STATISTICS AND SURVEYS AS LEGAL EVIDENCE

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Although sample surveys have been received as legal evidence as early as 1940[1] it was not until June 1959 that the findings of a survey were given serious consideration in an important legal decision. The breakthrough occurred in a Federal Trade Commission hearing involving nine ice cream companies when Examiner John Lewis [2] gave considerable weight to a sample survey in rendering his decision. Then, shortly after this, on October 2, 1959 in the U. S. District Court, Judge Walter J. La Buy[3] gave material weight to the findings of a sample survey in an important decision regarding the divestiture of du Pont holdings of General Motors stock by du Pont. More recently there was another Federal Trade Commission hearing involving The Borden Company[4] in which a sample survey was received as evidence.

National Analysts conducted the three surveys referred to above. During these hearings I have found myself pressured more and more by the Federal counsel toward the unprotected disclosure of the names of the respondents. This was done on the grounds that the names were needed to check the reliability of the survey data. But, the pressure to disclose the names is not applied until the survey is about to be presented as evidence. This turns out to be a legal trap which leaves only two clear-cut courses of action that can be taken - both leading to undesirable results. One course of action that can be taken is to disclose the names for unrestricted use. This leaves open the possibility of using the "Public Witness" procedure of subpoenaing the respondent against his will and forcing him to testify and be cross examined about the information which he voluntarily gave to the interviewers. The American people have willingly given information about themselves and their businesses to statistics-gathering agencies because the information has by-and-large been held in confidence. A violation of the principle of confidentiality and anonymity would undermine much of the statistics in this country, whether it is being collected by government agencies, universities or businesses. All a person has to do is to turn to other countries where these principles have been violated to see how difficult, if not impossible, it is to obtain accurate statistics of the kinds obtained in this country. More on this subject later.

The other course of action is to withdraw the survey from evidence. If this is done the question arises as to whether the research company can collect the money due it for conducting the survey. The research company might not only be subjected to this loss but might also be held liable for all other costs associated with this action on their part. If the research company does not take the loss then the respondent to the case must shoulder it. The financial loss to one or the other party is not an important matter in itself. It is an important matter if the courts are deprived of the kinds of information that is basic to the resolution of complex litigated matters that can only be obtained accurately by using scientific survey methods to obtain it.

Whenever we have conducted a sample survey to be used as legal evidence we have agreed to cooperate in the checking for reliability in the following way:-

(a) To make available to the counsel the names of each and every staff person who had anything to do with any phase of the survey, including all of the interviewers who participated in the survey, so that they could be questioned on any aspect of the survey. If necessary, they could be placed on the stand and cross examined.

(b) Every letter, memorandum, report or writing of any kind accumulated in the files in connection with the design and the carrying out of the survey, copies of all the interview sheets, containing substantially the verbatim replies of the interview (with the names of the survey respondents removed) would be

1/ United States v. Aluminum Company of America, 35 F. Supp.820, 823-24-S.D. N.Y. 1940

2/ F.T.C. Hearings - Docket Nos. 6172 through 6179 and 6425, involving nine ice cream companies

3/ U.S. District Court for the Northern District of Illinois, Eastern Division, Civil Action No.49C-1071, U.S. vs. du Pont, General Motors Christiana Realty Company, and Delaware Realty Corporation.

4/ F.T.C. Hearings - Docket No. 7129, involving The Borden Company.

made available to counsel with the understanding it would be held in camera.

In the dairy manufacturers and the du Pont cases, the surveys were offered and received in evidence under the above agreement and considerable weight was placed on them in the court's decision, without any pursuit of individual survey respondents. The respondents' names were not made public; counsel for both parties agreed that, before offering any of the survey papers in evidence the names would be removed therefrom. However, in the Borden case the government counsel insisted that they be given the names of all of the respondents for their unrestricted use. We realized that the government counsel wanted to satisfy themselves that the interviews were actually conducted and in exactly the manner described in our instructions. With this in mind we did agree to provide the government counsel with a limited number of respondents' names for restricted use. How this was to be done was spelled out in a written memorandum. (See Pages 6 through 11).

