the *Pittsburgh Press Club*⁵⁹ decision, and the various decisions interpreting Federal Rule of Evidence 703. With the exception of federal courts within the Third Circuit, which are bound by the *Pittsburgh Press Club* decision, courts are free to—and do—pick and choose among the criteria suggested by these sources in determining whether a particular poll is worthy of admissibility and/or substantial weight.⁶⁰

Regardless of the source consulted, modern courts evaluate the admissibility and, if admissible, the weight to be accorded particular survey results by juxtaposing standards for survey methodology developed and accepted by social scientists with methodology employed to produce the proffered results. Vigorous debate over the validity of methodology ensues between litigants and their respec-

⁵⁶ *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963); see *supra* notes 41-46 and accompanying text.

⁵⁷ 25 F.R.D. 351, 425-430 (1960).

⁵⁸ The *MANUAL FOR COMPLEX LITIGATION* has been published in 1970, 1973, 1977, 1981 and 1985.

⁵⁹ *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978).

⁶⁰ A court's decision as to which source to adopt may be determinative of the admissibility and weight accorded a particular poll. This is due to the conflicts between the various sources on key points, such as the acceptable degree of attorney involvement, the requirement of a party's intent to conduct a survey prior to its design and execution, and other issues of similar magnitude which are discussed in detail in Section II. Some courts cite select propositions from several sources without recognizing, much less attempting to reconcile, the conflicting standards contained therein. See, e.g., *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Laboratories*, 532 F. Supp. 1040, 1057-58 (D.N.J. 1980) (relying on excerpts from both the *MANUAL FOR COMPLEX LITIGATION* and *Pittsburgh Press Club* to evaluate a survey).

tive experts, culminating in arguments supporting or decrying the verity of the survey results.

Despite the subtleties of the particular point to which a survey is addressed, the same "core" issues, which focus on each step of the survey process, are raised in every case. The chronological steps subjected to close scrutiny are (1) determining the purpose of the study and identifying the information desired; (2) identifying the universe of potential respondents; (3) selecting the universe size and type; (4) constructing the questionnaire; (5) recruiting and training the interviewers; (6) testing the survey; (7) revising the survey to correct problems which surfaced during pretesting; (8) collecting the answers; (9) processing, summarizing, and analyzing the tests; and (10) presenting the conclusions gleaned from the survey data.⁶¹

Although all stages of survey design and execution are critical, courts most often find fatal flaws in the preliminary steps of universe selection and question preparation. These two steps are discussed in further detail below.

(a) The Proper Universe

The cost of surveying every member of a population whose views arguably reflect public opinion—for example, inquiring as to candidate preference of every citizen registered to vote in the next presidential election—is clearly prohibitive. The obvious objective of public opinion surveys is, therefore, to obtain responses from a select number of persons ("the sample") who are representatives of the whole group of people ("the universe") about whom one wants information.⁶²

It is not the size per se of the sample which causes or guarantees against error; rather, the determinative factor is whether the sample selected is representative of the larger universe whose ideas or information the pollster seeks to discover.⁶³ Representativeness is in-

⁶¹ See generally A. BLANKENSHIP, *supra* note 6, at 18-19; R. GROVES, *supra* note 6; B. HENNESSY, *supra* note 4, at 93; E. LEE, R. FORTHOFFER & R. LORIMER, *ANALYZING COMPLEX SURVEY DATA* (1989); S. SUDMAN & N. BRADBURN, *ASKING QUESTIONS* (1982).

⁶² B. HENNESSY, *supra* note 4, at 92. For a more complete discussion of types of sampling, including simple random sampling, systematic sampling, stratified sampling, and cluster sampling, see E. LEE, R. FORTHOFFER & R. LORIMER, *supra* note 61.

⁶³ As one expert explains, "The size of the sample is not the major source of error in most opinion surveys. When errors occur, in almost every case it is not because too few persons were interviewed, but because the wrong persons were wrongly interviewed." B. HENNESSY, *supra* note 4, at 95.

sured through random selection of respondents,⁶⁴ or through a combination of randomness and stratification.⁶⁵

Selection of a non-representative sample is often cited as grounds for exclusion of survey evidence.⁶⁶ For example, in *United States v. Local 560, International Brotherhood of Teamsters*,⁶⁷ the court held that the trial court abused its discretion by admitting testimony of survey results where only fifteen individuals, whose hostility toward the leadership of the union was already known, were polled as to the leadership's reputation for violence and economic retribution.⁶⁸ While noting that technical flaws usually affect the weight rather than the admissibility of survey results, the court relied on Federal Rule of Evidence 403⁶⁹ in holding that where a survey is "deliberately partisan in its limited sampling, the prejudicial effect of such a flawed survey substantially outweighs any probative value it may

⁶⁴ Randomness means that every unit in the universe has an equal chance of being drawn into the sample. *Id.* at 97; A. BLANKENSHIP, *supra* note 6, at 98. Lack of randomness has been identified with the case of inaccurate results obtained from "straw votes" used as early as 1824 to measure voter preference for political candidates. W. ALBIG, *supra* note 5, at 178. In 1936, for example, *The Literary Digest* sent ten million "ballots" to people on mailing lists compiled from telephone directories and automobile registration lists. Nearly 2.4 million were returned. Based on this data, *The Literary Digest* predicted that Landon would become the next U.S. President by culling 59.1% of the popular vote, representing 370 electoral votes. In fact, Roosevelt received 60.2% of the popular vote, sweeping to victory with 523 of the 531 electoral votes. *Id.* at 180. The fatal flaw in *The Literary Digest's* poll, according to Dr. George Gallup, Archibald Crossley, and other experts, was lack of random selection. *Id.* at 181-82. This was because (1) the mailing lists disproportionately represented the upper-income strata of the voting population, and (2) a high percentage of lower-income voters cast their ballots because economic conditions were a critical issue in 1936. *Id.* at 180.

⁶⁵ B. HENNESSY, *supra* note 4, at 97. Stratification is the division of the universe along demographic lines or by other set criteria to identify the group of respondents whose opinions are relevant to the matter being investigated. *Id.* at 97-98. Blankenship refers to the stratification process as "controlled sampling." A. BLANKENSHIP, *supra* note 6, at 22, 102-07.

⁶⁶ See, e.g., *Hawley Prods. Co. v. United States Trunk Co.*, 259 F.2d 69, 77 (1st Cir. 1958) (improper universe grounds for exclusion); *Delgado v. McTighe*, 91 F.R.D. 76, 80-81 (E.D. Pa. 1981) (survey inadmissible when expert could not testify with certainty that responses were representative of universe); *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (1978) (survey excluded in obscenity trial because offer of proof failed to demonstrate the representativeness of the persons interviewed). *But cf.* *Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852 (7th Cir. 1982) (survey of children ages six to twelve was satisfactory basis for trial court's decision that likelihood of confusion existed between the manufacturer of "General Lee" toy car and the sponsor of television show "Dukes of Hazzard," in which similar car was featured).

⁶⁷ 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

⁶⁸ *Id.* at 277.

⁶⁹ FED. R. EVID. 403 states in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

have."⁷⁰

Evidence of survey results may also be excluded where inquiry is made of the wrong group of respondents. For example, in the Second Circuit's *American Footwear Corp. v. General Footwear Co.*⁷¹ decision, the court reasoned that former purchasers of hiking boots, who did not necessarily have any present interest in purchasing boots, constituted an improper universe regarding the issue of whether consumers would likely be confused as to the manufacturer of a particular boot.⁷²

In contrast, *Zippo Manufacturing Co. v. Rogers Imports, Inc.*,⁷³ dramatically illustrates the persuasive impact of a properly defined universe. The plaintiff in that trademark infringement and unfair competition matter had the burden of proving that features copied from plaintiff's cigarette lighter caused prospective purchasers to (incorrectly) regard defendant's lighter as one manufactured by plaintiff.⁷⁴ To meet its burden, plaintiff commissioned three separate surveys with a sample size of about 500 smokers each.⁷⁵ The samples had been selected on the basis of Census Bureau data, which aided in the identification of fifty-three metropolitan and non-metropolitan localities.⁷⁶ The pollsters then selected 100 clusters within these localities (each consisting of 150 to 250 dwelling units) from which the respondents were selected.⁷⁷ In concluding that the survey results established not only the likelihood of confusion between the two lighters, but actual confusion as well,⁷⁸ the court opined that the results of the well-designed surveys were "approximately the same as would be obtained if each of the 115,000,000 [American cigarette smokers] were interviewed."⁷⁹

(b) The Proper Question(s)

As any attorney who has ever struggled with the correct phrasing and order of questions posed during a deposition or trial knows,

⁷⁰ *Local 560*, 780 F.2d at 277.

⁷¹ 609 F.2d 655 (2d Cir. 1979), *cert. denied*, 445 U.S. 951 (1980).

⁷² *Id.* at 660-61 n.4; *see also* *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984); *American Luggage Works v. United States Trunk Co.*, 158 F. Supp. 50, 52 (D. Mass. 1957), *aff'd*, 259 F.2d 69 (1st Cir. 1958).

⁷³ 216 F. Supp. 670 (S.D.N.Y. 1963).

⁷⁴ *Id.* at 679.

⁷⁵ *Id.* at 681.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 691.

⁷⁹ *Id.* at 684.

asking a properly formed question is critical in obtaining the desired response. In such situations, a certain amount of latitude is given which allows the attorney to lead the witness toward a specific answer. In conducting a survey, however, the use of leading or otherwise biased questions has repeatedly been cited as grounds for according the survey results little weight or for excluding the results altogether.⁸⁰

For example, in *Procter & Gamble Co. v. Sweets Laboratories*,⁸¹ a trademark case, a witness testified that twenty-six of the sixty housewives interviewed incorrectly thought that "Ivoryne" chewing gum was produced by plaintiff, the manufacturer of Ivory soap. In rejecting the witness' conclusion that confusion existed as to the manufacturer of the gum, the court held that the questions posed not only led the respondents to the answer desired by the plaintiff, but also created a game-type atmosphere. The court concluded:

It is obvious from the testimony of the witness that those housewives made a deliberate effort to associate appellee's trade-mark "Ivoryne" with some other well-known trade-mark. The interview to which they were subjected may properly, we think, be likened to a radio quiz program where those being interviewed make every effort to give the desired answers to the questions propounded.⁸²

Almost four decades later, plaintiff Amstar Corporation found its proffered survey results rejected, due in large part to the same flaw identified in the *Procter & Gamble* survey. In *Amstar Corp. v. Dom-*

⁸⁰ See, e.g., *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984) (survey which included "obviously leading question" properly excluded); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983) (surveys offered by both parties to trademark action rejected because questions asked were irrelevant to dispositive legal issues); *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500 (5th Cir. 1980) (format of questions critical to the weight accorded a survey); *Sears, Roebuck & Co. v. All States Life Ins. Co.*, 246 F.2d 161, 171 (5th Cir.), cert. denied, 355 U.S. 894 (1957) (trial court's exclusion of survey results based on "self-serving" questions upheld). But cf. *Carlock v. State*, 609 S.W.2d 787 (Tex. Crim. App. 1980) (polling data not rendered inadmissible simply because more probative questions could have been asked; deficiencies in question drafting goes to weight, not admissibility).

An interesting approach was taken in the obscenity prosecution case of *State v. Mayes*, 86 N.C. App. 569, 359 S.E.2d 30 (1987), aff'd, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009 (1989), where the court allowed a defense expert to testify based on results of two of seven questions the witness prepared for a survey, holding that the other five questions had "absolutely no relevance to what the community considers obscene." *Id.* at 577, 359 S.E.2d at 36.

⁸¹ 137 F.2d 365, 367-68 (C.C.P.A. 1943).

⁸² *Id.*

ino's Pizza, Inc.,⁸³ Amstar offered survey results to establish a likelihood of confusion between its product, Domino sugar, and the origin of the defendant's product, Domino's pizza. The results were obtained by showing each respondent a Domino's Pizza box and asking if respondent believed that the company which made the pizza made any other product. If the response was yes, respondent was then asked, "What products other than pizza do you think are made by the company that makes Domino's Pizza?"⁸⁴ Over seventy percent of the persons asked this question responded, "Sugar."⁸⁵ The Fifth Circuit affirmed the trial court's refusal to accord any probative weight to the survey, holding that the form and order of the survey questions reduced the process to "a mere word association test entitled to little weight."⁸⁶

Even when no deliberate effort is made to lead the respondents, the task of drafting survey questions which will yield unbiased and accurate results is not an easy one. While it is tempting to think that straightforward answers to survey questions can be evoked by simple, straightforward questions, this is not always the case.⁸⁷ As one expert observed, each questionnaire constructor and each respondent brings his or her particular (and often highly unusual) meanings and nuances to the process.⁸⁸ The difficulties occasioned by semantic variables are lessened by using words with which respondents are familiar, phrasing questions in a conversational, non-threatening manner, and by avoiding leading questions.⁸⁹ Pilot testing of individual questions and the completed questionnaire is highly recommended by polling experts.⁹⁰

⁸³ 615 F.2d 252 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

⁸⁴ *Id.* at 263.

⁸⁵ *Id.*

⁸⁶ *Id.* at 264 (citation omitted).

⁸⁷ B. HENNESSY, *supra* note 4, at 104. As one social scientist explains this problem, "[l]anguage is the conduit of social measurement. Although the language of the survey questions can be standardized, there is no guarantee that the meaning assigned to the questions is consistent over respondents." R. GROVES, *supra* note 6, at 450.

⁸⁸ R. GROVES, *supra* note 6, at 450.

