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# ALERT

## A TRADEMARK SURVEY CHECKLIST

By Eric C. Osterberg

Here is a six-step checklist for trademark infringement litigants hoping to prove likelihood of confusion through survey evidence. Litigants who carefully consider each of these issues should have a better chance of having their survey results admitted in evidence. It is derived from last year's summary judgment decision in Competitive Edge v. Staples in the Northern District of Illinois.

1. **Universe** - Be sure to correctly identify the "universe" of respondents. It should be consumers in the market at issue. If the universe is erroneous or undefined, the reliability of the survey is diminished.

2. **Sample** – The sample population must represent the universe, and be neither under-inclusive nor over-inclusive.

3. **Clear Questions** – Survey questions must be clear and precise.

4. **Filter Questions** – The survey should include some open-ended questions. Acceptable answers should include "don't know."

5. **Double Blind** – Ideally neither the questioner nor the respondents should know the reason for the survey.

6. **Data Collection and Recording** – Questions must be asked, and responses recorded, consistently and accurately.

If you have any questions regarding the information in this alert, please contact Eric C. Osterberg at 203.425.1510 or [eosterberg@foxrothschild.com](mailto:eosterberg@foxrothschild.com) or any member of Fox Rothschild's Intellectual Property Department.



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