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ANTECEDENTS, CONSEQUENCES AND REMEDIES**

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**JUDICIAL OPINIONS AS “MINEFIELDS OF MISINFORMATION”:
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Jacob Jacoby, Ph.D¹

Discussing factors that “may make judicial opinions a minefield of misinformation,”² Seventh Circuit Judge Richard A. Posner writes of:

...the reluctance of academic commentators to expand their study of cases beyond judicial opinions. Rarely will the commentator get hold of the briefs and record to check the accuracy of the factual recitals in the opinion.

All this would be of relatively little importance were it not that lawyers’ and, particularly judges’ knowledge of the world, or at least the slice of the world relevant to legal decision making, derives to a significant degree from judicial opinions. One of the distinctive features of judges ... is that they obtain much of their knowledge of how the world works from materials that are systematically unreliable sources of information.³

Apparently, Judge Posner’s hypothesis – that judicial opinions may be minefields of misinformation –remains to be tested. Perhaps this is because few may have the intimate knowledge of cases or access to the published and unpublished record sufficient for conducting such a test.

I have served as an expert witness in more than one hundred federally adjudicated matters and believe that, as a general rule, most courts “get it right,” especially insofar as factual recitals are concerned. However, I am also aware of a number of instances where a court’s factual recitals do not comport with the

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²Hon. Richard A. Posner, *The Problems of Jurisprudence*, Harvard University Press, 1990, at 210. (hereinafter: *The Problems of Jurisprudence*).

³ Id. at 211.

underlying record. When this occurs, there is reason to believe that it correlates negatively with the delivery of justice not only in the instant matter, but exerts rippling negative effects well beyond. Relying upon information available to me, a case study is used to examine the problem.⁴ Remedies are then suggested for mitigating the problem.

**I. A Case Study in Erroneous Factual Recitals:
*National Football League Properties, Inc. et al. v. ProStyle et al.***

Consider *National Football League Properties v. ProStyle* -- specifically, the Court's Decision and Order of July 25, 1997,⁵ Order of July 31, 1998⁶ and Order of April 28, 1999⁷ – a matter in which this author served as expert witness for plaintiffs. The pertinent background can be summarized as follows.

A. Case Background

1. The July 25, 1997 Decision and Order. As described by the Court, the case involved the following facts:

Defendants, through ProStyle, have recently and without plaintiffs' consent commenced selling in interstate commerce merchandise, including shirts, sweatshirts, dresses, swimsuits, caps and jackets, bearing the designations "PACK," "GREEN BAY P," with a player's name and number, "GBP CENTRAL DIVISION CHAMPIONS" AND "DIVISION CHAMPIONS GREEN BAY." Defendants' merchandise often display the

⁴ Aware of other science experts whose sworn testimony has been erroneously recited in published court opinions, this author invited others to supply him with examples to be used in this article. Indicating concern with how this information might be used against them in future matters, except for one instance noted herein, the remainder declined this invitation.

⁵ *National Football League Properties, Inc. and Green Bay Packers, Inc v. ProStyle, Inc. and Sheri Tanner* (E.D. Wis. 1997). Unpublished Decision and Order, Case No. 96-C-1404.

⁶ *National Football League Properties, Inc. and Green Bay Packers, Inc v. ProStyle, Inc. and Sheri Tanner*, 16 F. Supp. 2d 1012 (E.D. Wis. 1998).

⁷ *National Football League Properties, Inc. and Green Bay Packers, Inc v. ProStyle, Inc*, 57 F. Supp. 2d 665 (E.D. Wis. 1999).

Packers' team colors, which are dark green and yellow, or variations thereof. Certain articles of defendants' merchandise also bear football indicia, including football helmets, in the Packers team colors or variations thereof, which are displayed in conjunction with the aforementioned designations or with the names of various Packers' players and the respective numerals worn by those players. Defendants' products are often interspersed in the marketplace with products officially licensed by plaintiffs. Defendants have advertised their products in interstate commerce through a mail-order catalog.... In the catalog, pictures of defendants' products are interspersed throughout defendants' catalog with color photographs of team members of the Packers in team uniforms and team helmets.⁸

Plaintiffs commissioned a survey of acquired distinctiveness and likely confusion.⁹ It involved showing ten comparable groups of 65 respondents each one of ten shirts. Five shirts were defendants' "as sold" garments – four bearing the indicia described above, the fifth missing some of the indicia, but bearing the name and player numeral of a popular Green Bay Packers' player. Another five shirts were "control" shirts. The control shirts were identical to the test shirts except for substituting a non-infringing element where the allegedly infringing element appeared on defendants' shirts. For example, while defendants' garments used the name "Green Bay," the corresponding control garments were the same in all respects, except for the fact that "Green Bay" was replaced with "Ellison Bay," the name of another bay in northern Wisconsin. As defendants' "player" shirt addressed a peripheral issue, attention is concentrated on defendants' four Green Bay Packers shirts and the corresponding control shirts.

⁸ *National Football League Properties, Inc. and Green Bay Packers, Inc. v. ProStyle, Inc. and Sheri Tanner* (E.D. Wis. 1997). Unpublished Decision and Order, Case No. 96-C-1404 (July 25, 1997). From Findings of Fact, pages 6-7.

⁹ Jacob Jacoby "The Extent to Which Green and Yellow, When Seen in the Context of Other Pertinent 'Cues,' Have Acquired Secondary Meaning and are Likely to Cause Consumer Confusion." April 1997.

After being shown one of the shirts, each respondent was asked Question 1a: *What, if anything, do you think of when you see this shirt?* Recorded verbatim, the answers to this question can be used both directly to assess the “blurring of distinctiveness” component of dilution (Lanham Act, Section 43(c)) and indirectly to assess whether plaintiff’s marks have acquired secondary meaning.

Question 1a is completely open-ended; thus, respondents could have answered by saying anything, e.g., “the color of grass,” “the shutters on the house where I was born.” Since respondents who answered “Green Bay” might have meant either the NFL’s Green Bay Packers or simply the City of Green Bay, those who gave such an answer were asked a follow-up question: *1b. Do you mean anything in particular by “Green Bay”?* (which was probed once with: *Anything else?*). Note that Q1b also is completely open-ended and makes no mention of the municipality, the Packers or the NFL.

To assess confusion as to sponsorship (Lanham Act, Section 43(a)), the interviewer continued with Question 2a: *Do you think that in order to put out this shirt, the company that put it out...*

*did need to get permission,
did not need to get permission,
or you have no thoughts about this?*¹⁰

¹⁰ This closed-ended question gives equal, explicit emphasis to the affirmative (“did get”), negative (“did not get”) and neutral (“no thoughts about it”) sides of the issue. Moreover, to avoid “order bias,” the first and second response options (“did need” and “did not need”) were rotated so that, when the question was read, half the respondents heard the affirmative side first, while the other half heard the negative side first. Note also that an answer of “did need to get permission” is insufficient to be tallied as an instance of actionable confusion. For the latter to occur, the respondent would have to provide, in addition, certain specific answers to follow-up Questions 2b and 3.

Respondents who answered “did need to get permission” were then asked Question 2b, “*From whom did they need to get permission,*” and Question 3, “*What makes you say that the people who put out this shirt needed to get permission from ____? Anything else?*”

Defendants subsequently filed a *motion in limine* to exclude both the survey and this author’s opinions regarding defendants’ merchandise. Five arguments were presented in support of this motion.

2. The July 31, 1998 Order. The Court devoted several pages to considering each of defendants’ five arguments. Though it rejected four, because Question 2 asked consumers whether they thought defendant “needed to get” permission, it accepted the argument that “the survey’s confusion question improperly asked for a legal conclusion”¹¹. The inconsistent approaches across courts on whether it is more proper to measure whether consumers believe defendant “needed to get” permission vs. “did get” permission is discussed in detail elsewhere.¹² Suffice it to say that the findings from pertinent social science research, the overwhelming majority of District and Circuit Court opinions and, by implication, the *Daubert* and successor rulings of the Supreme

¹¹ Op cit., 1016. Many consider J. Thomas McCarthy to be the leading authority on trademark law. In commenting on the argument that the “need to get” formulation is incorrect because it “allows for the consumer’s misunderstanding of the law,” Professor McCarthy points out “it is consumer perception that creates ‘the law’ of whether permission is needed.” J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Volume 5, March 2000 Release, Section 32:175 at page 32-264. Also see related discussion in *McCarthy*, Section 24:9.

¹² Jacob Jacoby (2006) Sense and Nonsense in Measuring Sponsorship Confusion. *Cardozo Arts and Entertainment Law Journal*. 24:1, 63-97.

Court inveighing against junk science¹³ all come down on the side of using the “needed to get” formulation. Had the Court been aware of and heeded this body of evidence, the argument that “the survey’s confusion question improperly asked for a legal conclusion” would have evaporated.

Regardless, courts occasionally make mistakes and that fact, by itself, is not noteworthy. What makes the *ProStyle* Court’s several Opinions noteworthy is that the opinions not only exemplify the tendency described by Judge Posner to “state the facts as favorably to its conclusions as the record allows, and often more favorably,”¹⁴ but do so via numerous inaccurate factual recitals.

The July 31, 1998 Order concluded as follows:

[T]he court will grant defendants’ *motion in limine* regarding all survey answers to the above [confusion] question and any conclusions based on those answers. Because all four conclusions of the Jacoby study thus must be excluded from trial, the court will exclude his entire report and survey.

Finally, defendants argue that Jacoby is precluded from offering opinions not expressed in his expert report, thereby excluding him entirely from the case. Defendants cite no authority for this proposition, and, considering that discovery is ongoing and several months remain before trial, the court at this time will not preclude Jacoby from testifying.¹⁵

Thus, the Court would not hear any testimony regarding confusion. The Court also excluded testimony regarding secondary meaning because the opinions and conclusions were based on testing defendants’, not plaintiffs’, garments.¹⁶

¹³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); *Kumho Tire Co., Ltd. et al. v. Carmichael et al.*, 526 U.S. 137 (1999).

¹⁴ *The Problems of Jurisprudence*, 1990 at 210-211.

¹⁵ Op cit. at 1019.

¹⁶ Since “*What, if anything, do you think of when you see this shirt?*” was asked regarding *defendant’s* garments, how could plaintiffs argue this could be used to provide evidence regarding secondary meaning

However, while the Court had been critical of Question 2 (the source of the data for the likely confusion conclusion), given their innocuous nature, the Court found nothing to criticize about Questions 1a-1b (the source of the data for the secondary meaning conclusion). The Court had not been asked to consider, nor apparently had it considered, how Questions 1a-1b yielded data that were directly relevant for drawing conclusions regarding the “blurring of distinctiveness” component of dilution. Moreover, being the first question asked after a respondent was exposed to defendants’ garments, there was no possibility that a respondent’s answers to Question 1a would have been contaminated by having been asked any of the subsequent questions used to assess confusion.

Accordingly, the report was revised. All questions and content dealing with likely confusion was deleted, as was any discussion of secondary meaning. The portion that remained focused on what respondents’ answers to Question 1a revealed regarding dilution.¹⁷ Since dilution – a legal concept that, like other

of *plaintiffs’* garments? Consider the analogous situation where plaintiff alleges that defendant’s goods are likely to be confusing. Although one cannot infer confusion from demonstrating plaintiff’s goods possess secondary meaning, considerable case law (*See* Section 15:11, J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Volume 2) holds that, except for cases of reverse confusion, one can infer secondary meaning of plaintiff’s goods from testing and finding defendant’s goods to be confusing. This was the purpose of Question 1a. The rationale was that if, upon exposure to defendant’s garments, a large proportion of respondents said this merchandise made them think of plaintiffs and few (if any) respondents mentioned any other entity, this would enable one to infer that secondary meaning was attached to the combination of elements claimed by plaintiffs. Logically, if the combination of contested elements had not acquired distinctiveness indicating secondary meaning, they would not evoke high levels of association to plaintiffs. But when the vast majority of respondents exposed to defendants’ merchandise are made to think of plaintiff and none are made to think of any other entity, logical inference suggests this represents *prima facie* evidence of secondary meaning for plaintiff. Not appreciating or accepting this rationale, the court stated: “the survey was misfocused to the degree that it purported to show secondary meaning...” (July 31, 1998 Order, at 1017).

