

# Conquering Cognitive Biases

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Please note that the opinions expressed in this presentation are those of the speaker and may not represent the position of the Attorney General's Office

# A Lawyer's Functions

Preamble to the Iowa Rules of Professional Conduct

- Advisor.
- Advocate.
- Negotiator
- Evaluator.

# Rules of Professional Conduct

- Meritorious Claims and Contentions. (IRPC 32:3.1)
- Competence. (IRPC 32:1.1)
- Diligence. (IRPC 32:1-.)
- Communication. (IRPC 32:1.4)
- Advisor. (IRPC 32.2.1)

■ Objectivity:

Is essential to advocacy.

Precedes advocacy.

Should be recursive.

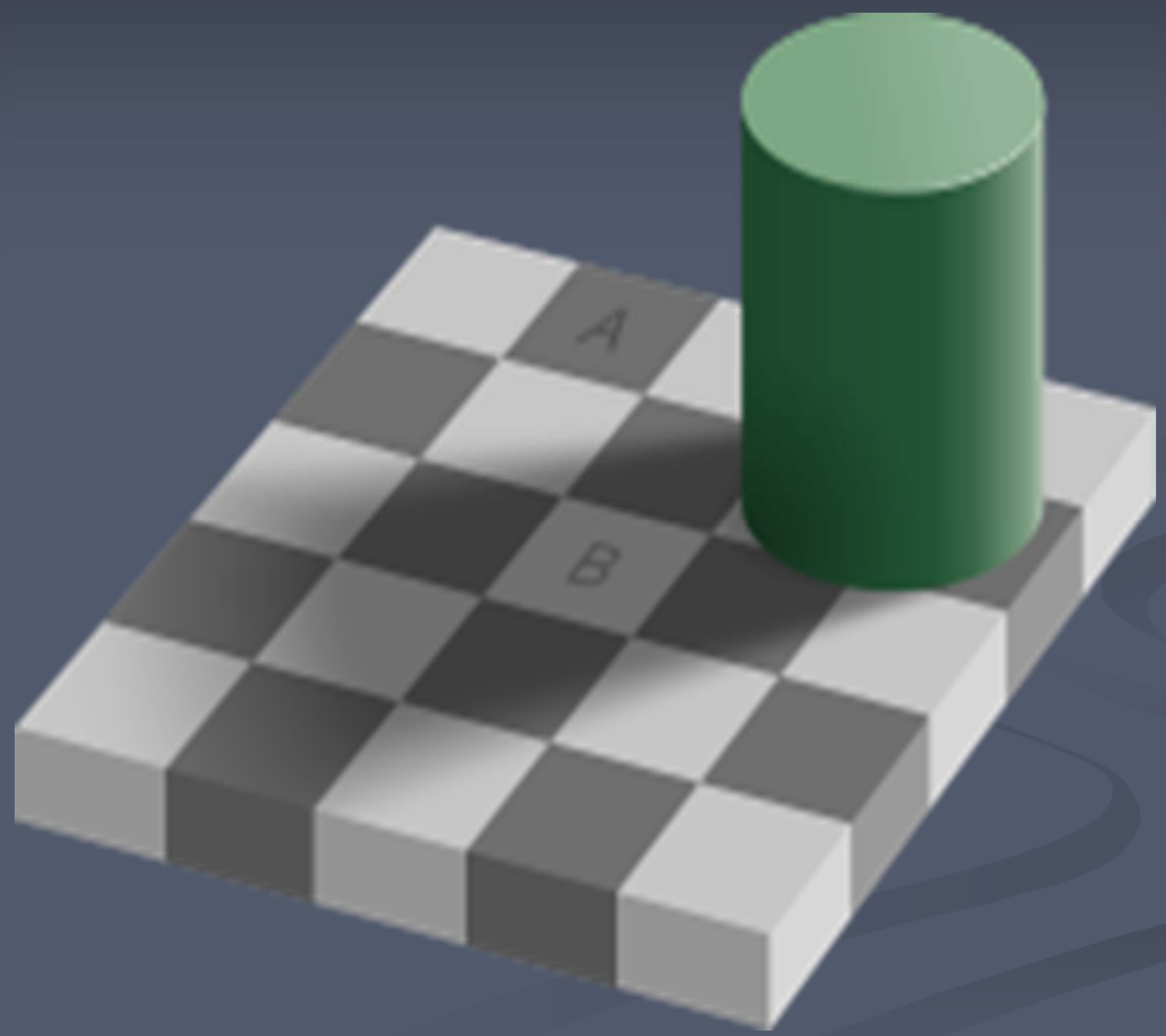
# Dual Objectivity

- Objective evaluation of the law.
- Objective evaluation of the facts.