⁸⁹ B. HENNESSY, *supra* note 4, at 107-09. See generally R. GROVES, *supra* note 6, at 449-82; H. SCHUMAN, *supra* note 9; S. SUDMAN & N. BRADBURN, *supra* note 61.

⁹⁰ S. SUDMAN & N. BRADBURN, *supra* note 61, at 282-85; B. HENNESSY, *supra* note 4, at 111; A. BLANKENSHIP, *supra* note 6, at 82. As Blankenship observes,

[H]umans are dynamic rather than static. Because of this fact, no questionnaire, regardless of how carefully it is planned, may be assumed to work well until tested under field conditions. A limited number of trial interviews may provide rough checks upon the quality of the wording of the questions, their scope and sequence, the length of the questionnaire, instructions to field workers, plans for tabulation, and the final cost of the survey.

In light of the difficulties engaged in question formulation, a litigant offering survey results into evidence is virtually assured that the opposing party, an expert retained by that party, or the court itself will scrutinize the survey questions for intended as well as inadvertent bias and potentially fatal semantic flaws.

For example, in *American Footwear Corp. v. General Footwear Co.*,⁹¹ the issue was whether defendant's marketing of a "bionic boot" violated certain trademark, unfair competition, and related laws. The trial court excluded from evidence the results of a telephone survey conducted of a "national probability" sample consisting of over 800 respondents.⁹² The party which proffered the survey, intervenor Universal Studios, claimed that the results established that the term "bionic" carried a secondary meaning due to its association with Universal's "The Six Million Dollar Man" and "The Bionic Woman" television shows.⁹³ The appellate court affirmed the exclusion of the survey results, primarily because of perceived flaws in the question posed to the respondents: "With whom or what do you associate a product labelled Bionic?" The court deemed the question too self-serving,⁹⁴ noting that the more relevant question would have been, "[W]ith whom or what do you associate a 'Bionic' boot?"⁹⁵

In addition to potential difficulties in the phrasing of questions, litigants face the possibility that a court will view a survey as having asked the wrong question; that is, one which yields results which are irrelevant to the key issues in the litigation. Such was the case in *People v. Norwood*,⁹⁶ where the court concluded that survey results establishing that most people residing in the challenged venue had heard of a murder charge were irrelevant to whether respondents were prejudiced against the defendant such that a trial within their jurisdiction would violate defendant's right to a fair and impartial jury.

2. *The Pittsburgh Press Club Criteria*

In 1960, the Judicial Conference Study Group articulated several factors by which the trustworthiness of a particular poll could be

Id. at 82.

⁹¹ 609 F.2d 655 (2d Cir. 1979).

⁹² *Id.* at 661 n.4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 37 Colo. App. 157, 547 P.2d 273 (1975).

adjudged.⁹⁷ Almost two decades later, the Third Circuit elaborated on these factors in *Pittsburgh Press Club v. United States*.⁹⁸ Since that time, a number of jurisdictions⁹⁹ have utilized the *Pittsburgh Press Club* criteria, in whole or in part, as a means of testing the proffered survey data for "circumstantial guarantees of trustworthiness."¹⁰⁰ These standards, which closely parallel the various steps of the survey process, dictate that:

- (1) A proper universe of respondents must be examined and a representative sample chosen;
- (2) The persons conducting the surveys must be experts;
- (3) The data must be properly gathered and accurately reported;
- (4) The questionnaires and manner of interviewing must meet the standards of objective surveying and statistical techniques;
- (5) The survey must be conducted independently of the attorneys involved in the litigation;
- (6) The interviewers or sample designers should be trained and "ideally" should be unaware of the purpose of the survey and litigation which inspire it; and
- (7) The respondents should be unaware of the purposes of the survey.¹⁰¹

In addition, the *Pittsburgh Press Club* opinion suggests that the survey must be material, and more probative than any other evidence on the issue to be admissible.¹⁰²

As previously noted, failure to meet any one of the *Pittsburgh Press Club* standards can be fatal to the admissibility or probative value of poll results; however, courts often view selection of the universe and formulation and content of the questionnaire as largely determinative of the trustworthiness of the evidence.¹⁰³ Focusing

⁹⁷ See *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 429 (1960).

⁹⁸ 579 F.2d 751 (3d Cir. 1978).

⁹⁹ See, e.g., *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 522 (10th Cir. 1987); *Lutheran Mut. Life Ins. Co. v. United States*, 816 F.2d 376, 378 (8th Cir. 1987); *United States v. Local 560*, 780 F.2d 267, 277 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 552 (7th Cir. 1980); *American Home Prods. Corp. v. Barr Laboratories*, 656 F. Supp. 1058, 1062, 1070 (D.N.J.), aff'd, 834 F.2d 368 (3d Cir. 1987); *Saliba v. State*, 475 N.E.2d 1181, 1188 (Ind. App.), petition for transfer denied, 484 N.E.2d 1295 (1985); *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 54-55 (Mo. Ct. App. 1984).

¹⁰⁰ *Pittsburgh Press Club*, 579 F.2d at 758.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984) (trial court erred in admitting survey of improper universe based on "obvious leading questions"); *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 507 (5th Cir.

on these two factors makes common sense and is technically astute, because asking the wrong people or the wrong question renders the responses irrelevant as a matter of law.

3. *The Manual for Complex Litigation*

With several important exceptions,¹⁰⁴ the two most recent editions of the Federal Judicial Center's *Manual for Complex Litigation*, published in 1981 and 1985,¹⁰⁵ are generally in accord with the *Pittsburgh Press Club* criteria.¹⁰⁶ The 1981 *Manual* suggests that the proponent of survey data has the burden of establishing that the poll was conducted in accordance with accepted principles of survey research.¹⁰⁷ This burden can be met by establishing that:

- (1) A proper universe was examined;
- (2) A representative sample was drawn from that universe;
- (3) The mode of questioning the interviewers was correct;
- (4) The persons conducting the survey were recognized experts;
- (5) The data gathered was accurately reported; and
- (6) The sample design, the questionnaire, and the interviewing were in accord with generally accepted standards of procedure

1980) (formation of questions and adequacy of universe are critical determinations); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980) ("[O]ne of the most important factors in assessing the validity of an opinion poll is the adequacy of the 'survey universe' . . ."); *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Laboratories*, 532 F. Supp. 1040, 1058 (D.N.J. 1980) ("most serious defect" in survey deemed inadmissible by trial court was lack of effort demonstrated by pollster to insure representativeness of interviewees); *Commonwealth v. Trainor*, 374 Mass. 796, 806, 374 N.E.2d 1216, 1220, 1222 (1978) (survey offered to establish community standards in obscenity case excluded due to reliance on local rather than state-wide universe and irrelevancy of results due to improper questions).

¹⁰⁴ These exceptions are: the role of the attorney in the survey process, the requirement that a party disclose his intent to conduct a poll to his opponent and to the court prior to the survey's execution, and the suggestion that surveys that record objective and subjective data should be reviewed under different standards of scrutiny.

¹⁰⁵ *MANUAL FOR COMPLEX LITIGATION* (5th ed. 1981) [hereinafter 1981 *MANUAL*]; 1985 *MANUAL*, *supra* note 48.

¹⁰⁶ The 1960 *Handbook of Recommended Procedures for the Trial of Protracted Litigation* was superseded by editions of the *MANUAL FOR COMPLEX LITIGATION* published under the auspices of the Federal Judicial Center in 1970 (2d ed.), 1973 (3d ed.), 1977 (4th ed.), 1981 (5th ed.) and 1985 (*MANUAL FOR COMPLEX LITIGATION SECOND*). The 1985 edition is labeled "Second" because it represents a major revision in both form and substance of previous manuals. For example, the 1981 *MANUAL* devotes six full pages to polling and survey data, see 1981 *MANUAL* at 112-17, while the 1985 *MANUAL* covers the subject in four paragraphs. See 1985 *MANUAL*, *supra* note 48, § 21.484, at 88-89.

¹⁰⁷ 1981 *MANUAL*, *supra* note 105, at 120.

and statistics.¹⁰⁸

The 1981 *Manual* also encourages the court to require proponents of survey evidence to "divulge the raw data, the method and program employed in evaluating the data, and all the results derived, both favorable and unfavorable to the offering party."¹⁰⁹

The most recent edition of the *Manual*, published in 1985,¹¹⁰ deletes, without explanation, the six-point checklist set forth above. It offers instead the terse recommendation that "[t]he proponent of such evidence has the burden of establishing conformity with generally recognized statistical standards, a task that will ordinarily involve expert testimony."¹¹¹ The 1985 *Manual* also differs from its immediate predecessor, and from the *Pittsburgh Press Club* standards, by advocating mandatory disclosure of a litigant's intent to take a poll prior to execution.¹¹²

Courts which embrace the recommendations set forth in the 1981 or 1985 *Manuals* generally focus on the same primary issues of universe selection and questionnaire formulation which are emphasized in *Pittsburgh Press Club* and its progeny. As noted previously, however, the *Manual* differs in several important respects. First, unlike the *Pittsburgh Press Club* standards, the 1981 and 1985 editions of the *Manual* do not identify attorney involvement in the survey process as being inherently suspect. Second, as explained above, the 1985 *Manual* strongly recommends that a party disclose its intent to conduct a survey prior to execution, and work with the court and opposing counsel to produce an acceptable survey.¹¹³ Finally, the 1981 *Manual* expressly articulates, and the 1985 *Manual* more subtly suggests, a distinction unheeded in decisional law, to wit, a perceived difference between surveys which record objective facts and those which report subjective impressions.¹¹⁴ Each of

¹⁰⁸ *Id.* The standards delineated in the 1981 MANUAL have not enjoyed the same level of acceptance as the *Pittsburgh Press Club* decision, but have influenced a number of courts. See, e.g., *National Football League Properties, Inc. v. N. J. Giants, Inc.*, 637 F. Supp. 507, 513-14 (D.N.J. 1986). Some courts have relied upon both the *Pittsburgh Press Club* decision and the 1981 MANUAL for guidance. See, e.g., *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Laboratories*, 532 F. Supp. 1040, 1057-58 (D.N.J. 1980).

¹⁰⁹ 1981 MANUAL, *supra* note 105, § 3.50. A discussion of discovery issues peculiar to polling data is outside the scope of this Article.

¹¹⁰ 1985 MANUAL, *supra* note 48.

¹¹¹ *Id.* § 21.484.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

these differences is discussed in Section II of this Article.

4. *Federal Rules of Evidence Approach*

Federal Rule of Evidence 703 provides a vehicle for an expert to offer an opinion even where the data or information underlying the opinion is not within her personal knowledge. The rule states:

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.¹¹⁵

The advisory committee notes to Rule 703 explain that the facts or data upon which expert opinions are predicated may be derived from three sources: (1) first-hand observation of the witness (for example, a treating physician); (2) cases presented at trial (for example, the hypothetical question posed to an expert); and (3) data presented to the expert which was formulated outside the trial and was not of the expert's own observation.¹¹⁶ The third category, which has resulted in much controversy, governs the use of polling evidence where the testifying witness did not conduct the poll, but did rely in whole or in part on the poll's results to form an expert opinion. The advisory committee defended the reliance by an expert upon data not directly gathered by the witness:

In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved.¹¹⁷

¹¹⁵ FED. R. EVID. 703.

¹¹⁶ FED. R. EVID. 703 advisory committee's note.

¹¹⁷ *Id.* (citations omitted); see also 1985 MANUAL, *supra* note 48, § 2.712.

Despite the liberal application advocated in the advisory committee notes, Rule 703 does not provide *carte blanche* for experts to rely on any data whatsoever, including that derived from public opinion polls. Rather, Rule 703 expressly requires that the materials on which an expert bases her opinion must be "of a type reasonably relied upon by experts in the particular field." If this threshold showing is made, then—and only then—"the facts or data [underlying the expert's opinion] need not be admissible in evidence."¹¹⁸

Although the advisory committee notes suggest Rule 703 as a means to streamline the admissibility of survey evidence by circumventing the hearsay problem associated with public opinion polls, Rule 703 raises more issues than it resolves.

First, Rule 703 implicitly creates an important evidentiary dichotomy: reliance by an expert on polling results (or any other data) to form her opinion does not automatically render the results admissible as substantive evidence.¹¹⁹ At best, Rule 703 paves the way for admission of the expert's opinion as substantive evidence, regardless of the admissibility *per se* of the underlying data.¹²⁰

Second, courts often read Rule 703 to require a showing that the data on which the expert relied is otherwise admissible.¹²¹ As applied to polling evidence, this means that courts will continue to wrestle with hearsay challenges to the admissibility of polling results.

Finally, Rule 703 appears to be inapplicable when the expert offering an opinion is the pollster himself, rather than an expert relying on the litigant-commissioned poll as only one piece of data upon which to form her opinion.¹²² These limitations of Rule 703 are discussed further in Section II. B. of this Article.

¹¹⁸ FED. R. EVID. 703.

¹¹⁹ FED. R. EVID. 703 advisory committee's note.

¹²⁰ See *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984).

¹²¹ See *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*, 739 F.2d 1028, 1033 (5th Cir. 1984); *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir. 1984); *United States v. Cox*, 696 F.2d 1294 (11th Cir.), *cert. denied*, 464 U.S. 827 (1983).

¹²² See *Paddack*, 745 F.2d at 1261-62.

