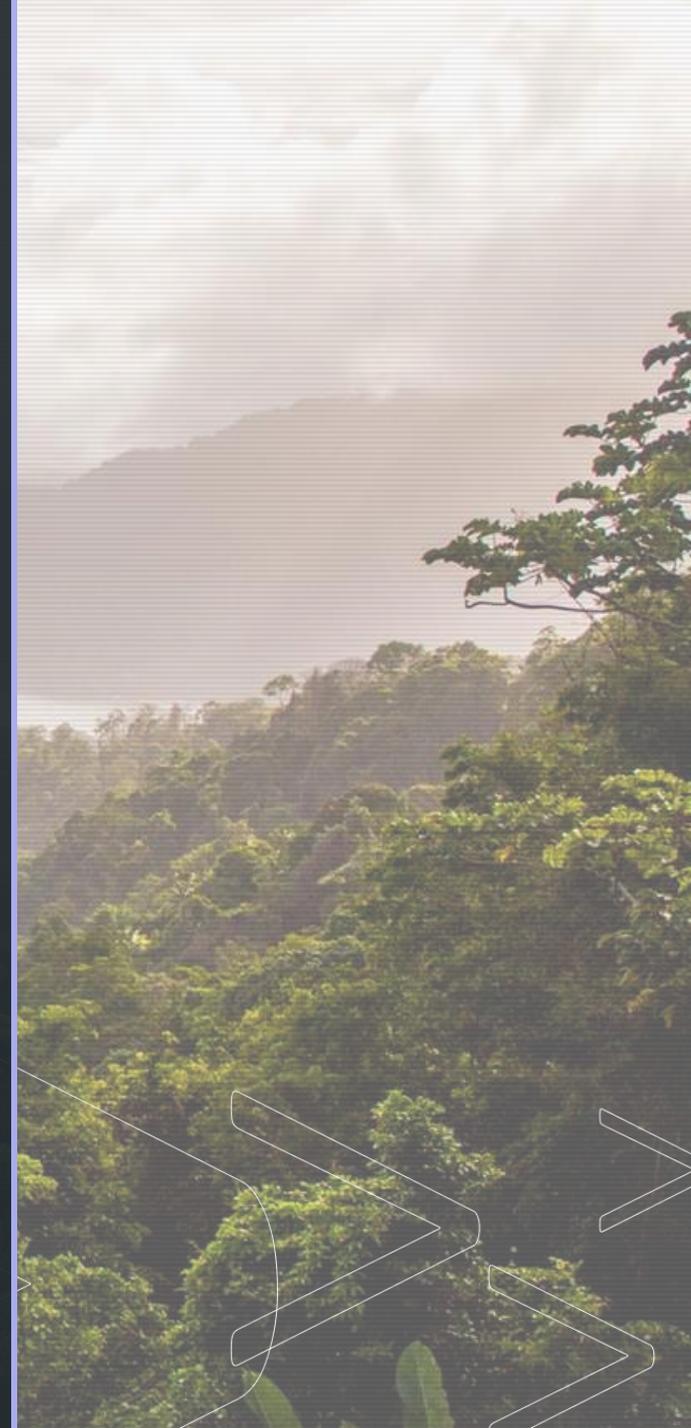


**JUDICIAL SETTLEMENT
CONFERENCING
CONFLICT IS INEVITABLE
COMBAT OPTIONAL-
HOW TO ACHIEVE
WIN WIN IN JSC**

**JUSTICE REALISED THROUGH
COLLABORATION
THE PEACE CIRCLE**

Presented by:

Justice of Appeal Vasheist Kokaram





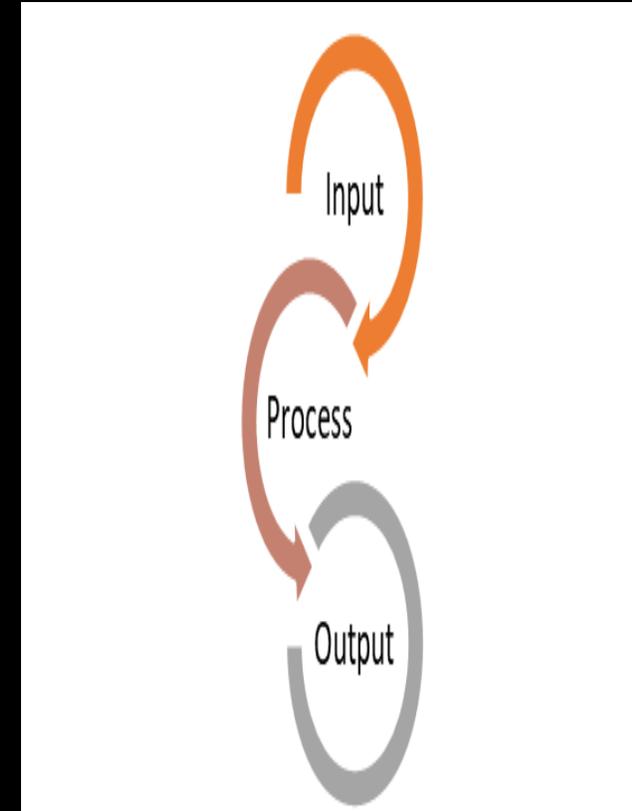
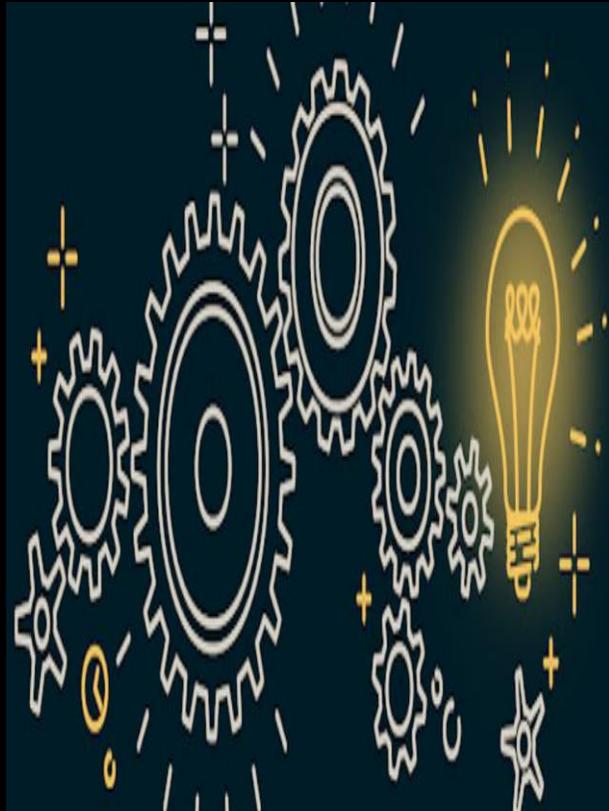
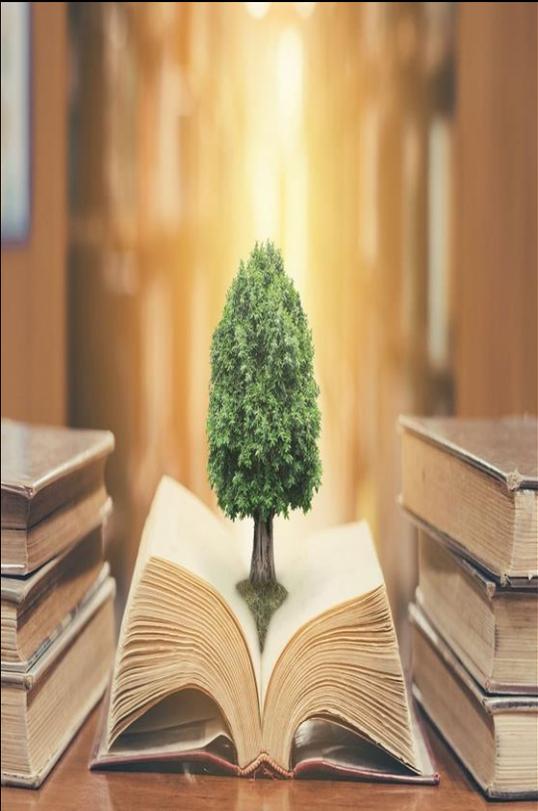
OBJECTIVES

