The Frye and Daubert Evidence Standards What is the difference? And does it matter to a Family Law Practitioner?

The Florida Family Law American Inn of Court

Pupilage Group IV

January 19, 2017

Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)

* Dealt with admissibility of systolic blood pressure deception test (i.e., the precursor to the polygraph machine) in a criminal case
* "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made ***must be sufficiently established to have gained general acceptance in the particular field in which it belongs.***"
  * (Bold and Italics added for emphasis.)

Prior Statutory Versions
Frye Standard

* **90.702. Testimony by experts**

* If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

* **Credits**
* Laws 1976, c. 76-237, § 1.

Prior Statutory Versions
Frye Standard

* 90.703. Opinion on ultimate issue

* Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

* **Credits**
* Laws 1976 c. 76-237 § 1.

Prior Statutory Versions
Frye Standard

* **90.704. Basis of opinion testimony by experts**

* The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

* **Credits**

* Laws 1976, c. 76-237, § 1. Amended by Laws 1995, c. 95-147, § 495, eff. July 10, 1995.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588, 592-93 (1993)

- Dealt with admissibility of scientific animal studies linking use of prenatal anti-nausea medicine and birth defects in a civil case
- Holding that *Frye* standard had been superseded by Federal Rule of Evidence 702, as the "rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'"
- Under Federal Rule 702, (the Daubert standard), "a trial judge must determine at the outset, … whether the expert is proposing to testify to ***(1) scientific knowledge*** that ***(2)*** will ***assist the trier of fact to understand or determine a fact in issue***[, which] entails a preliminary assessment of ***(3)*** whether the ***reasoning or methodology underlying the testimony is scientifically valid*** and of ***(4)*** whether that ***reasoning or methodology properly can be applied to the facts in issue***."
  - (Bold and Italics added for emphasis.)

Current Statutory Version Daubert Standard

90.702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, ***if:***

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

Credits

Laws 1976, c. 76-237, § 1. Amended by ***Laws 2013, c. 2013-107, §1, eff. July 1, 2013***.

(Bold and Italics added for emphasis.)

Current Daubert Standard
Factors to be Considered for Admissibility

- (1) whether the theory or technique in question can be and has been tested;
- (2) whether it has been subjected to peer review and publication;
- (3) its known or potential error rate;
- (4) the existence and maintenance of standards controlling its operation; and
- (5) whether it has had an explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community ("general acceptance" assessment).

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-94 (1993).

Current Statutory Versions Daubert Standard

- **90.703. Opinion on ultimate issue**

- Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

  - **Credits**

  - Laws 1976 c. 76-237 § 1.

Current Statutory Versions
Daubert Standard

- **90.704. Basis of opinion testimony by experts**

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. ***Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.***

- **Credits**

- Laws 1976, c. 76-237, § 1. Amended by Laws 1995, c. 95-147, § 495, eff. July 10, 1995; ***Laws 2013, c. 2013-107, § 2, eff. July 1, 2013.***
  - (Bold and Italics added for emphasis.)

And does the difference matter to the Family Law Practitioner?

- **Rule 12.364. SOCIAL INVESTIGATIONS**

- **(b) Appointment of Social Investigator.** When the issue of time-sharing, parental responsibility, ultimate decision-making, or a parenting plan for a minor child is in controversy, the court, on motion of any party or the court's own motion, may appoint an investigator under section 61.20, Florida Statutes. The parties may agree on the particular investigator . . . (or) . . . the court shall select and appoint an investigator. ***The social investigator must be qualified as an expert under section 90.702, Florida Statutes, to testify regarding the written study.***
  - (Bold and Italics added for emphasis.)

DEVELOPMENT OF "*DAUBERT*" IN FLORIDA

- Supreme Court of Florida currently deciding two issues relating to *Daubert* change. (In re: Amendments to the Florida Rules of Evidence, Case No. SC16-181)
  - 1. Should the Rules of Evidence be changed to incorporate Legislature's 2013 switch.
  - 2. Whether switch is substantive/policy matter (proper for legislature) OR procedural (up to Court).