II

CONFUSING AND CONFLICTING STANDARDS ON KEY ISSUES

A. Relying upon the "Weight Versus Admissibility" Principle: Some Curious Results

Where a court finds technical deficiencies in the methodology of a survey which prevents it from satisfying any of the previously discussed standards in toto, such flaws are not per se grounds for exclusion of the survey results into evidence. Rather, a general rule has emerged that such deficiencies impact the weight accorded to survey results rather than barring admissibility.¹²³

This is not to say, however, that technical flaws are never cited or upheld as a reason for excluding survey data from evidence. In *United States v. Local 560*,¹²⁴ for example, the court recited the general rule that technical problems normally impact only the weight to be attached to the survey evidence. Nonetheless, the Third Circuit held that the trial court abused its discretion in admitting a survey, in which only fifteen members of a union had been polled, to establish the membership's perception of the reputation of past and present members of the union's executive board.¹²⁵

In reviewing the rare cases in which surveys were not admitted because of technical shortcomings, at least three observations are readily made. First, the flaws are usually substantial, that is, of sufficient magnitude to render the results inherently untrustworthy

¹²³ See *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 844 (11th Cir. 1983); *C. A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055 n.10 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 521 (10th Cir. 1976).

¹²⁴ 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

¹²⁵ *Local 560*, 780 F.2d at 276-77. The Second Circuit reached a similar result when it viewed a survey as utilizing an improper universe and posing an "obvious leading question." *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984); *see also* *Bank of Utah v. Commercial Sec. Bank*, 369 F.2d 19, 27 (10th Cir. 1966) (survey properly excluded by trial court due to reliance on improper universe), *cert. denied*, 386 U.S. 1018 (1967); *Hawley Prods. Co. v. United States Trunk Co.*, 259 F.2d 69, 77 (1st Cir. 1958) (same); *Sears, Roebuck & Co. v. All States Life Ins. Co.*, 246 F.2d 161, 171 (5th Cir.) (trial court's exclusion of survey containing "self-serving" questions upheld), *cert. denied*, 355 U.S. 894 (1957); *Delgado v. McGighe*, 91 F.R.D. 76, 80-81 (E.D. Pa. 1981) (survey held inadmissible where expert could not testify with certainty that responses were representative of the universe and where terms used were not defined); *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Laboratories*, 532 F. Supp. 1040, 1057-58 (D.N.J. 1980) (survey evidence rejected due to attorneys' involvement in question design and due to "serious defect" in universe selection).

and even irrelevant as a matter of law.¹²⁶ Second, the vast majority of cases in which polling evidence was rejected were decided when survey techniques had not evolved to the level of sophistication and popularity they enjoy today.¹²⁷ Finally, the wide discretion generally accorded trial judges in deciding evidentiary matters is not constricted when survey evidence is at issue.¹²⁸ Thus, the trial court's exclusion or assignment of probative value to a seriously flawed survey will seldom be reversed on appeal.

The shift in focus from a question of admissibility to one of weight accorded survey evidence has led to some highly questionable—if not absurd—evidentiary rulings. In the trademark infringement case of *American Greetings Corp. v. Dan-Dee Imports, Inc.*,¹²⁹ for example, the court found plaintiff's survey seriously flawed in many respects: it was designed by counsel, its questions were biased, it was performed in a haphazard and unprofessional manner, and the respondents were not randomly selected.¹³⁰ Despite these findings, the court accorded the survey "some limited weight,"¹³¹ noting that technical adequacy is a matter of weight rather than admissibility,¹³² and that the survey results "corroborated the court's own finding" on the key issue of the likelihood of confusion between the products at issue.¹³³

Measured against any standard of trustworthiness, the survey results should have been excluded from consideration by the *Ameri-*

¹²⁶ Such was the case in *Local 560*, 780 F.2d at 277, where only fifteen union members, whose bias against union leadership was already known, were polled as "representatives" of the entire union membership, as well as in *Universal City Studios*, 746 F.2d at 118, where the key question posed to respondents suggested its own answer.

¹²⁷ The mere fact that the advisory committee's note in FED. R. EVID. 703, adopted in 1975, recommends that rule as a "more satisfactory" method of admitting polling evidence, suggests that this type of evidence had gained widespread acceptance.

¹²⁸ See *Local 560*, 780 F.2d at 279; *Debra P. v. Turlington*, 730 F.2d 1405, 1413 (11th Cir. 1984); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 385 (7th Cir.), cert. denied, 429 U.S. 830 (1976).

¹²⁹ 619 F. Supp. 1204 (D.N.J. 1985), vacated in part on other grounds, 807 F.2d 1136 (3d Cir. 1986).

¹³⁰ *American Greetings*, 619 F. Supp. at 1224.

¹³¹ *Id.* A similar result occurred in *Union Carbide*, 531 F.2d at 388, where the appellate court held that a survey excluded by the trial court due to bias should have been considered probative of the likelihood of confusion. In a classic "horse before the cart" maneuver, the court held that the extremely high percentage of confusion demonstrated by the survey overcame the bias problem. *Id.* This logic is flawed since the bias may well have driven the high results.

¹³² *American Greetings*, 619 F. Supp. at 1224 (citing *United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F.2d 967, 974 (3d Cir.), cert. denied, 342 U.S. 861 (1951)).

¹³³ *Id.*

can Greetings court. Indeed, the court's threshold findings that an improper universe was selected and that the questions were biased, effectively rendered the results irrelevant to the specific issues before the court. In short, the *American Greetings* decision rode roughshod over the most basic principle of evidence, to wit, that only relevant material demonstrating some degree of trustworthiness is admissible.¹³⁴ Such treatment can be explained by either of two theories: (1) the court misunderstood the evidentiary standards governing polls, or (2) the court credited the results because they were in accord with the court's desired outcome.¹³⁵

Further support for the "outcome-oriented" theory is found where a court ignores survey results which it finds technically sound but which do not support the court's ultimate conclusion. This was the situation in the United States Supreme Court's decision in *Meese v. Keene*.¹³⁶

In *Meese*, a California State Senator desired to exhibit three Canadian films on acid rain and nuclear war which the Department of Justice had previously identified as fitting the definition of "political propaganda" found in the Foreign Agents Registration Act of 1938.¹³⁷ Senator Meese challenged the Act on first amendment grounds, claiming that due to the pejorative nature of the term "political propaganda" (defined in the Act to include any communications used to influence U.S. foreign policy),¹³⁸ exhibiting films

¹³⁴ Similar abuse of certain fundamental rules of evidence arguably occurred in *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1090-91 (8th Cir. 1980), where the court did not dispute defendant's claim of multiple errors in plaintiff's survey, including a complaint that no expert had been offered to lay a foundation for admission of the evidence, but held that such "technical deficiencies" go to the weight accorded the survey rather than its admissibility.

¹³⁵ Another example of an outcome-oriented result is *General Motors Corp. v. Cadillac Marine & Boat Co.*, 226 F. Supp. 716, 735-38 (W.D. Mich. 1964), where one court admitted a survey into evidence which supported its resolution of the case even though the court recognized that the survey's probative value fell "far short" of acceptable standards, due to selection of an improper universe, improper phrasing and ordering of questions, inaccurate and misleading tabulations of the responses, and complete lack of testimony as to how the survey was prepared.

¹³⁶ 481 U.S. 465 (1987).

¹³⁷ By letter dated January 13, 1983, the Department of Justice notified the National Film Board of Canada (NFBC) that the three films—"If You Love This Planet," "Acid Rain: Requiem or Recovery," and "Acid From Heaven"—were considered "political propaganda" pursuant to the Foreign Agents Registration Act, 22 U.S.C. §§ 611-21 (1966), and "requested that NFBC comply with the labeling and reporting requirements imposed by § 4 of the Act, 22 U.S.C. § 614." See *Meese*, 481 U.S. at 467-68 nn. 1 & 3.

¹³⁸ *Meese*, 481 U.S. at 471-72.

characterized as such would harm his political career.¹³⁹

In arguing his case, the Senator submitted a Gallup pollster's affidavit wherein the pollster explained the results of a survey showing that 49.1% of the public would be less inclined to vote for a candidate who had "arranged to show to the public three foreign films which the Justice Dept. had classified as 'political propaganda.'" ¹⁴⁰ The district court observed that the survey evidence was "neither rebutted [n]or impeached" and found the results conclusive: the term "political propaganda," as used in the context of the statute, was derogatory and created an impermissible chilling effect which abridged free speech.¹⁴¹ The Supreme Court disagreed.

Though the Court identified no technical flaws or other evidentiary barricades impacting the weight or admissibility of the "uncontradicted"¹⁴² survey evidence, it considered the survey results probative and conclusive only on the issue of whether the Senator had standing to bring the lawsuit.¹⁴³ In fact, the Court cited the poll as compelling the conclusion that the term "political propaganda" clearly "threatens to cause him cognizable injury."¹⁴⁴ But instead of relying on the uncontested survey results which demonstrated that nearly half of the population perceived the word "propaganda" negatively, the Court took refuge in the Webster's Dictionary definition of "propaganda"¹⁴⁵ to support its conclusion that the word is amenable to several interpretations which are not all pejorative in nature. The Court also gratuitously deemed the pejorative definition the "narrower" one.¹⁴⁶ As used in the statute, the Court opined, "propaganda" carries a neutral meaning¹⁴⁷ which does not place the regulated material "beyond the pale of legitimate discourse."¹⁴⁸ Accordingly, the Court found no constitutional infirmities in the statute.¹⁴⁹

The Court's treatment of the survey results in *Meese* is inconsis-

¹³⁹ *Id.* at 473.

¹⁴⁰ *Id.* at 473-74 n.7.

¹⁴¹ *Id.*

¹⁴² *Id.* at 474.

¹⁴³ *Id.* at 473-76.

¹⁴⁴ *Id.* at 473.

¹⁴⁵ *Id.* at 477-78 n.10. The Court quoted WEBSTER'S NEW INTERNATIONAL DICTIONARY 1817 (3d ed. 1981), defining "propaganda" as "doctrines, ideas, argument, facts or allegations spread by deliberate effort through any medium of communication in order to further one's cause or to damage an opposing cause." *Id.*

¹⁴⁶ *Meese*, 481 U.S. at 478.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 479.

¹⁴⁹ *Id.* at 484-85.

tent at best and intellectually dishonest at worst. First, the Court found the uncontested survey results—specifically, the showing that almost 50% of the public would be less inclined to vote for an individual who had shown a film labeled by the government as propaganda—sufficient evidence of potential harm to allow the Senator to establish standing and pursue his first amendment challenge to the statute. In virtually the next breath, however, the Court rejected the Senator's argument that, since many voters perceive the term propaganda in a pejorative sense, the use of the word in the statute seriously restricted his first amendment right to show any films fitting the statutory description. Instead, the Court relied upon the dictionary definition to support its conclusion that propaganda is not always a pejorative term. But it is the public, not dictionaries, who vote. The Court's simultaneous reliance upon and rejection of the survey results is neither intellectually satisfying nor reality-based.¹⁵⁰

The probative value assigned to any piece of evidence is, and should remain, a matter of discretion with the court. What cases such as *American Greetings* and *Meese* illustrate, however, is discretion gone awry. Such misdirection is perhaps traceable directly to the unique nature and historic treatment of survey evidence.

While a cynic may argue that the treatment accorded survey evidence by these two courts is reconcilable because both courts were outcome-oriented, one can just as plausibly view these decisions as examples of continued misunderstanding of the proper role of survey evidence. That is, in *American Greetings*, the court embraced the "weight versus admissibility" principle without question, and in the process overrode additional, dispositive considerations such as relevance and trustworthiness; in *Meese*, the Court was reluctant to declare a federal statute constitutionally infirm on the strength of a type of evidence which historically has been considered suspect.

Trademark, antitrust, and other cases which routinely involve survey evidence are usually tried to the bench. In this situation, another dynamic is at work which may inspire blind adherence to the weight versus admissibility test. That dynamic is the appellate

¹⁵⁰ The Court also posited that since the definition of political propaganda had been "on the books" for over 40 years, the Court could safely presume that people "who have a sufficient understanding of the law" know that the statutory definition of the term "is a broad, neutral one rather than a pejorative one." *Id.* at 483 (footnotes omitted). Again, the Court's logic begs a reality check: in view of the uncontested results of the public opinion poll, how many voters can we presume possess this sophisticated comprehension of "the law?"

court's "charitable presumption" that the trial court relied only upon evidence which was properly received in reaching its decision.¹⁵¹ The existence of this presumption has led at least one federal trial court to conclude that the "safer course" is to receive the admittedly flawed evidence and then ignore it or give it as much weight as the court deems appropriate.¹⁵² Adoption of such a course by trial courts may be inspired by appellate court observations like the following from the Eighth Circuit:

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted.¹⁵³

The charitable presumption that the trial court will assign appropriate weight to even highly questionable evidence is, of course, based on the theory that judges, unlike juries, can completely ignore evidence once it has been admitted.¹⁵⁴ While such a theory is just one of many fictions under which our system of justice operates, there are several arguments which counsel against the wholesale adoption of the "admit it for what it's worth" approach. Certainly, "there is room for skepticism on the point that judges will rely only upon what is admissible and disregard the rest."¹⁵⁵ Additionally, there is nothing in the rules of evidence, either in the generally accepted codified form or its common law precedent, which sets or even permits application of different standards in jury and non-jury cases.¹⁵⁶

In sum, mere existence of the weight versus admissibility stan-

¹⁵¹ See, e.g., *United States v. 396 Corp.*, 264 F.2d 704 (2d Cir.), cert. denied, 361 U.S. 817 (1959).

¹⁵² *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1202 (E.D.N.Y. 1983).

¹⁵³ *Builders Steel Co. v. Commissioner*, 179 F.2d 377, 379 (8th Cir. 1950) (citations omitted).