¹⁷ Jacob Jacoby, “The Fame of the Green Bay Packers as Embodied in its Registered Marks, and the Extent to which *ProStyle* Merchandise Dilutes and is Likely to Cause Confusion with these Marks.” September 1998.

core concepts of intellectual property law, has no meaning without reference to the psychology of consumers¹⁸ -- was in its infancy as an element of federal law, a second section of the report sought to educate the Court regarding well-established psychological thought and research bearing on this concept.¹⁹

3. The April 28, 1999 Order. The Court would have none of this. As stated in its 1999 Order:

The court concludes that Jacoby's survey, even as edited to avoid the court's earlier criticisms of it, is seriously flawed. The main problem with the survey (as edited for the second report) is that it essentially asks one question, "What, if anything, do you think of when you see this shirt?", without further probing, see 5 J. McCarthy, *Trademarks and Unfair Competition*, Section 32: 176 (1999) ("Without further probing, such a question may well be meaningless and irrelevant."), and without showing any control shirt to any survey respondents or asking any control questions.²⁰

Consider the Court's objections. First, there is no requirement in science (and likely none in law) that, to yield reliable and valid findings, questionnaires (or witness examinations) need to consist of some minimum number of questions. It is not the quantity of questions asked that matters, but their quality and

¹⁸ Several years prior to enactment of the Lanham Act, Supreme Court Justice Felix Frankfurter wrote: "The protection of trademarks is the law's recognition of the *psychological function* of symbols." (*Mishawaka Rubber and Woolen Mfg. Co. v. S.S. Kresge Co.* 316 U.S. 203, 86 L. Ed. 1381, 62 S.Ct.1022, 53 U.S.P.Q. (1942); italics supplied.) Fifteen years earlier, Frank Schechter, in his famous *Harvard Law Review* article, defined dilution as "the gradual whittling away or dispersion of the identity and hold upon *the public mind* of the mark or name by its use upon non-competing goods." (F.I. Schechter, The Rational Basis of Trademark Protection, *Harvard Law Review*, 40, 813 (1927); Reprinted in *The Trademark Reporter* 334, 342 (1970), italics supplied.) In what probably is the most authoritative source on trademark law, J. Thomas McCarthy asserts: "However, secondary meaning is a fact *only* in the sense that *the state of a buyer's mind* is a fact." (J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Clark Boardman Callahan, 1999 West Group. Volume 2, Section 15:29. Italics supplied.) In like fashion, Richard Kirkpatrick writes: "trademarks are intellectual or psychological in nature. It follows that the question of trademark infringement is primarily one of the psychology – cognitive and behavioral – of consumers. (Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law*. Practising Law Institute. Rel. #4, 11/99; xx.

¹⁹ For an expanded version of that section of the proffered report, see: Jacob Jacoby (2001) *The Psychological Foundations of Trademark Law*. 91:5 *The Trademark Reporter* 1013-1071 .

responsiveness to the issue at hand. It requires only a single question to learn someone's age, social security number, marital status, etc., and it may require only a single question of a witness to learn all that is needed. Suppose that, in answer to the prosecuting attorney's question "Did you strangle your wife because she was having an affair with Mr. Doe?," the witness answers "Yes; and I have no regrets over doing so!" No other questions are required to establish motive, guilt and lack of remorse. Although subsequent questions fleshed out the details, it required but a single question to learn that President Nixon had installed a system for surreptitious tape recording in the Oval Office. If the question is not leading or otherwise biased and yields answers that are responsive, there is no scientifically based legitimacy to the criticism that research is somehow flawed if but a single question is used to elicit this information.

As a matter of science, to represent that a survey need consist of more than a single question is factually incorrect. When the answers given by the respondents are clear and responsive, no treatise on survey research procedure even hints at a need for further probing. Indeed, where answers are complete and responsive, additional probing becomes a form of badgering, adds to interview length (and cost) and, in multi-question surveys, decreases respondents' motivation to answer subsequent questions. When he wrote "Without further probing, such a question may well be meaningless," Professor McCarthy used language clearly and precisely. "[M]ay well be meaningless"

²⁰ 57 F. Supp. 2d 665, 668.

does not equate to “necessarily will be meaningless,” the latter being the meaning apparently extracted and propagated by the Court.

Second and most important are the Court’s comments bearing on the issue of scientific “controls.” These comments exhibit considerable misunderstanding regarding what scientific controls are and how they are to be devised, used and interpreted. Elaborating upon its criticisms, the Court set forth a number of scientifically untenable points regarding scientific controls that, if relied on as precedent, can only serve to establish a foundation for junk science. As discussion of scientific controls, including the *ProStyle* Court’s erroneous comments on this subject, is beyond our present scope, the reader is directed elsewhere for a more complete treatment.²¹ Present attention focuses upon the Court’s many erroneous “factual recitals.”

Concluding this case summary, although the Court rejected both the original and revised report, likelihood of confusion and dilution via blurring were so obvious that the jury held for plaintiffs. Hence, there was no need for plaintiffs to appeal the outcome.

B. Examining the Accuracy of the Factual Recitals

Comparing the “factual recitals” in *NFLP v. ProStyle* with the underlying source material reveals the opinion to be a veritable minefield, making numerous recitations of fact diametrically opposed to the underlying record in ways that are

²¹ Jacob Jacoby (2002) “Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys.” *The Trademark Reporter* 92(4)890-956; see pages 922 through 953 for a discussion of the *ProStyle* Court’s comments.

both material and significant. One paragraph in particular draws our attention, beginning with the following sentence:

Jacoby apparently has not learned from his mistakes which, contrary to plaintiffs' assertions that Jacoby's surveys "have been universally relied upon" and have never been rejected by a court, seem to be numerous.²²

The only place where the phrase "have been universally relied upon" appeared in Plaintiffs' Brief in Opposition to Defendants' Motion *In Limine* was in the following sentence:

In the sports marketing context, in connection with NFLP – which represents over fifteen years of work – Dr. Jacoby's surveys have been universally relied upon by trial courts nationwide.²³

An objective reading of this sentence would yield the conclusion that the phrase "have universally been relied upon" was appropriately qualified so that it applied solely to surveys this author had proffered as evidence in litigated matters "in connection with NFLP" and definitely was not meant to apply to all surveys I had proffered as evidence in all litigated matters in which, to that point in time, I had participated. As written by Plaintiffs' counsel, the representation was 100% correct.²⁴ Most appreciate that omitting the beginning of a sentence can

²² *National Football League Properties, Inc. and Green Bay Packers, Inc v. ProStyle, Inc. and Sheri Tanner*, 16 F. Supp. 2d 1012 (E.D. Wis. 1998). At page 1018.

²³ Plaintiffs' Brief in Opposition to Defendants' Motion *In Limine*, p. 11, n. 12, *National Football League Properties, Inc. et al., v. ProStyle, Inc. et al.* No. 96-C-1404 (E.D. Wis.).

²⁴ The phrases "in connection with NFLP ...universally been relied upon" referred to the following: In according the survey considerable weight, the court in *NFL v Wichita Falls* wrote: "... the Court is impressed with the steps plaintiff took to insure the reliability of the survey. It was well-designed, meticulously executed and involved some of the very best experts available..." (*National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp 651, 658 (W.D. Wash., 1982). In according another survey considerable weight, the court in *NFL v New Jersey Giants* wrote: "Dr. Jacob Jacoby ...has extensive knowledge and experience in the design and interpretation of consumer surveys, and is an expert in those areas." (*National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp 507, 513 (DNJ, 1986). In accepting and relying upon a third survey, the District Court in *NFL v Baltimore CFL Colts* wrote: "This Court finds this survey helpful in assessing whether the marks are so similar in

dramatically alter the meaning conveyed, sometimes creating a meaning completely opposite to that being conveyed by the source of that message. Consider reading television “crawl,” the line of print news that various television news programs provide as a continuous stream at the bottom of the television screen. “Dipping at some arbitrary point into the river of text, it’s alarming to read ‘... BIN LADEN HAS NUCLEAR WEAPONS’ when the preceding phrase ‘OFFICIALS DO NOT BELIEVE’ has just eluded you.”²⁵ By stripping the phrase “have universally been relied upon” from its context, the phrase was converted from being entirely accurate into the opposite.

Having asserted that there were “numerous” instances where surveys proffered by this writer subsequently had “been rejected by a court,” the *ProStyle* Court then cited ten opinions in support of its assertion. Yet, as detailed below, examination of the underlying record reveals that five of these ten opinions were ones where the court of record had offered one or more criticisms – but then admitted and relied upon the proffered survey either completely or in part.²⁶ In

appearance and suggestion as to cause confusion, even though defendants have opined differently.” (*National Football League Properties, Inc. et al. v. Metropolitan Baltimore Football Club Ltd. et al* 31 U.S.P.Q.2D (BNA) 1801, USDC, SD In, Indianapolis Division, 1994). On appeal, the 7th Circuit wrote: “The plaintiffs’ study, conducted by Jacob Jacoby, was far more substantial [than defendants’ survey] and the district judge found it on the whole more credible.” “...Jacoby’s survey was not perfect, and this is not news. Trials would be very short if only perfect evidence were admissible.” The 7th Circuit then agreed with the District Court “in crediting the major findings of the Jacoby study and inferring from it and the other evidence in the record that defendants’ use of the name ‘Baltimore CFL Colts’ whether for the team or on merchandise was likely to confuse a substantial number of consumers.” (*Indianapolis Colts Inc., National Football League Properties, Inc. and National Football League v. Metropolitan Baltimore Football Club Limited Partnership, James L. Speros, and Canadian Football League*, 34 F.3d 410 (7th Cir., 1994)).

²⁵ “The Year in Ideas,” *New York Times Magazine* December 9, 2001; Section 6, 49, 66.

²⁶ *Quality Inns Int’l, Inc. v. McDonald’s Corp.*, 695 F. Supp. 198, 218-19 (D. Md. 1988); *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1446 (S.D. Ohio 1990); *Indianapolis Colts, Inc. v. Metro Baltimore Football Club Ltd.. Partnership*, 34 F. 3d 410, 416 (7th Cir. 1994); *Novo Nordisk*, 1996 U.S. Dist. LEXIS 12807.

three other instances, examination of the underlying record reveals that the surveys were not rejected, but admitted and accorded little weight, a distinction that is far from trivial. In a ninth instance, the record reveals that the original court's criticism was for offering opinions *without* having conducted a survey. Hence, this matter could not possibly be cited as an example of where survey had been rejected. There was only a single instance where a prior court had admitted the survey and data being proffered, but then rejected all opinions predicated upon that survey and the resultant data. A single "rejection" is hardly a number sufficient to warrant being characterized as "numerous," especially considering that, to that point in time, I had proffered survey evidence in more than one hundred federally litigated matters, with most court opinion ranging from favorable to laudatory. Attention is now directed to examining the underlying record, namely, the ten opinions cited by the *ProStyle* Court in support of its assertion that "numerous" surveys I had proffered as evidence were "rejected."

Because it involved another National Football League case heard in the same (Seventh) Circuit, first consider *Indianapolis Colts, Inc. v. Metro Baltimore Football Club*. Although defendants' survey was given scant weight by the District Court and rejected outright by the appellate court,²⁷ contrary to the *ProStyle* Court's representation, instead of being "rejected," the survey I designed and conducted for plaintiffs was accorded appreciable weight by both

²⁷ "Both parties presented studies. The defendant's was prepared by Michael Rappeport and is summarized in a perfunctory affidavit by Dr. Rappeport to which the district court gave little weight. That was a kindness." *Indianapolis Colts, Inc. et al. v. Metropolitan Baltimore Football Club Limited Partnership et al.* 34 F.3d 410, 415 (Seventh Cir. 1994). Defendants' expert's reply to the Seventh Circuit's opinion is provided in Michael Rappeport, The Role of the Survey "Expert" – A Response to Judge Posner, 85, *TMR*, 211.

the District and Circuit Courts. Consider the published record, first comments from the District Court followed by comments from the Appellate Court.

