

ASTC Professional Code
PRACTICE AREA A VENUE SURVEYS

The standards and practice guidelines for trial consultants' use of survey research in connection with motions addressed to pretrial juror bias are intended to be consistent with general accepted principles and standards of survey research.

Where questions arise that are not covered by the standards set forth here, practitioners should refer to general principles and standards of other professional organizations.¹ In addition, academic survey research sources included in Appendix 1 to this document provide extensive support and guidance on survey research methodology.

The survey is the tool of choice for academics, journalists, marketing professionals, government agencies, and courts in measuring public opinion.²

The purpose of these standards, practice guidelines, and commentary is to provide a set of minimum principles for evaluating the quality of public opinion surveys submitted to courts in connection with motions to change venue or other motions addressing the problem of pretrial juror bias.³ Motions to change venue may be made in criminal or civil cases. Since such motions are more commonly made in criminal cases, these practice guidelines make reference to criminal issues. However, the criteria for assessing reliability of survey methodology are the same whether the trial involves criminal charges or civil claims.

¹ For example see, American Association for Public Opinion Research (AAPOR), *Best Practices for Survey Research* (2022). Additional literature on survey research can be found by the following authors: Czaja, R., & Blair, J. (2005), Fowler, F.J. (2002), and Schuman, H., & Presser, S. (1981).

² Surveys have been accepted as evidence by courts for more than 60 years. For example, in *Zippo Manufacturing Co., v. Rogers Imports*, 216 F. Supp. 670 (1963), the court stated, "The weight of case authority, the consensus of legal writers, and reasoned policy considerations all indicate that the hearsay rule should not bar the admission of properly conducted public opinion surveys." See, Diamond S., *Reference Guide on Survey Research*, National Research Council. 2011. Reference Manual on Scientific Evidence: Third Edition. Washington, DC: The National Academies Press. <https://doi.org/10.17226/13163>.

³ Such motions might include motions to improve voir dire conditions or to change voir dire procedures or to dismiss a case due to widespread pretrial opinion formation.

VENUE SURVEYS: PROFESSIONAL STANDARDS

I. Overview issues

A. Purpose of a Venue Survey

The purpose of a venue survey is to collect evidence for possible presentation to a court relevant to the question of whether there is a reasonable likelihood that a fair trial cannot be had in the original trial jurisdiction.

Trial Consultants shall not participate in, sponsor, or conduct surveys known as “push polls,” which are primarily designed to influence survey respondents’ opinions in a particular direction by presenting systematically biased information. Such surveys are intended to shape rather than to measure public opinion.⁴

Trial Consultants conduct surveys that are generally designed to measure public opinion about a particular case by assessing the existing opinions of survey respondents.⁵

B. Report of Results

The trial consultant’s presentation of survey results to a court shall include the questionnaire that was used in the survey, identification of the primary persons who performed the work (including their qualifications), and descriptions of how each of the following standard steps for conducting a survey was completed:

- Design of the survey instrument.
- Determination of respondent eligibility and sampling procedures.
- Training of interviewers and supervisors to conduct the interview.
- Interviewing procedures.
- Dates of data collection.
- Disposition of sample.
- Tabulation of survey data.

In the case of questions asked only of a subgroup of the sample interviewed, the report should make clear both numbers and percentages for both the entire sample and the subgroup asked the question.

⁴ “Push polls MAY be indicated by the presence of some of the following factors: dramatic oversampling, that is contacting numbers of participants that are well beyond what is necessary for reliability; creating questions that work primarily to inform participants of alleged facts, as opposed to measuring reactions to them (e. g., “If you learned that the candidate had an illegitimate child, would you vote for him?”)

⁵ It is understood that some members of the ASTC provide non-litigation related research services. These prohibitions relate to litigation related work only.

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II. Basic Questionnaire Design

A. Basic Components of a Venue Survey Questionnaire

A venue survey questionnaire in a criminal case should include at least the following six categories of questions:

1. Screening: Questions to determine respondent eligibility.
2. Awareness and knowledge of the case, the parties, or issues in dispute: Questions designed to identify the proportion of the eligible population that has read or heard about the case.
3. Prejudgment: Questions designed to measure respondents' opinions about a defendant's guilt.
4. Sources of Information: Questions designed to identify respondents' sources of information about a case.
5. Demographics: Questions designed to obtain demographic characteristics of survey respondents. These are generally limited to questions that can be compared to available demographic data in order to determine representativeness.
6. Case knowledge: Questions designed to measure the extent of case knowledge and familiarity with items widely reported in the media.