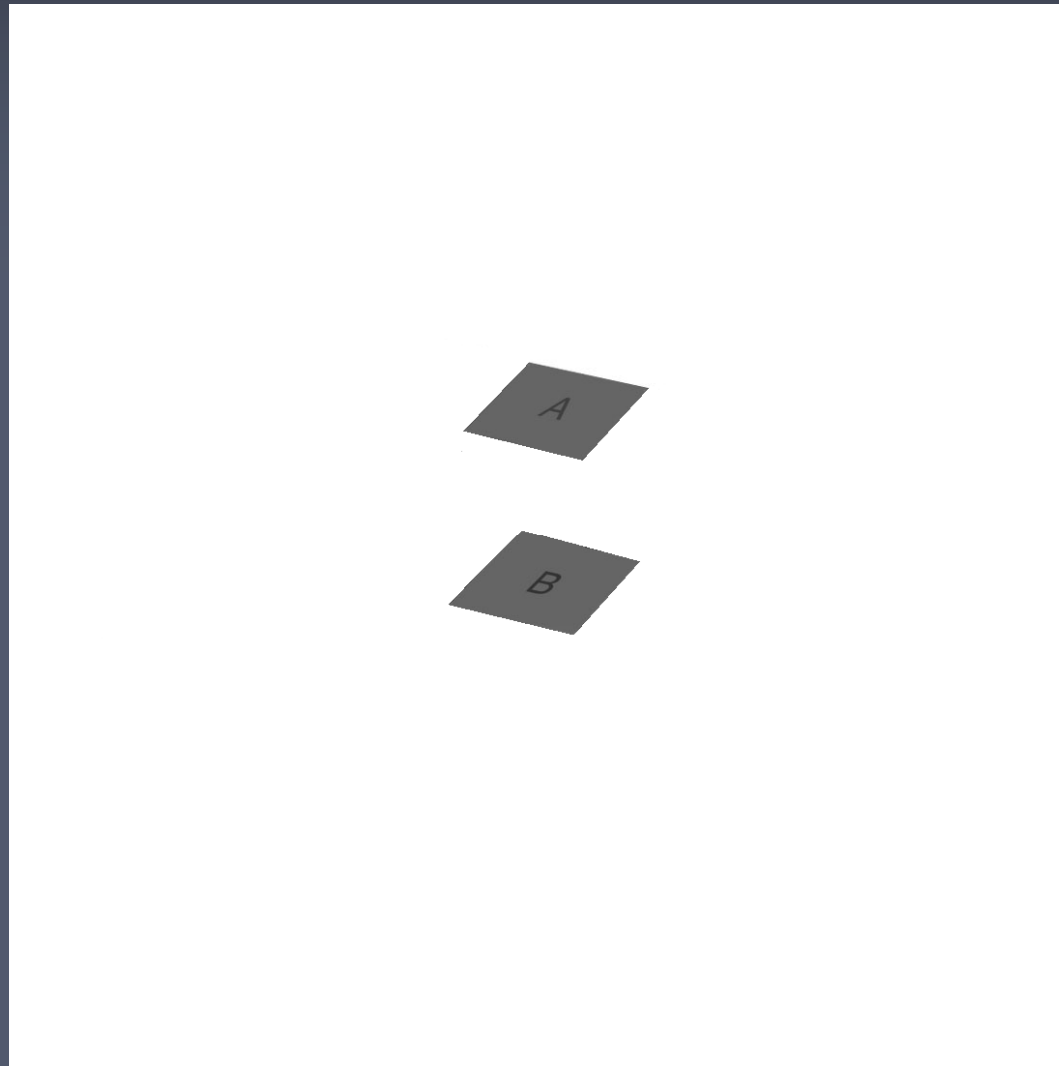
# Barriers to Objectivity

- Human cognition causes systematic and predictable errors in judgment.
- We fail to perceive our errors in judgment.