¹⁵⁴ *Toys "R" Us*, 559 F. Supp. at 1202.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

dard does not excuse the court from determining the degree to which flaws affect the ability of survey evidence to meet threshold requirements, such as relevancy and inherent credibility. Even if the survey is perfectly executed and the results properly analyzed, all is still for naught if the wrong question or questions are posed to the respondents. Conversely, where questionnaire design appears beyond reproach and execution is unchallenged, even an unintentional but careless error in the analysis of the results can render the entire process suspect, so as to fall short of circumstantial guarantees of trustworthiness. As with all other types of evidence, an affirmative duty remains with the trial court to exercise its discretion to determine whether any flaws are serious enough to warrant exclusion of the evidence. Rubber-stamping admission under the weight versus admissibility principle is simply not acceptable.

B. Discerning the Utility of Federal Rule of Evidence 703 When Survey Results are Proffered

As noted previously,¹⁵⁷ three shortcomings are apparent when Rule 703 is employed to overcome the hearsay obstacle to the admission of survey or polling data. First, Rule 703 allows for admission of an expert's opinion premised on survey or other "hearsay" evidence, but does not provide for admission of the underlying data as substantive evidence. Second, even when survey or other data is being cited for the limited purpose of supporting the expert's opinion, a number of courts continue to carefully scrutinize the data for circumstantial guarantees of trustworthiness normally required of substantive evidence. Finally, Rule 703 is not (or should not be) applicable where poll or survey results constitute the entirety of the data underlying the expert's opinion. These points are discussed seriatim below.¹⁵⁸

¹⁵⁷ See *supra* notes 115-19 and accompanying text.

¹⁵⁸ In defense of the drafters of Rule 703, who envisioned that rule as a means to aid in the admission of survey results, the interrelationship among Rules 703, 704, and 705 must be noted. Rule 704 is often helpful to the party proffering survey results through the testimony of an expert, since it allows an opinion or inference even if it "embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704. Thus, in an obscenity case, the expert could rely on survey results to testify about the community standards against which the challenged work could be judged; in a defamation case, the expert could rely on a public opinion poll to opine that the plaintiff is or is not a public figure.

Rule 705 allows expert testimony "without prior disclosure of the underlying facts or data, unless the court requires otherwise." FED. R. EVID. 705. As a practical matter, however, the party offering the expert has usually divulged a good deal of information about the underlying data under the liberal rules of discovery. See, e.g., FED. R. CIV.

1. *Substantive Evidence Limitation*

Prior to the 1975 enactment of the Federal Rules of Evidence, expert opinion testimony was allowed even where the data underlying the opinion was inadmissible; however, only the expert's opinion per se was admissible as substantive evidence. This line drawing was explained by the Tenth Circuit in *Hickok v. G.D. Searle & Co.*¹⁵⁹ in response to plaintiff's attempt to offer rebuttal testimony to support his medical theory of causation. The proffered testimony consisted of his medical expert's explanation of a recently published medical article. The court excluded the testimony on the grounds that the article was hearsay and, in any event, could not have served as the basis of the expert's opinion since it was published after the opinion was formed. The court further explained:

It is true that expert witnesses are sometimes allowed to testify as to hearsay matters by discussing published materials, . . . but this is allowed in our Circuit solely to establish the basis for the expert's opinion, and not to establish the veracity of the hearsay matters themselves. Where testimony as to hearsay is received for such a limited purpose, its effect is to be carefully controlled by the trial judge, including the giving of limiting instructions to the jury.¹⁶⁰

The pre-Rules evidentiary dichotomy of allowing admission of the expert's opinion into evidence but not the underlying data was not dissolved by the adoption of Rule 703; to the contrary, Rule 703 simply states that the facts or data on which the expert's opinion is based "need not be admissible in evidence."¹⁶¹ This has led courts to conclude, as did the *Hickok* court in its pre-Rules decision, that the underlying data is not admissible absent a showing of independent grounds supporting admissibility.¹⁶² As explained by the Ninth

P. 26. Even where the underlying data has not been produced prior to trial, Rule 705 mandates disclosure of "the underlying facts or data on cross-examination." FED. R. EVID. 705. A party's inability to produce the underlying survey data can prove fatal to the admissibility of the survey results and/or the expert's testimony based on those results. See, e.g., *Hackett v. Housing Auth.*, 750 F.2d 1308, 1312 (5th Cir.) (survey excluded because original raw data no longer available), *cert. denied*, 474 U.S. 850 (1985); *Porter v. United States*, 409 F. Supp. 757, 762 (Cust. Ct. 1976) (court determines that results of studies are not credible, *inter alia*, because "the data from which the results were derived is unavailable, and cannot be examined or verified").

¹⁵⁹ 496 F.2d 444 (10th Cir. 1974); see also *Standard Oil Co. v. Moore*, 251 F.2d 188, 222 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

¹⁶⁰ *Hickok*, 496 F.2d at 447 (citation omitted).

¹⁶¹ FED. R. EVID. 703.

¹⁶² See, e.g., *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270 (7th Cir. 1988); *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983); *Rush*

Circuit, "Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion. It does not allow the admission of the [hearsay] reports to establish the truth of what they assert."¹⁶³

Stated more succinctly, "[w]hile an expert witness may base his opinion on such evidence, this does not magically render the hearsay evidence admissible."¹⁶⁴ Recognition of this dichotomy has caused some courts to instruct the jury that the materials on which the expert based her opinion are not substantive evidence which may be considered separately from the expert's testimony.¹⁶⁵ The practical ramification of such a ruling in the context of polling evidence is that the most persuasive data may not be carried into the jury room during deliberation, and the jury may even be instructed to accord the survey results little or no weight independent of the expert's opinion. In a bench or jury trial, the trier of fact may find an expert's opinion unpersuasive due to a subjective determination of credibility. Without independent admission of the empirical polling (or other) data supporting the expert's opinion, the proponent of the expert's testimony may well be unable to meet his burden of proof, even where the empirical data alone is sufficient to meet that burden.

The drafters of Rule 703 have been criticized for not addressing or remedying this two-tiered evidentiary standard.¹⁶⁶ Indeed, while the distinction between admission of the expert's opinion and the data underlying that opinion places a cumbersome, but not neces-

Presbyterian St. Luke's Medical Center v. Safeco Ins. Co., 722 F. Supp. 485, 498 (N.D. Ill. 1989).

¹⁶³ Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir. 1984) (footnote omitted) (citations omitted).

¹⁶⁴ Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 576 F. Supp. 107, 158 (D. Del. 1983), *aff'd mem.*, 740 F.2d 956 (3d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). See generally Carlson, *Getting a Grip on Experts*, LITIGATION, Summer 1990, at 36-38, 59; Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984). As Carlson points out in his 1990 LITIGATION article, Minnesota has recently amended its counterpart to federal Rule 703 to prohibit wholesale admission of the data underlying the expert's testimony during direct examination of the expert. See Carlson, LITIGATION at 38, 59; see also, Park, *Confining the Expert: Rule 703(b) of the Rules of Evidence*, BENCH & BAR OF MINNESOTA 33 (March 1990).

¹⁶⁵ Paddack, 745 F.2d at 1262.

¹⁶⁶ See, e.g., American Bar Association, *Emerging Problems Under the Federal Rules of Evidence* 209 (1983) ("Once an expert gives an opinion based upon inadmissible hearsay, the question whether the jury should be provided with the otherwise inadmissible information often arises. Rule 703 does not address this problem, nor does Rule 705.").

sarily insurmountable, burden on the litigants, it may also confuse the jury. Fortunately, expert opinion testimony on crucial points is liberally allowed to aid the jury, and admission of any or all of the data underlying that opinion is available pursuant to evidentiary rules other than Rule 703. In the specific context of polls and surveys, admission can be sought, as previously discussed,¹⁶⁷ under the present sense impression, state of mind, business record, or residual exceptions to the hearsay rule. To eliminate, or at least lessen, the potential for jury confusion, a simple limiting instruction regarding the data underlying the expert's opinion can be given.¹⁶⁸

The gravamen of the problem with Rule 703 is that neither the explicit language of the rule nor the accompanying advisory notes direct the courts and litigants to these possibilities; rather, the notes suggest that Rule 703 alone provides sufficient grounds for admission of the survey data over a hearsay objection. In short, Rule 703 does not live up to the advisory note's billing as "a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence."¹⁶⁹

2. *Judicial Scrutiny of Data Underlying the Expert's Opinion*

In addition to not providing a vehicle for the admission of polling results as substantive evidence, Rule 703 also presents a potential obstacle to getting survey results in front of the jury, even in the form of an expert's opinion. This is because some courts examine the data underlying the expert's opinion not only to determine whether an expert in the field could properly rely upon it, but also to independently assess the data's reliability. Under this restrictive view, the expert is not allowed to testify if the foundation materials would have been excluded as hearsay, regardless of whether the "hearsay" material is of a type which the expert routinely consults in his usual field of endeavor.¹⁷⁰ The irony is thus repeated: while Rule 703 was intended to circumvent the hearsay objection to survey evidence,¹⁷¹ some courts still require a showing that survey evi-

¹⁶⁷ See *supra* text accompanying notes 47-50.

¹⁶⁸ *Paddack*, 745 F.2d at 1263; *United States v. Madrid*, 673 F.2d 1114, 1118 n.4 (10th Cir.), cert. denied, 459 U.S. 843 (1982).

¹⁶⁹ FED. R. EVID. 703 advisory committee's note.

¹⁷⁰ See generally 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 703[03] (1991). While not specifically citing Rule 703, the *Pittsburgh Press Club* court excluded the exhibits and expert testimony which were based on the survey data which had failed to meet the court's criteria for trustworthiness. See *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978).

¹⁷¹ See FED. R. EVID. 703 advisory committee's note.

dence comes within an exception to the hearsay rule even before allowing an expert to offer an opinion based in whole or in part on survey results.

A case illustrating the courts' continued confusion over the role of Rule 703 is *Debra P. v. Turlington*.¹⁷² In that matter, high school students challenged the constitutionality of a requirement that all seniors pass a competency test prior to receiving a high school diploma. To defend the instructional validity of the test, defendants commissioned a private consulting firm to conduct a study consisting of the following four components: (1) a questionnaire sent to teachers to ask whether they provided instruction related to the twenty-four skills tested and, if so, whether they had provided sufficient instruction for students to master each skill; (2) a survey sent to sixty-seven school districts and four university laboratory schools inquiring as to which grade levels provided instruction on each of the skills and when the majority of students would have mastered them; (3) site visits to verify the accuracy of the responses provided by the districts; and (4) student surveys administered by site visitors containing example questions in all twenty-four skill areas.¹⁷³

At trial, the *Debra P.* defendants offered four expert witnesses who opined, based in part upon the results of the four-part study, that Florida schools were teaching the skills necessary for students to pass the high school test. The plaintiffs argued that the survey results were inadmissible hearsay and offered two experts, one of whom testified that the teacher survey was flawed because it was designed to illicit positive results.¹⁷⁴

In response to plaintiffs' argument that defendants' survey results were inadmissible hearsay, the trial court found the results admissible under the residual hearsay exception of Federal Rule of Evidence 803(24), or as the basis of expert opinion testimony under Rule 703.¹⁷⁵

In ruling upon the hearsay objection, the trial court conceded that defendants' survey, like the one rejected by the court in *Pittsburgh Press Club*, was flawed because the interviewers were aware of the purpose of the poll, but added:

[E]ven if the survey results were not admissible under Rule

¹⁷² 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

¹⁷³ *Debra P.*, 564 F. Supp. at 180-81.

¹⁷⁴ *Id.* at 182.

¹⁷⁵ *Id.*

803(24), this Court has wide discretion under Rule 703 to allow an expert to explain the basis of his opinion. Since all of defendants' experts testified that they had relied on the survey data, and the plaintiffs were given a substantial opportunity to cross-examine the experts on the study's reliability and to present their own expert opinions of the data, admission of the raw data was not prejudicial to the plaintiffs.¹⁷⁶

While there is certainly nothing improper in admitting polling or other evidence on alternative grounds, the court's lengthy analysis of the survey's admissibility in *Debra P.* is troubling for several reasons. First, the court apparently viewed Rule 703 as an independent basis for admitting the data underlying the experts' opinions as substantive evidence,¹⁷⁷ an approach which has been rejected by a sound majority of legal authority.¹⁷⁸ Second, after reiterating Rule 703 as the basis for admitting the evidence, the court nonetheless independently considered plaintiffs' criticisms of the surveys to determine "what weight, if any, should be given to the survey results."¹⁷⁹ In short, *Debra P.* shows that courts continue to be mired in the hearsay quandary, despite the intent of the drafters of Rule 703 to eliminate this evidentiary quicksand.¹⁸⁰

¹⁷⁶ *Id.* at 182-83 n.7 (emphasis added) (citations omitted).

¹⁷⁷ *See id.* at 182 ("In the alternative, they were admitted under Fed. R. Evid. 703 as being the basis of the expert opinions presented at trial.") (emphasis added) (citations omitted).

¹⁷⁸ *See, e.g.,* *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270 (7th Cir. 1988); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987); *Mannino v. International Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981). *See generally* Note, *The Scope of the Reasonable Reliance Requirement of Federal Rule of Evidence 703*, 1988 U. ILL. L. REV. 1069.

¹⁷⁹ *Debra P.*, 564 F. Supp. at 183 n.7.

¹⁸⁰ A rare decision illustrating the proper relationship between Rule 703 and the use of survey evidence is *Baumholser v. Amax Coal Co.*, 630 F.2d 550 (7th Cir. 1980). The plaintiffs' expert, a geologist, testified that defendant's blasting operations had damaged the walls and foundations of plaintiffs' home. His testimony was based in part upon a survey he had conducted of homeowners in the area. The trial court incorrectly admitted the survey as substantive evidence.

