



Podcast Transcript

AD Nauseam – Survey Says: The Consumer Perception Study Pt. 2

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Rubenking: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an

emphasis on the FTC and the NAD. I'm Randal Rubenking, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kauffman, two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel are back with special guest Randy Shaheen, a fellow partner at BakerHostetler and the Advertising team's survey guru, to discuss consumer perception surveys, a tool that businesses use to gauge how consumers view and interpret advertisements in Part 2 of their series, Survey Says: The Consumer Perception Study. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Randy.

Kaufman: And thank you once again for joining us here at AD Nauseam. Our crack market researchers are telling us that you podcast junkies just love a theme, a recurring story, or some kind of serial. So here we are. We've got Part 2 of our series on consumer perception surveys and in order to do that justice, we needed to bring in the big guns, our colleague, general brainiac, the ever-delightful Randy Shaheen.

Mudge: Yes, indeed. Daniel, Randy taught me everything I know about designing, conducting, and defending surveys. He, in his very self-deprecating, joking way, says he forgot all of it and I'm now teaching it back to him. But again, that is just our Professor Shaheen.

Now Randy, Daniel and I talked a lot about our favorite game shows on the first episode of this series and, well, we like to stay away from controversies on this podcast, keep things family-friendly. Wanted to ask you, do you have an opinion in the game show world about who should have replaced Alex Trebek on Jeopardy? Daniel, you don't have to answer, because I know you love Doctor Oz and I am confident you were rooting for him. I personally, I'm a huge Ken Jennings fan, I think he is a great host. But I also think Anderson Cooper absolutely would have killed it.

Shaheen: So definitely LeVar Burton. He has to wear the cool glasses that he wore on Next Generation to help him.

Mudge: I knew that was coming.

Kaufman: I have to say on Anderson Cooper, I loved when he hosted a reality show, The Mole. I did watch that for a couple of years and really loved it. But I know, look, there is lots of gamesmanship in surveys. Want to know, what are folks' favorite board game? I am actually old-school and reliable here, and give me a Monopoly game any day.

Mudge: Monopoly, regular old-school monopoly.

Kaufman: I'll do a special one. I've got The Simpsons monopoly board at home.

Mudge: I'm going to give you the tip for people like me with the ADHD that Monopoly goes on forever, Monopoly Empire is a version that is quicker and is super fun, and it features a lot of fabulous brands. Randy, what about you?

Shaheen: So another game that takes too long to play, the game Risk.

Kaufman: Haven't played that in years.

Mudge: I don't think I've ever played that. But that is for you strategists, you big minds.

Alright, let's do a reminder. For those who might have missed our kickoff episode with Series 1, and please go back and listen to it, watch it again. We talked about when and why an advertiser might want to conduct a litigation quality survey versus a focus group or marketing survey, including for use at the FTC at the NAD or in a Landham Act case. And we talked about some of the research in consumer perception that the FTC has done over the years and again, how those kinds of surveys do differ from pure marketing surveys.

Now, today, we're going to geek out a little bit. We're going to focus on how to design a survey when you want to test those messages about consumer takeaways from an ad. And of course, that is either to show that they hear an implied message that can't be supported, if you're a plaintiff, or that consumers understand how you intended it to be understood, if you're the advertiser. But Randy, let's start by talking about who you might want to survey when you do a consumer perception survey.

Shaheen: Sure. So, the idea is to survey the universe of people to whom the ad is targeted specifically, survey people who've either recently purchased or will soon purchase a product in the category. Typically, it is the last three to six months or going forward, the next three to six months. You want to survey people who have a stake in the product and the questions. I like to think of it as similar to the concept of standing in law, right? People bringing lawsuits who have a stake in the outcome, right? On the other hand, you also don't want to survey people who know too much, right? So, we typically exclude people who work for that product category, who work in the industry because sometimes, knowing too much, you overthink it.

Kaufman: This is really a fine balance because you can be criticized if you survey too broad a universe, including people who are not interested in the category or likely to buy the product or if you survey too narrow a universe, say only including current purchasers of a product and not likely future purchasers. When we think about numbers, though, how many people should be surveyed?

Shaheen: So, I wish there was a magic number exactly.

Kaufman: There is never a magic number, Randy.

Shaheen: Well, I know. I would say, typically you're looking at three to 400 people. If it is a really narrow product category, it is a product that a lot of people use, it is often hard to recruit that many and you probably don't need that many. So, it could get

smaller. You need to think about things like margin of error, if the survey population is too small and the difference is too small, that could be a problem. You want to hopefully be able to say your results are statistically significant, and that is where you end up normally needing a few hundred. You also want to make sure the sample is representative of your universe to whom the ad is targeted and people who use the product or product category, right?