Florida Bar News, Vol. 43, No. 18 p. 1, September 15, 2016.

Oral arguments commenced in September 2016…. And….Waiting?

COMMON LAW STILL DEVELOPING

- First "*Daubert*" cases were "on appeal" when rule changed.
  - *Conley v. State of Florida*, 129 So. 3d 1120 (Fla. 1st DCA 2013).
    - Criminal case- Involved penile plethysmograph (PPG) which was excluded in a "Jimmy Ryce Act" hearing.
    - Issue (originally) whether trial court could exclude the PPG evidence when the Third DCA had previously held that PPG was not "new or novel evidence" subject to *Frye* scrutiny. *State v. Fullwood*, 22 So. 3d 655 (Fla. 3rd 2009).
    - First DCA found that there was no interdistrict conflict so the PPG should have been admissible.
    - BUT WAIT…

…THERE'S MORE

- 1st DCA noted that "while appeal was pending, Florida adopted the federal standard governing the admissibility of scientific evidence first announced (by SCOTUS) in *Daubert*...which replaced the *Frye* standard."

- "Accordingly" the ruling was reversed and remanded to determine the admissibility of PPG evidence under *Daubert*/Sec. 90.702

  - ….And that was it.

COURTS BEGAN EXPOUNDING

- *Perez v. Bell South Telecomms, Inc.*, 138 So. 3d 492 (Fla. 3rd DCA 2014).
  - Civil case (negligence)- Perez sued employer claiming work conditions (too many hours) lead to baby's birth related defects.
    - Trial Court granted summary judgment after striking her only (medical) expert witness.
      - Doctor based opinion on fact Ms. Perez did not work with her first child but worked with second.
      - Doctor's opinion testimony was deemed inadmissible.
  - Appellate Court noted prior "path" for admission of expert testimony.
    - 1) If scientific theory is new or novel- has the "thing" from which the deduction is made gained "general acceptance" in the scientific community…"*Frye* test" OR
    - 2) Pure Opinion-Testimony not "new or novel"- based on expert's experience/observation.
      - *Frye* does not apply to opinion IF the methods used to form opinion are generally accepted under *Frye*)?
  - Third DCA noted that Legislature adopted *Daubert* in 2013 to "prohibit in the courts of this state pure opinion testimony."
    - "[P]urpose of the new law is the law is clear: To tighten the rules of admissibility of expert testimony…"
    - "Moreover, section 90.702… indisputably applies retroactively…" [Procedure not substance]

COURTS AS GATEKEEPERS

- *Booker v. Sumter County Sheriff's Office*, 166 So. 3d 189 (Fla. 1st DCA 2015).
  - First DCA affirmed denial of Workman's Comp benefits but wrote opinion to address *Daubert* analysis, noting case law is slight.
    - Courts are now "gatekeepers" to "ensure an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant filed.
    - Trial Court has broad discretion in determining how to apply this gatekeeper function to experts' testimony.
      - An untimely raised *Daubert* challenge or objection will be denied in most circumstances.

Booker Continued

- Assuming a timely motion - "Gatekeeper" must determine:
- 1) Did objection sufficiently put opposing counsel on notice of the basis for the *Daubert* challenge
  - I.e. cite "conflicting (medical) literature and expert testimony."
- 2) Is testimony "pure opinion" (no longer allowable).
  - "[P]ure opinion testimony is based only on (clinical) experience… cornerstone of sec. 90.702 is relevance and reliability based on scientific knowledge.
- 3) Apply *Daubert* test
  - a) testimony based on sufficient facts/data;
  - b)product of reliable principles/methods;
  - c) principles/methods reliably applied to facts of the case.
    - Some factors to consider in assessing reliability of methodology:

      -Can it be tested? Has it? Subject to peer review? Error rates determined? Are there standards controlling a techniques operation? Were standards maintained? Is methodology generally accepted (sounds familiar)?

      -May take judicial notice of evidence that has been deemed acceptable by appellate court.

Where are we now?