PRINCIPLES

PROCESS

PREPARATION

OUTPUT



BLOOD OF VICTORY



A TALE OF TWO FRIENDS



FOUR MYTHS OF CIVIL LITIGATION

**JUSTICE MUST NOT BE
DONE BUT SEEN TO BE
DONE**

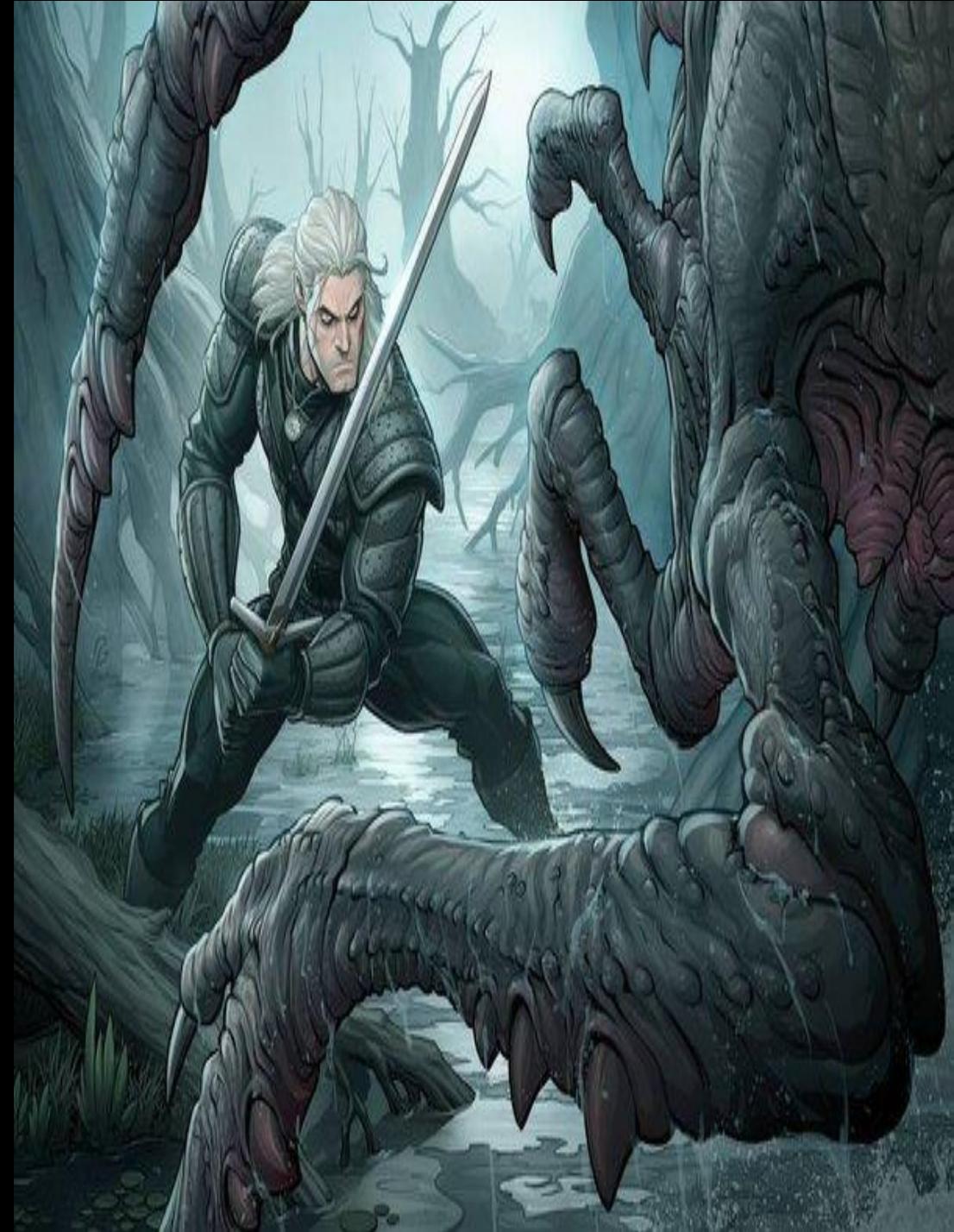
TRIAL BY COMBAT

**JUDGE
DISPASSIONATELY
APPLYING LAW**

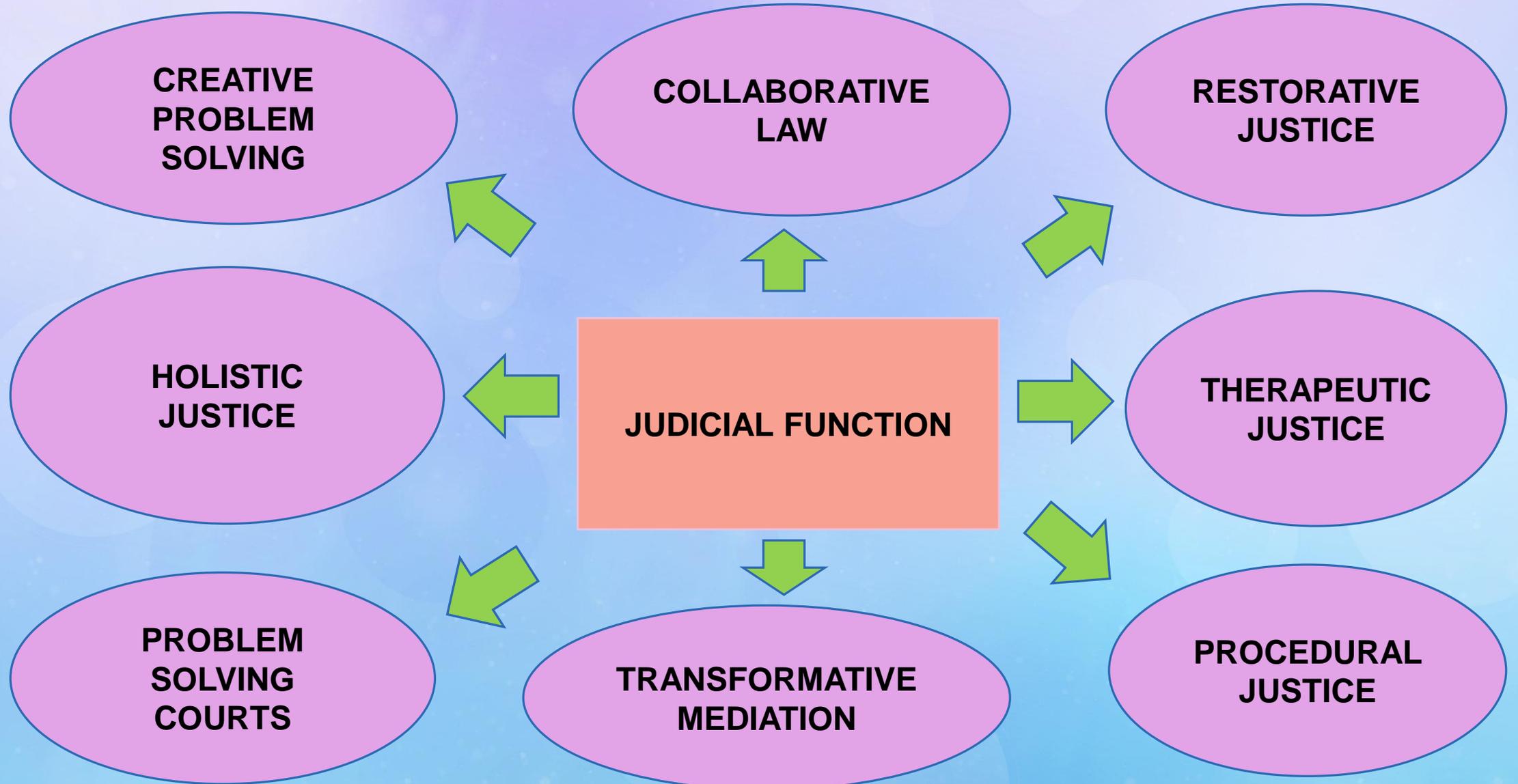
**ACTIVELY MANAGE
CASES TO TRIAL**

JSC VS THE MYTHS OF LITIGATION

- **Trial by combat** v **collaboration towards consensus**
- **Dispassionate application of law** v **compassionate resolution of concerns underlying legal dispute**
- **Justice must be done and seen to be done** v **justice must also be felt**
- **Cases are to be managed to trial** v **cases are to be resolved through tailor made resolution design processes**
- **Peaceful resolution of disputes** v **Peace as the outcome of dispute resolution**



INFLUENCES FROM THE COMPREHENSIVE LAW MOVEMENT



IN A JSC.....

- ✓ Client gets their day in court
- ✓ Clients meet a judge who appropriately focuses the emotionalism of judging/deals with underlying issues of a legal dispute with a view to arriving at an outcome that is peaceful
- ✓ Satisfaction in legal work
- ✓ Prevents repeat litigation
- ✓ Our innate Caribbean hospitality
- ✓ We create a peace circle



JUDICIAL SETTLEMENT CONFERENCE CONTINUED.....