On appeal, defendant noted several flaws in the survey which arguably supported its exclusion as substantive evidence. Although the appellate court did not disagree with the defendant's assessment of the survey as hearsay which may have not been independently admissible, the court held that the expert was entitled, under Rule 703, "to rely on hearsay evidence to support his opinion, so long as that evidence was of a type reasonably relied upon by other experts in the field." *Id.* at 553. In the court's view, the expert's uncontradicted and un rebutted testimony that his survey was similar to those conducted by the Atomic Energy Commission "more than satisfied the threshold inquiry as to whether other experts would rely upon it." *Id.* In other words, while the hearsay nature of the survey might bar its admission as substantive evidence, the expert's opinion based on the survey was by itself sufficient to meet plaintiff's burden of

3. *Inapplicability when Pollster is an Expert*

As a vehicle for admitting survey evidence, Rule 703 is limited to situations where an expert's proffered testimony is based only *in part* on survey results. Such was the case in *Debra P.*, where the expert opinion testimony of a former superintendent (that the competency test in question was instructionally valid) was based on his years of work experience and professional training, as well as the surveys conducted for the litigation. In such a scenario, the standard interpretation of Rule 703 as allowing the court to defer to the expert's reliance on the poll appears sound.

The same deference is not appropriate, however, where the proffered expert's opinions or conclusions are drawn *solely* from the results of a public opinion poll or survey. This latter scenario arises frequently in litigation where the poll is designed to address a critical, if not determinative, point in the litigation, such as the degree of consumer confusion between two products at issue in a trademark or unfair competition case. In this context, the pollster is often the only person offered as an expert.¹⁸¹ Obviously, simply posing the usual Rule 703 inquiry of whether the underlying material is of the type reasonably relied upon by other experts in the same field will always yield an affirmative answer when the pollster is the expert. But, in such a situation, the usual presumption of credibility that would otherwise arise due to the expert's reliance on the data should not come into play. The inability of Rule 703 to provide guidance in such cases is documented in a trademark infringement action brought by the owners of Toys "R" Us against a new enterprise operating under the name "Kids 'r' Us."¹⁸²

The plaintiff in *Toys "R" Us* sought to introduce the expert opinion of its pollster, Dr. Robert C. Sorenson, that a likelihood of confusion existed in the minds of the public between the names of plaintiff's and defendant's stores.¹⁸³ Dr. Sorenson's testimony that

proof. Accordingly, no reversible error was found in the trial court's incorrect admission of the survey as substantive evidence. *Id.*

¹⁸¹ See, e.g., *Keith v. Volpe*, 858 F.2d 467, 481 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 61 (1989); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980); *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1341 n.19 (2d Cir. 1975). But cf. *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1089-90 n.4 (8th Cir. 1980) (court holds that plaintiff's failure to provide expert to interpret survey results is not fatal to admissibility of the survey).

¹⁸² *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189 (E.D.N.Y. 1983).

¹⁸³ *Id.* at 1202.

the public was confused by the similarity in store names was predicated entirely on a survey conducted under his direction.

Although the court had no difficulty in qualifying Dr. Sorenson as an expert,¹⁸⁴ it found that the survey itself did not meet the criteria for trustworthiness articulated in the 1981 *Manual for Complex Litigation*.¹⁸⁵ Specifically, the court found a high potential for error in the methods in which the interviews were conducted and the way in which the results were tabulated.¹⁸⁶

Following the court's initial ruling that the survey did not reflect sufficient indicia of trustworthiness, plaintiff attempted to salvage the survey by calling another expert, a professor of marketing and chairman of the marketing department at New York University. Like Dr. Sorenson, plaintiff's second expert, Dr. Henry Assael, testified that the survey indicated consumer confusion. A number of concessions made by Dr. Assael, however, confirmed problems in the universe selection and the method of interviewing used in the survey.¹⁸⁷ In short, Dr. Assael's testimony created an even wider credibility gap in the survey evidence. Having branded the survey as falling far short of "genuine guarantees of trustworthiness,"¹⁸⁸ the court excluded the testimony of Doctors Sorenson and Assael, stating that no deference was due them under Rule 703.¹⁸⁹

As in *Debra P.*, the correctness of the *Toys "R" Us* court's exclusion of the survey evidence and expert's testimony based thereon is not necessarily suspect; in fact, an opposite ruling accepting the survey data because the expert (i.e. pollster) relied on it would represent the worst type of impermissible bootstrapping. But the case

¹⁸⁴ *Id.* at 1203.

¹⁸⁵ *Id.* at 1205 (citing 1981 MANUAL, *supra* note 105, at 116).

¹⁸⁶ The court was especially troubled by the fact that more than 20 persons employed by Dr. Sorenson's company and two subcontracting companies were involved in the survey's execution and the analysis of the results, that Dr. Sorenson admitted that the validity of the survey results could have been compromised by the failure of one or more persons to follow instructions and/or do their assigned tasks competently, and that Dr. Sorenson could not testify based on personal knowledge as to the accuracy of the work done by the employees of the subcontractors. *Id.* at 1203-04. The *Toys "R" Us* decision implicitly raises, but does not answer, the question as to the proper method and person(s) needed to establish a credible foundation for the admission of the survey evidence. While this issue is outside the scope of this Article, it is deserving of further investigation by counsel commissioning a survey or poll.

¹⁸⁷ *Id.* at 1204.

¹⁸⁸ *Id.* at 1205.

¹⁸⁹ *Id.* The court's rejection of the survey evidence, however, was not fatal to plaintiff's case. Although the survey failed in its purpose to show actual confusion, the court found other evidence of the likelihood of confusion sufficient to grant plaintiff's request for injunctive relief. *Id.* at 1210.

serves to illustrate, once again, the failure of Rule 703 to simplify the evidentiary issues involved when survey evidence is proffered. Indeed, the *Toys "R" Us* court found it necessary to discuss at some length the various rationales for allowing admission of "hearsay" survey evidence before finally determining that such evidence is best admitted under the residual hearsay exception.¹⁹⁰

In sum, the hearsay analysis continues to be replayed in many cases where survey results are proffered, regardless of the intent of the drafters of Rule 703 to avoid such repetition.¹⁹¹ Common sense, as well as legal authority, suggests that application of Rule 703 is neither complex nor particularly helpful in the context of admissibility of survey evidence. In the event that Rule 703 is relied upon, the following steps are appropriate: (1) pretrial disclosure of the underlying survey data and an opportunity for opposing counsel to depose the testifying witness about same; (2) determination, preferably before trial pursuant to a motion in limine, whether the underlying survey data is of a type reasonably relied upon by other experts in the field, with appropriate deference being given to the testifying expert's representations on this point; (3) if the question asked at step two is answered in the affirmative, allow the witness to testify regarding her opinion; (4) allowance for liberal inquiry on cross-examination regarding the source(s) and validity of the underlying survey or polling data; and (5) submission of the case to the jury with instructions that the credibility of all witnesses, including experts, is for its determination, and that the validity (or lack thereof) of the survey data is one factor which jury members should consider in assessing the expert's credibility.¹⁹²

C. Requiring Disclosure of Intent to Execute a Survey

The 1960 *Handbook of Recommended Procedures for the Trial of Protracted Cases*¹⁹³ recommends advance planning when survey results are to be offered into evidence. That specific recommendation states:

¹⁹⁰ *Id.* at 1204-05.

¹⁹¹ FED. R. EVID. 703 advisory committee's note.

¹⁹² See *United States v. Elkins*, 885 F.2d 775, 786 (11th Cir. 1989) (when expert's opinion is based in part on hearsay, weakness of the basis of the opinion goes to weight, not admissibility), *cert. denied*, 110 S. Ct. 1300 (1990); *American Universal Ins. Co. v. Falzone*, 644 F.2d 65, 66-67 (1st Cir. 1981) (court gave careful consideration to the requirement that the expert's reliance be reasonable, but did not delve into the reliability of reports and other "hearsay" data on which expert's opinion was based). See generally Note, *supra* note 178.

¹⁹³ 25 F.R.D. 351 (1960).

In certain instances and with the consent of all parties, it may be desirable to consider at pre-trial a proposed poll so that the flaws in mechanics may be eliminated, to the extent possible, before the poll is taken. However, participation in such a procedure should not be made compulsory.¹⁹⁴

As previously noted, more modern standards, as articulated in *Pittsburgh Press Club* and the 1985 *Manual for Complex Litigation*, take divergent views regarding the duty of counsel to inform the court and opposing party of plans to conduct a survey prior to execution. While the Third Circuit's *Pittsburgh Press Club* decision is silent on this point, the 1985 *Manual* is unequivocal in its recommendation that disclosure be mandatory:

The parties should be required, before conducting any poll, to provide other parties with an outline of the proposed form and methodology, including the particular questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process. The parties should attempt to resolve any disagreements concerning the manner in which the poll is to be conducted, and a meeting between the experts engaged by the litigants may produce a mutually acceptable plan. Of course, the results and any opinions based on the poll should be disclosed promptly after it has been taken.¹⁹⁵

Extensive research identifies no case in which a court wholeheartedly embraces the 1985 *Manual*'s recommendation and rejects survey evidence because the offering party failed to disclose its intent to conduct the survey prior to execution. Moreover, while the *Manual*'s pre-execution disclosure rule in theory streamlines the admissibility process for survey evidence, actual experience of litigants who voluntarily disclose survey plans does not unequivocally demonstrate the effectiveness of such a procedure.

Pre-survey disclosure effectively prevented successful challenges to the survey results from the opposing party at both the trial and appellate level in *Piper Aircraft Corp. v. Wag-Aero, Inc.*¹⁹⁶ In that trademark infringement action, Piper sought to utilize survey evidence to demonstrate a likelihood of confusion in the minds of consumers between its parts and parts manufactured by the defendant. Prior to undertaking "the great expense of conducting an actual survey,"¹⁹⁷ Piper filed a motion in limine asking the court to deter-

¹⁹⁴ *Id.* at 430 (footnotes omitted).

¹⁹⁵ 1985 *MANUAL*, *supra* note 48, § 21.484.

¹⁹⁶ 741 F.2d 925 (7th Cir. 1984).

¹⁹⁷ *Id.* at 929.

mine the admissibility of its proposed survey.¹⁹⁸ The questions and preliminary results were given to the court.¹⁹⁹ Defendant opposed the motion, claiming that the putative respondents constituted an improper universe, that the survey process incorrectly used defendant's 1982 rather than 1980 catalogue, and that the survey results were hearsay.²⁰⁰ The court rejected each of defendant's arguments and granted Piper's motion, holding that the survey results merely recorded the present sense impression and existing state of mind of the respondents and, hence, were admissible under Federal Rules of Evidence 803(1) and 803(3); that the universe selected was acceptable; and that the 1982 catalogue served as an adequate basis for survey questions.²⁰¹ The trial court cautioned, however, that it would entertain a motion to strike at trial if Piper failed to establish " 'the interviewers' credibility to the court's satisfaction.' " ²⁰² The final survey was conducted just three days before trial.²⁰³

After a bench trial, during which the court admitted Piper's survey as " 'probative evidence demonstrating the likelihood of confusion,' " the court granted Piper's request for injunctive relief.²⁰⁴ On appeal, defendant's challenge to the admissibility of the survey fell on deaf ears. In response to defendant's argument that it did not have an opportunity to conduct discovery of the final survey results prior to trial, the appellate court was impressed with the fact that Piper followed the " 'commendable procedure' " of submitting the survey questions and preliminary results to the trial court for an *in limine* ruling on admissibility.²⁰⁵ The court opined:

The district court properly reserved until trial the question of the weight it would give to the survey. Although we do not condone plaintiff's postponement of the full survey until the eve of trial, the possibility that settlement could be reached without a trial makes the postponement understandable, due to the great costs involved in conducting a full-scale survey. Additionally, from the discovery undertaken with respect to the preliminary survey, defendant knew exactly what the format and content of the final survey would be. Thus, there was no surprise attendant upon the admission of the survey into evidence, and the fact that plaintiff

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* This procedure was initially advocated by the Seventh Circuit in *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 386 (7th Cir. 1976).

²⁰⁰ *Piper Aircraft*, 741 F.2d at 930-31.

²⁰¹ *Id.* at 929-30.

²⁰² *Id.* at 929.

²⁰³ *Id.* at 931.

²⁰⁴ *Id.* at 929.

²⁰⁵ *Id.* at 931.

did not produce the full survey prior to trial, if prejudicial to defendant, as tardy production of evidence sometimes could be, was not sufficiently so as to call for reversal.²⁰⁶

Similar efforts to avoid an unfavorable evidentiary ruling by submitting the proposed survey questions to the court did not prove as successful for the survey's proponent in *Union Carbide Corp. v. Ever-Ready, Inc.*²⁰⁷ As in *Piper*, the trial judge issued a pre-trial ruling that the survey results would be admissible, but that the weight to be accorded the results would be determined at trial.²⁰⁸ Unlike in *Piper*, however, the trial court ultimately determined that bias and other problems in the survey entitled the results " 'to little, if any, weight.' " ²⁰⁹ However, the court of appeals reversed the low probative value assigned by the trial court to the survey. The court held that the bias in the survey would not likely "reduce to insignificance the extremely high percentage of [consumer] confusion shown by the survey."²¹⁰

While the results in *Piper* and *Union Carbide* demonstrate some advantage to the survey proponent in seeking pre-execution input from the court, the in limine rulings sought in those cases are a far cry from the process which the 1985 *Manual* advocates as mandatory. Indeed, the in limine approach fosters the adversarial nature of offering and opposing evidence, while the system suggested by the *Manual* requires a concerted, unified effort by litigants and respective experts to devise the definitive survey. Accordingly, only the threshold question of admissibility of the survey is answered by the in limine ruling, with the issue of the weight accorded the results left unresolved until thorough examination and cross-examination in court. In contrast, the accord reached by the litigants, their experts, and the court under the *Manual* procedure would, at least in theory, leave little ground for challenging the survey evidence at trial. A "super class" of evidence would emerge which, by definition or default, would be regarded as extremely probative, potentially excluding any consideration by the court or jury of other valid, probative evidence on the same issue.