- Still on hold…

- *Bunin v. Matrixx Initiatives, Inc.*, 197 so. 3d 1109 (Fla. 4th DCA June 2016).
  - DCA again held that the change in 90.702 was a procedural change that applies retroactively.
    - "A statute that merely relates to the admissibility of evidence is generally considered procedural." (citing *Perez*).
- *Crane Co. v. Delisle*, Nos. 4D13-4351 and 4D14-146, 2016 Fla. App. LEXIS 13818 (Fla. 4th DCA September 2016).
  - Defendant tried to argue Court lacked authority to apply *Daubert* because the FL Supreme Court has yet to approve the legislative change.
    - DCA denied appeal noting that statutes are presumed constitutional and to be given effect until held otherwise.
    - Plus the appellate courts have already applied the statute to the admission of testimony.
- *Baricko v. Barnett Transportation*, Case No. 1D16-1304 (January 17, 2017)
    - Concurring opinion- Plaintiff's argument that *Daubert* test in 90.702*it* is not applicable until the SCFL rules on In re: Amendments to the Florida Evidence Code, was "unpreserved and frivolous."
    - Noted that since WC cases are *quasi judicial*, even if FLSC declines to adopt the *Daubert* standard for judicial proceedings it will still apply to WC proceedings.

Why look to other states on *Daubert*?

- Persuasive authority
- Fill the toolbox
- Key takeaways
  - Daubert is about whether the method is scientific and reliable – not whether the conclusion is correct. *Biro v. Biro*, 2007-Ohio-3191.
  - FIT. "Expert testimony lacks 'fit' when a large analytical leap must be made between the facts and the opinion" Can finder of fact can properly apply that reasoning or methodology to the facts? *Burkholder v. Carroll*, No. A-14-666, 2016 WL 3181196 (Neb. Ct. App. May 31, 2016).

Does *Daubert* even matter in bench trials?

- Unlike juries when experts are excluded, the judges hear it all anyway.
- *Petion v. State*, 48 So. 3d 726 (Fla. 2010).
  - There's a "rebuttable presumption that in non-jury cases, trial judges base their decisions upon admissible evidence and have disregarded inadmissible evidence."
  - A judge hearing inadmissible evidence presumably disregards improper evidence, and exposure is harmless.
  - That presumption can be rebutted through admission of improper evidence, express reliance, or actual reliance.
- But other states applying *Daubert* show it matters: courts are upheld, or reversed, on *Daubert* grounds all the time.
- The application of Daubert is more relaxed, but standards still must be met. *Burkholder v. Carroll*, No. A-14-666, 2016 WL 3181196 (Neb. Ct. App. May 31, 2016).

"Your Honor, that expert I asked you to appoint? Bad idea; never mind."

- Out-of-state cases addressing show the right way and wrong way to challenge the opinion of an expert whose appointment you agreed to.
- Wrong ways: Attack qualifications. Or methodology generally. Or scattershot.
  - Attacking methodology itself won't go far. *Margo M. v. Martin S.*, 2006 WL 1596495 (Neb. Ct. App. June 13, 2006).
  - Hodgepodge won't do. *Burkholder v. Carroll*, 2016 WL 3181196 (Neb. Ct. App. May 31, 2016).
- Instead, challenge application of methodology to reach the opinion. *Robb v. Robb*, 687 N.W.2d 195 (Neb. 2004). Or overreaching.

Bad things happen (to you) when your expert can't defend methodology.

- Expert had no information regarding studies on polygraphing, method of testing, statistical basis of claimed success rate, and disavowed ability to determine accuracy "like other sciences." *Franklin v. Franklin*, 2005-1814 (La. App. 1 Cir. 12/22/05), 928 So. 2d 90.
- Expert didn't recognize books or science pertinent to conclusion; said psychology is no exact science, but mostly training and instinct. *Giannaris v. Giannaris*, 960 So. 2d 462 (Miss. 2007).
- Real estate expert and forester, but didn't follow standards. No evidence of reliability of timber appraisal or methodology. *Bufkin v. Bufkin*, 259 S.W.3d 343 (Tex. App. 2008).
- Expert's opinion properly excluded valuation because it included goodwill (never divisible marital property in Mississippi). *Rhodes v. Rhodes*, 52 So. 3d 430 (Miss. Ct. App. 2011).