- ❖ **It is a means by which our Judiciary delivers people centric justice, humanises the face of the law, deepens the meaning of the constitutional judicial function, delivers social justice and reorients the justice paradigm to focus on dispute resolution/reconciliation, peace and human development.**

MUCH ADO ABOUT SHOPPING

Maria Hill v Value Dollar Co Ltd

- Maria was struck by a trolley cart while shopping at Value Dollar
- She was 2 months pregnant and she complained of injuries to her back
- The Company sees no merit in the claim. An employee from Value Dollar stored a stack of trolleys which collided with a loading cart which was gently pushed onto Maria
- The Company has failed to respond to her request to pay her medical bills
- She filed an action for damages for personal injuries



PART A JUDICIAL SETTLEMENT CONFERENCING [JSC]

- A component in the suite of ADR options
- A recognised ADR mechanism which compliments mediation Part 38A 1(1)
- “non-adversarial, co-operative decision-making process in which a Judge or Master assists the parties in resolving their dispute.” (designed to assist parties in their negotiation of settlement proceedings or issues 38A.1.2)
- It is a judicial process.
- It is a circle...a judge led search for a peaceful outcome to human conflict



JSC V MEDIATION

SIMILARITIES

- ❖ Party autonomy
- ❖ Confidentiality
- ❖ Informed consent
- ❖ Voluntariness
- ❖ Similar strategies

DIFFERENCES

- ❖ Mostly facilitative but also evaluative
- ❖ JSC Judge conferred with significant power influence/authority
- ❖ Judge's experience in litigation will play a role in the decision making of the parties
- ❖ Interaction with parties mindful of judicial ethics
- ❖ A judicial functionbut...not a trial judge...peace circle