The *Manual*'s mandatory disclosure approach finds some support in *Union Carbide*'s suggestion that the "desirable procedure would be for the parties to attempt in good faith to agree upon the

²⁰⁶ *Id.* at 931.

²⁰⁷ 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

²⁰⁸ *Id.* at 386.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 388.

questions to be in such a survey.”²¹¹ Unlike the *Manual*, the *Union Carbide* decision, perhaps more firmly rooted in reality, does not nominate this procedure as an inflexible prerequisite to admissibility of survey evidence. Indeed, it is somewhat naive to assume that legal counsel can function as compatriots in the preparation and execution of survey results—especially when such cooperation will likely produce evidence dispositive of key issues in the litigation—while remaining partisan adversaries in all other matters.²¹² Moreover, under Federal Rule of Evidence 705²¹³ and the liberal discovery rules,²¹⁴ failure to disclose prior to executing a survey will not unduly prejudice opposing counsel’s ability to prepare for trial. Stated differently, absent extreme ineptitude on the part of opposing counsel in conducting discovery, there should be no surprises regarding the proffer of polling data at trial. Furthermore, a very real danger exists that the parties will fail to reach agreement on any of the steps of the survey process, necessitating a much greater degree of judicial intervention than is warranted during the evidence gathering phase of litigation.

In short, while the proponent of survey evidence stands to benefit from early disclosure of the intent to conduct a survey, and possibly even from agreeing with opposing counsel upon the questions to be asked,²¹⁵ cooperation between the respondent and opposing counsel

²¹¹ *Id.* at 386.

²¹² As one commentator observed:

The adversary system almost induces opposing counsel to misrepresent or manipulate facts before the Court. The primary goal of the advocate is, after all, to achieve a favorable legal decision even at the expense of empirical truth. For that matter, the courtroom setting, with its ringing tones of partisanship, is not the ideal place to examine social science findings.

P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 202 (1972).

²¹³ Rule 705 states: “The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”

In the author’s experience, courts do not hesitate to order disclosure of the underlying data during the discovery phase; in any event, Rule 705 mandates disclosure on cross-examination of the opponent’s expert.

²¹⁴ For instance, FED. R. CIV. P. 26 allows “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,” even where the information sought would be inadmissible at trial, provided the discovery request “appears reasonably calculated to lead to the discovery of admissible evidence.” More specific rules governing the discovery of an expert’s opinion and the grounds for the opinion are set forth in FED. R. CIV. P. 26(b)(4).

²¹⁵ See, e.g., *Dreyfuss Fund, Inc. v. Royal Bank of Canada*, 525 F. Supp. 1108, 1116 n.3 (S.D.N.Y. 1981) (in preliminary injunction hearing, court gave no weight to plaintiff’s survey results due to errors in execution; court indicated that survey would be

should not be mandated.²¹⁶

D. Determining the Proper Degree of Attorney Involvement

Unlike the *Pittsburgh Press Club* standards which require that "the survey must be conducted independently of the attorneys involved in the litigation,"²¹⁷ the criteria for polling evidence set forth in the various editions of the *Manual* does not caution against attorney involvement. Indeed, the stated rationale for the 1985 *Manual*'s recommendation of mandatory advance disclosure is antithetical to *Pittsburgh Press Club*'s prohibition against attorney involvement. This conflict arises because the *Manual* perceives the opportunity for both parties, as well as the court, to participate in the design and execution of the survey as a benefit. In contrast, *Pittsburgh Press Club* apparently viewed any degree of attorney involvement in the survey process as detrimental to the trustworthiness of a survey.²¹⁸

A court's consideration (or lack thereof) of attorney involvement can determine the weight given to particular survey results or even the admissibility of the evidence. For example, the court in *American Home Products Corp. v. Barr Laboratories, Inc.*²¹⁹ excluded

accorded weight if flaws were corrected in final study and suggested, but did not mandate, that the parties make a good faith attempt to agree upon the final survey questions).

²¹⁶ An alternative to mandating cooperation among the litigants and their experts is a court-appointed, independent expert pursuant to FED. R. EVID. 706. The court's inherent power to appoint an expert was recognized prior to the codification of the Federal Rules of Evidence, see, e.g., *Danville Tobacco Ass'n v. Bryant-Buckner Assocs.*, 333 F.2d 202 (4th Cir. 1964), *aff'd after remand*, 372 F.2d 634 (4th Cir. 1967), *cert. denied*, 387 U.S. 907 (1967), but is generally used only when the judge believes additional expert input is needed to fairly resolve a case. See, e.g., *Stickney v. List*, 519 F. Supp. 617 (D. Nev. 1981) (past director of state corrections department appointed as expert in suit challenging prison conditions; expert asked to report on prisons' eighth amendment responsibilities to furnish adequate food, clothes, and sanitation). In jury cases, the court's reluctance to appoint an expert is premised on the fear that the "presence of a court-sponsored witness, who would most certainly create a strong, if not overwhelming, impression of 'impartiality' and 'objectivity,' could potentially transform a trial by jury into a trial by witness." *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351 (E.D. Mich. 1980).

²¹⁷ *Pittsburgh Press Club*, 579 F.2d at 758. This requirement was originally suggested, without elaboration, by the Judicial Conference Study Group in its *Handbook of Recommended Procedures for the Trial of Protracted Litigation*. *Id.* (citing 25 F.R.D. 351, 429 (1960)).

²¹⁸ *Pittsburgh Press Club* did not offer a rationale for disfavoring attorney involvement, but did categorize this requirement as "[j]ust as important" as sound sample design, questionnaire formation, and interviewing techniques. *Id.*

²¹⁹ 656 F. Supp. 1058 (D.N.J. 1987), *aff'd*, 834 F.2d 368 (3d Cir. 1987).

proffered survey results on a number of grounds, including the degree of attorney involvement.²²⁰ In that case, plaintiff claimed that defendants violated state and federal trademark laws by selling 200 milligram over-the-counter Ibuprofen tablets of a color similar or identical to that of plaintiff's 200 milligram Advil tablets. Plaintiff offered the results of a consumer survey which purported to demonstrate, among other things, that defendant's use of the Advil color created a likelihood of confusion as to the commercial source of defendant's product.²²¹

Placing "the burden [on] the proffering party to prove the quality of [the] survey evidence,"²²² the court carefully scrutinized the survey expert's testimony concerning selection of the universe, design of the questions, and the method used to elicit responses from the interviewees.²²³ While noting deficiencies in the sampling techniques used,²²⁴ the court was also troubled by pre-survey conferences between the expert and plaintiff's counsel,²²⁵ even though the expert deemed such meetings necessary to insure that the survey would be responsive to the legal issues.²²⁶

The court deciding *American Home Products* is not alone in its reluctance to give credence to survey results where attorneys involved in the litigation actively participated in the design and execution of the survey. In *Delgado v. McTighe*,²²⁷ for example, plaintiffs surveyed law schools inquiring about the ethnicity of their graduates in an effort to pursue a class action. The court rejected the proffered survey results for failure to meet the *Pittsburgh Press Club* criteria for admissibility, noting that:

The evidence at the class certification hearing clearly showed that the survey was not conducted independently of the attorneys involved in the litigation. Plaintiffs' counsel was actively involved in designing the form of the survey, sending the forms to the law schools, and collecting the data when it was returned to

²²⁰ *American Home Prods.*, 656 F. Supp. at 1070.

²²¹ *Id.* at 1062.

²²² *Id.*

²²³ *Id.* at 1070-71.

²²⁴ *Id.* at 1070.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ 91 F.R.D. 76 (E.D. Pa. 1981); see also *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Laboratories*, 532 F. Supp. 1040, 1058 (D.N.J. 1980) (Refusing to admit survey data, the court opined that "[o]ne problem with the survey was that plaintiffs' attorneys were involved in designing the questions that were to be asked. . . . This conflicts with the admonition in *Pittsburgh Press* that surveys be designed without guidance from lawyers.").

his office. . . . For these [and other] reasons, the survey might lack the "circumstantial guarantees of trustworthiness" necessary for it to be admissible in evidence.²²⁸

At the opposite end of the spectrum from the *Pittsburgh Press Club* requirement that surveys be conducted "independently" of the attorneys involved in the litigation is the previously criticized²²⁹ *American Greetings*²³⁰ case, which allowed admission of a survey designed entirely by plaintiffs' counsel. There, the court rationalized that "[w]hile not dispositive, this fact renders plaintiffs' survey somewhat less weighty than it might otherwise be."²³¹ In a twist on the *American Greetings* rationale, defendants in another case argued (unsuccessfully) that plaintiff's survey (designed to show the generic nature of the "monopoly" trademark) was inherently flawed because it had been devised "without the mediation of a trademark attorney."²³²

A court's reading of bias into any survey where the proponent's counsel provides input places the attorney in a precarious position. If counsel maintains a "hands off" approach to the survey, a very real danger exists that the results will prove irrelevant to the specific and perhaps narrow legal or factual issues involved. Indeed, critical stages such as universe selection and question formation beg for guidance from competent legal counsel familiar with judicial guidelines on these points.²³³ As one court observed, in excluding the results of a survey of retail luggage dealers on the grounds that the perceptions of the ultimate customers, rather than the dealers polled, were relevant: "Those who designed the survey apparently did not fully appreciate the legal consequences of the point that there were at issue in this case two markets"²³⁴

This is not to say that overzealous participation by counsel in a survey should go unnoticed; in fact, mechanisms exist which safeguard against bias that may result from too much attorney input. The most obvious of these are pretrial discovery and cross-examina-

²²⁸ *Delgado*, 91 F.R.D. at 81.

²²⁹ See *supra* notes 129-134 and accompanying text.

²³⁰ *American Greetings Corp. v. Dan-Dee Imports, Inc.*, 619 F. Supp. 1204 (D.N.J. 1985), *vacated in part on other grounds*, 807 F.2d 1136 (3d Cir. 1986).

²³¹ *American Greetings Corp.*, 619 F. Supp. at 1215-16.

²³² *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1325 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

²³³ See *supra* notes 62-96 and accompanying text.

²³⁴ *American Luggage Works, Inc. v. United States Trunk Co.*, 158 F. Supp. 50, 52 (D. Mass. 1957), *aff'd sub nom. Hawley Prods. Co. v. United States Trunk Co.*, 259 F.2d 69 (1st Cir. 1958).

tion of the expert or witness through whom the survey results are proffered. Both procedures provide ample opportunity to determine the nature and degree of attorney involvement and the corresponding impact, if any, on the survey results.

The *Pittsburgh Press Club* requirement that surveys be conducted independently of legal counsel is unreasonable and counterproductive. It is unrealistic to assume that lay people, even pollsters with extensive experience as expert witnesses, can precisely define the proper universe and frame the definitive question(s) without some input from legal counsel. In a system where the omission of a single word from a question can lead to exclusion of survey results at trial,²³⁵ and where the proper universe is defined by a subtle yet critical difference in the point in time when respondents are interviewed,²³⁶ every step of the survey should be reviewed and evaluated by the commissioning attorney in light of governing law. Indeed, in view of the costs incurred by the client in conducting a survey and the potentially high probative value which a credible survey enjoys on dispositive issues, it may well constitute legal malpractice for the attorney to take a completely hands-off approach.

As implicitly suggested in the foregoing discussion, the goal is to allow sufficient attorney involvement to assure a legally and factually relevant survey without condoning excessive "guidance" by counsel which constitutes a thinly-disguised effort to bias the survey results in the client's favor. When allegations of bias surface, cross-examination of the witness who offers the results is an appropriate mechanism for discrediting the results. Only in the most extreme situations should the court step in and exclude the survey evidence altogether. In any event, contrary to the inference clearly drawn from the *Pittsburgh Press Club* "independence from counsel" rule, an attorney's involvement in the survey should not automatically carry a presumption of untrustworthiness.

E. Conditioning Admissibility of a Survey upon a Showing of Necessity

In view of the previous discussions in this Article, it is clear that

²³⁵ See, e.g., *American Footwear Corp. v. General Footwear Co.*, 609 F.2d 655, 661 n.4 (2d Cir. 1979) (proper question would have asked, "With whom or what do you associate a Bionic boot?"; not just the word "Bionic"), *cert. denied*, 445 U.S. 951 (1980).