Thorough understanding of methodology and its application to the case carries the day.

- Social worker allowed to opine that children showed signs of having experienced domestic violence, theorize about substance abuse problems at home, and purport to assess risk level of recurring violence. *McFall v. Armstrong*, 10-1041 (La. App. 5 Cir. 9/13/11), 75 So. 3d 30.
- Extensive discussion of qualifications, methodology, and reliability to specific facts and case. *Von Hohn v. Von Hohn*, 260 S.W.3d 631, 643 (Tex. App. 2008).
- Readiness to explain departures from standard, effect on analysis, and reliability of modified approach to case. *Biro v. Biro*, 2007-Ohio-3191.

Parting tips for your trial – and preserving your win on appeal.

- No *Conley* problems! Show why your expert's testimony is admissible, or why her expert's is not, under *Daubert* and *Frye*. *Cf*. *Padula-Wilson v. Wilson*, 2015 WL 1640934 (Va. Ct. App. Apr. 14, 2015).
- Beware waiver. If you withdraw objections to admitting certain evidence in the course of questioning the other expert, then the court might rely on the otherwise inadmissible evidence even if it excludes the expert. *Varran v. Granneman*, 312 Mich. App. 591, 880 N.W.2d 242 (2015).
- Never rely on inexperience or lesser qualifications as a challenge. An attack on qualifications seldom beats superior "fit." *Sternat v. Sternat*, 2015 WI App 90, 365 Wis. 2d 607, 871 N.W.2d 867; *Rhodes v. Rhodes*, 52 So. 3d 430 (Miss. Ct. App. 2011).
- If you've tried to hire the expert you're challenging in the exact same case—you look silly. *Root v. Root*, 65 P.3d 41 (Wyo. 2003).

Admissibility of Evidence

1923 *Frye v. United States*

Scientific evidence is allowed into the courtroom if it is generally accepted by the relevant scientific community. The Frye standard does not offer any guidance on reliability. The evidence is presented in the trial and the jury decides if it can be used.