B. General Principles of Question Design

General principles of survey item construction including those that apply to fact or opinion items should be followed in venue surveys.⁶ Questions should be as simple and as short as possible within the constraints of the information sought. Survey items with multiple interpretations or conflicting compound statements should not be used.

The validity of responses is enhanced by omitting nonessential items from the interview; pretesting the interview for comprehensibility and clarity; and conducting cognitive interviews to assess how potential respondents interpret the questions.

C. Question Wording

Question wording that creates pressure to give answers of one kind or another should not be used. Leading and loaded questions suggest the correct response and should not be used.

D. Telephone Survey Questionnaire Introduction

The survey introduction in a phone survey should include neutral explanations to potential respondents that describe: the purpose of the survey, the caller's identity and, how the phone number or household was selected, and how confidentiality will be maintained.

Respondents should not be told that the survey is being conducted in connection with a motion to change venue as that information might result in biased responses.

⁶ See Babbie (1989), Sudma and Bradburn (1982) or Rea and Parker (2014).

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Once an eligible respondent agrees to participate, the interview should begin with an instruction that there are no right or wrong answers to the questions.

- E. Questions to Measure Respondents' Awareness and Knowledge of a Case
Case awareness is usually measured with one or more closed-ended questions carefully designed to include a short neutral description of the case based on information that appeared in the media.⁷ Respondents who do not recognize the case in response to a single question may be asked additional questions to tap awareness. It is important to carefully consider which details to include in the recognition questions to avoid context or order effects on the prejudgment question. Once awareness has been established, closed ended or open-ended questions can be used to fully explore the respondent's beliefs and knowledge about the case and/or the people involved.

- F. Questions to Measure Respondents' Prejudgment of a Case
The wording of questions designed to measure guilt or prejudgment should not suggest socially desirable responses. For example, no reference should be made to the presumption of innocence or burden of proof.

Direct questions about a respondent's ability to be fair and impartial if called to be a juror in the case should not be used. Such questions and others that inquire as to whether the respondent can set aside prejudicial information and reach a verdict based on the evidence presented at trial yield inflated estimates of this ability.⁸ The change of venue survey is designed to assess the extent of bias and prejudgment in the jury pool, not whether an individual juror believes they can set aside their bias and be a fair and impartial juror. That is a decision for the trial judge based on the totality of the circumstances, not solely on a juror's professions of impartiality.

- G. Open-ended Questions
When open-ended questions are used, responses must be recorded as close to verbatim as possible. Open-ended questions should not follow questions that provide information that could influence the content of responses.⁹

- H. "Don't Know" Responses
Respondents must be made aware that they can say they do not know or have no opinion in response to any question. If respondents are instructed at the beginning of the interview that they are free to answer "don't know" or "no opinion" at any time, they do not need to be given that response option when presented with response alternatives to each individual question.

⁷ This approach does not apply in civil cases where the potential bias being explored may be identification or affiliation with a party or parties rather than case awareness and prejudgment.

⁸ Self-reported ability to be fair and impartial or to recognize and set aside bias and prejudice are suspect here, as in other contexts, such as the voir dire setting. See: Bronson (1989), A study on the prejudicial impact of pretrial publicity found that 62% of jury-eligible residents said they could be fair and impartial and decide the case solely on the basis of the evidence presented. However, only 39% said they could put knowledge of the media out of his or her mind. See Moran, C., & Cutler, B.L. (1991).

⁹ For discussion of the tradeoffs associated with the use of closed-ended and open-ended questions, see: Bradburn, Sudman, and Blair (1979) and Sheatsley (1983).

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- I. **Context/Order Effects**
The survey questionnaire should be reviewed to identify and eliminate or correct context and/or order effects. Attention should be paid to the wording of individual questions and the order in which questions are asked because these factors can influence respondents' responses.¹⁰ Context or order effects can be subtle and complex and may affect opinions and judgments, making responses ambiguous and interpretation difficult.

