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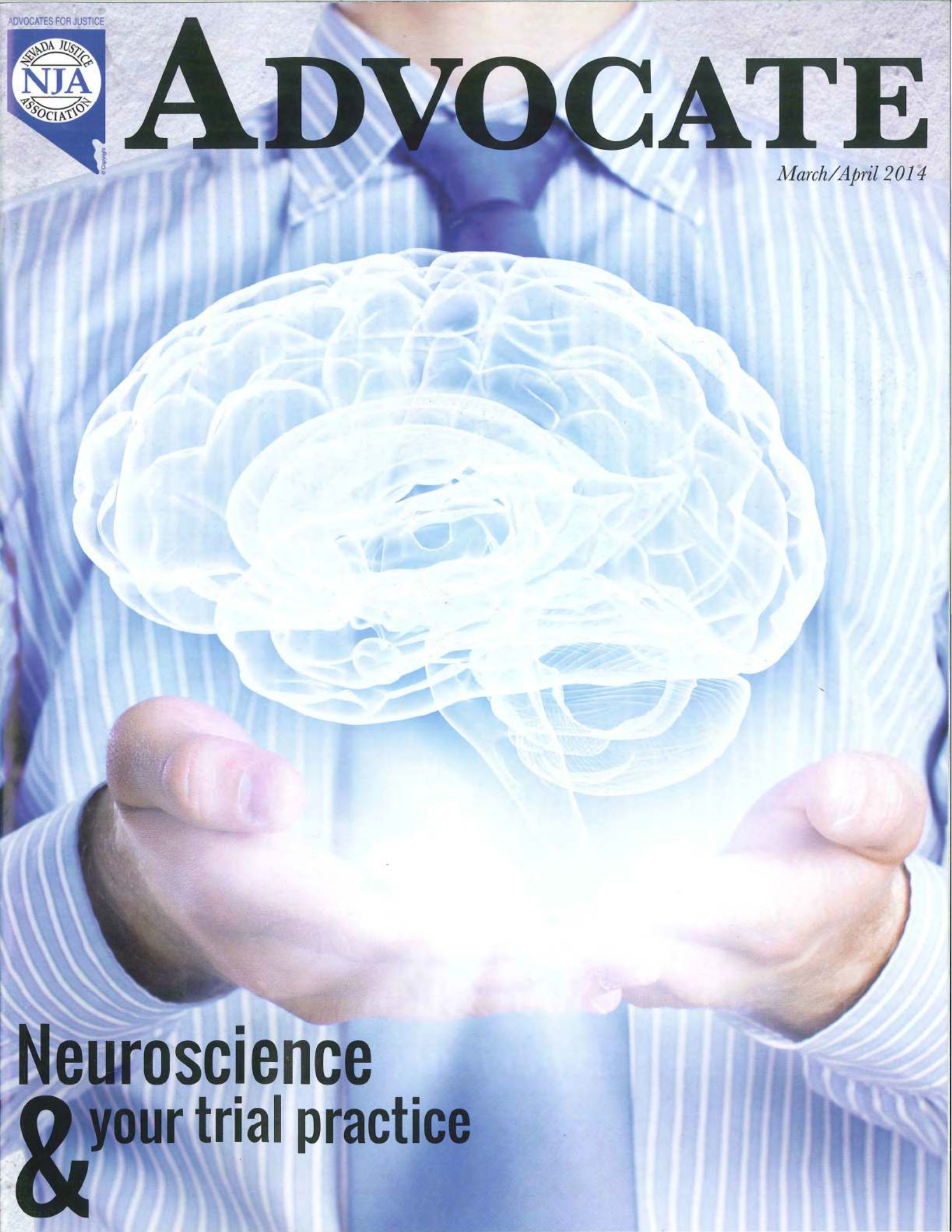
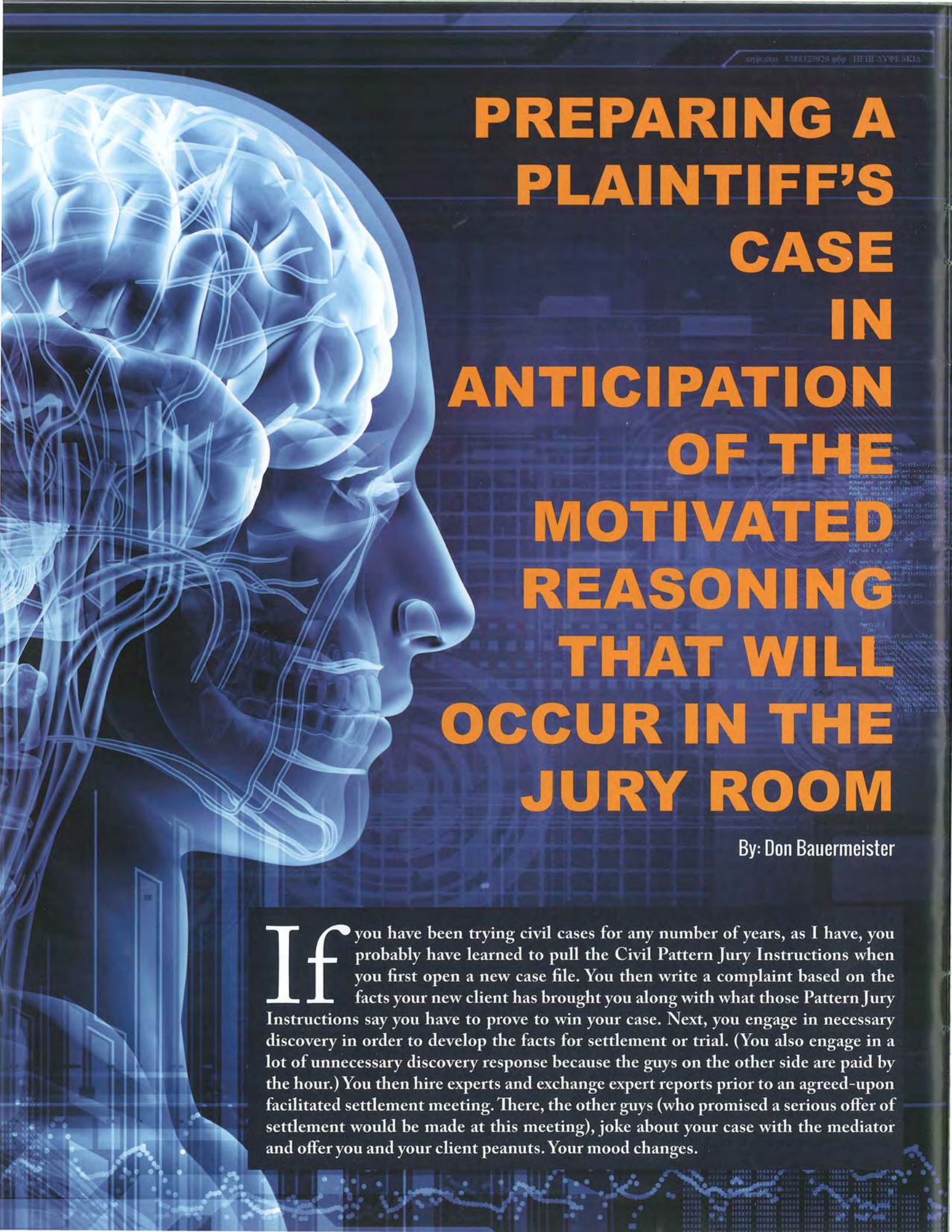