Sample surveys provide the courts the opportunity to utilize the scientific principles and procedures developed by the statisticians, the economists, and those working in the fields dealing with human behavior in order to obtain some of the kinds of information that are basic to sound legal decisions. It is only possible through the use of these principles and procedures that some of the kinds of information needed can be obtained accurately enough that the legal decision could confidentially be based upon them. Data collected for scientific investigation also has to be assessed for validity and reliability before it is accepted as scientific proof and methods have been developed for doing this. These methods must be applied in assessing the reliability of sample surveys submitted as court evidence. Since the surveys are based upon samples, the reliability of the sample estimates must be assessed from the viewpoint of sampling variation and biases and any statement of accuracy must be expressed as probabilities derived from sample frequency distributions. The mere fact that a respondent report is shown to be in error does not in itself prove that the sample estimates are useless. Errors of this type may, for example, in the aggregate be held within tolerance limits through a quality control system. If these scientific concepts are used to check the reliability it would necessitate a considerably different approach to the checking procedures than are sometimes used by the legal profession. Dr. Bayton will address his remarks to this point. It is up to the scientist to point out to the courts what these concepts are and how they can be applied. Who has more at stake in this matter and who is better equipped to do this than the American Statistical Association? The legal profession and the sampling organizations are looking to them for guidance.

I am presenting to you as a case in point the procedure followed in the Borden case. It is possible that we may have gone too far in yielding to counsel demands. It must be emphasized that there was and is a perfectly legitimate aspect to these demands. The court and the parties to a legal case should examine critically the question of whether survey evidence is what it purports to be and the question of limitations and inaccuracies of the data presented. It seems to me, however, that the criteria and procedures for such an examination should be primarily statistical rather than legal. It is high time that the ASA and other responsible professional organizations (e.g., the American Marketing Association) explore these implications thoroughly and then take a definite position and provide leadership in securing legal acceptance of this position. The individual research organization cannot by itself sustain a sound position. This requires the weight of the profession and, to date, the statistical profession as such has not discharged its responsibility for setting and supporting appropriate standards of professional behavior as they relate to the disclosure of information from survey respondents. The following quotations are taken verbatim from the memorandum sent to the Federal Trade Commission in the Borden case:

(1) There will be (a) a series of ten interviews conducted by you alone; (b) a series of twenty interviews conducted jointly by one of you and one of Borden's counsel; and (c) any and all additional joint interviews which you may desire (subject to our option, if the aggregate number of joint interviews should exceed 100, to content before the Hearing Examiner, on the basis of the circumstances then obtaining, that you are not entitled to pursue the matter further; but without any present agreement on your part that the number shall be anything less than the entire, all of the respondents).

(2) Selection of respondents to be interviewed will be entirely in your discretion. Neither National Analysts nor Borden nor anyone on their behalf will contact any such respondent in any way in advance of the interview. By way of further assurance as to that, you may if you wish inform us, in advance of each interviewing trip, only as to the location where you are to be met, and wait until the interviewing trip is underway before designating (by segment number and interview number) any respondent who is to be approached for interview.

(3) You (along with your representative, in the case of joint interviews) will be accompanied to the respondent's door by a male interviewer from National Analysts. In no instance will this be the interviewer who saw that particular respondent during the National Analysts' study.

(4) After ascertaining that the person at the door answers to the same name as shown for that address in National Analysts' study records, the National Analysts interviewer will open the conversation as follows:

"Good_____. I am_____ from National Analysts, a market research firm in Philadelphia. You will recall that some months ago one of our people called on you in connection with a study we were making on evaporated milk. Today this (these) gentlemen would like to ask you some questions about that. This is Mr._____ who is a lawyer with the Federal Trade Commission; (and this is Mr._____ _____, who is one of our client's lawyers.")