# Checkershadow Illusion



# Checkershadow Illusion





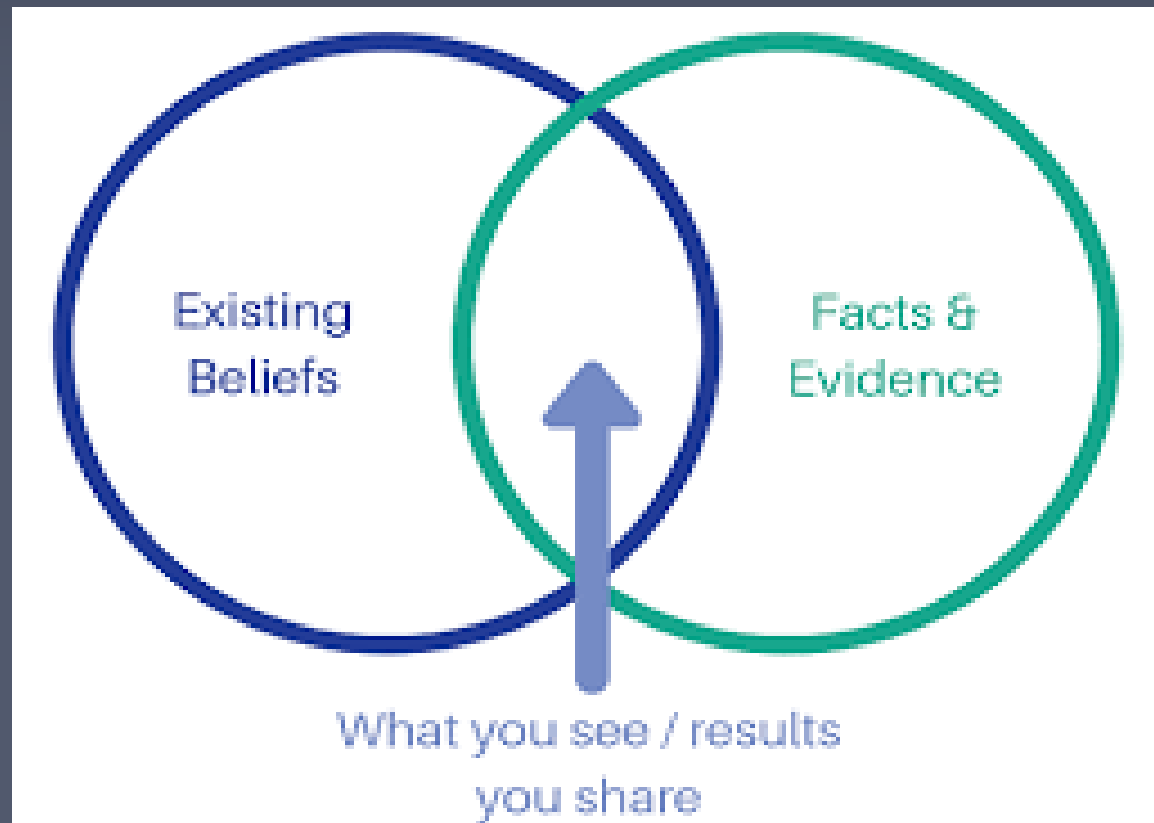
# Cognitive Pitfalls

- Cognitive biases.
- Heuristics.
- Logical fallacies

# Optimism Bias



# Confirmation Bias



# Overconfidence Bias (and Epistemic Arrogance)



# Anchoring Bias



# Apophenia



# Narrative Fallacy

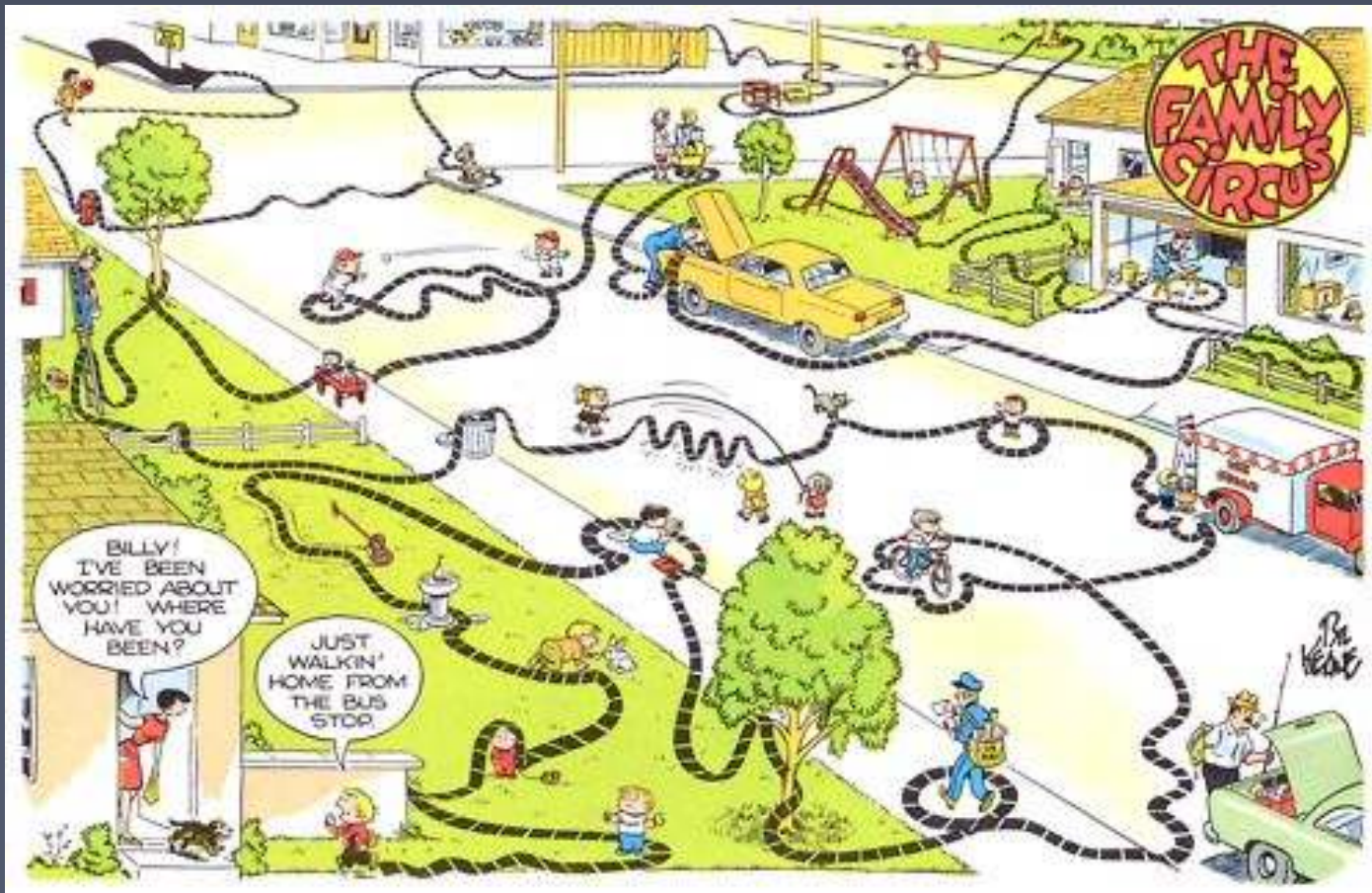