This [District] Court has accepted the plaintiffs' survey as being a helpful indicator of the degree of similarity of the parties' marks....This Court finds this survey helpful in assessing whether the marks are so similar in appearance and suggestion as to cause confusion even though defendants have opined differently....The survey shows that there is confusion in any case. ... the survey offered by plaintiffs reduces the need for this Court to infer from arguments...²⁸

The plaintiffs' study, conducted by Jacob Jacoby, was far more substantial [than defendants survey], and the district court found it on the whole more credible....

Jacoby's survey was not perfect. Trials would be very short if only perfect evidence were admissible.

[The 7th Circuit accepts the district court's opinion] crediting the major findings from the Jacoby study and inferring from it and the other evidence in the record that defendants' use of the name "Baltimore CFL Colts" whether for the team or merchandise was likely to confuse a substantial number of consumers.²⁹

As is clear from the openly available published record, both District and Circuit Courts accorded the survey weight and relied upon its findings. Thus, by citing *Indianapolis Colts* as an instance where "Jacoby's surveys ... have ...been rejected by a court," the *ProStyle* opinion inaccurately recites the facts. It is noteworthy that the Seventh Circuit's opinion was authored by Judge Richard Posner. Not only is Judge Posner widely recognized as one of the nation's most scientifically informed and astute judges, but he also holds a reputation for being

²⁸ *Indianapolis Colts, National Football League Properties, Inc. and National Football League v. Metropolitan Baltimore Football Club, Limited Partnership, James L. Speros and Canadian Football League* 1994 U.S. Dist. LEXIS 19277; 31 U.S.P.Q. 2D (BNA) 1801 (USDC, Indiana).

²⁹ *Indianapolis Colts, Inc. v. Metro Baltimore Football Club Ltd. Partnership*, 34 F. 3d 410, 416 (7th Cir. 1994).

skeptical and often critical of experts.³⁰ It seems to me the fact that Judge Posner agreed with the district court “in crediting the major findings from the Jacoby study” should speak volumes, especially to District Courts operating within the ambit of the Seventh Circuit.

Consider, now, *Worthington Foods*,³¹ a second of the cases cited by the *ProStyle* Court in support of its assertion that “Jacoby’s surveys ... have ...been rejected by a court.” In presenting the *Worthington* Court’s opinion, the *ProStyle* Court’s writes: “noting flaws in Jacoby study and holding that ‘the [Worthington] Court does not place great weight on Dr. Jacoby’s study.’” Most familiar with case law, and even those who are not, will appreciate that “does not place great weight on” does not equate to a “rejection” of either the survey or the opinions predicated thereon. Indeed, as the record shows, the *Worthington* Court was careful to characterize the survey as having “small flaws” – then admitted and relied upon it, finding “that the results of the survey are likely to be accurate.”

The plaintiff’s final contention undercutting the Jacoby study is that the interviewees examined the products in the isolation of an enclosed interviewing area. The study did not take place in a grocery store and did not account for the bombardment of sensory data received by the

³⁰ For example, suggesting that experts may be viewed as a non-differentiated commodity, Judge Posner’s has conveyed the impression that he holds testifying experts in low regard. Consider the following:

[The witness’ testimony was] either that of a crank, or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened; at the time of the trial he was involved in 10 such cases. His testimony illustrates the age-old problem of expert witnesses who are often the mere paid advocates of partisans of those who employed and paid them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that that cannot now be proved by some so-called “experts.” See *Chaulk v. Volkswagen of America, Inc.* 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J. dissenting) (quoting *Keegan v. Minneapolis & St. L. R.R.*, 76 Minn. 90, 95, 78 N.W. 965, 966 (1899)).

³¹ *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1446 (S.D. Ohio 1990).

consumer in the hustle and bustle of the typical supermarket environment. This criticism is sound.

Consumers tend to be more rushed when shopping at a grocery store and less careful than they otherwise might be.

To an extent, isolation was essential for Dr. Jacoby's study and any researcher would have to face the same problem. Therefore, this shortcoming may be unavoidable. Nevertheless, this factor limits the probative value of the Jacoby study to a small degree.

After considering the plaintiff's arguments concerning the study, the Court finds that Dr. Jacoby's study is somewhat probative, in spite of small flaws. The Court finds that the results of the study are likely to be accurate...

The reason why the *Worthington* Court considered the survey only "somewhat probative" had little to do with the test protocol or questions asked. Rather, being proffered at a Preliminary Injunction hearing, the survey was limited to a "pilot" sample of 50 consumers. It was for this reason that the court felt that the pilot survey was only "somewhat probative."³² Regardless, as the *Worthington* Court did admit and accord the survey weight, it was an inaccurate recital of the facts for the *ProStyle* Court to cite *Worthington* as an instance where my survey had been "rejected."

*Simon & Schuster, Inc. v. Dove Audio, Inc.*³³ represents a third case cited by the *ProStyle* Court in support of its assertion. Describing that matter, the *ProStyle* court wrote: "holding that because of flaws, 'the [*Dove Audio*] Court assigns significantly reduced weight to the Jacoby Survey's results'." Consider, now, the published record. In very courtly and even-handed fashion, the *Dove Audio* court wrote:

³² Despite relying on 50 people, since not a single one of the respondents evidenced confusion of any sort, the application of standard statistical inference procedures relied upon by scientists across all the sciences permits one to predict (with a very high degree of scientific certitude) that, were one to use a larger sample of any size, confusion would not exceed *de minimus* levels.

³³ 970 F. Supp. 279, 291 (S.D.N.Y. 1997).

Dove attacked the Jacoby study on several fronts, but we find the survey suffered from only one significant flaw: the ambiguous wording of the main question designed to test for likelihood of confusion. [Appended to this sentence was the following footnote] The Court does not find Dove's other criticisms compelling, including the view that the Jacoby Survey asked improper leading and suggestive questions. Aside from the ambiguity of the question addressed above, the Jacoby Survey asked appropriate questions that did not improperly suggest the answer plaintiffs were seeking. The Court also finds that the Jacoby Survey defined an appropriate universe of respondents.³⁴

According a survey "significantly reduced weight" necessarily means the survey was admitted, not "rejected." Moreover, the *ProStyle* Court's use of the plural "flaws" (as opposed to the singular "flaw") does not comport with the published record. As it clearly indicated, the *Dove Audio* Court had but a single criticism – which was to consider the word "version" to be ambiguous.³⁵ Again, as comparison with the underlying record reveals, it was an inaccurate recitation of the facts for the *ProStyle* Court to cite *Dove Audio* as an instance where this writer's survey had been "rejected."

The *ProStyle* Court cites *Novo Nordisk of North America v. Eli Lilly and Co.*³⁶ as representing a fourth case in support of its assertion that "Jacoby's surveys ... have ...been rejected by a court." Yet, as the *Novo Nordisk* Court wrote:

³⁴ Note that, here again, we have a court finding no problem with a confusion question containing the "had to get" (as opposed to the "did get") permission meaning.

³⁵ As used in the sentence "I had a ball," the word "ball" is ambiguous. The speaker might be referring to having had a spherical object, a good time, or a formal dance. The surrounding verbal context -- "I had a ball and threw it against the wall" -- is what makes the meaning clear. The *Dove Audio* court contended that, as used in the question, the word "version" was ambiguous. However, in most surveys, questions are not asked in isolation. Examination of the immediately preceding context used by the interviewer in establishing a foundation for the question reveals that the meaning of "version" was rendered unambiguous by this context

³⁶ 1996 WL 497018 (S.D.N.Y)

This Court accepts the results of the first two questions in the Jacoby survey[showing] 25% of respondents mistakenly believed that the maker of the cartridge and the maker of the pens were somehow connected. The remainder of the questions, however, were suspect to many interpretations by the respondents. Thus, despite the credibility of Dr. Jacoby ..., this Court discards the remainder of the survey results.³⁷

Rejecting some questions while admitting and giving weight to findings obtained with other questions hardly qualifies as an instance where the survey was rejected.³⁸ Accordingly, it was an inaccurate recitation of the facts for the *ProStyle* Court to cite *Novo Nordisk* as an instance where this writer's survey had been "rejected."

Citing a fifth case in support of its assertion, the *ProStyle* Court writes: "*Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 218-19 (D. Md. 1988) (rejecting results of Jacoby survey as irrelevant)." This writer proffered three surveys in that matter. One tested a yellow pages display ad, a second tested an in-flight magazine ad, while the third tested a mock-up of signage for defendant's proposed McSleep Inns. The *Quality Inns* Court wrote a single sentence regarding the first two of these surveys: "The Court does not consider the results of the surveys on these two stimuli as relevant."³⁹ Beyond relevancy, the court found no fault with these surveys. For the *ProStyle* Court to imply that there were technical deficiencies in either of these surveys represents an

³⁷ *Ibid.* at 6.

³⁸ Note that the questions regarding sponsorship confusion rejected by the *Novo Nordisk* Court were the same questions accepted by both the District and Appellate Courts in *Indianapolis Colts, Inc. v. Metro Baltimore Football Club*, by the District courts in *Worthington*, in *Dove Audio*, and in *Quality Inns*, as well as by numerous other courts; see: Jacob Jacoby, *Sense and Nonsense in Measuring Sponsorship Confusion*. *Cardozo Arts and Entertainment Law Journal*, (forthcoming).

³⁹ At page 219.

inaccurate representation of the facts. Further, the *ProStyle* Court fails to mention that the *Quality Inns* Court did admit and rely upon the data obtained from the third survey.

As part of the citation string used to support its assertion that “Jacoby’s surveys ... have ...been rejected by a court,” the *NFLP v. ProStyle* court writes: “*Smith v. Ames Dep’t Stores, Inc.*, 988 F. Supp. 827, 834 (D.N.J. 1997) (holding that ‘Dr. Jacoby’s failure to consider data gleaned from actual consumers limits [his opinion’s] value’).” In marked contrast to this representation, the *Smith v. Ames* Court wrote: “In his cross motion, plaintiff describes Dr. Jacoby as a ‘hired gun with an empty holster – a survey expert who has not conducted a survey’.” This statement is entirely accurate. Contrary to my urging and advice,⁴⁰ no survey was ever conducted and no survey evidence was proffered, prompting the *Smith v. Ames* Court to write of “Dr. Jacoby’s failure to consider data gleaned from actual consumers limits [his opinion’s] value.” Since no survey was ever conducted (and, hence, none proffered), citing *Smith v. Ames* as an example of where “Jacoby’s surveys ... have been rejected by a court” essentially amounts to nothing other than a fabrication. Everything in the record published and unpublished record is crystal clear – there was no survey. As described by

⁴⁰ Similarly, in *Barnes Group Inc. v. Connell Limited Partnership*, 15 U.S.P.Q.2d 1100 (D. Del 1990) the court wrote: “Dr. Jacoby’s opinions were not based on any survey evidence and he admitted that he had requested that plaintiff conduct a survey which plaintiff declined to do.” For balance, it should be noted there often are times when I advise clients against conducting a survey, although neither *Smith v. Ames* nor *Barnes v. Connell* were such occasions.

Professor Faigman: “The ‘facts’ become part of the interpretive reality of the Court, a process separated from any empirical reality.”⁴¹

Examination of the underlying record in the remaining four cases cited by the *ProStyle* Court as instances where surveys I proffered were “rejected” reveals that these surveys had not been rejected; rather, they were accepted and accorded little or no weight. Although this would render the *ProStyle* Court’s recital technically inaccurate, perhaps the Court intended these cases to exemplify its assertion that “Jacoby apparently has not learned from his mistakes.” If so, it merits reviewing these cases to determine whether the flaws noted by these courts were being repeated in survey I proffered in *ProStyle*. If so, then the *ProStyle* court would be correct; I had not learned from my mistakes. However, if the criticisms rendered by these earlier courts had been completely rectified in the survey proffered in *ProStyle*, then the Court would have been factually incorrect both in describing the survey proffered in its case and in asserting “Jacoby apparently has not learned from his mistakes.”