²³⁶ See, e.g., *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984) (proper universe consisted of people contemplating purchase of plaintiff's product in near future, not those who had recently purchased plaintiff's product).

admissibility of survey results hinges primarily upon the presence of circumstantial guarantees of the data's trustworthiness.²³⁷ An equally critical issue frequently mentioned by the courts is whether admission of polling evidence must be further justified by a "showing of necessity." Such a requirement is met by the proponent's demonstration that the survey evidence is "more probative on the issue than any other evidence" which could be obtained through "conventional methods."²³⁸

In *Keith v. Volpe*,²³⁹ an action was brought against a city for failing to approve construction of housing for people with low and moderate incomes who were displaced by freeway construction. The Ninth Circuit fully entertained defendant's argument that plaintiffs' survey of the racial and economic status of affected persons should be excluded as unnecessary because similar data was available from the 1980 federal census and other surveys.²⁴⁰ The court concluded, however, that since the data available from other sources was two to five years out of date, "the information in the [plaintiffs'] survey was more probative of the current composition of the areas in question and thus much more probative on the issue of adverse impact."²⁴¹

Like the "circumstantial guarantees of trustworthiness" requirement, the "showing of necessity" requirement serves, in an appropriate case, as a prerequisite to admissibility.²⁴² Unlike the trustworthiness criterion, however, the necessity factor is seldom elaborated upon by the courts. The lack of clear guidance on the necessity requirement is due in large part to the courts' usual practice of initially determining whether a survey is inherently trustwor-

²³⁷ See generally 1 J. MOORE, MOORE'S FEDERAL PRACTICE § 2.712 (1982).

²³⁸ See, e.g., *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978); see also *Debra P. v. Turlington*, 730 F.2d 1405, 1413 (11th Cir. 1984) (court accepts argument by plaintiff's expert that while methods other than the survey procedures used were available to obtain information on the instructional validity of the high school competency test at issue, the survey evidence was necessary because the other methods were "either impractical, prohibitively expensive, or less reliable"); *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983) (court accepts "necessity and genuine guarantees of trustworthiness to be the correct bases for receiving survey evidence" offered to establish likelihood of confusion in consumers' minds resulting from defendant's adoption of store name similar to that owned by plaintiff).

²³⁹ 858 F.2d 467 (9th Cir. 1988), cert. denied, 110 S. Ct. 61 (1989).

²⁴⁰ *Id.* at 480.

²⁴¹ *Id.*

²⁴² *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 428 (1960).

thy; obviously, if a poll or survey is deemed inadmissible because trustworthiness is lacking, the issue of necessity is moot.²⁴³

Adding to the confusion as to when a showing of necessity is required is the failure of many courts to cite the specific grounds or rule under which the survey data is admitted, other than stating that the survey must be trustworthy.²⁴⁴ This omission may simply reflect the degree of acceptance which survey evidence has attained in general, or constitute an implicit recognition of the need for survey data in cases where the public's perception of an item or event is determinative. For instance, use of survey evidence is usually the norm in cases involving allegations of trademark infringement and other acts of unfair competition,²⁴⁵ false advertising,²⁴⁶ and even obscenity prosecutions.²⁴⁷ Indeed, several decisions characterize a party's failure to submit survey data as a concession of weakness in the party's position.²⁴⁸

²⁴³ In *Delgado v. McGighe*, 91 F.R.D. 76, 80 (E.D. Pa. 1981), for example, the court stated that the proffered survey data would be admissible, if at all, only if it met all of the requirements of FED. R. EVID. 803(24), including the showing that the survey was more probative than other available evidence. Because the survey failed the threshold trustworthiness test, however, there was no need for the court to undertake the necessity analysis.

²⁴⁴ See, e.g., *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir.), cert. denied, 429 U.S. 830 (1976); *Dreyfuss Fund, Inc. v. Royal Bank of Canada*, 525 F. Supp. 1108 (S.D.N.Y. 1981); *Quaker State Oil Refining Corp. v. Burmah-Castrol, Inc.*, 504 F. Supp. 178 (S.D.N.Y. 1980).

²⁴⁵ See, e.g., *Grotian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1341 (2d Cir. 1975) ("[t]here is substantial authority to support the admissibility of properly conducted surveys in trademark infringement cases"); *Dreyfuss Fund*, 525 F. Supp. at 1116 ("Surveys are frequently used in trademark litigation and are recognized by courts as a way of demonstrating secondary meaning or a likelihood of confusion."); *Zippo Mfg. Co. v. Rogers Imports*, 216 F. Supp. 670, 684 (S.D.N.Y. 1963) (recognizing "scientific survey" as preferred method of establishing state of mind of consumers regarding challenged goods in trademark infringement and unfair competition cases).

²⁴⁶ See, e.g., *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985) ("consumer surveys conducted by independent experts may arguably constitute the best way to establish consumer understanding"); *Quaker State*, 504 F. Supp. at 182 ("If an advertisement is not facially false, then plaintiff must demonstrate that consumers receive false or misleading advertisement by the use of expert testimony and survey research data.").

²⁴⁷ See, e.g., *State ex rel. Pizza v. Strobe*, 54 Ohio St. 3d 41, 46, 560 N.E.2d 765, 770 (1990) (citing with apparent approval statement by court of appeals that survey results regarding residents' tolerance for sexually oriented materials "was the most relevant and probative evidence presented" in obscenity prosecution); *Saliba v. State*, 475 N.E.2d 1181, 1185 (Ind. App. 1985) (recognizing that testimony based on survey results "is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise . . .").

²⁴⁸ See, e.g., *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 361 (2d Cir.

Regardless of the reason for the lack of guidance on the necessity requirement, the dearth of judicial discussion on this point leaves both the attorney contemplating the commissioning of a survey and the judge considering the admissibility of survey data at a clear disadvantage. While the nonchalance with which courts dispense with or insist upon a showing of necessity is always troublesome, lack of uniform treatment of this factor is especially problematic where the proffered use of the survey evidence is a novel one.

For instance, in a products liability case predicated upon the alleged failure of the manufacturer of alcoholic beverages to warn consumers of the purported dangers of excessive consumption,²⁴⁹ the defendant might consider commissioning a public opinion poll designed to measure the existing level of consumer awareness of the health hazards associated with excessive consumption. Arguably, survey results demonstrating a high level of consumer awareness serve to negate any duty on the manufacturer's part to supply additional warnings;²⁵⁰ but, since failure to warn has traditionally been established through expert testimony without reference to litiga-

1983) (plaintiff's petition for preliminary injunction denied because plaintiff failed to "undertake some form of survey of consumer attitudes under actual market conditions" to establish consumer confusion or secondary meaning) (citation omitted); *Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co.*, 349 F.2d 389, 395-96 (2d Cir. 1965) (court advises that plaintiff should have used opinion poll to show injury to its trademark which allegedly resulted from defendant's actions), *cert. denied*, 383 U.S. 942 (1966); *Broadcasting Publications, Inc. v. Burnup & Sims, Inc.*, 582 F. Supp. 309, 318-19 (S.D. Fla. 1983) (failure to submit survey evidence demonstrating actual consumer confusion deemed highly relevant by court in rejecting plaintiff's claims of trademark infringement and unfair competition); *Information Clearing House, Inc. v. Find Magazine*, 492 F. Supp. 147, 160 (S.D.N.Y. 1980) (In denying plaintiff's claim of trademark infringement, court observed that "[i]t is also significant that plaintiff, though possessed of the financial means, did not undertake a survey of public consumer reaction to the products under actual market conditions.").

²⁴⁹ In *Shuput v. Heublein, Inc.*, 511 F.2d 1104, 1106 (10th Cir. 1975), for example, the court held:

The duty to warn . . . does not extend to a perfectly obvious hazard but we do not consider this to be such a case. The propensities of bubbly wine may be well known to many but are not a matter of such common knowledge as to be established as a matter of law and imposed as a matter of judicial knowledge.

Id. The author suggests that a well-constructed and executed survey designed to measure actual levels of consumer awareness of the effects of defendant's product might have persuaded the court that any "danger" associated with consumption of the product was obvious, and thus negated any obligation on the part of defendant to provide additional warnings. For a comprehensive discussion of the duty to warn generally imposed on manufacturers, see Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 11 J. PROD. LIAB. 103 (1988).

²⁵⁰ See Davis, *supra* note 1, at 346-47.

tion-specific surveys,²⁵¹ the proponent may be required to show the probative superiority of polling evidence over more "conventional" methods of proof. Failure to make such a showing could result in exclusion of the survey results.²⁵² Thus, indiscriminate application of the necessity requirement would create an arbitrary and unintended barrier to legitimate and creative uses of survey data.

Several questions beg answers when the necessity requirement is examined. First, what is the genesis of this requirement? Second, why is it not uniformly required as a threshold test for admissibility of polling data? Finally, should it be uniformly adopted as a threshold requirement?

The precise origin of the necessity requirement is not difficult to identify. Certainly, the common-law requirement, now reflected in Federal Rule of Evidence 402, that evidence must be relevant to be admitted, paired with Rule 401's definition of relevant evidence,²⁵³ implicates a requirement for some showing of necessity for all evidence proffered. Requiring a higher standard of probative value for polling evidence can be attributed in part to the suspicion with which survey evidence has been historically viewed.²⁵⁴

As the judiciary became more comfortable with the use of survey evidence, it was admitted not only through reliance on common-law exceptions to the hearsay rule,²⁵⁵ but also under the rationale that admissibility was proper, even where the survey did not fit precisely within an established hearsay exception, upon a showing of necessity and trustworthiness. The 1960 *Handbook* advocated this approach,²⁵⁶ and further advised: "Proof of necessity does not require a showing of total inaccessibility to proof of the facts desired to be shown, but the offeror must show the impracticability of making his proof by conventional methods."²⁵⁷ To a large extent, the *Hand-*

²⁵¹ See Epstein & Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656, 661 (1987).

²⁵² See, e.g., *Zippo Mfg. Co. v. Rogers Imports*, 216 F. Supp. 670, 683 (S.D.N.Y. 1963) (holding that necessity "requires a comparison of the probative value of the survey with the evidence . . . which . . . could be used if the survey were excluded"). This test, as articulated by the *Zippo* court in 1963, was endorsed by the Ninth Circuit in 1988 in *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988).

²⁵³ FED. R. EVID. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

²⁵⁴ See *infra* section II.F.

²⁵⁵ *Zippo*, 216 F. Supp. at 683.

²⁵⁶ *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 428 (1960).

²⁵⁷ *Id.* (footnote omitted).

book merely advocated extending to survey evidence the well-established common-law principle allowing admission of evidence which did not fit with precision into an established hearsay exception, as long as necessity and trustworthiness were demonstrated.²⁵⁸ Decisional law embraced this suggestion and began to justify admission of survey evidence as long as a "need for the statement at trial" was shown, and the "circumstantial guaranty of trustworthiness surrounding the making of the statement" was demonstrated.²⁵⁹

Indeed, just three years after the *Handbook* was published, the oft-cited *Zippo* court observed that "well reasoned authority" justified admission of survey results under the following rationale:

[T]he determination that a statement is hearsay does not end the inquiry into admissibility; there must still be a further examination of the need for the statement at trial and the circumstantial guaranty of trustworthiness surrounding the making of the statement. . . . Necessity in this context requires a comparison of the probative value of the survey with the evidence, if any, which as a practical matter could be used if the survey were excluded. If the survey is more valuable, then necessity exists for the survey, i.e., it is the inability to get 'evidence of the same value' which makes the hearsay statement necessary.²⁶⁰

Codification in the mid-1970s of the Federal Rules of Evidence adopted the evidentiary avenues paved by common law for admission of survey evidence, primarily the present sense impressions exception of Rule 803(1),²⁶¹ the existing state of mind exception of Rule 803(3),²⁶² and the residual exception of Rule 803(24).²⁶³ While no specific showing of need is required for admission of statements which reflect a present sense impression or existing state of mind, the residual exception requires an express determination by a court that the hearsay statement offered is "more probative on the point for which it is offered than any other evidence which the pro-

²⁵⁸ The "necessity" requirement appears to have been originally drawn from 2 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1421-23 (1904). See *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515, 518 (2d Cir. 1913) (Judge Learned Hand writes for the court that "the requisites of an exception of the hearsay rule[] [are] necessity and circumstantial guaranty of trustworthiness."); *United States v. Aluminum Co. of America*, 35 F. Supp. 820, 823 (S.D.N.Y. 1940) ("when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information . . . is reliable").

²⁵⁹ See *Zippo*, 216 F. Supp. at 683.

²⁶⁰ *Id.* (footnotes omitted).

²⁶¹ See *supra* note 48 for text of Rule 803(1).

²⁶² See *supra* note 42 for text of Rule 803(3).

²⁶³ See *supra* note 49 for text of Rule 803(24).

ponent can procure through reasonable efforts.”²⁶⁴

Based on the language of the Rules, it is tempting, but unwise, to conclude that courts will only require a showing of necessity where Rule 803(24) provides the grounds for admissibility of survey data. The imprecise language used by the courts when discussing the admissibility of polling evidence prohibits the drawing of any such bright-line test.

In *Pittsburgh Press Club*, for example, the court listed the hearsay exceptions available to a proponent of hearsay evidence (i.e., present sense impression, existing state of mind, and residual hearsay), and then added: “In other words, the survey is admissible if it is material; if it is more probative on the issue than any other evidence; and if it has ‘circumstantial guarantees of trustworthiness’”²⁶⁵ Although the quoted language was possibly intended to refer solely to admissibility under the residual exception, the decision is hardly a model of clarity on this point. In any event, the survey of financial data in *Pittsburgh Press Club* would be admissible, if at all, only under the residual hearsay exception. It is therefore curious that the exhaustive guidance provided to the court below did not address whether the specific survey at issue in the appeal met the “more probative . . . than other evidence” criterion identified earlier in the Third Circuit’s opinion.²⁶⁶ This omission is especially puzzling since the task confronting the trial court on remand included ruling on the admissibility of additional survey evidence.²⁶⁷

The confusion surrounding the necessity requirement can largely be resolved by the court clearly citing the specific rule of evidence upon which it determines admissibility of the survey at issue, followed by literal interpretation of the cited rule.