BENEFITS/ADVANTAGES/SIMILARITIES TO MEDIATION

Save relationships

Expand the range of options available to resolve disputes

Includes the parties to the dispute in the decision making process

Provide an independent assessment of risks

Help parties identify their interests and assessment of their positions

Explore alternative resolutions through a co-operative decision making process



Less Risk

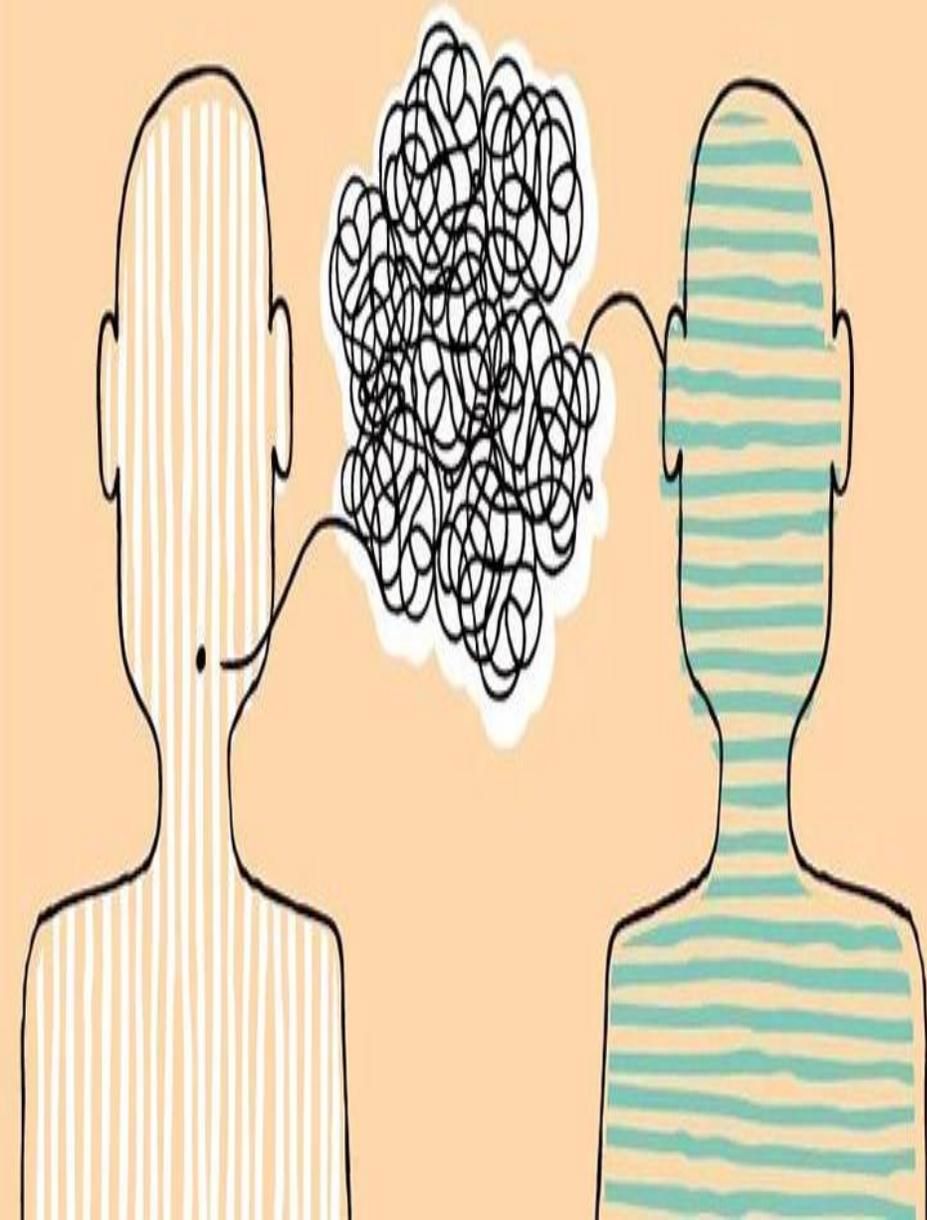
Less Costly

Less Adversarial

Less Court Resources

**Ability to obtain neutral evaluation
of case prior to trial**

**All issues affecting parties may be
brought to the table**



Parties are not bound by rules of evidence or procedure

All interested parties may be present and heard

Parties in control of the process

Use of Court orders to help process

PART 25 and 64 OECS CPR

The court must further the overriding objective by actively managing cases. This may include –

- ❖ actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party;
- ❖ encouraging the parties to co-operate with each other in the conduct of proceedings;
- ❖ encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures;

Adverse cost orders

Conduct-fail to attend or refuse to participate 38A. 10

Unreasonable refusal to participate in an ADR approved by the Court 64.6(6)(a)