- J. **Pretesting the Questionnaire**
Survey design should include a pretest in which a small number of eligible respondents are surveyed to assess length, comprehension, question redundancy, or other case specific design issues. Modifications may be made after a pretest. If any changes are made in the questionnaire after the pretest, then pretest data must not be included in the final survey tabulations.

¹⁰ See: Fink (2015), Robinson & Firth (2018) and Schuman, and Presser (1981).

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III. Basic Survey Procedures

A. Respondent Selection

All potential survey participants must be screened to meet two criteria.

1. They must be eligible for jury service as defined by statute or local rule.
2. They must be included in the source list(s) designated by the statute or local rule (e.g., voter registration, driver's license, state tax filers).

Trial Consultants should use reasonable procedures to exclude from their surveys any individual who has already been identified as a prospective juror. Such screening generally involves asking respondents if they have been summoned for jury service within the time frame of the trial date for the case in question.

All individuals in the venue who meet the criteria outlined above form the population of potential survey respondents.

B. Selection Method

The sample of potential survey respondents included in the research ideally should be selected randomly from members of the population of potential survey respondents.

For telephone surveys, various methods can be used to approximate a random sample.

1. Randomly select telephone numbers from all working numbers in the jurisdiction under study. With the increasing reliance on mobile phones, and decreasing numbers of people who rely on landlines, the sample should primarily or exclusively be drawn from cell phone numbers. Because cell phone users may take their numbers with them when they move, the sample should be drawn from cell phone numbers with billing addresses in the jurisdiction under study.
2. Randomly select telephone numbers from a source list that contains individuals in the jurisdiction under study who meet at least one of the criteria used by the court to select potential jurors.

Other methods may be used to approximate a random sample of potential survey respondents.

1. Administer the survey to a sample of prospective jurors called for other cases at the courthouse in the jurisdiction under study with the approval of the judge and jury commissioner.
2. Administer the survey to a sample of people appearing at the Department of Motor Vehicles. Care must be taken to vary both the time of day and day of the week that the survey is administered to reduce potential sampling bias and to ensure that respondents meet jury eligibility requirements (e.g., U.S. citizenship, age).
3. If an internet-based survey is employed, steps must be taken to ensure that the sample drawn forms a representative sample of the population from the venue being surveyed. Opt-in internet survey procedures introduce biases that prevent samples from claiming statistical representativeness.

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- C. **Sample Size**
Desirable sample size takes into account a number of issues, including characteristics of the jurisdiction such as heterogeneity and size of the population, the desired size of confidence interval(s), and resources available for conducting the survey. The typical sample size is 300 – 400. Trial jurisdictions with populations under 50,000 may require using a smaller sample.
- D. **Representativeness of the Survey Sample**
The demographic composition of the survey sample can be compared to the population of the trial jurisdiction to measure whether the survey sample adequately represents the population of potential jurors. This is typically done using data from the U. S. Census. However, the U. S. Census is an imperfect surrogate for the population of potential jurors for an assortment of reasons. The decennial census may be outdated by mid-decade and the Census suffers from undercounts of many minority populations. The Census also does not account for jury eligibility requirements (e.g., citizenship, voter registration, driver's license among other factors), or economic hardship exclusions that may disproportionately reduce the participation of minority jurors.
- E. **Other Telephone Survey Standards**
Multiple callbacks must be used to obtain the highest possible completion rate.
- Interviewers must be instructed to read all questions exactly as written. Interviewers must also be instructed that they may not explain a question unless specifically worded explanations are provided for in the standardized interview. When such explanations are not provided, interviewers are only allowed to re-read the question.
- Interviewers must be instructed to record all responses to open-ended questions as close to verbatim as possible. Supervision of interviewers should include monitoring of randomly selected calls as they are being made to assure that interviewers are following the survey protocol.
- F. **Respondent Confidentiality**
Professional survey research organizations require that confidentiality of respondents be protected.¹¹ Unless the respondent waives confidentiality, or unless it is otherwise required by law, trial consultants shall hold as privileged and confidential all information that might connect a respondent's identity with his or her responses. If paper questionnaires or answer sheets are used, identifying information should be destroyed as soon as it is no longer necessary for follow-up.