Citing *ConAgra, Inc. v. Geo A. Hormel & Co.*, 784 F. Supp. 700, 725-28 (D. Neb. 1992), the *ProStyle* Court wrote: “holding that ‘the Jacoby study...must be significantly discounted’ because of ‘serious flaws in the study’”). Now consider the underlying record. In its opinion, the *ConAgra* Court offered the following criticisms:

Hormel raises essentially two criticisms of Dr. Jacoby’s study. First, Hormel argues that the primary defect in Dr. Jacoby’s survey, which defect renders the results meaningless, is the failure to inquire into each respondent’s state of mind after a response was made to various survey questions. In other words, Hormel argues that with regard to all of the

⁴¹ David L. Faigman, *Legal Alchemy*, NY: H. Freeman & Co., 1999, at 110.

questions, Dr. Jacoby should have asked: “What makes you say that?” The second criticism of Dr. Jacoby’s survey was that it did not contain a “control.” I agree with Hormel that the criticisms advanced with regard to Dr. Jacoby’s study are serious flaws in the study. However, while these flaws call into question the results, they do not in my opinion totally invalidate this study.

While one of the likelihood of confusion questions in the *ConAgra* survey failed “to inquire into each respondent’s state of mind after a response was made,” all the likelihood of confusion questions in *ProStyle* were followed up with a question asking “What makes you say that?” Second, due to a regrettable miscommunication the planned control group was omitted from the *ConAgra* survey and the Court was correct to find fault for this reason. In contrast, the *ProStyle* survey contained 325 respondents assigned to one of five separate control groups corresponding to each of the five test groups. As the survey proffered in *ProStyle* included both “what makes you say that?” questions and five separate control groups, it is difficult to understand why the *ProStyle* court cites *ConAgra* as supporting its conclusion that “Jacoby apparently has not learned from his mistakes.” The facts compel just the opposite conclusion.

Consider, now, the question earning the court’s disapproval in *Beam v. Beamish & Crawford* where the issue concerned use of the name *Beamish* for beer. In that case, the survey objective was to determine whether the name “Beam” had acquired secondary meaning. So as not to be accused of focusing the respondents’ attention exclusively on hard liquor, the key question was worded as follows: “Thinking only about beer, wine and liquor, what, if anything, does the name or nickname Beam mean to you?”⁴² Although the question does

⁴² Jacob Jacoby, *The Public’s Mental Associations to the Name “Beam”* October 1990.

provide a frame of reference (beer, wine or liquor), the “if anything” language also makes it clear that the respondent could say “The name ‘Beam’ does not make me think of anything” – and many respondents gave just such an answer.

In remanding the matter to the lower court, the Second Circuit accurately characterized the “beer, wine or liquor” question as being of a “compound form.”⁴³ Perhaps thinking that all aided questions were necessarily leading questions, the District Court subsequently characterized it as a “leading” question. What is striking is that, despite this (mistaken) criticism, in the very next sentence, the District Court accepted the findings obtained using this question, writing: “Even so, the study does show that ...more than half of the respondents associate BEAM with JIM BEAM or bourbon. Less than 1% of the respondents associated BEAM with beer.” As the phrase “leading question” is understood and used both across the social sciences and in law,⁴⁴ that question was not a leading question. Regardless, as the *ProStyle* Court did not assert any of the questions in the survey proffered in that matter were leading – because none were – the rationale for citing the *Beamish* decision as support for the assertion “Jacoby apparently has not learned from his mistakes” is not obvious.

⁴³ Docket # 90-7994; filed June 19, 1991.

⁴⁴ Authorities on evidence recognize that closed-ended, aided questions are not necessarily leading. As Wigmore writes: “Questions may legitimately suggest to the witness the *topic* of the answer; [such questions are necessary where the witness has the knowledge] but its terms remain dormant in his memory until by the mention of some detail the associated details are revived and independently remembered.” (3 Wigmore, Evidence, Section 769 (Chadbourn rev. 1970), at 154.) Suppose, upon being asked “Who are the current U.S. Supreme Court Justices?,” the proverbial person on the street cannot recall any. Suppose, this person were then asked “Which, if any, of the following is a current Supreme Court Justice: John Jay; Felix Frankfurter; Antonin Scalia; Sylvester Stallone; or none of the above?” If 50% of respondents asked this question answer “Scalia” but 20% answer “Stallone,” we would not say the question was unreliable, but would understand that it was these latter respondents who answered in an unreliable fashion.

The survey in *American Home Products (AmHo)* sought to assess the likelihood of confusion arising from defendant's using generic tablets in the identical color and nearly the identical shape as plaintiff's Advil tablets. The survey's focus was post-sale, not point-of-sale, confusion. While the *AmHo* court stated the survey had a number of flaws, most authorities (including most other federal courts that have commented on the same research procedures) do not consider the procedures the *AmHo* Court identified as flaws to be flaws. Hence, as discussed below, its criticisms appear unmerited.

As one criticism, the *AmHo* court opined that the survey was flawed because it employed a non-probability sample rather than a probability sample. Yet examination of case law, the corpus of scholarly work published in leading peer reviewed social science journals, and customary research practices in the marketing and advertising industries all reveal that when something tangible has to be shown to respondents, surveys almost always employ non-probability sampling designs.⁴⁵ Indeed, less than 18 months earlier, another court in the same District had written the following regarding another of this writer's surveys: "Moreover, a non-probability survey ... is sufficiently reliable to be admitted into evidence and *accorded substantial weight*... and non-probability survey evidence has been accepted by courts in many trademark and unfair competition cases."⁴⁶ Summarizing case law on this point, Prof. McCarthy writes: "Almost all courts have found that non-probability 'mall-intercept' surveys are sufficiently reliable to

⁴⁵ See Jacob Jacoby and Amy H. Handlin (1991) Non-probability designs for litigation surveys, *The Trademark Reporter*, 81, 169-179.

be admitted into evidence.”⁴⁷ This being so, the *AmHo* court’s criticism regarding sampling design represents an idiosyncratic view at odds with widely accepted research practice and considerable legal precedent. As such, in my opinion, it merited neither acceptance nor repetition by the *ProStyle* Court.

Troubled by the fact that the survey tested of out-of-the-package, post-sale confusion (not as-sold in-the-package, point-of-sale confusion), as a second criticism, the *AmHo* court wrote:

In testifying regarding the significance of his findings, Dr. Jacoby emphasized in his testimony that the survey was not intended or designed to duplicate the conditions attendant when a consumer actually decides to purchase a product, nor could his findings be construed to relate to the issue of consumer confusion before the initial purchase of a product. (at 1066)

In general, the packaging used for Advil bears no material similarity to the packaging used by Perrigo for its retail consumers. (p. 1066)

Although troubled by the survey being a test of post-sale confusion, the *AmHo* Court had no difficulty applying such a post-sale test itself, writing: “To my eyes, plaintiff’s and defendant’s tablets are readily distinguishable when compared side by side or when viewed separately” (p. 1070). However, side-by-side tests have almost universally been held to be inadmissible by other courts⁴⁸

⁴⁶ *National Football League Properties Inc. v. New Jersey Giants Inc.* 637 F Supp 507 at 518, 229 USPQ 785 at 792 (D NJ 1986). Note that italics have been added to the quoted portion and the survey in this matter was designed, implemented and proffered by this writer.

⁴⁷ *McCarthy on Trademarks and Unfair Competition*. West Group. (Section 32: 165). Relatedly, examination of survey research conducted by practitioners as well as that published in peer-reviewed scholarly journals reveals that, where something needs to be shown to the respondent, overwhelmingly (in more than 95% of the cases) researchers employ non-probability, not probability designs. Thus, well conducted studies using non-probability designs are fully in keeping with Rule 703 of the Federal Rules of Evidence.

⁴⁸ Reviewing case law on point, Welter writes: “The side-by-side comparison survey involves two trademarks presented either orally or visually to the respondent at the same time. The courts are of the opinion that this setting rarely reflects the reality of the marketplace with regard to likelihood of confusion.” Phyllis J. Welter *Trademark Surveys* West publishing. Section 6.01[3]:

and would have been recognized as a serious flaw in this instance where it is highly unlikely that a consumer would simultaneously be holding both plaintiff's and defendant's pills in her hands. Regardless, the fact that the survey tested post-sale confusion attributable to the shape and color of defendant's tablets (rather than their pre-purchase confusion of the package) cannot be a valid criticism. Regardless, as the issue in *ProStyle* was pre-sale, not post-sale confusion, it merited neither acceptance nor repetition by the *ProStyle* Court.

Another of the *AmHo* Court's criticisms was that "Dr. Jacoby, who designed the survey, consulted with plaintiff's attorneys concerning the definition of issues on which to test and the propriety of the survey's scheme for questioning respondents, a fact which further detracts from the weight which should be accorded the survey results."⁴⁹ As Prof. McCarthy writes:

...this cannot be a correct criticism and is based upon a misreading of precedent.

Attorney cooperation with the survey professional in designing the survey is essential to produce relevant and useable data. If attorneys cannot tell the survey director what the legal issues are and assist the director in framing relevant questions to be directed at the relevant universe, then irrelevant survey data are bound to be the result.⁵⁰

The use-of non-probability samples, testing products out of their packaging to assess post-sale confusion, and consulting with counsel before designing the survey are matters routinely accepted by virtually all federal courts. To hold that these were "mistakes" is to reject *stare decisis* and say that virtually all surveys proffered in all trademark cases are "mistakes" and the courts who

⁴⁹ At page 1070.

⁵⁰ *McCarthy on Trademarks and Unfair Competition*. (Section 32:166).

accept these surveys are in error. Although the *AmHo* Court is entitled to its opinion, as these were not mistakes that required rectification in future surveys, it becomes difficult to understand the rationale for the *ProStyle* court citing *AmHo* as support for its opinion that “Jacoby apparently has not learned from his mistakes.”

With the exception of the *ProStyle* opinion, I received my most severe criticism in *Weight-Watchers*. There, the Court levied the following criticisms of my survey:

The study’s two major shortcomings were its failure to focus on the kind of confusion that was at issue in this case [viz. confusion as to sponsorship or authorization], and its use of “control” advertisements supposedly to show that consumers were generally confused about advertisements and thus to justify disregarding most confusion as irrelevant “noise.”

The *Weight-Watchers* Court was correct in criticizing the survey for not testing sponsorship confusion.⁵¹ However, since the survey proffered in *ProStyle* did

⁵¹A red flag under *Daubert* is the failure of a scientist to consider other causes for an observed effect (see D. J. Capra *The Daubert Puzzle* 32 G. Law R., 699, 714, 727). Beyond the factors noted in *Daubert*, the Federal Rule of Evidence Advisory Committee’s Notes on the December 1, 2000 amendments to FRE Rule 702 identified sother factors for a gatekeeper’s consideration, including: “Whether the expert has accounted for *obvious* alternative explanations” (italics supplied). Here, the judiciary may benefit greatly by borrowing from its approach to scientific reasoning; the failure to consider other causes might serve as a red flag for judicial reasoning as well. While correct in holding the failure to include a permission question was a flaw, appearing not to have considered *obvious* alternative explanations for this failure, it is perhaps not surprising that the Court incorrectly attributed the cause of this omission to the researcher. In point of fact, the reason why there was no question on sponsorship confusion is *not* that the study was designed without such a question; as designed, the survey did contain such a question. Defendant’s counsel said he would be addressing this issue in a manner that did not require consumer data and instructed that this question be removed. Since (sometimes to the detriment of both the attorney and expert) the researcher’s role does not trump the role of the attorney, but only extends to testing the attorney’s theory of the case, I acquiesced.