Take peanut butter for example. They have broad appeal. There is not a segment of the market that you target peanut butter to. I guess you avoid people who have peanut allergies but beyond that, it is a pretty broad universe. And then you try to balance according to census data as far as things like gender, age, ethnicity, area of the country, et cetera. But sometimes you've got a product that doesn't appeal so broadly to the general population that might skew, for example, younger or older. So, for example, if you were testing an ad for a gaming product, the audience for that product presumably is going to skew a lot younger than the general audience. And so, you need to adjust who you go out and survey. In the old days, we used to call these mall intercept studies because you would literally intercept people, stop people in the mall, and ask them questions. But now we've long since gotten past that. Most surveys are done online, and that makes it often a lot easier to recruit and identify people.

Kaufman: So, in addition to selecting the right universe, you need to use care in what you tell participants about the survey. You don't want to be accused of introducing bias by telling participants up front exactly what they will be doing.

Mudge: Yeah, this really trips people up because in marketing surveys it is common to set the stage for people and tell them you're going to be asked about a product that cures cancer or whatnot. Describing the product and the product benefits up front can be said to poison the well and bias answers when you're trying to tease out how consumers understand ads versus understanding a likely purchase intention.

Kaufman: So, after you screen out for the right people to answer questions about an ad, you show the ad to the participant. What are some of the issues there that can trip people up?

Shaheen: I think the most common one is that if you're testing a print ad or a label and there is always the question of how long you let a participant look at the ad. If you leave it in front of them when you're asking them the questions so they can go back and look at it, then it risks becoming a reading test. On the other hand, if you only let them look at it once and then ask the questions, it becomes a memory test.

But as between those two alternatives, I think by and large, we tend to default to not making it a reading test. It is just not natural that somebody asks you a question about a product and then you're able, on the shelf, to look at it and see the answer. With video ads, it tends to be easier. I think it is pretty much accepted that you let the participants watch the ad twice and then they move on to answering the questions.

- Mudge: Yeah, but I think ultimately what you're trying to do, and these are all choices, right, whenever you're designing a survey, you're making choices all along the way. You're trying to replicate the live viewing experience as much as possible, whether you're testing a video ad, whether you're testing a billboard, whether you're testing a label. So, really thinking through how actual consumers consume the ad and trying to mimic that.
- Shaheen: And that comes up a lot if you think about a package on a grocery shelf. You see the front of the package. You have the ability to pick it up, to turn it, to look at the back, to look at the sides. So, often in a survey we give people the option to do that, but some people might not ever do it. They just look at the front and throw it in the shopping cart. So, you give people the option to do more, but don't force them to do more.
- Mudge: Now let's talk about designing the questions and the process of what is called filtering or starting with open-ended questions and moving increasingly to more specific questions.
- Shaheen: Sure. Generally, the first question that entity likes you to ask or questions sometimes are, what is the main message of the ad and then a further prompt. Are there any other messages that the ad conveys? This gives the participants the opportunity to tell you in their own words, without any prompting, what they took away from the advertising. We talk about those as being open-ended questions. Sometimes the answers are helpful. Oftentimes I find they're not because people tend to just play back the literal claims in the ad. The ad told me to buy Product X where they said Product X does Y, but it is a very standard survey to at least start there.
- Kaufman: In addition, suppose there is an ad for beer, talks about crisp taste and low calories. You don't want people answering questions about what was communicated regarding taste, if they didn't pick up on that message in the first place. Otherwise, they're probably just guessing. So surveys typically use filter questions to inquire whether an advertisement communicates something about a topic and then asks follow up questions only to those who answer in their affirmative. Eventually, the survey may proceed to directed close ended questions that focus respondents on a specific topic. It is also important to remember that even though some people may get filtered out and not asked the follow up questions, they still get counted when you are calculating what percentage of consumers were misled but they get counted as not misled because they didn't pick up on the general topic message that was at issue.
- Mudge: We got to talk about one of the hardest issues in surveys and that is the creation of a control. Randy, what is this and why is it need?
- Shaheen: So exactly, I have my law school class design and conduct a survey as one of their assignments, and I feel like the control or creating the control is always a thing they stumble over most. So, a well-designed test control study will create a survey to determine whether any false beliefs stem from the ad versus other factors, things we call preexisting beliefs. For example, people might think that

organic products are healthier or better for you just because as opposed to anything that the advertiser actually communicated. So, you want to try to filter out that kind of noise and just survey the ad itself. So, you create an alternate version of the ad, a control version of the ad with the allegedly misleading portion, fixed.

Fixed typically doesn't mean you just take it out, it just means clarifying the ad to remove any doubt that it might be conveying something misleading. For example, if there is a concern that an ad might be implying government approval of a claim, you could add a disclaimer to the control ad that states the claim has not been approved. Once you do that, you test the original ad, and you test your control ad, subtract any deception found in the control ad from the deception in the actual ad, and this leaves you with the percentage of net deception which is what you would use to decide if the ad is misleading.