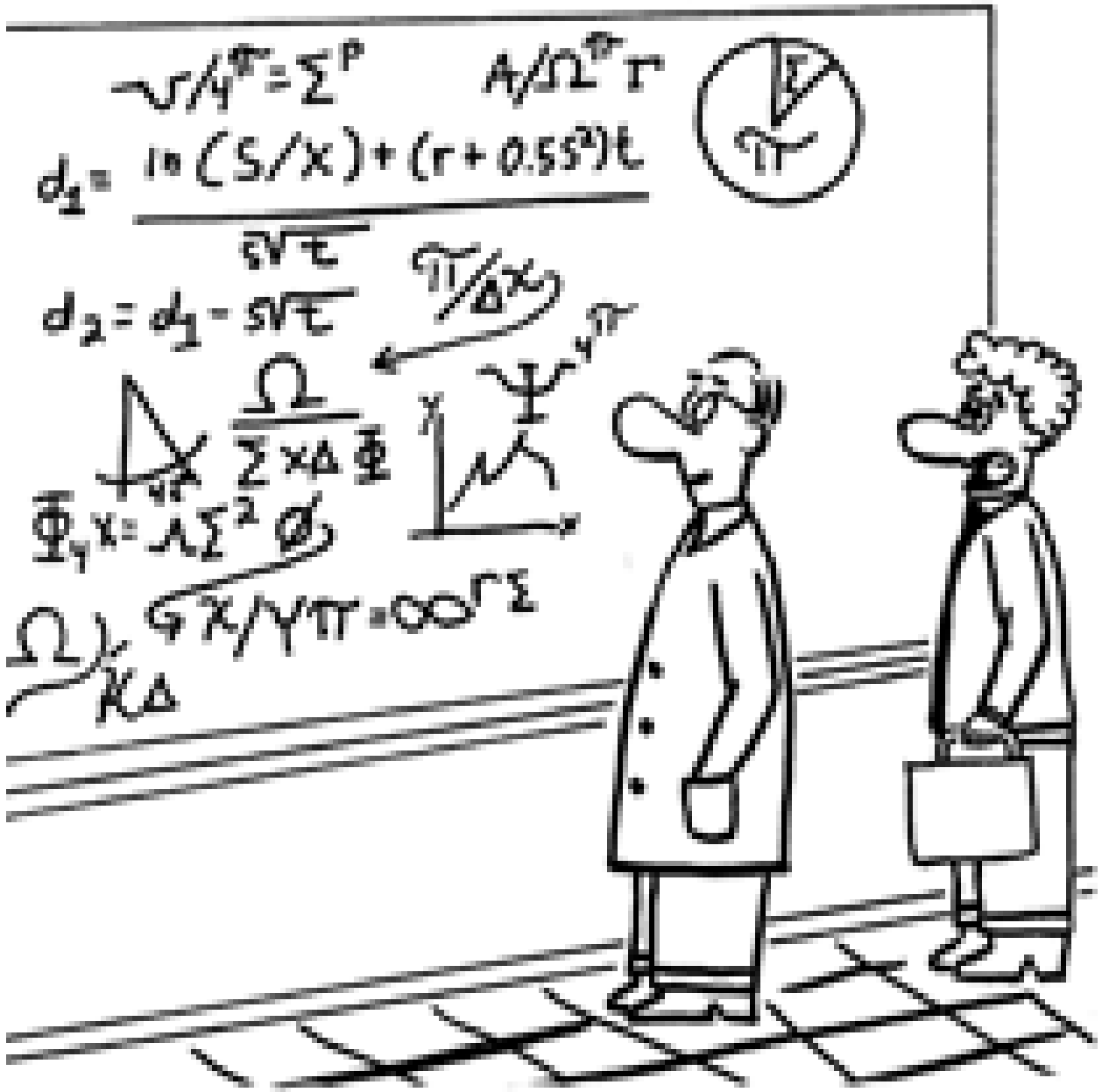
1993 *Daubert v. Dow*

Admissibility is determined by:

- Whether the theory or technique can be tested
- Whether the science has been offered for peer review
- Whether the rate of error is acceptable
- Whether the method at issue enjoys widespread acceptance.
- Whether the opinion is relevant to the issue

The judge decides if the evidence can be entered into the trial.