Neuroscience & your trial practice



PREPARING A PLAINTIFF'S CASE IN ANTICIPATION OF THE MOTIVATED REASONING THAT WILL OCCUR IN THE JURY ROOM

By: Don Bauermeister

If you have been trying civil cases for any number of years, as I have, you probably have learned to pull the Civil Pattern Jury Instructions when you first open a new case file. You then write a complaint based on the facts your new client has brought you along with what those Pattern Jury Instructions say you have to prove to win your case. Next, you engage in necessary discovery in order to develop the facts for settlement or trial. (You also engage in a lot of unnecessary discovery response because the guys on the other side are paid by the hour.) You then hire experts and exchange expert reports prior to an agreed-upon facilitated settlement meeting. There, the other guys (who promised a serious offer of settlement would be made at this meeting), joke about your case with the mediator and offer you and your client peanuts. Your mood changes.

You prepare for trial by writing openings and closings, direct and cross-examinations, and evidence admission arguments for the judge. The case tries beautifully. You have proven every element of the cause of action by evidence far exceeding a preponderance. The judge thanks you (while the jury is out), because you presented such a well-prepared and efficient case. You strongly feel the judge sees the case your way, but the judge is careful not to openly show favoritism. The next day, the judge's face nevertheless shows shock and surprise after the court reads the jury's defense verdict. You know it's a defense verdict before the clerk even reads the special verdict form.

Happen to you? It's happened to me. I'm sorry to report, more than once. In fact, it's happened to me (and other lawyers that I believe are very good lawyers), so many times that I have been working for over 15 years to try to figure out what is going on. This article is presented to introduce you both to how I think these cases are being lost inside the minds of the jurors (not in your courtroom presentations), and what you can do about it.