# More cognitive barriers and logical fallacies.

- Hindsight bias.
- Availability heuristic.
- Authority argument.
- Ad hominem argument.



# Getting to an Objective Evaluation.



1. Your evaluation of the case should be recursive.



## 2. Your research should be timely and comprehensive.

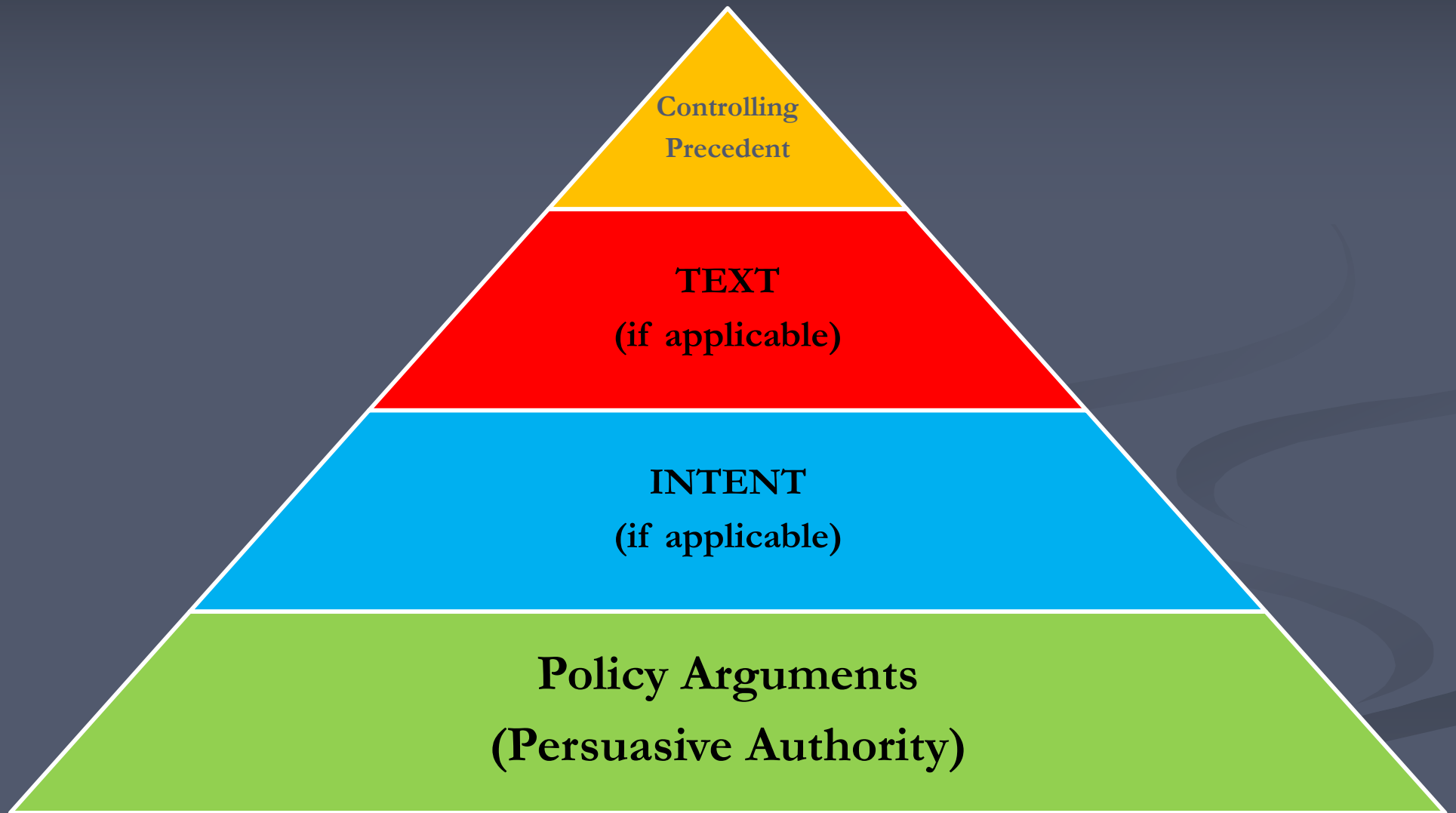
### Why?