¹¹ Maintaining respondent confidentiality is standard practice in survey research. AAPOR, *Code of Professional Ethics and Practice* (2021) states, "We understand that the use of our research results in a legal proceeding does not relieve us of our ethical obligation to protect participant privacy and keep confidential all personally identifiable data, except where participants have permitted disclosure."

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- G. **Availability of Original Data**
When requested, appropriate data including tabulations of responses to closed ended questions and verbatim responses to open-ended questions should be made available to opposing parties in the litigation. However, it is not appropriate to make available any information that could identify individual respondents.

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IV. Data Analysis

- A. Analysis of Venue Survey Results
Analysis of venue survey data may be limited to a report of frequencies, or marginals, which list the number and percent of survey respondents giving each answer to each question.
- B. Validity
Venue survey items must have “face validity,” that is, they must obviously deal with questions of case awareness and prejudice.
- C. Testing Validity
Questions of validity concern whether the interview items are measuring accurately what they purport to measure. Validity can be tested with data analyses to determine consistency within sets of responses, or to identify relationships among variables.

Complete consistency within sets of responses is not to be expected. Nor is it necessary to analyze all possible relationships that bear on questions of validity.

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I. Overview Issues

A. Purpose of a Venue Survey

The purpose of a venue survey is to measure the level of knowledge and nature of opinions about a pending case in the jurisdiction of trial.¹² Venue survey evidence is sometimes submitted to courts in connection with motions to change or transfer venue or in support of a motion to use a “foreign” or “imported” jury, sometimes called a “change of venire,” or motions to modify voir dire procedures.

When prospective jurors cannot be screened out of a survey because they have not yet been notified of their upcoming dates of service, Trial Consultants should discuss with the attorney the possibility of inadvertent contact with a prospective juror and consider ways to reduce the potential for such contact.

B. Report of Results

Presentation may be in the form of a written report, a declaration, an affidavit, testimony, or some combination of the three. Decisions concerning the format and timing of the presentation are determined by local rules and case-specific orders.

The information disclosed about a survey should be sufficient to permit evaluation and replication.¹³

¹² Conducting a survey for the purpose of manipulating or influencing opinions of prospective jurors (so called “push polls”) violates the trial consultant’s duty to provide all services in a manner that will protect the integrity of the jury pool. See ASTC Code of Professional Standards: General Professional Standards VI.

¹³ Disclose all methods of the survey to permit evaluation and replication. See, AAPOR, *Best Practices for Survey Research* (2022).

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II. Basic Questionnaire Design

A. Basic Components of a Venue Survey Questionnaire

Venue survey design generally includes reviewing exposure to the case on social media as well as media coverage, and then drafting a questionnaire and conducting a pretest with a small number of respondents to assess survey length, comprehension and to identify any potential programming issues.

In a civil case, a venue survey might assess the extent of knowledge and/or affiliation with a party or parties and knowledge of facts in dispute, along with or instead of measuring awareness and prejudice of the issues to be decided in a specific case.

B. Length of the Survey

Case specific factors such as the nature of the case and issues in dispute, scope of news coverage frequency or volume of discussion on social media, and prior knowledge of the people or parties involved in the case will determine the length of the interview. Unnecessarily lengthy surveys should be avoided to minimize survey fatigue and increase completion rates.

C. Questionnaire Introduction

A venue survey is typically described to potential respondents as a “public opinion survey among residents of _____ County to obtain opinions about the criminal justice system and about a specific case.” If no criminal justice questions are included, the introduction might explain that “We are conducting interviews with _____ County residents about a criminal case that has been in the news.” Respondents should not be told the ultimate purpose of the survey (that it is being conducted in connection with a motion to change venue) as that information might result in biased responses.

After the introduction, some researchers may include a few closed-ended questions concerning generic issues related to the survey such as criminal justice attitudes or media use. The questions can serve to demonstrate that the survey content is as promised in the introduction and to increase respondents’ comfort by giving them an opportunity to respond to questions that are easy to answer. It is standard practice to alternate the point of view of opinion statements so that opinion consistency would require agreement with some questions and disagreement with others.