Scientific logic and procedure requires ruling out plausible alternative explanations before concluding A (in this case, Jacoby) is responsible for B (the fact that no sponsorship question was included). Failing to employ such logic, or even to ask this researcher why there was no such question, operating with a degree of certitude unjustified in scientific realms, the Court opined I was responsible. As it wrote:

test sponsorship confusion and the court had no criticism of the strong controls employed to measure sponsorship confusion, it is difficult to understand how the *ProStyle* court is able to cite *Weight-Watchers* as supporting the conclusion that “Jacoby apparently has not learned from his mistakes.” The facts compel the opposite conclusion.

Including the Court’s prefatory statement (using the phrase “have been universally relied upon”), the discussion above has examined eleven recitations of fact made in one *ProStyle* opinion. Doing as Judge Posner suggests – namely, getting “hold of the briefs and record to check the accuracy of the factual recitals in the opinion” – reveals that in seven out of these eleven instances, the *ProStyle* court’s recitations are clearly contradicted by the existing record and in another three instances, substantially so. What would explain the *ProStyle* opinion being so systemically a minefield of misinformation?

II. The Antecedents of Erroneous Factual Recitals

It is to be expected that errors of the sort described above will surface occasionally in reported opinions. As is so for all mortals, being human, courts are subject to mishearing or incorrectly remembering things they heard or read. When not checked against the underlying record, this alone may create serious

It is obvious that Dr. Jacob Jacoby, a veteran of the trademark litigation arena and the creator of the Stouffer survey, constructed the study specifically to disprove consumer confusion Jacoby’s study focused on confusion as to the goal or source of the advertisement, but did not focus upon confusion as to endorsement from the message in the advertisement...

While this may have been the Court’s opinion (more correctly, its hypothesis), it is not fact but mere speculation. Nothing, either in the record or anywhere else, exists to confirm such speculation. While the Court easily could have tested its hypothesis by asking this witness to explain why the survey contained no such question, it elected not to do so.

problems. Moreover, these tendencies are only intensified by the heavy caseloads with which courts must cope. They are further exacerbated when the matter involves scientific testimony. Although the designated gatekeepers of science, research shows most judges know relatively little regarding science⁵². While being human and struggling to cope with heavy workloads in unfamiliar realms likely explains a certain amount of error, what would explain the wholesale erroneous recitals such as those evidenced in *ProStyle*?

Commenting upon “the seamier side of the judicial process,” Judge Posner notes “the pervasive reliance of modern American judges on ghostwriters (most judicial opinions nowadays are drafted by law clerks), ...”⁵³ Thus, it is entirely possible the *ProStyle* court did not author these factual inaccuracies, but simply adopted them.

Law clerks are not the only ghostwriters. Another common practice is for a court to request opposing counsel to submit proposed findings of fact, then to accept the slanted, self-serving representations of one of these advocates into its opinions and findings of fact. Such was the case in *ProStyle*. Perhaps because defense counsel had not long before then been a clerk in that District, the *ProStyle* Court may have decided to forego checking his representations against the underlying record. However, the switch from clerk to counsel brings with it a

⁵² As examples, see: Sophia Gatowski, Shirley A. Dobbin, James T. Richardson, Gerald P. Ginsburg, Mara L. Merlino and Veronica Dahir (2001) Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* World. *Law and Human Behavior*. 25 (5), 433-458; Margaret B. Kovera and Bradley D. McAuliff (2000) The effects of peer review and evidence quality on judge’s evaluations of psychological science: Are judge’s effective gatekeepers? *Journal of Applied Psychology*, 85 (4), 574-586.

⁵³ Posner, op. Cit., at p. 190.

sea change in perspective; one is not supposed to be an advocate while the other is. And while it is the job of counsel to be advocates for their clients, because some advocates may employ “lawyer’s tricks,”⁵⁴ their recitals need to be checked for accuracy. Indeed, it seems reasonable to suspect that the submissions of such advocates are the source of much factual error in judicial opinions. Consider the following example.

In *Schwan's IP, LLC v. Kraft Pizza Co.*,⁵⁵ counsel retained two survey experts, one to conduct a secondary meaning survey and one to conduct a likelihood of confusion survey, with each survey to be used for the issue it tested and no other purpose. The likelihood of confusion survey used a “Squirt” protocol and was not capable of determining secondary meaning, a fact that the survey expert clearly explained in deposition testimony. Despite this, without the expert’s authorization or knowledge, in its brief in opposition to a motion for summary judgment, counsel cited both surveys as supplying evidence of secondary meaning. The Court’s opinion then stated how that expert’s did not support a finding of secondary meaning. The published opinion thus criticizes the expert for something the underlying record clearly indicates warranted no criticism.

Regardless of whether portions of a court’s opinions are ghostwritten by clerks or opposing counsel, the buck obviously stops at the court’s desk.

⁵⁴Writing in *The Problems of Jurisprudence*, it does not take long for Judge Posner to raise the problem of “lawyers’ tricks; at 10. That said, fairness requires this writer to acknowledge that law is not the only profession where Judge Posner alerts us to “tricks.” Writing the Seventh Circuit’s *Indianapolis Colts* opinion, he raises the possibility of “tricks of the survey researcher’s black arts.”

⁵⁵ 379 F.Supp.2d 1016 (D. Minn., 2005).

Ultimately, it alone is responsible for the accuracy of the factual recitals in its opinions.

Although distasteful to contemplate, there also remains the possibility that, whether consciously or unconsciously, incorrect recitals may sometimes reflect a court stating:

... the facts as favorably to its conclusions as the record allows, and often more favorably. This unedifying practice reflects both the psychology of judging (having persuaded himself that a particular outcome is correct, the judge or judge's clerk will tend unconsciously to screen out facts that support a contrary outcome) and the formalistic style. An opinion would not look as powerful, as confident, as certainly right if it acknowledged the strength of opposing views.⁵⁶

Apropos of acknowledging “the strength of opposing views,” it is noteworthy that the *ProStyle* Court neither noted nor alluded to any of the overwhelmingly greater number of instances where my research and testimony had been treated very favorably, even lauded, by federal courts. This seems comparable to reading an article that devoted attention to the half-dozen or so instances where opinions of the *ProStyle* Court had been criticized and reversed by appellate courts without that article noting or alluding to the more than three score opinions by this Court that have been upheld or gone unchallenged. Such treatment would hardly be called “fair and balanced,” presumably, the essence of justice.

III. The Consequences of Erroneous Factual Recitals

Presumably along with most others, I tend to believe it is more often the case that courts are correct than incorrect in their factual recitals. Nonetheless,

as Judge Posner surmises and as the preceding case study indicates, courts do sign their names to opinions containing erroneous factual recitals which, as one can readily see, sometimes are accompanied by pejorative embellishment implying that the expert has acted incompetently or unethically

Another theme in Judge Posner writings is the consequences of judicial decisions, particularly the paucity of information regarding these consequences.

As examples:

The judge's essential activity... is the making of a large number of decisions in rapid succession, with little feedback concerning their soundness or consequences.⁵⁷

The underlying problem is that so little is known about the consequences of legal decisions.⁵⁸

When it comes to erroneous factual recitals, who might experience the consequences of such errors and how might these parties be affected?

A. Consequences for Parties Directly Associated with the Adjudicated Matter

The most immediate consequence ensuing from erroneous factual recitals is that they may exert an adverse material impact upon the delivery of justice in the instant matter. When a court gets the facts – even a single fact -- wrong, it may be just the thing that tilts its opinion in a direction inconsistent with justice. As a consequence, at least one of the litigants will have been treated unjustly.

Others directly associated with the adjudicated matter may also be affected by the erroneous factual recitals. This includes counsel, witnesses and

⁵⁶*The Problems of Jurisprudence*, at 210-211.

⁵⁷*The Problems of Jurisprudence*, at 192.

the court itself. Regarding the court, there is always a chance that the matter will be appealed, thereby raising the possibility that the erroneous factual recitals will come to light, conceivably serving as grounds for reversal or remand. As acquiring a reputation for making factually incorrect recitals does not reflect favorably upon those making such recitals, courts that habitually do so risk squandering their credibility among appellate courts. Even when not appealed, should the erroneous recitals otherwise come to light and be publicly discussed (e.g., in the media or in law reviews), this might cause the originating court and possibly even other members of the judiciary a certain amount of discomfort. This is to be expected, as not even the U.S. Supreme Court is immune from such scrutiny.

The critical response that routinely follows [the Supreme Court's] alleged errors surely influence the Court. The justices read their reviews, both scholarly and in the general press. Recently, for instance, this phenomenon has been labeled the "Greenhouse effect," after the *New York Times*' influential reporter Linda Greenhouse.⁵⁹

.....

Where an erroneous recital is suspected of having played a role in a court's deliberations, decisions and final opinion, others who may be affected by the court's erroneous factual recital include plaintiff's and defendant's counsel. One of these parties likely will experience an improved reputation and enhanced prospects for future business, while the other may experience just the opposite. Thus, the potential consequences for these parties are likely to be both material and pecuniary.

⁵⁸*The Problems of Jurisprudence*, at 110.

⁵⁹ Faigman, *Legal Alchemy*, at 114.

Where a court's erroneous factual recitals involve a testifying expert (as in *ProStyle*), the injurious consequences for the expert could be long-lived and substantial. For many who practice and adjudicate law, if a court's opinion is written in a manner that suggests something is factual and true, then unless challenged and overturned in a court of law, it remains accepted as factual and true. A court's erroneous factual recitals can thus wreak havoc, tarnishing even the most distinguished expert's credibility and reputation. Insofar as the expert is concerned, though there not there as a litigant, but for the purpose of assisting the trier of fact in understanding and resolving the dispute in a just manner, the expert herself becomes the recipient of injustice. Without any remedy at law for securing redress and the rehabilitation of his or her good name, an expert whose testimony or prior record is the subject of a court's erroneous factual recitals⁶⁰ may forever bear the burden of a trier of fact who has performed his or her task poorly.

As the judicial system is currently structured, tarnished by a court's erroneous factual recitals, the rights of testifying experts are less than those accorded defendants accused of the most heinous crimes. At least the latter enjoy the right to have the charges against them heard by a jury of their peers. In contrast, experts whose work is subject to a court's erroneous factual recitals have little recourse other than to suffer the slings and arrows of their outrageous misfortune. Having no opportunity for the matter to be heard and the errors

⁶⁰ It certainly is the case that not all erroneous recitals by a court are intentional. However, whether intentional or not, the effect is equivalent to having the court bear false witness. At least since the time

possibly rectified not only is unfair to the aggrieved expert, but inconsistent with the fundamental notion that “The law must be fair.”⁶¹

Last, any suggestion that appellate review is sufficient to cure the problem is mistaken. In many situations, the party on whose behalf the expert has proffered testimony will not appeal the matter. A losing party may have neither the will nor resources to file an appeal and, although its expert may have been severely and unjustly criticized, the prevailing party (as in the *ProStyle* matter) has no need to file an appeal. Thus no opportunity exists to correct the record. Even when there is appellate review, constraints are imposed on what the tribunal may examine. Moreover, the tribunal may never become aware of the erroneous factual recital so that, again, the record may not be set straight.

B. Consequences for Parties Beyond Those Directly Associated with the Adjudicated Matter

As important as the consequences are for the litigants in the matter where the inaccuracies first surface, the repercussions of erroneous factual recitals may be far greater for parties not directly associated with the originating matter. Because “lawyers’ and, particularly judges’ knowledge of the world, or at least the slice of the world relevant to legal decision making, derives to a significant degree from judicial opinions,”⁶² some might argue that the potential erroneous

Moses came down from Mount Sinai, a fundamental pillar of common law has been the Ninth Commandment, “Thou shalt not bear false witness.”

⁶¹ Justice Stephen Breyer, *Reference Manual on Scientific Evidence*,(2002) at 4.

⁶² Op cit. at 211.

recitals have for compromising the delivery of justice in subsequent cases is likely to be more important than the impact on litigants in the instigating matter.

