

Scantily Clad Survey Gets Bounced Out in Strip Club Scuffle

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Survey evidence in Lanham Act cases can often times be pretty revealing. If you develop it correctly, survey evidence can be a key ingredient to a successful outcome. But if you develop it incorrectly it will show flaws that you and your expert won't want the world to see. This blog post tells the tale of the latter type of survey evidence that contained improper stimuli, a lack of control, and misguided questions. Read on as we discuss the problems that were laid bare in a recent [Daubert order](#) issued by the U.S. District Court for the District of Colorado.

It all started when a Denver-based strip club, Dandy Dan's, allegedly used pictures of several women in social media posts to advertise its "gentlemen's club" establishment. There was only one, small problem with this advertising blitz: none of the women pictured were employed by or otherwise associated with Dandy Dan's. Oh Dan. These women were models, actresses, and social media stars in their own right, and they did not think what Dan did was all that dandy. In fact, they sued for false endorsement and false advertising under Section 43(a) of the Lanham Act.

In order to prove up their claims, Plaintiffs hired an expert to establish that Dandy Dan's use of the photos "caused or is likely to cause consumer confusion" that the Plaintiffs endorse, sponsor, or are otherwise affiliated with Dandy Dan's. In doing so, Plaintiffs' expert went on a bit of a frolic in a number of respects.

First, the survey stimuli he used were wholly improper. He started by showing respondents a collection of the ads at issue. Inexplicably, some of the photographs of the women used were not even plaintiffs in the case and included the likes of Carmen Electra, Claudia Sampedro, and Megan Iglesias. He then tried to draw a number of conclusions from the data he gathered from irrelevant stimuli. Injecting irrelevant stimuli into a survey is not going to give any court warm and fuzzy feelings about the proffered evidence. Strike One.

Second, the expert did not use a control. The expert's stated rationale for not doing so was that his research was not testing a "causal proposition." Practice pointer: In any Lanham Act matter where you are attempting to show the ads in question cause deception, you are testing a causal proposition. In those circumstances, the expert must use a control. The expert's loosey-goosey approach was not going to cut it. Strike Two.

Third, the expert engaged in rather promiscuous use of irrelevant questions. Respondents were asked things such as whether the use of the photos made respondents "more interested in defendant's club." Their degree of interest (or non-interest) in Dandy Dan's is irrelevant as to whether respondents believed the plaintiffs endorsed it. The expert also asked such things as how the ads made respondents "feel" and "what is the first thing that comes to mind" when respondents saw the ads. These touchy feely questions did not get the job done as they were simply irrelevant to the issue at hand. Strike Three.

Not surprisingly, the court found these flaws "serious enough and pervasive enough" to warrant the exclusion of the expert's proffered testimony.

The takeaway here is that if your expert provides extra-judicial stimuli, lacks control, and gets too touchy feely, things aren't headed in the right direction. It may be time to make a course correction lest you find yourself on the receiving end of a *Daubert* Dandy.