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

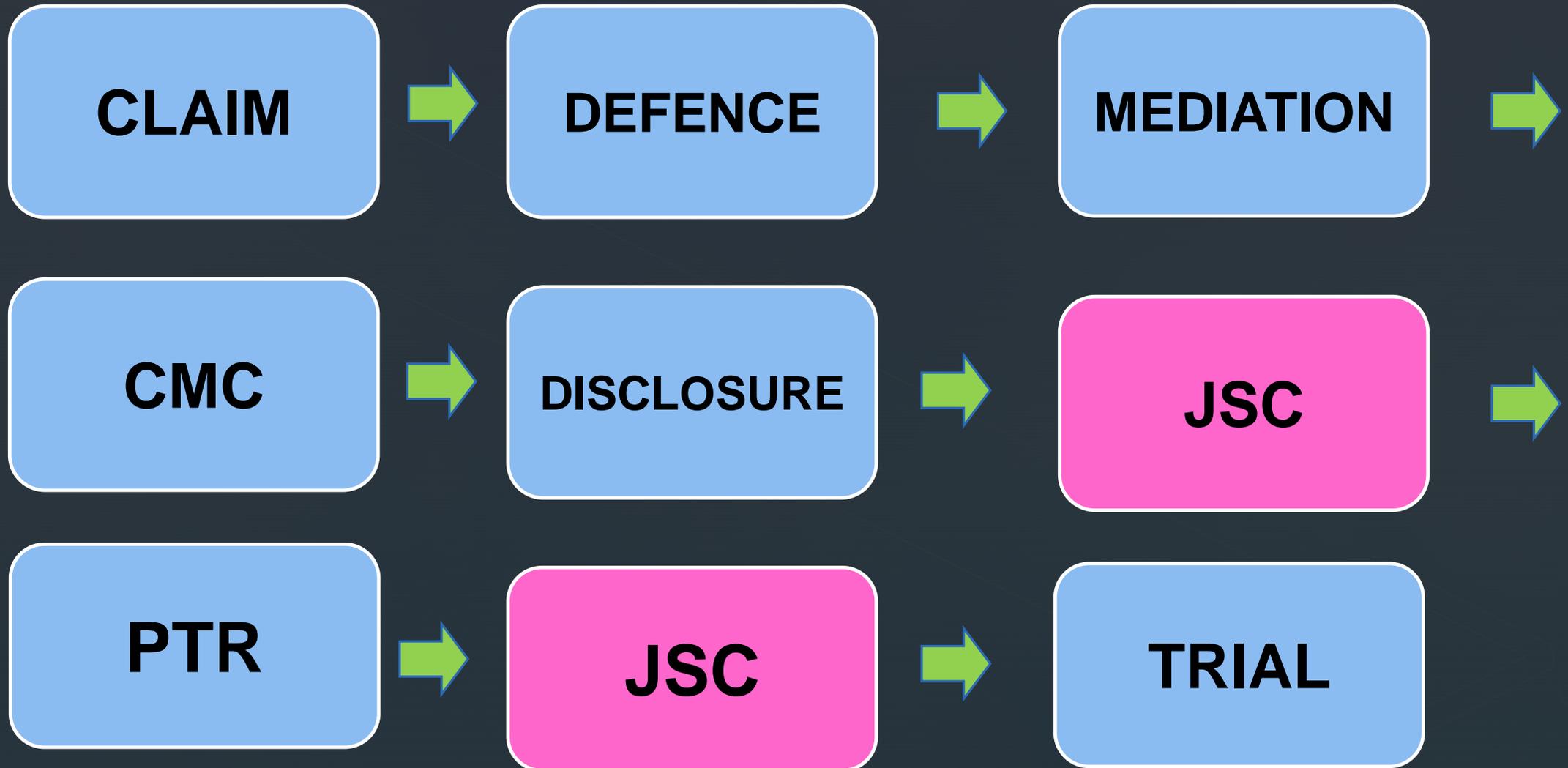
CARRINGTON V UTT

IS HILL V VALUE DOLLAR A SUITABLE CASE FOR JSC

- Prior mediation always helpful
- Relational disputes
- ❖ Is the real dispute between the parties suitable for JSC?
- ❖ Is the choice consistent with giving effect to the overriding objective?
- ❖ What are the costs benefits?
- ❖ What is the impact on the timely disposition of the dispute?
- ❖ How is a refusal a proportional use of both parties' resources?
- ❖ Are there important factors or obstacles to negotiation which cannot be overcome in the JSC?
- ❖ The importance to afford parties a voice in a safe face to face engagement or would the process be **anti-therapeutic**
- ❖ Reality testing needed
- ❖ Opportunities for joint gains

Carrington v UTT CV2016-03482

WHEN SHOULD I REFER A MATTER TO JSC



TIMING OF JSC FOR HILL V TRU VALU

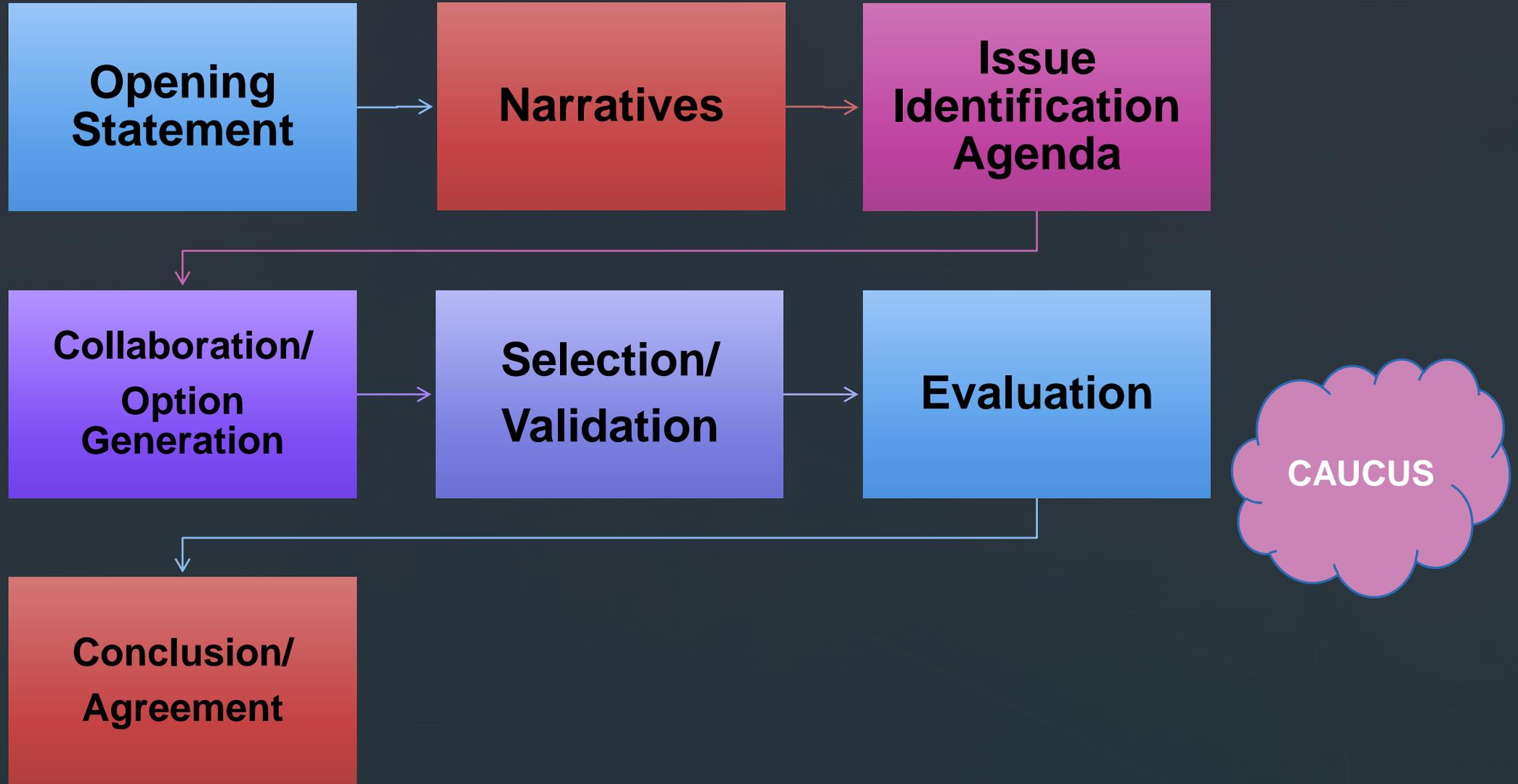
- ❖ During CMC stages - After the close of pleadings/at least after disclosure
- ❖ PTR stage
- ❖ Dangers of convening too early- Parties may attempt to test their case with a volunteer judge to help them build a better case.
- ❖ If convened too late may not have sufficient time prior to the trial date to arrive at a complete settlement-be wary of rushed settlements
- ❖ Trial stage?
- ❖ Appeal