Once error is created and apparently endorsed by a court, these newly created “facts” tend to exert a reverberating impact upon other courts. Newly minted, these “facts” can then be disseminated through Lexis, Westlaw and similar information retrieval systems, after which, for reasons described by Judge Posner, they may become incorporated into subsequent opinions and case law. “Because law, like language, values stability, legal mistakes, too, can become sanctified by time and usage.”⁶³ Thus is spawned a body of law predicated in part upon “systematically unreliable sources of information.”

The delivery of justice is the *raison d’etre* for judging, yet the perpetuation of such error cannot be anything other than a detriment to the delivery of justice. The credibility of and respect for the judiciary is in large measure predicated upon the public’s perception that judicial decisions are based on “the truth, the whole truth, and nothing but the truth.” As instances of erroneous recitals become more widely known, such error – especially the perpetuation of such error -- can only serve to undermine the public’s confidence in and regard for the judiciary.

Courts are not the only ones who insure that erroneous factual recitals have an unwarranted and extended life. Lawyers’ “knowledge of the world [also] ... derives to a significant degree from judicial opinions...”⁶⁴ Engaged in

⁶³*The Problems of Jurisprudence*, at 52.

⁶⁴ *Op cit.* at 211.

preparing for subsequent matters, upon searching Lexis or Westlaw and finding what seems to be a nugget in support of their position, counsel will incorporate these inaccuracies into their own briefs and arguments, possibly not knowing (or caring) that the recital is factually incorrect. In this way, lawyers not directly associated with the originating case can breathe further life into the recitation of error.

C. Illustrating the Impact of a Single Erroneous Factual Recital Upon Subsequent Case Law

Given its wholesale inaccuracies, the *ProStyle* opinion might be excused as a rare anomaly. Yet inaccurate recitals do occur and Judge Posner's minefield metaphor is apt. An area can be 99.9% free of land mines, yet stepping on the remaining .1% can be lethal. By analogy, it takes but a single factual error in an otherwise correct opinion for case law to be debased. Is such impact actual or mere speculation?

Consider *Quality Inns International Inc. v. McDonald's*,⁶⁵ a matter that involved three surveys being proffered as evidence on behalf of plaintiff, as well as others offered on behalf of defendant. The issue was whether Plaintiff's use of the name McSleep Inn was likely to cause confusion such that potential lodgers in such a facility would think it somehow emanated from, was sponsored by or affiliated with defendant.

Consumer surveys used for assessing likely confusion require that a proper control be employed for the purpose of estimating "noise" (namely, error,

⁶⁵ *Quality Inns International, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 219 (D.Md. 1988).

including confusion not attributable to the alleged cause), with said estimate of noise then being deducted from that obtained with the allegedly infringing item prior to arriving at the level of estimated confusion.⁶⁶ In considering how much “noise” is reasonable or to be expected in any given instance, the *Quality Inns International Inc. v. McDonald’s*⁶⁷ Court wrote:

[b]oth experts acknowledged that there are inherent distortions in surveys which they call ‘noise.’ But none estimated that the extent of this noise would ever rise above a few percentage points.”

As one of the experts referred to in this passage, this recital of “fact” came as news to me and prompted me to get hold of the official court transcript.⁶⁸ A detailed examination of this transcript reveals nothing to indicate that I said or implied noise would “[n]ever rise above a few percentage points.” What I did say was that, in the studies being proffered *in that particular matter*, the noise levels empirically obtained were less than 2%.

The transcript also reveals that I provided testimony completely at odds with the notion that noise would *never* rise above a few percentage points. Specifically, describing the findings from an advertising industry “benchmark” study (that used a national probability sample of 1,347 magazine reading

⁶⁶ As used in the realm of survey research, “noise” is error attributable to factors not at issue, such as when a portion of the confusion evidenced in a likelihood of confusion survey is due to miscomprehension of or bias in the question or by guessing at answers, not by anything associated with the contested trademark or trade dress. A more extensive discussion of “noise” may be found in Jacob Jacoby (2002) Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys. *The Trademark Reporter* 92 (4) 890-956.

⁶⁷ *Quality Inns International, Inc. v. McDonald’s Corp.*, 695 F. Supp. 198, 219 (D.Md. 1988).

⁶⁸ Reporter’s Official Transcript of Proceedings; July 22, 1988 at pages 952-955.

respondents to test a representative sample of 54 full-page ads appearing in nationally circulated magazines), I testified:

...the noise level in print [magazine ads] runs between – the arithmetic average is approximately 18% and the median, which means the mid-most number, the most common number, is 11.8% or let's say 12%. So depending upon which number you use, there is a noise level between 12 to perhaps 18% associated with magazine print communications.

Having conducted this study and authored a book and several peer reviewed journal articles based upon these data,⁶⁹ it would have been inconsistent (to an extent bordering on perjury) for me to have testified that “noise would [n]ever rise above a few percentage points.”

The impact of the *Quality Inns* court recalling 2% instead of 12% to 18% likely was inconsequential in its decision making; the impact of its presumably unintentional erroneous recital of the testimony has not been. The *Quality Inns* Court's erroneous recital subsequently was quoted verbatim in J. Thomas McCarthy's hornbook *McCarthy on Trademarks and Unfair Competition*. Those familiar with the intellectual property literature would agree that Professor McCarthy's work is probably the single most influential treatise in the field. In frequently updating and revising this work, Prof. McCarthy reviews, analyzes, synthesizes and comments upon evolving case law. Understandably, with little time to “get hold of the briefs and record to check the accuracy of the factual

⁶⁹ Jacob Jacoby and Wayne D. Hoyer, *The Comprehension and Miscomprehension of Print Communications: A Study of Mass Media Magazines*. Hillsdale: NJ. Lawrence Erlbaum Associates 1988; Also see: Jacob Jacoby and Wayne D. Hoyer, The Comprehension-Miscomprehension of Print Communications: Selected Findings. *Journal of Consumer Research*, 1989, 15, 434-443.

recitals in the opinion,”⁷⁰ Prof. McCarthy accepts a judicial opinion’s factual recitals as being accurate. But consider the implications when they are not.

When Professor McCarthy repeats a court’s factual inaccuracy, it can seriously impact ensuing legal briefs and court opinions, thereby compounding the impact of the original erroneous recital. Indeed, following the *Quality Inns* Court’s recital being repeated in Professor McCarthy’s work, it began surfacing in various legal briefs and in several opinions, including *Weight Watchers v. Stouffer’s*, where that Court commented:

In *Quality Inns Intern., Inc. v. McDonald’s Corp.*, 695 F. Supp. 198 (D.Md. 1988), Jacoby conducted a survey for Quality Inns to show lack of confusion over the company’s proposed “McSleep Inn” hotels. The court, finding a certain amount of confusion, wrote that “[b]oth experts acknowledged that there are inherent distortions in surveys which they call ‘noise.’ But none estimated that the extent of this noise would ever rise above a few percentage points.” *Quality Inns Intern., Inc.*, 695 F. Supp. At 219. That finding seems to contradict Jacoby’s testimony here.⁷¹

As if it were not enough to have one court (likely unintentionally) make a factual recital that represented my testimony to be something other than it actually was, it becomes more than a bit discomfoting to then have another court use that factually incorrect recital to impeach my testimony in another matter.

Attempting to stem repetition of and reliance upon the *Quality Inns* Court’s erroneous recital, I wrote Professor McCarthy informing him of the particulars. While continuing to quote the Court’s recital, thankfully, he now alerts readers to the fact that this recital might not be accurate. As is now stated:

⁷⁰*The Problems of Jurisprudence*, at 211.

⁷¹ *Weight Watchers Int’l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1274 (S.D.N.Y. 1990).
Footnote 10.

Two leading survey experts, Hans Zeisel and Jacob Jacoby, were on opposite sides of the case and the judge remarked that “none estimated that the extent of this noise would ever rise above a few percentage points.” However, Jacob Jacoby has advised the author that Jacoby is of the view that the judge misinterpreted the record and that the trial transcript reveals that this was not Jacoby’s testimony.⁷²

As can be seen, when earlier recitals are factually incorrect, the judiciary’s built-in reliance upon precedent only serves to perpetuate and compound the error. The cause of justice based on truth is ill served by such reverberating recitals. Perhaps this is why Judge Posner observes the following regarding precedent. “The hierarchical structure of a legal system and the desire for stability that is encapsulated in the doctrine of *stare decisis* may advance ‘justice’ in a variety of senses, ...but they may *impede the search for truth*”⁷³ [Italics supplied]. While the need for stability is important, one wonders why justice predicated upon truth does not trump stability, particularly as the latter is the essential promise of the Constitution and what the citizenry likely expects out of its justice system.

IV. Remediating Erroneous Factual Recitals

While errors – including erroneous factual recitals -- may be unavoidable, their occurrence serves no good purpose. This is especially so when one considers the repercussions of erroneous factual recitals, especially their potential for compromising the integrity of subsequent case law. Several suggestions can be offered for ameliorating the problem, some of which need be

⁷² *McCarthy on Trademarks and Unfair Competition*, Release 16 12/2000. Footnote 5, Section 32:187, page 32-309.

implemented prior to opinions being published, others of which apply after opinions containing factual error have been published. I am of the opinion that the more of these suggestions adopted and implemented, the lower will become the rate and severity of erroneous factual recitals.

A. Before Judicial Opinions are Published

Clearly, it would be best if factual errors did not appear in court opinions in the first instance and the suggestions for avoiding, or at least reducing, the occurrence of such error are fundamental. Courts who write their own opinions need to double check their recitals, or have this done by others. Equally important, despite the tendency noted by Judge Posner for courts to state "... the facts as favorably to its conclusions as the record allows, and often more favorably," to avoid creating new facts that have no foundation in reality, courts should resist the tendency to re-state *opinion* in a manner that suggests it is *fact*.

Courts also need to be vigilant about checking the accuracy of factual recitals when relying upon material drafted by their clerks. Perhaps informing clerks in advance that the court would be spot-checking their work – and actually engaging in occasional spot-checking -- would be sufficient in most instances. As context often determines meaning, courts need to be especially wary of instances where brief phrases have been extracted and quoted. To avoid extracting and conveying a meaning not intended by the original author, before incorporating such snippets into their own opinions, as a matter of due diligence, courts should ask to see the context from which the snippet was extracted.

⁷³ *The Problems of Jurisprudence*, at 82.

Greatest vigilance needs to be exercised when counsel are invited to submit proposed findings of fact. Especially in this era of hardball lawyering,⁷⁴ being advocates for their clients, the ostensibly accurate factual recitals of counsel need to be checked with a fine tooth comb. The American Bar Association's *Model Rules of Professional Conduct* (2002) contains the following:

Rule 3.3: (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

Rule 8.4: It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice.

In spite of these rules, it is not uncommon to find briefs and proposed findings of fact reflect the following practices: (1) Even when they have all the facts at their disposal and obviously do or should know better, providing an incomplete and unbalanced picture for the purpose of creating a record designed to mislead the tribunal. (2) Even when they have all the facts at their disposal and obviously do or should know better, distorting, misrepresenting and sometimes proffering fabrications. (3) Even when answers to their deposition questions reveal their theories and conclusions to be unfounded, ignoring this testimony and using "just

⁷⁴ Discussing evolution of the American Bar Association's "Model Rules of Professional Conduct," Hazard and Hodes comment:

Prominent members of the bar, many of them sitting judges, complained that the lack of professionalism is most evident and most acute among trial lawyers, and that it is manifested by a lack of "civility." The "Rambo" lawyers, it was argued, follow a "hardball" or "scorched earth" policy in discovery and at trial, to the detriment of other participants in the justice system and thus ultimately to the detriment of society. It was usually conceded that "uncivil" lawyers were attempting to maximize client interests, using legally available tactics, but it was asserted that *public* values ought to trump the value of client service.

Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, Aspen 2003, Section 1.6, at 1-11.

answer my questions ‘yes’ or ‘no’” admonitions to elicit small truths in the service of creating big lies.⁷⁵ (4) Using material shorn from its context to convey misleading impressions and meanings. That such tricks are so widely practiced likely underlies Wolfram’s observation:

On the assumption that lawyers regularly engage in lying, bullying, and other forms of dissimulation and coercion in their practices, many nonlawyers, and some lawyers, contend that ‘legal ethics’ is an oxymoron – one cannot be both a good lawyer and a good person.⁷⁶

Before incorporating any of counsels’ proposed findings of fact into their own opinions, to avoid beginning a cycle or factual error in judicial opinions, courts need to compare (or have their clerks compare) the factual recitals in counsels’ submission with the underlying record. Were courts to “initiate appropriate actions”⁷⁷ in those instances where they find material discrepancies in meaning between counsels’ submissions and the underlying record, one would expect that the litigators who appear before them would become less likely to employ such tricks in an effort to mislead the court and divert justice.

⁷⁵ To illustrate, consider Mr. X, a witness whose published writings contain the following sentence: “It is exceedingly rare to see courts let their own religious beliefs intrude when judging cases.” Now consider a cross-examining attorney who asks “Mr. X, isn’t it true you wrote the words ‘courts let their own religious beliefs intrude when judging cases’? Just answer ‘yes’ or ‘no’.” While witnesses take an oath to provide “the truth, the whole truth, and nothing but the truth,” in my experience, whether demanded by the cross-examining attorney or imposed by the court, the “just answer ‘yes’ or ‘no’ admonition” often leads to the cross-examiner finessing the situation so that small truths are elicited that are contrary to the larger truths generally at issue. For many practical reasons, relying upon re-direct to remedy the problem is a flawed and often ineffective mechanism, especially when counsel elect not to engage in a re-direct examination.

⁷⁶ Charles. W. Wolfram, *Modern Legal Ethics*, Section 2.7.3, at 76 (1986).

⁷⁷ Canon 3B of the "Code of Judicial Conduct for United States Judges" holds:

(2) A judge should require court officials, staff, and others subject to the judge’s direction and control, to observe the same standards of fidelity and diligence applicable to the judge.

(3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Apropos of the above suggestion, both the 5th and 11th Circuits have a policy such that, if the trial judge adopts essentially unvarnished the canned findings drafted by one side, then those findings are automatically suspect and will be reviewed with added vigor upon appeal. For example, counsel for defendant in *Amstar Corp. v. Domino Pizza, Inc.*, 615 F.2d 252 (5th Cir. 1980) noted in its appeal that the District Court had rubber-stamped the plaintiff's proposed findings of fact. The appellate court then held:

The court's 54-page memorandum of Findings of Fact and Conclusions of Law was copied almost verbatim from proposed Findings of Fact and Conclusions of Law submitted by plaintiff's counsel. While the practice of allowing counsel for the prevailing party to write the trial judge's opinion has not been proscribed by this circuit, it should nevertheless be discouraged. Even though the court, in adopting plaintiff's findings and conclusions, stated that it had "individually considered" them and adopted them because it "believed them to be factually and legally correct," a cursory reading of the district court's memorandum leaves one with the impression that it was indeed written by the prevailing party to a bitter dispute. While the "clearly erroneous" rule of Fed.R.Civ.P. 52(a) applies to a trial judge's findings of fact whether he prepared them or they were developed by one of the parties and mechanically adopted by the judge, "we can take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule." *Wilson v. Thompson*, 593 F.2d 1375, 1384 n.16 (5th Cir. 1979). See also *James v.*

Stockham Valves & Fittings Co., 559 F.2d 310, 314 n.1 (5th Cir. 1977);
Volkswagen of America, Inc. v. Jahre, 472 F.2d 557, 559 (5th Cir. 1973).

As was stated in James :

"(T)he appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge. 559 F.2d at 314 n.1, quoting *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962).

Were the other circuits to adopt a similar policy, district courts might better appreciate that, before incorporating counsels' proposed findings of fact into their own opinions, they need to compare (or have their clerks compare) the factual recitals in counsels' submission with the underlying record.

B. After Judicial Opinions have been Published

As a scientist (with forty years of post doctoral experience whose scholarly research and writings are often cited across the social sciences⁷⁸ and

⁷⁸ Analysis of the leading peer-reviewed scholarly journal in this author's discipline, the *Journal of Consumer Research*, reveals I had had the highest "influence index" of any of the field's 42 most-published scholars whose work was accepted and published in *JCR* during the 15 year period spanning 1974-1989. See D. Hoffman & M. Holbrook, "The Intellectual Structure of Consumer Research," *Journal of Consumer Research*, 1993 (19), 507-517, at 511. (As an indication of its selectivity and rigor, the rejection rate at the *Journal of Consumer Research* tends to hover between 85% and 90% of the papers submitted.)

A comprehensive study of the impact of publications in the *Journal of Marketing*, *Journal of Marketing Research* and *Journal of Consumer Research*, (traditionally considered marketing's most rigorous peer-reviewed journals) reveals this writer to have been the most often cited consumer scholar (and second most often cited marketing scholar) in the *Social Science Citation Index* for the 20 year period spanning 1969 through 1988. (The *Social Science Citation Index* covers more than 1,400 empirically oriented social and managerial science journals worldwide.) See Joseph Cote, Siew Meng Leong and Jane Cote. "Assessing the

honored by scientific societies⁷⁹), I resonate to and concur with Judge Posner when he writes: “the doctrine of precedent ... in one sense is a refusal to correct errors – a posture that would be thought bizarre in scientific inquiry.”⁸⁰ Science relies upon – indeed, demands – the identification and correction of error. The scientifically based knowledge we routinely and unthinkingly use as we go about our daily lives would not be possible were it not for science’s emphasis upon identifying and correcting error as a necessary foundation for progress.

Science is but one of many valued realms where the correction of error is highly valued. A hallmark of responsible journalism is the publication of errata and corrections. The *New York Times*, for example, daily publishes corrections on Page 2 of Section A.⁸¹ Setting aside the increased likelihood of suits for slander and libel, were responsible media not to publish merited errata and corrections, one would expect their credibility among the public to erode.

Dissemination and Utilization of Marketing Research in the Social Sciences: A Citation Analysis Approach.” Department of Marketing Working Paper, Washington State University, August 10, 1990.

⁷⁹ It has been my good fortune to have four social science societies honor my scholarly research and writings. In 1991, I was the first recipient of the American Academy of Advertising’s “Outstanding Contribution to Advertising” award for having made “a significant and sustained contribution to advertising research through a systematic program of research.” In 1995, I was the fifth recipient of the American Psychological Association’s Society for Consumer Psychology bi-annual “Distinguished Scientist Award” for “sustained, outstanding contributions to the field of consumer psychology.” (Basking in reflected glory, the third recipient later received a Nobel Prize.) Based upon my contributions to the field of consumer research, in 1993, I was elected a Fellow of the Association for Consumer Research, an honor bestowed upon approximately 1% of the membership. In 1978, I received the American Marketing Association’s Harold H. Maynard award for an article judged to have made “the most significant contribution to marketing theory and thought” during the preceding year.

⁸⁰ *The Problems of Jurisprudence*, at 82.

⁸¹ Accompanying these corrections is the following statement: “The Times welcomes comments and suggestions, or complaints about errors that warrant correction. Messages on news coverage can be [sent to...]. Comments on editorials may be [sent to...]. Readers dissatisfied with a response or concerned about the paper’s journalistic integrity ay reach the public editor ... at ...”

The refusal to recognize, acknowledge and correct error can easily bring down powerful governments and relegate large international firms to the dustbin of history. Under any interpretation of rationality, in this day and age, it truly is bizarre for any institutional entity of note in any realm – especially one that relies upon credibility and respect -- to refuse to have some system for identifying and correcting its errors.

Hence, in addition to relying upon formal appellate review (essentially a hit or miss reactive process initiated by counsel), one is prompted to ask why should a more proactive approach to identifying and correcting error not also be characteristic of the judicial system – a system where truth, as a foundation for justice,⁸² presumably is at least as prized and the stakes may often be much higher than they are in science and journalism? As it would be a sizable step toward insuring that subsequent case law is predicated upon accuracy and truth (as it should be, not upon inaccuracy and newly minted “facts” having no foundation in reality), and to avoid having the integrity and credibility of the judicial system compromised, it is in law’s self interest to have a formal, institutionally supported system for publishing errata that identifies and calls attention to erroneous recitals. In all likelihood, developing and instituting such a system would require truly modest resources relative to the benefits to be gained. While such a system might fall under the auspices of the Judicial Conference or the Federal Judicial Center, regardless of where it might reside, the judicial system is sorely in need of some mechanism that would, after review by an

⁸² As a basis for providing testimony, witnesses are required to swear that they will “tell the truth, the whole truth and nothing but the truth.”

appropriate tribunal, publish errata when there is reason to believe the record merits being corrected.

Beyond viewing the matter from the perspective of the judicial system as a whole, consider the matter from the perspective of individual judges. When a judge's published opinion contained factual erroneous recitals, one would think that, informed of these error(s), other judges would be loath to repeat them. Such reluctance would stem not only from personal concerns – repeating the error might make them appear unwise, even foolish; if appealed, such error might lead to reversals of their published opinions in which such factually incorrect recitations appear -- but also from their well honed sense of ethics and especially an appreciation of how the repetition of error has the potential to exert adverse repercussions upon the delivery of justice and subsequent case law.

Actually, repeating and, as a consequence, further propagating erroneous “facts” would appear to violate the spirit of Canon 2A of the Code of Judicial Conduct for United States Judges. Canon 2A holds that “A judge should ... act at all times in a manner that promotes public confidence in the integrity ... of the judiciary,” with the accompanying Commentary providing the following elaboration: “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.” Were the lay public to become aware of the current approach, I suspect the majority would view the absence of any systematic procedure to correct error (a consequence of which being that erroneous factual recitals may be repeated again and again and come to influence subsequent case law) a form of irresponsible conduct and their

confidence in the judiciary would be eroded accordingly. Appreciating their potential for negative repercussions upon subsequent case law, to avoid citing or relying upon them in their own writings, it can be presumed that judges would want to be made aware of erroneous factual recitals that had been identified in prior pertinent judicial opinions.

With respect to counsel, those possessing a well developed sense of ethics no doubt would find value in the availability of a formal system for identifying erroneous recitals, as such a resource would enable them to purge such error from their briefs and pleadings prior to submission. Moreover, having an officially sanctioned system for the identification and reporting of prior erroneous recitals against which a counsel's representations could be held accountable likely would curtail the propagation of such errors by those who might be ethically challenged. This would be especially so if counsel understood that, by preparing briefs and pleadings that rely upon what had been identified as an erroneous factual recital, they risked a court initiating "appropriate action."⁸³ True, mere publication of an *erratum* would not guarantee it would be read by all who might come across the original source of misinformation. However, given readily accessible published notices of errata, a review of pleadings by a competent adversary and/or the court itself certainly provides a prescription for

⁸³ Both the Hunt-Vitell model of ethical behavior (*see*: Shelby D. Hunt and Scott J. Vitell, "A general theory of marketing ethics." *Journal of Macromarketing* 6 (Spring 1986), 5-16. Shelby D. Hunt and Scott J. Vitell, "The general theory of marketing ethics: A retrospective and revision." In N. Craig Smith and John A. Quelch *Ethics in Marketing*, Richard D. Irwin (1993) 775-784; at 776) and the research conducted as tests of the model indicate that codes of ethics are necessary but not sufficient for stifling unethical behavior. Unless a code is backed up with a functioning enforcement system, so that every member of the organization knows that, if detected, unethical behavior will cause him serious adverse consequences, the code has no teeth. To paraphrase the Bard, while an organization's code may be full of sound and fury, for all practical purposes, unless accompanied by enforcement, it signifies nothing.

the reduction of erroneous factual recitals by counsel who might be ethically challenged.