One of the first things you need to understand is a concept called "motivated reasoning." A good place to begin is by looking up that subject in the Skeptic's Dictionary. There you'll see:

> "*The most common of all follies is to believe passionately in the palpably not true." It is the chief occupation of mankind.*" -- H.L. Mencken
>
> "*Reasoning was designed by evolution to help us win arguments.*" -- Hugo Mercier and Dan Sperber
>
> "*We apply fight-or-flight reflexes not only to predators, but to data itself.*" -- Chris Mooney.
>
> Motivated reasoning is **confirmation bias** taken to the next level. Motivated reasoning leads people to confirm what they already believe, while ignoring contrary data. But it also drives people to develop elaborate rationalizations to justify holding beliefs that logic and evidence have shown to be wrong. Motivated reasoning responds defensively to contrary evidence, actively discrediting such evidence or its source without logical or evidentiary justification. Clearly, motivated reasoning is emotion driven. It seems to be assumed by social scientists that motivated reasoning is driven by a desire to avoid cognitive dissonance. Self-delusion, in other words, feels good, and that is what motivates people to vehemently defend obvious falsehoods.

See, the Skeptic's Dictionary at http://skepdic.com/motivatedreasoning.html.

Well, this is depressing. If people are going to believe what they want to believe no matter what the facts are, why do I keep trying to prove facts in the courtroom? Good question. The answer is because the judge will dismiss your case if you don't prove facts that raise a question for the jury on every element of what you are trying to prove. You are still dealing with a rational proof requirement with the judge.

With the jury, odds are you are dealing with a different game in its entirety. Here, in the words of neuroscience writer Chris Mooney, "[P]aradoxically, you don't lead with the facts in order to convince. You lead with the values – so as to give the facts a fighting chance." *See, The Science of Why We Don't Believe Science* by Chris Mooney; *Mother Jones Magazine*, May/June 2011, at page 12; also at http://m.motherjones.com/politics/2011/03/denial-science-ch. Mooney's article explains the theory of motivated reasoning as follows:

The theory of motivated reasoning builds on a key insight of modern neuroscience (PVF): Reasoning is actually suffused with emotion (or what researchers often call "affect"). Not only are the two inseparable, but our positive or negative feelings about people, things, and ideas arise much more rapidly than our conscience thoughts, in a matter of milliseconds – fast enough to detect with an EEG device, but long before we are aware of it. That should not be surprising: Evolution required us to react very quickly to stimuli in our environment. It is a "basic human survival skill," explains political scientist Arthur Lupia of the University of Michigan. We push threatening information away; we pull friendly information close. We apply fight-or-flight reflexes not only to predators, but to data itself.

We are not driven only by emotions, of course – we also reason, deliberate. But reasoning comes later, works slower – and even then, it doesn't take place in an emotional vacuum. Rather, our quick-fire emotions can set us on a course of thinking that's highly biased, especially on topics we care a great deal about.

Id. at page 3. How this happens, according to political scientist Charles Taber of Stonybrook University, is that a subconscious negative response to new information, in turn, guides the type of memories and associations formed in the conscious mind. People "retrieve thoughts that are consistent with their previous beliefs, and that will lead them to build an argument and challenge what they're hearing." *Id.* at 3.

The entire process has been described by Jonathan Haidt, a University of Virginia psychologist, as one where, "[w]hen we think we're reasoning, we may instead be rationalizing." Haidt says the human brain acts much more like a lawyer than a scientist. Haidt believes that human "reasoning" is a means to a predetermined end – winning our "case" and is shot through with biases. Haidt believes this includes "confirmation bias," in which we give greater heed to evidence and arguments that bolster our beliefs, and "disconfirmation bias," in which we expend disproportionate energy trying to refute views that we feel strongly against. *Id.* at 4. Following Haidt, Chris Mooney concludes:

[None of this is] "to suggest that we aren't also motivated to perceive the world accurately – we are. Or that we never change our minds – we do. It's just that we have other important goals besides accuracy – including identity affirmation and protecting one's sense of self – and often those make us highly resistant to changing our beliefs when the facts say we should."

Id. at 4.

All of the above is resoundingly confirmed in an excellent analysis entitled "*Why Bad Beliefs Don't Die,*" written by Gregory W. Lester, a Psychologist and Graduate faculty member at the University of St. Thomas in Houston, Texas. Lester writes:

Because beliefs are designed to enhance our ability to survive, they are biologically designed to be strongly resistant to change. To change beliefs, skeptics must address the brain's "survival" issues of meanings and implications in addition to discussing their data.