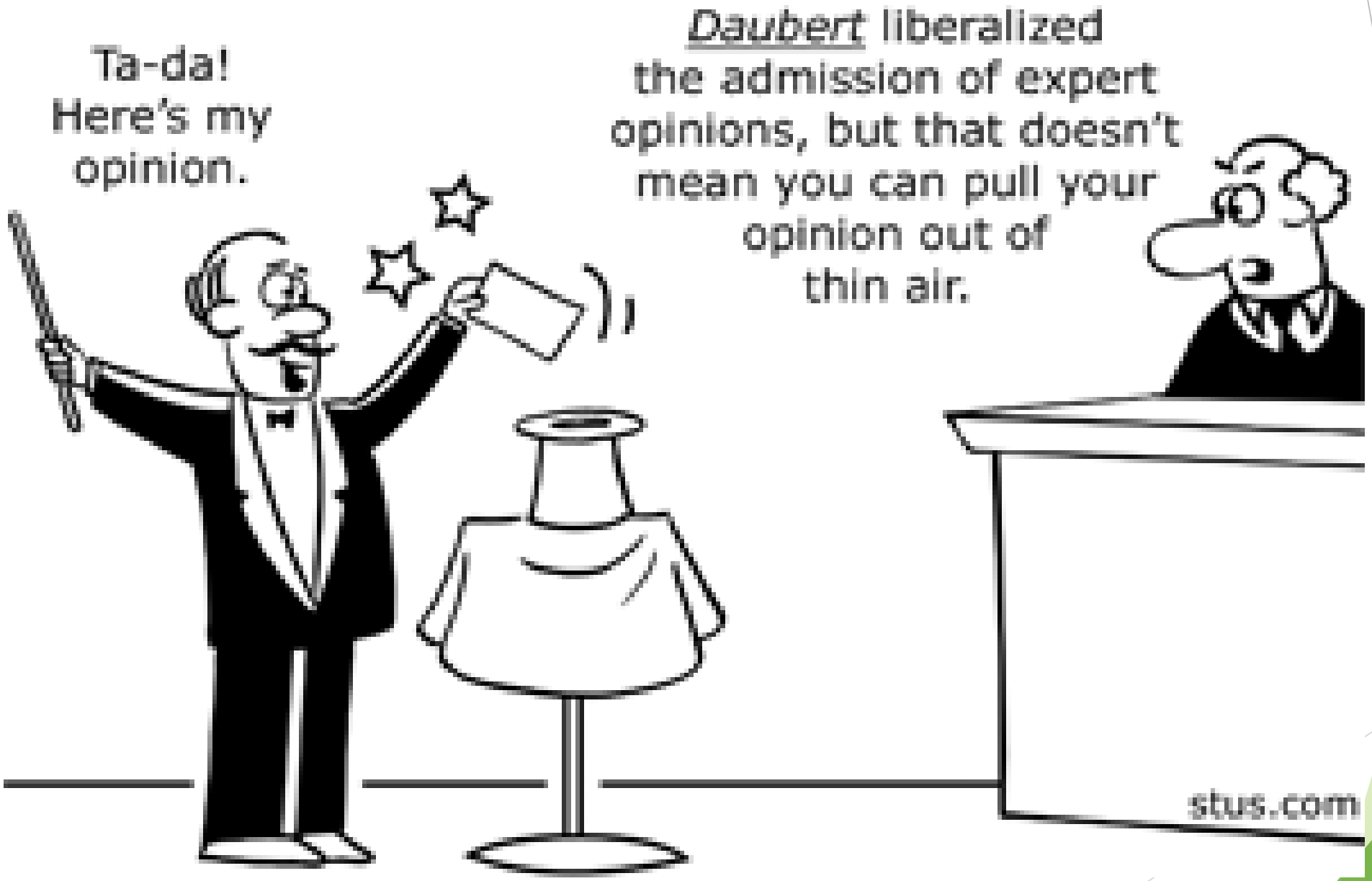
"COUNSELOR, YOU KNOW THAT THE JURORS HAVE THE RIGHT TO WEIGH THE CREDIBILITY OF A WITNESS."