(5) After the respondent's willingness to be interviewed has been indicated expressly or by fair implication, the National Analysts' interviewer will excuse himself and go back to the car, and the interview will proceed.

In the event that any respondent should state an unwillingness to be interviewed, nothing further will be asked; and that respondent will, of course, not be counted as among the 10 or 20 or 100, as the case may be, mentioned in paragraph 1 above.

(6) In each interview, whether conducted by you alone or jointly with one of us, you will be free to conduct your questioning entirely as you see fit, without restriction or interruption on our part. After you have completed your questioning in a joint interview, our representative will be entitled to ask such additional questions as he may wish.

(7) The 10 interviews to be conducted by you alone will be deemed of a purely exploratory nature, and no effort will be made to adduce in any form any evidence in this case relating to those particular interviews.

(8) As to each joint interview, you and our representative will endeavor to stipulate as to all matters which either of us may wish to have covered. Such stipulations may be offered in evidence, in whole or in part, as either party may see fit in usual course, subject to the other party's right to object in the same manner as if the interviewed respondent were personally present on the stand.

(9) You will in no event, by any means, whether formal or informal, and regardless of whether the procedures set out in this letter are pursued to a conclusion or abandoned, further contact or pursue any respondent whose name is made known to you in accordance with the foregoing procedures. This will apply, for example, in respect to any respondent who may be unwilling to be interviewed, and it will apply without regard to anything that may happen or fail to happen during or after any interview.

(10) If at any point during the conduct of the above-mentioned series of interviews you should for any reason (whether because of what you

> might deem to be an excessive number of refusals to be interviewed, or otherwise) conclude that such procedures were inadequate from your standpoint, you would be entirely free to abandon those procedures and to proceed before the Hearing Examiner in whatever way you might think fit, on the basis of the circumstances then obtaining.

The government counsel in the Borden case refused to agree to the above proposal, still insisting, upon unrestricted use of names. So it was necessary to ask for a ruling on it by the examiner and I submitted the following affidavit in support of our position.

"Throughout my association with National Analysts, which has been continuous since 1948, it has carefully followed a policy of not knowingly or willingly disclosing to persons outside its organization the identity of persons interviewed in the conduct of studies and surveys. This policy conforms with the non-disclosure policies and practices of all other reputable survey research organizations and is supported and policed by our industry societies and associations.

This fundamental policy in not disclosing the identity of respondents extends throughout the Company's operations. The psychologists, who constitute a substantial part of the professional staffs of our own and other survey research organizations, must operate within the following principle, set out in the ethical standards of psychologists, adopted by the Council of Representatives of The American Psychological Association (Principle 4.32-1):

> The identity of research subjects must not be revealed without explicit permission. If data are published without permission for identification, the psychologist is responsible for adequately disguising their source.

This principle is recognized and practiced by our other staff members in devising and directing scientific sample surveys. Our interviewers are indoctrinated and trained to understand the importance of obtaining and maintaining the confidence of respondents.

Accordingly, our interviewers explicitly or implicitly convey to respondents the assurance that their response will be kept anonymous. While the extent to which specific and explicit assurances are made may vary from survey to survey, depending upon the nature of the information being sought, this principle of confidentiality and anonymity is basic to all of our work. By the use of the code systems and the simple expedient of cutting or tearing off name and address information from response sheets, not even the National Analysts' client, or in this case its legal counsel, can identify respondents.

The following passage from National Analysts' "Manual for Interviewers" is representative of the emphasis given the non-disclosure policy.