See, Why Bad Beliefs Don't Die, in the *Skeptical Enquirer* newsletter: Volume 24.6, November/December 2000. Lester's article begins with the premise that senses and beliefs are both tools for survival which have evolved to augment one another. He believes our brains consider them to be separate but equally important purveyors of survival information. The loss of either one endangers us. "Without our senses we could not know the world within our perceptual realm. Without our beliefs we could not know the world outside our senses or about meanings, reasons, or causes." Lester notes:

This means that beliefs are designed to operate independent of sensory data. In fact, the *whole survival value of beliefs is based on their ability to persist in the face of contradictory evidence.* Beliefs are not *supposed* to change easily or simply in response to disconfirming evidence. If they did, they would be virtually useless as tools for survival. Our caveman would not last long if his belief in potential dangers in the jungle evaporated every time his sensory information told him there was no immediate threat. . . As far as our brain is concerned, there is absolutely no need for data and belief to agree. They've each evolved to augment and supplement one another by contacting different sections of the world. . . When data and belief come into conflict, the brain does not automatically give preference to data. This is why beliefs – even bad beliefs, irrational beliefs, silly beliefs, or crazy beliefs – often don't die in the face of contradictory evidence. The brain doesn't care whether or not the belief matches the data. It cares whether the belief is helpful for survival.

Id. at page 3.

Lester then tells us that communicators must learn always to address not only the facts they want to present, but "the implications that changing the related beliefs will have for the fundamental world view and belief system of the affected individuals." He continues, communicators "must discuss the meaning of their data in the face of the brain's need to maintain its belief system in order to maintain a sense of wholeness, consistency, and control in life." *Id.* at 3.

With the above views in mind, it becomes somewhat clearer to understand why presenting all the

evidence that is needed under the Civil Pattern Jury Instructions may still cause you to lose in court. You are not just presenting the facts. A good trial lawyer must knowingly present facts in the context of the belief structures that people bring to the courtroom in their heads. Those belief structures vary from person to person and community to community. But they are consistent enough to be identified and consistent enough to be utilized in preparing a case. That case must have evidence and arguments designed to be consistent with the strongly-held underlying beliefs of the jury (and never be directly contrary to those same beliefs), if it is to be believed.

A very important project is now underway at Yale Law School to help lawyers attend to both the cultural meaning, as well as the scientific factual meaning of information. (Some of the research papers by the Yale Law School cultural cognition project can be found online, such as the one at http://papers.ssrn.com/abstract#1549444.) That paper identifies three strategies that help communicators control for cultural meaning and factual accuracy in the art of persuasion. This includes identity affirmation, pluralistic advocacy, and narrative framing. *Id.* at 31.

Identity affirmation teaches that individuals who are contemplating information that is threatening to their cultural values will reactively dismiss it – unless they are simultaneously provided a discussion of the reasons why such information is consistent with the same (or other strongly-held) values the group possesses.

Pluralistic advocacy teaches that audiences attend more open-mindedly to even threatening information if it is being advocated by experts who openly share important values of the same audience. Importantly, this often means some of the values that are seen and felt on either side of the Fox News/MSNBC divide. Once the audience hears some confirming evidence that the speaker shares some part of their side of that divide, they are far more open to the actual data of the presentation, irrespective of the direction it heads.

Narrative framing tells us that individuals tend to assimilate information by fitting it into pre-existing narrative templates or schemas that invest the information with meaning. Importantly, "[B]y crafting messages to invoke narrative templates that are culturally congenial to target audiences, risk communicators can help to assure that the content of the information they are imparting receives considered attention across diverse cultural groups.

Id. at 31.

These tools are real. They are scientifically based. They can help you change the outcomes of your cases. But they require some study of the nature of the development, meaning, and application of the tools. This is the same study that will help you understand why juries can think about particular evidence and arguments in ways that judges (and most legally-trained people) do not. Since these are the thinking processes the jurors are using to decide your cases, it only makes sense to identify them, understand them, and make appeals on behalf of your clients through them. When you do that, jurors feel a sense of understanding echoing through their minds. Your message then sounds like what they were already thinking before they stepped into the courthouse.

Don Bauermeister, Esq. has been called one of America's finest trial lawyers. To learn more about his revolutionary research and how he applies it, join Mr. Bauermeister and NJA on May 1st. *Please turn to page 25 for details on CLE registration.*

Juries & the Secrets of Cognitive Neuroscience

Part of the Richard A. Harris Series of Continueing Education

On May 1st, NJA is bring Don Bauermeister, the author of this issue's feature article, to Las Vegas for our Spring CLE. Come learn how to use cognitive neuroscience research to understand even the most conservative jurors.

The following day, May 2nd, Mr. Bauermeister will provide private case consultation in a roundtable setting. Limit one case, 20 plaintiff NJA members only. Registrations taken on a first come, first served basis.

May 1, 2014
11:30 p.m.-5:00 p.m.
Mandalay Bay, Palms Room
Las Vegas
Lunch Included - 4.5 CLE Credits

Plaintiff Lawyer Only

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$275 - Pillars & Sustaining Members
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