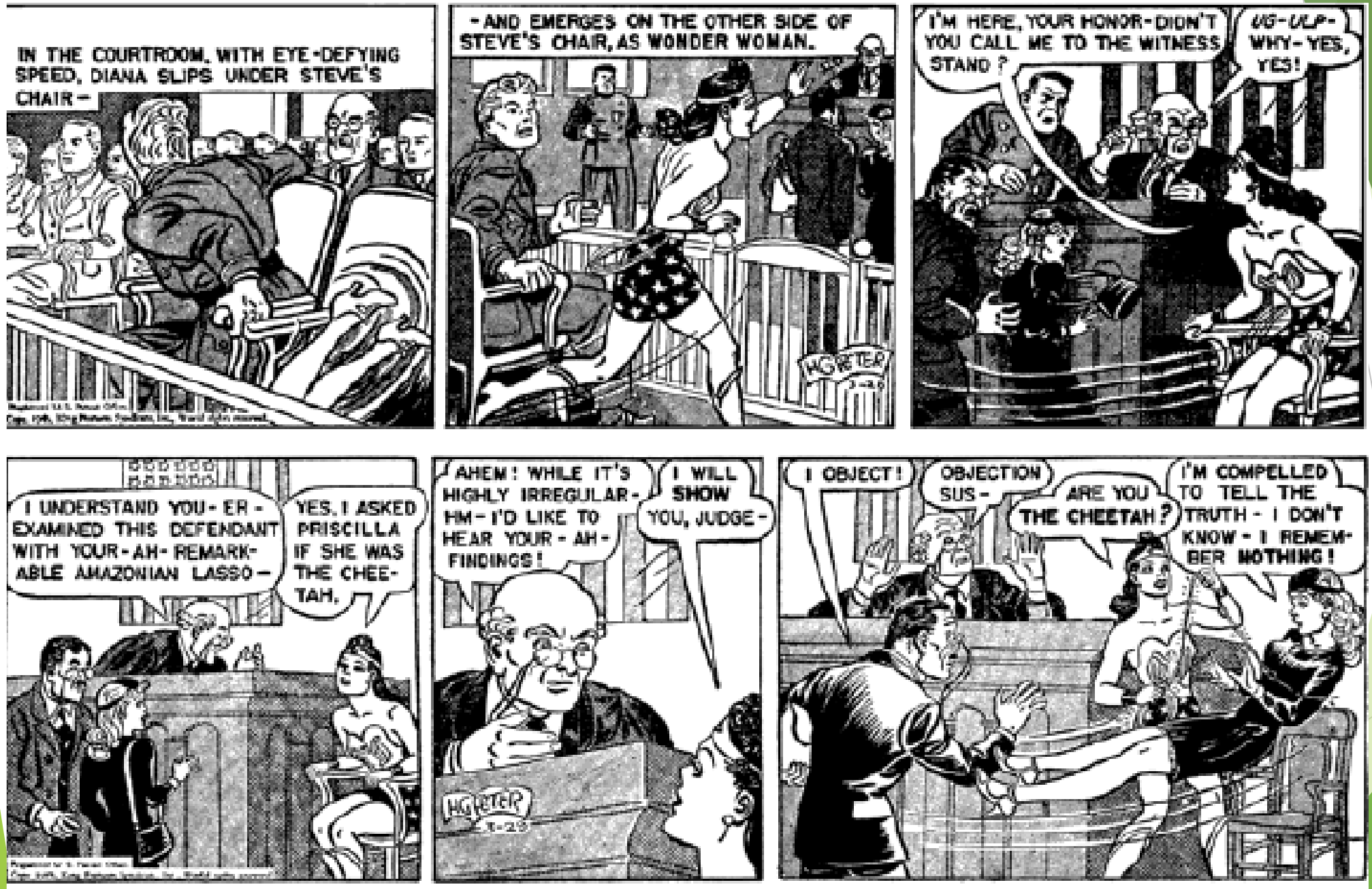


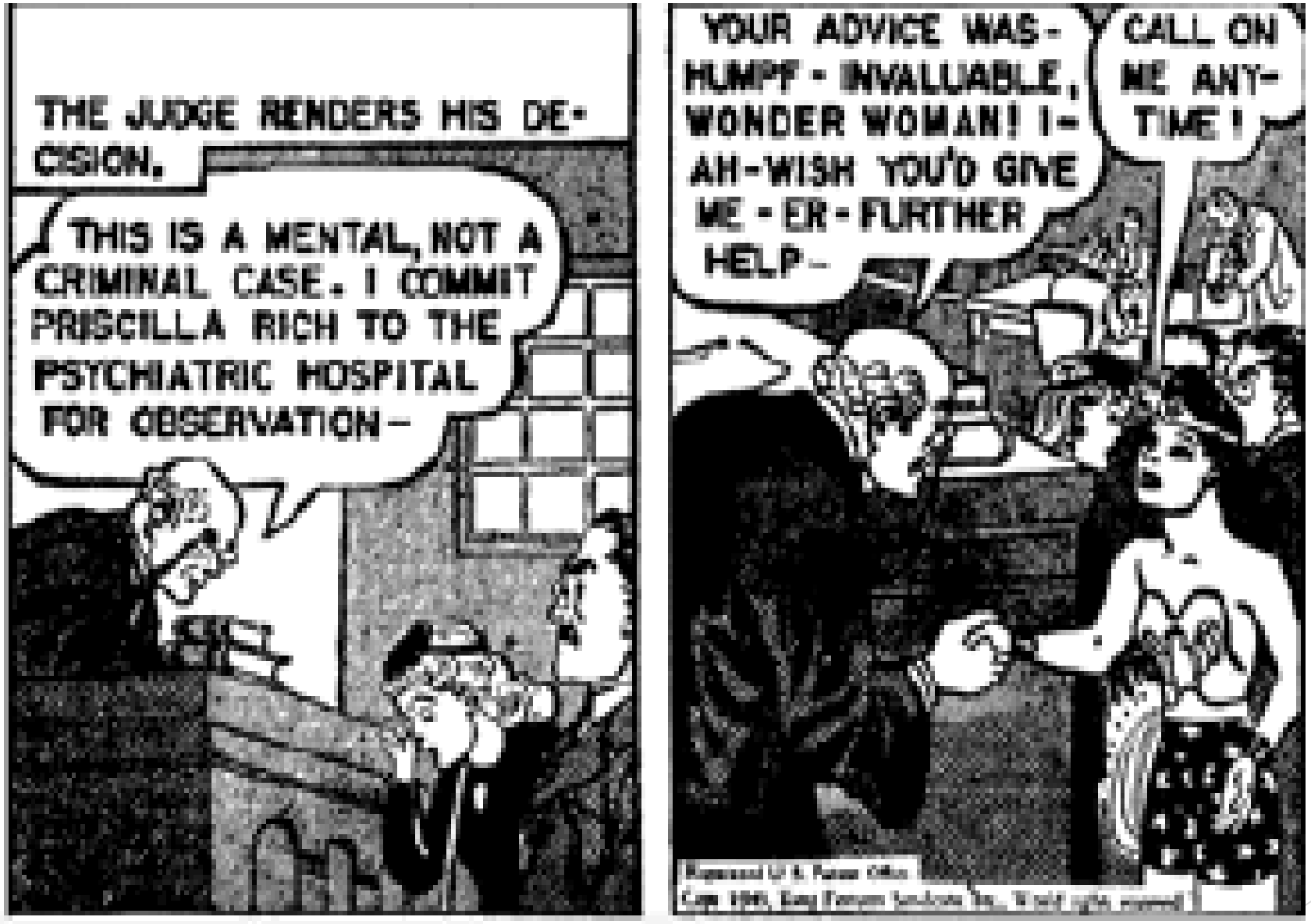
Your science sure looks impressive, but the word on the street is that you're kind of a quack.

stus.com


My theories aren't generally accepted yet.
It's okay if your peers don't respect you, as long as the judge and jury do.
stus.com


Ta-da! Here's my opinion.
Daubert liberalized the admission of expert opinions, but that doesn't mean you can pull your opinion out of thin air.
stus.com


IN THE COURTROOM, WITH EYE-DEFYING SPEED, DIANA SLIPS UNDER STEVE'S CHAIR—
-AND EMERGES ON THE OTHER SIDE OF STEVE'S CHAIR, AS WONDER WOMAN.
I'M HERE, YOUR HONOR-DIDN'T YOU CALL ME TO THE WITNESS STAND?
UG-ULP-WHY-YES, YES!
I UNDERSTAND YOU-ER-EXAMINED THIS DEFENDANT WITH YOUR-AH-REMARKABLE AMAZONIAN LASSO—
YES, I ASKED PRISCILLA IF SHE WAS THE CHEETAH.
AHEM! WHILE IT'S HIGHLY IRREGULAR-HM-I'D LIKE TO HEAR YOUR-AH-FINDINGS!
I WILL SHOW YOU, JUDGE-
I OBJECT!
OBJECTION SUS-
ARE YOU THE CHEETAH?
I'M COMPELLED TO TELL THE TRUTH-I DON'T KNOW-I REMEMBER NOTHING!


THE JUDGE RENDERS HIS DE-
CISION.
THIS IS A MENTAL, NOT A CRIMINAL CASE. I COMMIT PRISCILLA RICH TO THE PSYCHIATRIC HOSPITAL FOR OBSERVATION—
YOUR ADVICE WAS- HUMPF - INVALUABLE, WONDER WOMAN! I- AH-WISH YOU'D GIVE ME - ER - FURTHER HELP—
CALL ON ME ANY- TIME!