> The willingness of the average citizen to give information must at all times be protected. Researchers, including interviewers, must always be considerate and honest in their dealings with the public, or else the usefulness of the survey as a tool in economic and social research will soon be at an end. No person should take part in a survey without a sense of responsibility to the public from which the survey sample is drawn. Any betrayal of confidence or unscrupulous use of "sample individuals," remarks, or of the final results, on the part of any person connected with a survey organization, is a breach of responsibilities. That survey organization cannot long endure. In the final analysis, the continued use of marketing research as a useful social tool depends upon the spontaneous cooperation of our respondents, and as researchers we must never lose sight of that fact.

As to scientific work for legal purposes, it seems clear to me that a rule that organizations who conduct such work may be subjected to court-ordered unrestricted disclosure of names of respondents, with the ensuing unprotected intrusion upon them, would sound the death knell for scientific legal survey work. If there were such a rule, no reputable scientific research firm could in good conscience undertake a legal survey of the evaporated milk type without first dis-

closing to its respondents the possible future involuntary involvement demanded here. Such a disclosure would greatly reduce the response rate and thus introduce a selectivity bias which would render these scientific research surveys unreliable.

Of immediate concern to me as chief executive of National Analysts is the grave impact which an unrestricted disclosure of the identity of respondents in the Borden survey would have on our organization. To begin with, respondents pursued for involuntary reinterviews and further unwanted questioning after a promise of anonymity, expressed or implied, would be rightfully indignant and even incensed that National Analysts, in revealing their identity, subjected them to inconvenience, annoyance and discomfort. Such respondents are part of the public whose continued confidence National Analysts must have. The promise of non-disclosure, by policy and practice, to the National Analysts' interviewers who took part in this survey would have been broken. It follows that the disillusionment of our staff of interviewers with National Analysts, occasioned by any such disclosure, would greatly impair their effectiveness in future surveys. They could hardly be expected to continue to strive conscientiously to create the confidential interview relationships necessary for unbiased responses. Certainly, the over-all quality of their work, in which we have invested so much, would be reduced and I have great fear that many would refuse to remain with us.

Concern of several of our professional men is already evident. Two of our key staff members have expressed their unreserved disapproval of the unrestricted disclosure of names of respondents in the Borden survey, and have advised me that they would consider resigning if National Analysts discloses the names of respondents to persons outside our organization except under the circumstances and conditions expressed below.

We have made every effort to work out a program which would enable us to keep faith with our survey respondents and our employees and yet permit government counsel to go into the field and check into our conduct of this survey.

The essential ingredients of this program, from National Analysts' standpoint, are the voluntary participation by survey respondents in reinterviews or in testimony or both, and the agreement that any persons refusing to be reinterviewed (or, having been reinterviewed, refusing to testify) would not be contacted again.

It is the uncoerced consent to reinterview and the uncoerced consent to testify which I feel relieves National Analysts of its burden of protecting the anonymity of respondents."

In this case the examiner agreed to our position and ruled against disclosure of respondents' names without unrestricted use. Examiner Abner E. Lipscomb stated [4] "We believe there is considerable virtue in the insistence of respondent's counsel upon keeping confidential the names of the persons interviewed." This does set a precedent but does not necessarily prevent the next examiner or judge ruling to the contrary.

In summary, I have placed before the Association an issue upon which they should take a stand. In taking a stand the Association must decide between (1) should the respondent's name in sample surveys, used in legal cases, be kept strictly confidential? (2) Should the names be disclosed without restricted use? (3) Should names be disclosed with the consent of the respondent and with a restriction placed upon their use? If so, what are the principles and procedures to be followed? In this decision consideration should be given to (a) the use of scientific principles and procedures for checking the reliability and validity of the sample surveys' findings, (b) to the principle of confidentiality and anonymity and to the consequences of any violation of these principles, and (c) to the framework of legal principles and procedures within which the legal decision must be made. This is an important issue and is one in which the American Statistical Association and its members have a great deal at stake in the stand they take. If a position is taken, I am sure it will, in the future, weigh heavily upon the Court's decision as to how far the research organization should go in the disclosure of respondents' names. This is a pressing issue and I trust that the Association will, in the near future, state its position.