F: Considering Different Standards for the Admission of Surveys which Measure Objective and Subjective Data

If, in fact, a showing of necessity is (or should be) required only where admission of survey evidence is grounded in the residual hearsay exception, another irony surfaces. If a survey attempts to record respondents’ beliefs or mental impressions—a measurement which is arguably more difficult to measure than objective facts—then the proponent has a strong argument for characterizing the

²⁶⁴ FED. R. EVID. 803(24)(B).

²⁶⁵ *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (1978).

²⁶⁶ See *id.* at 760-63.

²⁶⁷ *Id.* at 762 n.22.

results as present sense impressions or existing states of mind. Under these two hearsay exceptions, the Federal Rules of Evidence require no showing of necessity.²⁶⁸ If, however, the survey purports to record objective facts, such as the racial and economic status of individuals displaced by the freeway in the *Keith* case, responses which intuitively seem more reliable, then the proponent bears the higher burden of establishing necessity as a prerequisite to admissibility.

The 1981 *Manual* distinguishes between surveys which collect objective data, such as color, number, and size, and polls measuring subjective data, "such as beliefs, opinions, or motivations of the interviewees."²⁶⁹ According to the 1981 *Manual*, the former, "if properly conducted, possess sufficient elements of trustworthiness to be admitted;"²⁷⁰ but with the latter type of data, the *Manual* cautions, trustworthiness may be lessened. Thus, "the showing of necessity in such a case should be stronger and the question of trustworthiness should be more carefully scrutinized."²⁷¹ In general, decisional law neither makes this distinction nor imposes different levels of necessity, but rather scrutinizes surveys recording objective and subjective data in the same manner.²⁷²

The survey at issue in *Pittsburgh Press Club*, for instance, purported to collect objective data on the use of the club's facilities by its members. The survey consisted of eight questions, including: "Did you, as a member of the Press Club host a party, banquet or meeting?" and, "Was the party, banquet or meeting a social event for your personal guests?" Respondents were asked to check "yes" or "no" to each inquiry without providing additional comments. Thus, the club members were asked to provide data of a factual nature which was based on external events capable of measurement on an objective scale. It is therefore interesting to observe that the standards under which the Third Circuit critiqued the survey have

²⁶⁸ See *supra* text accompanying notes 261-63, discussing FED. R. EVID. 803(1), (3) & (24).

²⁶⁹ 1981 MANUAL, *supra* note 105, at 115. The 1985 MANUAL does not explicitly address the objective/subjective distinction, but states that polls which question individuals' observations, attitudes, beliefs, and motivations, i.e., subjective measurements, "require special attention." 1985 MANUAL, *supra* note 48, § 21.484, at 89.

²⁷⁰ 1981 MANUAL, *supra* note 105, at 115.

²⁷¹ *Id.* at 116.

²⁷² The lack of sensitivity displayed by jurists is evidenced by the nomenclature used in their opinions; that is, the word "survey," which could easily be designated as a term limited to measurement of objective data, is used synonymously with "opinion poll," which suggests a collection of subjective data.

been widely adopted in cases involving subjective responses to survey questions.²⁷³

The *Manual*'s recommendation that a distinction be recognized between surveys recording objective and subjective data finds some support from social scientists. As two experts on survey question design explain, questionnaires are traditionally relegated to one of two categories: those which record behavior or facts (objective), and those which seek to capture psychological states or attitudes (subjective).²⁷⁴ The first group includes characteristics of things, events, and people which have already occurred and which are, at least in theory, capable of external verification.²⁷⁵ In contrast, responses to subjective questions "are not verifiable even in principle, since states or attitudes exist only in the minds of the individuals and are directly accessible, if at all, only to the individuals concerned."²⁷⁶

A call for a different, lower level of scrutiny of objective data presupposes that the line between objective and subjective data is easily drawn. However, social scientists caution that this is not always the case.²⁷⁷ Many questions regarded as "factual," including employment status, marital status, and ethnic and racial identification, have a subjective component.²⁷⁸ Furthermore, despite the theoretical possibility of validating external events, modern survey techniques do not include independent checking by the interviewer to confirm the objective information provided by respondents.²⁷⁹ Moreover, the same factors which present potential for error in recording subjective data, such as memory, motivation, communication, and knowledge, do not evaporate when the information sought is objective in nature.²⁸⁰

²⁷³ See, e.g., *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513 (10th Cir. 1987) (survey offered to show confusion in minds of consumers regarding origin of defendant's reel); *United States v. Local 560*, 780 F.2d 267 (3d Cir. 1985) (membership's perception of union management recorded in survey); *Saliba v. State*, 475 N.E.2d 1181 (Ind. App. 1985) (poll proffered to establish community standards against which allegedly obscene material should be evaluated).

²⁷⁴ S. SUDMAN & N. BRADBURN, *supra* note 61, at 17.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See 1 SURVEYING SUBJECTIVE PHENOMENA, *supra* note 6, at 10-14.

²⁷⁸ H. SCHUMAN & S. PRESSER, *supra* note 9, at 1.

²⁷⁹ For instance, a poll designed to determine the number of people who jog and the frequency of their running does not require the interviewer to surreptitiously follow respondents for a week or so to verify their responses.

²⁸⁰ That is, material may be forgotten, or the time at which something happened may be remembered incorrectly; respondents may be motivated not to tell the truth because of fear of consequences or because they want to present themselves in a favorable light; respondents may not understand what they are be-

In addition to the difficulty a court will encounter in attempting to distinguish between "objective" and "subjective" survey data, and the recognition that, even if distinguishable, both types are susceptible to similar infirmities, a further problem arises in divining different levels of scrutiny for polling data based on a categorization of the results. There is no litmus test against which the trustworthiness or inherent credibility of any evidence, including survey data, can be measured.

There is no way to delineate, at least not with any acceptable degree of precision, the variation in degree of review which a court should apply to objective and subjective survey results. Certainly, the suggestion in the 1985 *Manual* that subjective data "be more carefully scrutinized" does not offer a workable standard. In short, the existing standards, which focus upon each step of the survey—formation, execution, and analysis of results—apply comfortably to both objective and survey data. Thus, there is no need for a court to devise different yardsticks against which polls recording objective and subjective data should be measured.

III

SUGGESTIONS FOR A HARMONIZED APPROACH

A. *Case Law: A New Attitude*

Making the observation that courts are still struggling with the evidentiary rules governing survey evidence does little to aid the cause. So wherein lies the solution? Two possibilities are immediately apparent: (1) judiciary adoption of a hybrid approach to standards set forth in the *Manual for Complex Litigation* and the *Pittsburgh Press Club* decision, paired with a re-examination of the courts' role vis-a-vis the expert when Rule 703 is called into play; and (2) construction and adoption of a new rule of evidence which reconciles the points of conflict discussed in this Article (and perhaps others not identified herein), and which explains, either in the text of the rule or the advisory committee notes accompanying the rule, the relationship between the new rule and existing rules such as Rule 703.

The first, and perhaps easier, solution begins with an explicit recognition by the courts and litigants that survey evidence is neither a

ing asked and answer the question in terms of their own understanding; and finally, they may just not know the answer to the question and answer it without indicating their lack of knowledge.

S. SUDMAN & N. BRADBURN, *supra* note 61, at 19.

superior type of evidence deserving of admission in every case nor an inherently inferior class of evidence which the courts are free to ignore. Second, the judiciary should re-examine the standards articulated in the 1960 *Handbook*, the subsequent *Manuals*, and decisions such as *Zippo* and *Pittsburgh Press Club*, in light of advances in the technology of polling methodology, the well-established utility of polling evidence in certain substantive areas of law, and potential uses in other areas, in order to reaffirm the existing standards which make sense and to reject those which do not.

A revaluation by the courts will result in standards wherein: (1) attorney involvement will not be inherently suspect; (2) litigants will be required to divulge survey results to opposing counsel early in the discovery phase, but will not be required to disclose a mere intent to conduct a survey; (3) no distinction will be made for surveys which purport to measure objective as compared to subjective data; (4) litigants will be required to defend each step of the survey data as comporting to accepted survey methodology; (5) courts will not place an unduly heavy burden of demonstrating necessity (i.e., that the survey data is the most probative evidence on point) upon a litigant advocating a novel use of polling evidence; and (6) rubber-stamping of admittedly flawed survey evidence under the "weight versus admissibility" rationale will be eliminated, resulting in exclusion of noncredible survey results. Moreover, following careful reflection, courts may cease to (improperly) cite Rule 703 as an alternative ground for admission of survey results as substantive evidence, but will allow appropriate deference to an expert whose opinion is based in part on survey evidence without sending the survey data through the hearsay threshing machine.

B. Legislative Solution: A New Rule of Evidence

An alternative method for resolving the issues discussed herein, and perhaps others not directly addressed, is the drafting and adoption of a new rule of evidence which codifies, revises, and clarifies current evidentiary standards governing survey evidence. A proposed rule, drafted to ameliorate the concerns raised throughout this Article, is set forth immediately below.²⁸¹

²⁸¹ The author does not purport to be a pioneer in proposing such a rule. Indeed, a suggestion was made shortly after the rules were enacted that such an amendment to the Federal Rules of Evidence was warranted. See Note, *Opinion Polls*, *supra* note 1, at 1132-33. The author also does not pretend to present the definitive draft of an appropriate rule; rather, this draft is intended primarily as a springboard for discussion as to the

Proposed Federal Rule of Evidence 807: Admission of Public Opinion or Survey Evidence:

(1) If a poll or survey constitutes a minor amount (i.e., less than fifty percent) of the information, material, or data upon which an expert relies in forming an opinion to be offered at trial and the poll or survey is not being offered as substantive evidence, then admissibility of the expert's opinion is permitted as provided pursuant to Rule 703, without the necessity for the court to scrutinize the poll or survey for independent guarantees of trustworthiness. Upon timely request from counsel, the court shall instruct the jury that the survey results do not constitute substantive evidence in the case.

(2) Where an expert bases his opinion solely or substantially (i.e., more than fifty percent) upon a poll or survey, or where a party seeks admission of poll or survey results as substantive evidence without the testimony of an expert witness, the court shall scrutinize the methodology employed which produced the poll or survey results for circumstantial guarantees of trustworthiness. The criteria against which the methodology is judged shall include, but need not be limited to, the following factors:

(a) The design and execution of the poll or survey, as well as any analysis of the results of the poll or survey, were accomplished through significant input from a person or persons qualified as an expert in the field of polling or surveying;

(b) A proper universe of respondents was identified;

(c) A statistically significant number of respondents within the relevant universe were polled;

(d) Individual questions were drafted to avoid leading the respondents or producing otherwise biased responses;

(e) The order in which questions were asked was designed to avoid leading the respondents or producing otherwise biased responses;

(f) The medium selected for conducting the interviews (telephone, mail solicitation, face-to-face interviews, or any combination thereof) was appropriate for the type of information sought;

(g) Persons conducting the interview were trained in the art of interviewing and were unaware of the purposes for which the information was being gathered;

(h) Respondents were not aware of the purposes for which their responses were being solicited;

(i) The questionnaire and individual questions were pretested to determine potential sources of confusion, bias, or other error which could occur during the interviewing process, and necessary corrections made;

(j) Field work by interviewers was closely monitored by

need for such a rule and, in the event such a need is identified, to provide a starting point for drafting purposes.

those responsible for the design and implementation of the poll or survey;

(k) Collection and processing of the data were done in accordance with accepted mathematical and/or statistical procedures containing sufficient safeguards to minimize the potential for error; and

(l) Conclusions drawn from the poll or survey were in fact supported by the poll or survey results.

(3) In the event that the poll or survey satisfies some, but not all, of the indicia of trustworthiness set forth in subsection (2), the trial court must make an express determination of whether the flaws are of such magnitude as to render the survey or poll results unworthy of any consideration, and thus subject to exclusion from evidence, or whether the flaws are of a nature and magnitude that the poll or survey results should be admitted into evidence, with the deficiencies taken into account by the trier of fact in determining the weight to be accorded the evidence.

(4) Involvement in the design or execution of a poll or survey by the attorney representing the proponent of the survey evidence shall not constitute sufficient reason for excluding such evidence, unless opposing counsel can demonstrate that said involvement directly biased or otherwise improperly influenced the results of the survey or poll at issue in favor of the proponent.

(5) In a proper case, the court may appoint an expert to conduct a poll or survey pursuant to Rule 706.

(6) A party who intends to conduct a poll or survey for use in litigation need not disclose this intent prior to execution, but must disclose to opposing counsel at the earliest time practicable the results of any poll or survey,

(a) Upon which the party's expert will base an opinion at trial, or

(b) The party will seek to introduce as substantive evidence at trial. Failure to disclose the results in a timely fashion shall be grounds, within the court's discretion, for exclusion of the poll or survey results.

(7) No showing is required by the proponent of poll or survey results that the evidence is more probative upon a point of fact or law than other available evidence. This provision in no way supersedes or modifies other requirements for admissibility, such as the prohibition in Rule 402 against the admission of irrelevant evidence, or the discretion accorded the trial court under Rule 403 to exclude evidence under circumstances described in that rule.

CONCLUSION

The potential use of polling and survey data for both the social science and legal disciplines is virtually unlimited. Properly crafted questions, posed to a relevant group of respondents, can greatly en-

rich the breadth and depth of our understanding of human thought processes and our perception of the world around us. Whether the information harvested is limited in application to the degree of consumer confusion in a trademark infringement case, or offers a measure of public sentiment directly impacting the enactment and interpretation of laws governing life and death issues such as capital punishment, public opinion polls and surveys will continue to reflect, and to a certain extent redefine, the legal and social environment in which we act and interact. Accordingly, this type of evidence should not be subjected to the conflicting and confusing standards by which its admissibility and weight are evaluated in courtrooms today.