D. Questions to Measure Respondents’ Awareness of a Case

Approaches to eliciting respondents’ information, beliefs or knowledge include questions exploring recall of the case and reactions to what the respondent has read, seen, or heard about the case.¹⁴ There are many approaches to eliciting information about respondents’ sources of information about a case. One approach is to ask direct closed-ended questions, inquiring, for example, whether the respondent read about the case in newspapers or on the Internet or has seen anything about the case on TV or heard about it on the radio or from others in the community. Another approach is to ask questions about media use (e.g., how frequently respondent

¹⁴ A study on the prejudicial impact of pretrial publicity found that 62% of jury-eligible residents said they could be fair and impartial and decide the case solely on the basis of the evidence presented. However, only 39% said they could put knowledge of the media out of his or her mind. Moran, C., & Cutler, B.L. (1991). The prejudicial impact of trial publicity. *Journal of Applied Social Psychology*, 21(5), 345-67.

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reads, watches or listens to local news in newspapers, the Internet, TV, or radio) and to compare media use responses to case awareness responses. Sometimes both approaches are used.

Case awareness can also be assessed by exploring respondents' recall, reaction, or recognition. Respondents' recall is usually explored with open-ended questions designed to elicit respondents' descriptions of what they have heard or read in the media. Like jurors, many survey respondents will minimize what they know about a case when asked an open-ended question.¹⁵ It often proves beneficial to include closed-ended recognition questions to further evaluate the extent of case knowledge. Respondents' reactions to what they have read or heard are usually explored with open-ended questions designed to let respondents express their opinions and feelings about the case, the defendant and/or the injured parties in their own words.

- E. Questions to Measure Respondents' Prejudgment of a Case
A survey question aimed at measuring prejudgment is not intended to predict trial outcome. The survey assesses pretrial prejudgment, bias, or prejudice. Typically, prejudgment is measured with scaled response questions. For example, the respondent may be asked, "Based on what you have read or heard, do you think that XXXX is.... definitely not guilty, probably not guilty, probably guilty, or definitely guilty. In accordance with generally accepted principles for survey research, the order in which predefined responses are offered to respondents should be varied. That is to say that half of the respondents should be given the response categories for the scale discussed here beginning with "definitely not guilty" while for the other half the scale should begin with "definitely guilty."

- F. Order Effects
The order in which survey questions are asked can influence the responses participants give to subsequent questions. Therefore, trial consultants should avoid question sequences that would unduly influence participants' later responses.

¹⁵ See Bronson, E. (1989). "The effectiveness of voir dire in discovering prejudice in high publicity cases: A study of the minimization effect."

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III. Basic Survey Procedures

A. Respondent Selection

A person who meets statutory eligibility requirements but who is not included in the lists from which jurors are summoned for qualification is not an eligible respondent for a venue survey.

When contacting a household's land line techniques for sampling within households may be used to maximize distribution by age and gender when using a landline sample. One such technique is known in the field as the "youngest male, oldest female" approach in which respondents are asked for in a fixed gender and age order. It is not appropriate to incorporate techniques for sampling within households when using a cell phone sample.

B. Eligibility and Sampling

A well-designed sample provides an efficient and economical way to discover the attitudes and characteristics of the target population. If a sample is properly designed, and designated procedures for selecting respondents are rigorously applied, survey results will reflect the attitudes and opinions of the population the sample represents within a known probability and range of error.

Generally, people who have been convicted of a felony are not eligible to serve as jurors.¹⁶ A convenient approach to excluding respondents who have been convicted of a felony is to ask respondents about this in the initial screening questions or as a final question and to exclude as ineligible those who do not say no.

C. Source of Sample for phone survey

When contacting household landlines, a telephone sample for the geographic area under study can be purchased from sample providers. Random digit dial sample (RDD) provides an equal probability of selection and reaches households with listed and unlisted phone numbers. In some jurisdictions Listed Household sample (LHH) may be used to supplement an RDD sample to increase contact rates within the jurisdiction. Samples can be purchased which exclude known business, government, fax and disconnected numbers to increase survey efficiency. However, because many eligible respondents no longer rely on or even have landlines, use of a cell phone sample has become the primary sample source in most telephone surveys. Cellphone sample providers draw from a consumer cellular database which is multi sourced and appended to the billing address in the venue under study.