- Substantive law tells us what facts are important.
- Substantive law helps us organize the facts.
- Substantive law identifies defenses, burden of proof, relevant doctrines.
- Substantive law guides discovery.

## 2. Timely and Comprehensive Research

- Distinguish between settled law and unsettled law.
  - Settled law – evaluation is fact-driven.
  - Hybrid – some parts of your case may be settled, others not.
- If unsettled, think about the hierarchy of legal analysis.

### 3. Use the Hierarchy of Analysis in Evaluating Your Case





# 4. Identify and Evaluate Policy Arguments

# Identify Policy Arguments

- Judicial administration arguments.
  - Firm v. flexible.
  - Complexity v. ease of application.
  - Floodgates of litigation.
  - Slippery slope argument.





# Identify Policy Arguments

- Normative arguments.



Watch out – “tradition” is a weak argument!!!!

- Moral arguments.
- Social utility arguments.

# Normative Arguments in Varnum

- Government goal of ensuring optimal environment for raising children.
- Government goal of promoting procreation.
- Government goal of promoting stability in opposite sex relationships.
- Government goal of conservation of state resources.

# Identify Policy Arguments

- Institutional competence arguments.
- Economic arguments.

# Evaluate Policy Arguments

- Not all policy arguments are equal.
- Persuasive authority is only as strong as the arguments/reasoning.
- The strength of policy arguments depends on whether they are supported by facts and data?

# Objectivity and the Facts



# 5. Don't Believe Your Client.



## 5. Don't Believe Your Client.

- Cognitive barriers apply to your client.
- Ask your client to relay the facts chronologically.
- Ask your client to distinguish between what they **know** and what they believe(d).
- Ask your client to tell you what they think other people are not telling you.
- Known knowns; known unknowns; unknown unknowns.



## 6. Drill the Fact Well.



## 6. Drill the Fact Well.

- Do not believe any witness.
- Compare stories.
- Missing facts.
- Knowledge/cognition – who knew what when.
- Control – who had control?
- Action and reaction.
- Beliefs, assumptions, perceptions.
- Motive and intent.

# 7. Organize the Facts.

- Charting.
- Timelines and chronologies.
- Chains of causation.

# 8. Be Honest.



## 8. Be Honest.

- With yourself and your client (candid communication and advice).
- Advise your client that your assessment is recursive.

# 8. Be Honest.

- Have a presentation plan
  - Facts (do I need to explain some cognitive biases that might be at work?)
  - Potential course of action and choices.
  - Your analysis and opinions.
  - Your recommendations.
  - Client decisions.
  - Have I missed anything?

“About half the practice of a decent lawyer consists in telling clients that they are damned fools and should stop.”

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