Kaufman: What if there are situations where you really just can't quite fix the ad? Are there other controls that might be acceptable?

Shaheen: Yes, and it does happen once in a while. Sometimes when you can't do a control ad, TV ad, or commercial, or video ad where the whole message is potentially misleading, you'd have to just start over, NAD has accepted that you can instead default to a control question. This at least filters out people who are just guessing. In that case, you don't have two separate ads. You'd have one ad and one survey, and if you ask people a question about something that could plausibly appear in the ad but does not.

For example, if you're surveying an ad that arguably implies a comparative taste advantage but says nothing about the comparative price of the two products, you could include a control question that asked people whether the ad communicated any message regarding the price of the product. Anybody who says yes gets screened out as a guesser because the ad clearly didn't say that. Now NAD very much wants to see surveys using a control ad. So, if you're going to try a control question, you need to make sure you can really justify an argument that there is no way to plausibly fix or create a control ad from what you're trying to test.

Mudge: Randy, either way, whether you have a control ad or whether you have a control question, what is the amount of net deception that you need to find? And I know this differs a little bit depending on the forum.

Shaheen: Yes, exactly. I like to say if you're 10% or under, you're safe, and 20% or above, you're not safe, and everywhere between 10 and 20, is the no man's land. Certainly, the FTC, the courts would say low teens might be fine sometimes. NAD, I think I've seen go as low as 18. So, there is this no man's land between 10 and 20.

Mudge: Right, but you really want above 20%, certainly at NAD?

Shaheen: Yeah, if you're trying to argue something is deceptive to really be confident about that, assuming your survey is reliable, you'd want at least 20.

Mudge: And Randy, there is another kind of consumer perception survey that we should touch on that sometimes conducted for use in litigation and that is the survey to test for materiality or whether a claim is material to a consumer's purchase decision or not. Can you walk us through what these look like and when it might be useful to test for materiality?

Shaheen: Yeah, it is interesting. There is certainly surveys you could do in a Lanham Act, false advertising case, an FTC investigation. I know you have done that previously. Several FTC cases or even in the class action, false advertising context. At NAD, however; their focus is on whether there is a misleading claim that is made. What is the claim then? Is it misleading? They don't really care about materiality. They're not trying to bring a legal action. So, it is less relevant. Materiality tests are often easier than consumer perception studies.

One typical way you might do it is to take whatever you're trying to test, the ad, or website, whatever it happens to be, ask participants how likely are you to purchase a product after seeing this ad. Materiality is supposed to be linked to purchase decision. Then test a different version of the ad, like the control where you fix the alleged misrepresentation and you ask the same question. How likely are you to purchase after seeing this ad? If those two responses are substantially similar, if there is no statistically significant difference in purchase likelihood between those two ads, you can argue potentially that the claim is not material because you've removed it or modified it, and you get the same purchase inclination. Doesn't happen often, but it can.

And I think the bottom line in all of this is that whenever you design the survey, there is just a lot of decisions you have to make. And those decisions involve a lot of science, there is certainly a lot of studies on this; but also, some art. I've never seen a survey that somebody couldn't at least try to reasonably criticize. Way back in 1992, in the *Kraft* case, when the 7th Circuit said the FTC didn't always have to rely on consumer surveys, the court also urged the FTC to help develop uniform standards for surveys. So, in its words, advertisers and the FTC wouldn't go round and round on this issue and uncertainty is reduced to an absolute minimum. But unfortunately, anybody who deals with surveys at NAD or elsewhere would say we're a long ways off from that yet.

Kaufman: So Randy, sounds like we continue to go round and round, I guess?

Mudge: No.

Shaheen: Exactly.

Kaufman: Well, Randy, we are always delighted to have you on AD Nauseam. I learned a lot here today and I would say look, the takeaways from me are, first, there are lots of available tools to test consumer perception of claims as well as the materiality of those claims. Second, every survey is unique and will involve making lots of choices over who to survey, how to show an ad and how to frame the questions. Every stage, it is important to make the choices that are most defensible, that give you a representative universe with appropriate sampling and

a methodology that is non-leaning and objective as possible so as not to introduce bias or lead participants to the answers that you want. And finally, make sure you work with lawyers and survey experts and survey firms who know what they are doing and understand the important difference between litigation surveys and marketing surveys.

Mudge: That indeed was a lot to take in Daniel, but Randy, thank you so much for joining us and helping us unpack this, and that is it for another edition of AD Nauseum. Hope to see you next time.

Rubenking: Thank you, Amy, Daniel and Randy. If you have any questions for Amy, Daniel or Randy, their contact information is in the show notes. For more information on the latest developments in ad law, visit our Adventures in Law blog at www.adventures-in-law.com and check out all AD Nauseum episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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