An officially sanctioned system for identifying and calling attention to erroneous factual recitals would also serve to protect the heretofore ignored rights of testifying experts whose reputations are sullied by such recitals. Even where a court's erroneous factual recitals have been unknowingly made with the noblest of motives, the judicial system should be capable of subsequently correcting the record by publishing errata, if only so that the injured party can be made whole again.

Based upon my experiences, I can offer personal testimony to the fundamental understanding expressed by Judge Posner when he writes "We should not be surprised that the failure to redress injuries that ought to be redressed is considered a failure to do justice."⁸⁴ In at least twenty cases since the ProStyle opinion, either in pleadings filed with the court or during cross-examination, opposing counsel have raised the ProStyle court's litany of erroneous factual recitals in an effort to impugn my credibility or competence. While many courts are astute enough to understand what may be going on (leading to their dismissing these efforts⁸⁵), others seem to be persuaded by such

⁸⁴ *The Problems of Jurisprudence*, 322.

⁸⁵ Three examples out of many that could be cited. As the first, consider the cross-examination in *Juicy Couture, Inc. and L.C. Licensing, Inc. v. L'Oreal USA, Inc. and Luxury Products, LLC*. U.S.D.C. S.D.N.Y. April 19, 2006. 04 Civ. 7203 (DLC), a portion of which was:

- Q. There was a case NFL v. Prostyle, 16 F. Supp2d 1012 from 1998. And your survey for the plaintiff, the NFL, was heavily criticized by the Court, was it not?
- A. Correct.

....

calumny. Regardless, from a rational perspective, it makes no sense for factually incorrect recitals to be permitted to re-surface, thereby potentially derailing the administration of justice in subsequent matters. Justice Breyer writes: “The law must be fair.”⁸⁶ I, for one, have difficulty understanding how the “refusal to correct error” is fair to anyone, especially to testifying experts who have no

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- Q. Now, in that NFL v. Prostyle case, the Court then proceeded to identify ten cases in which your survey had been criticized.
- A. Yes. [From pages 652-3 of the trial transcript of April 11, 2006]

In its Opinion and Order, the Court wrote: “There was a second survey that was offered into evidence. Lancome chose a renowned expert to design its study. Jacoby designed a survey for Lancome to test the extent to which use of the word Juicy in connection with Lancome was likely to cause confusion.... It found negligible, if any, evidence of confusion. (FN 33: “It is unnecessary to spend time addressing Couture’s attacks on the Jacoby survey... Suffice it to say that the attacks on Jacoby’s well-designed survey were strained and unpersuasive.”)

Second, consider the following from Plaintiff’s Reply Memorandum of Law in Further Support of its Motion for a Preliminary Injunction filed in *Hill’s Pet Nutrition, Inc. v. Nutro Products, Inc.* (USDC, D Kansas (#03-4001 SAC), Memorandum And Order, March 25, 2003), arguments later repeated as cross-examination questions. Stating there were “countless cases from around the country that have repeatedly attacked Jacoby’s credibility and outright rejected his conclusions” (at page 7), the Memorandum continues:

Indeed, Jacoby has repeatedly been criticized by federal courts in especially harsh terms. For example, the Seventh Circuit has assailed Jacoby’s work as containing “tricks of [his] black arts,” *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club*, 34 F.3d 410, 416 (7th Cir. 1994).

Exemplifying a trick of *lawyers’* black arts, although citing *Indianapolis Colts* as authority, nowhere does plaintiff’s Reply Memorandum of Law indicate to the *Hill’s v. Nutro* court that, while the Seventh Circuit raised the “tricks of the survey researcher’s black arts” as a rhetorical question concerning all survey research, it actually accepted my survey, crediting its major findings and according them weight. In response, here is what the *Nutro* Court wrote in its Memorandum And Order, March 25, 2003: “The court finds the credentials and testimony of Dr. Jacoby to be impeccable, and his rationale thoroughly persuasive. Dr. Jacoby’s critique of Mr. [X’s] survey, as set forth above in the findings of fact, convince the court that Mr. [X’s] conclusions lack scientific validity.” *Hill’s Pet Nutrition, Inc. v. Nutro Products, Inc.* USDC, D Kansas (#03-4001 SAC).

In a third matter, after plaintiff’s counsel recited the same factually incorrect recitals, the Court wrote: “Counsel also cross-examined Dr. Jacoby on the handful of cases in which his findings had been criticized, suggesting that Dr. Jacoby had intentionally ‘rigged a survey to get a particular result.’ I have read those cases, and I have read cases that laud Dr. Jacoby’s credentials and research. I do not find it surprising that a witness who has testified in over 100 cases has been criticized from time to time, and find Dr. Jacoby is a highly qualified and well-recognized expert in consumer confusion and survey evidence” [From Footnote 14; citations omitted]. *Wells Fargo & Co., et al. v. WhenU.com, Inc.* U.S.D.C., E. D. MI (Southern Division). Case No. 03-71906 (NGM). Memorandum Opinion and Order Denying Plaintiff’s Motion for Preliminary Injunction. Nov. 19, 2003

remedy at law for combating and having corrected the repetition of defamatory error.

Beginning in childhood, most readers likely have repeated the following many times during their lives: “I pledge allegiance to the flag of the United States of America, and to The Republic for which it stands, one Nation under God, indivisible, with liberty and *justice for all*” [italics supplied]. According to Wikipedia, the online encyclopedia:

Justice (French *justice* from Latin *justitia*, from *justus* "just") is a concept involving the fair, moral, and impartial treatment of all persons. In its most general sense, it means according individuals what they actually deserve or merit, or are in some sense entitled to (classic Latin concept of *unicuique suum*).

[Further] justice is the obligation that the legal system has toward the individual citizen and the society as a whole.

Until and unless the judiciary develops an institutionally supported system for publishing errata that identifies, catalogues and calls attention to erroneous recitals, it cannot be said that it has fulfilled its obligation to provide justice for all.

Of course, it may be that the justice system will see no pressing need to address erroneous factual recitals and the problems these create. Under such circumstances, at least three alternatives to the judiciary can be envisioned. First, understanding its necessity, a law school or other entity publishing a law journal might take it upon itself to develop a system for cataloging and publishing

⁸⁶ Justice Stephen Breyer, “Introduction,” *Reference Manual on Scientific Evidence*. Federal Judicial

verified errata appearing in published court opinions, findings of fact and conclusions of law. I suspect that any law journal regularly containing such a section would quickly become a best seller. Second, if they saw a potential for profit, some private publisher or other entity might be inclined to take on such a project.

Last, because erroneous factual recitals often involve scientists and matters of scientific concern, some appropriate entity within the scientific community (e.g., the American Association for the Advancement of Science) might consider undertaking the task. In spite of *Daubert* and successor rulings⁸⁷ (or perhaps because of some of the rulings that have been handed down as a result), the scientific community may come to understand that it cannot long afford to have law predicated upon uninformed and often erroneous representations of science by gatekeepers who, for the most part, have not been educated regarding and do not understand science.

As part of this understanding, that entity may see value in expanding its efforts beyond publishing errata when warranted. It might also entertain serving a quasi-appellate function, to which scientists unjustly maligned by a court might go to have a jury of their peers review the matter. This appeal mechanism need not mirror the traditional model used by the judiciary. Rather, the mechanism could be compatible with the kinds of things the scientific community already does and does well.

Envision a scholarly journal (perhaps named something like *Judicial*

Center. (2000) at 4.

⁸⁷ See fn 12, *supra*.

Opinions Involving Science) whose editor-in-chief would be a highly respected scientist and whose editorial board would consist of a blue-ribbon panel of scientists representing the sciences from which concepts and methods most often surface in litigation. The board would also include legal scholars and, hopefully, members of the judiciary. (Unlike law reviews, but like scholarly scientific journals, the editorial board would not contain students.) The function of the editorial board would be to review submissions and then identify and obtain reviews from other scientists more directly immersed in the pertinent field of inquiry. Each submitted manuscript – which would be in the form of a reasoned appeal or commentary citing the scientific literature in support of its arguments -- would be reviewed by at least one scientist from the pertinent scientific arena and one attorney experienced in that area of the law (e.g., intellectual property).

To establish and maintain credibility as a high quality source of commentary on the interface between law and science, the acceptance standards would necessarily be high. If the rejection rates for submissions reached 90%, so be it. The objective would be to illuminate generally and to provide a vehicle for correcting judicial error in regard to scientific research and testimony proffered in litigated matters. Only quality submissions making sound scientific arguments would be accepted for publication. Although the journal might begin with but one or two issues annually, given that science topics and testimony are increasingly an element of litigation, one could expect the journal to eventually become a quarterly or bi-monthly. Having such perspectives from

the scientific and possibly even members of the legal community on record not only would benefit scientists with scientifically meritorious arguments, but would also benefit the practice of law and the delivery of justice in subsequent cases.⁸⁸

The idea of such a journal is consistent with arguments put forth by the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.* As the Court explained:

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.⁸⁹

Members of the judiciary are either the most powerful, or among the most powerful public officials in our society. In comparison, individual scientists who serve as testifying experts are highly limited in their opportunities to counteract erroneous judicial statements. Having a venue where meritorious appeals would be able to contest and correct such judicial commentary would be in keeping with the Seventh Amendment to the United States Constitution, which promises a right (at least in criminal cases) to be heard by a jury of one's peers.

V. Conclusion

Writing that judicial opinions were “systematically unreliable sources of information,”⁹⁰ Judge Posner essentially was expressing an hypothesis. To test

⁸⁸ In a letter to this author expanding upon what is adumbrated above, Jerre Swann, a prominent trademark attorney, contends having accurate science and representations of science in judicial opinions is absolutely crucial as a foundation for ethical attorneys and future judicial opinions. He suggests that whatever independent authority is established to review the correctness of statements regarding science made in judicial opinions should have the capability of delving into and commenting unpublished rulings brought to its attention. This would be in addition to considering manuscript submissions.

⁸⁹ 418 U.S. 23, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) –n 27:96 n.2. as cited in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990).

⁹⁰ *Id.* at 211.

this hypothesis, he recommended one “get hold of the briefs and record to check the accuracy of the factual recitals in the opinion.” Doing as Judge Posner suggests (in this instance, comparing factual recitals in the Court’s Order of July 31, 1998 in *National Football League Properties v. ProStyle*⁹¹ to the underlying record), provides support for the contention that at least some as yet unknown proportion of judicial opinions may be minefields of misinformation.

The present analysis was limited to a single case study – one where this author had intimate knowledge of the matter and direct access to much of the underlying record, both published and unpublished. Yet important questions remain to be addressed and demonstrating so many factual errors in one opinion hopefully will encourage legal scholars to conduct systematic analyses of other judicial opinions. These questions include: What proportion of court opinions contain factual recitals that are in error? For those opinions that do contain such error, what is the typical extent of such error? Is it generally only a single error (for example, the *Quality Inns* Court’s misstatement of my testimony regarding “noise” represents, insofar as I am able to tell, the only incorrect recital in that opinion), or is it wholesale error (for example, the *ProStyle* Order was shown to contain, at a minimum, seven factual recitals that were in error). Are such errors randomly distributed across courts, or do the opinions of some courts evidence a disproportionately high amount of such error?

The import of this article may be summarized as follows. A certain proportion of judicial opinions may indeed be minefields of misinformation.

⁹¹ *National Football League Properties, Inc. and Green Bay Packers, Inc v. ProStyle, Inc. and Sheri Tanner*, 16 F. Supp. 2d 1012 (E.D. Wis. 1998).

Unless unconcerned with propagating untruths, it is incumbent upon authors of judicial opinions to engage in genuine efforts to ensure the accuracy of their factual recitals. Inattention to the need to do so is dangerous for the judiciary, the administration of justice and, ultimately, society as a whole. To ignore this need would support another of Judge Posner's hypotheses, namely, that "a carapace of falsity and pretense surrounds law and is obscuring the enterprise. It is time we got rid of it."⁹²

⁹² *The Problems of Jurisprudence*, at 469.