D. Online Surveys

Online self-administered surveys present a number of challenges to achieving a representative sample from a population of potential jurors. For example, respondents tend to be younger than the population as a whole. Opt in respondents may not reside in the jurisdiction being surveyed. The respondent identified may not be the individual (or entity) completing the survey.

¹⁶ Each state has the ability to determine whether restoration of rights will permit those with felony convictions to serve. This issue is currently in flux, so it is necessary to check the current policy in each state.

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Steps must be taken to ensure that the respondent is an actual person (not a robot) and one who meets the criteria to be eligible for jury service (e.g., citizenship, age, and geographical location). Completed surveys must not be included if respondents fail to complete the survey questionnaire within established time parameters or who fail attention check procedures.

Respondents may be recruited through text messages sent to mobile phones with billing address within the jurisdiction under study.

E. Sample Size

The size of the sample employed affects the statistical reliability of the reported outcomes. Under normal circumstances a sample of at least 300 people will provide sufficient outcome reliability for most surveys.

If the size of the population being sampled is small, a sample size smaller than 300 may be required to avoid contacting and having to exclude involving an unnecessarily high proportion of potential jurors.

Notwithstanding statistical issues of sampling error, practical experience has repeatedly shown that survey results do not change dramatically after the first 100 surveys have been completed. When the research design involves comparisons among several samples, smaller samples may be used, supported by tests of significance of the differences among them.¹⁷

Evidence of different levels of exposure or prejudice in alternative jurisdictions can be useful in persuading the Court there is a significant risk of an unfair trial in the original venue that can be minimized by a change of venue. Such comparison studies of alternative jurisdictions may be used when:

1. Media may have influenced residents of alternative jurisdictions being considered as possible sites to receive the case.
2. A demonstration of the comparative magnitude of media influence is desired.
3. Limited resources are available for the venue research and very large differences exist in awareness, prejudice, and other important factors between the original trial jurisdiction and alternative venues for the trial.

F. Representativeness of the Survey Sample

To compare survey data with census data, attention should be paid to using the same formats in the survey as are used in the census for asking demographic questions and coding responses.¹⁸ Presentation of survey results to a court can include comparison of basic demographics of survey respondents with demographics of the trial jurisdiction, using census or other comparison data. Since attitudes and opinions of potential jurors are the focus of a venue survey, internal analysis of the data from a survey that is not demographically representative may nevertheless provide relevant evidence of juror bias and prejudice. For example, having too many female respondents may not matter if levels of prejudice among males and among females are similar.

¹⁷ See Nietzel, M. T., & Dillehay, R. C. (1983). Psychologists as consultants for changes of venue: The use of public opinion surveys, and Smithson (2003).

¹⁸ <https://www.pewresearch.org/short-reads/2020/02/25/the-changing-categories-the-u-s-has-used-to-measure-race/>

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- G. **Call-backs**
The more callbacks made to an unanswered phone number before retiring that number, the better. Typically, 4 to 6 callback attempts should be made, increasing the likelihood of a completed interview or determination that the phone number is not an eligible respondent or household.

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IV. Data Analysis Issues

A. Analysis of Venue Survey Results

Frequencies, or marginals, report the count and percent of responses to each question. Cross-tabulation or tests of significance such as chi squares or correlations can also be offered. Cross-tabulation compares respondents' answers to two or more questions. For example, how many respondents (what percent of the sample) are aware of the case *and* read or make use of the media daily? In some instances, other data analysis techniques such as content analysis can be helpful to explain the survey results.

B. Validity

Consistency between respondents' answers to open-ended questions about what they recall about the case and their responses to questions about recognition of specific case facts can be an indicator of survey validity. A positive relationship between case awareness and sources and/or extent of media exposure, including social media, can be an indicator of survey validity.

Another method of testing the validity is to compare levels of recognition of low publicity issues to levels of recognition of facts that have been widely discussed in the media. False facts should not be used to test the accuracy of other responses in venue surveys. [If false facts are used, they must be clearly false, with no possibility that respondents who know about the case could confuse the false facts with true facts that have been publicized.

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