REFERRAL PROCESS- HOW TO MAKE A REFERRAL ORDER

- **Rule 38A.3,4-** Two opportunities
 - During the CMC process and the stages leading up to trial or hearing of an appeal
 - During the hearing or trial provided it is undertaken with the parties' consent.
- **Rule 3-** Referral to a settlement conference before a hearing by order
- **Rule 4-** Referral to a settlement conference during a hearing by consent
- Judge cannot take part in trial unless by consent and not inappropriate (A3.2 4.2)

GENERAL STAGES JSC



NINE ELEMENTS OF PROCEDURAL JUSTICE

VOICE

**RESPECTFUL
TREATMENT**

NEUTRALITY

**TRUSTWORTHY
AUTHORITIES**

ACCOUNTABILITY

UNDERSTANDING

**ACCESS TO
INFORMATION**

**AVAILABILITY OF
AMENITIES**

INCLUSIVITY

NINE ELEMENTS OF PROCEDURAL JUSTICE	JSC
VOICE	Party participation mandatory
RESPECTFUL TREATMENT	Compassionate treatment by judge
NEUTRALITY	Empathise without exhibiting bias
TRUSTWORTHY AUTHORITIES	Confidentiality and Creating trust in the safe space of a JSC
ACCOUNTABILITY	Informed consent and approval of consent orders-subject to judicial scrutiny
UNDERSTANDING	Information exchange Evaluative exercise
ACCESS TO INFORMATION	Bona fide efforts to collaborate
AVAILABILTIY OF AMENITIES	Maintaining equality of parties at the table
INCLUSIVITY	Party autonomy and involvement of all stakeholders including attorneys

PART 2. PREPARING FOR YOUR JSC



PREPARATION IS KEY

Prepare for the court referral

- Rule 8- Counsel for parties must be prepared at CMC or PTR to advise court on need and timing of JSC
- Discuss and agree on when is the best time for a JSC
- Exchange information to help inform their decision and assist in preparing for JSC
- Discuss estimated time for JSC and possible schedules
- Any possible aids needed: experts/site visits/photographs
- Inform the court of their desire for a JSC
- Obtain referral order

PREPARATION IS KEY CONTINUED

Prepare client

- Attorney convenes client meeting to properly brief client on the JSC process manage expectations and work out parameters for settlement
- Explore non monetary aspects
- Do not adopt positional stance –keep an open mind lets see how the negotiations go
- Understand Interests, BATNAs and WATNAS
- Rule 9- Parties or their representative who has authority to negotiate must attend the conference
- Rule 7- Execution of confidentiality agreement. The settlement conference is conducted on a 'without prejudice' basis
- Prepare settlement memorandum/brief Rule 12
- Be prepared for pre conference meetings

- **Prepare: gather information: interests/issues/**
- **Impediments/bottom line, leverage, client views**
- **Plan for emotions**
- **Rhetoric**
- **Cultivate relationship**
- **Exchange information**
- **Identify issues, interests**

HILL V VALUE DOLLAR: INTEREST VS POSITIONS

CLIENT'S POSITION	CLIENT'S INTERESTS/ CONCERNS	DEFENDANT'S POSITION	DEFENDANT'S INTERESTS/ CONCERNS
Compensation	Respect	Denial of liability	Reputation
Defendant at fault	Communication	Claimant exaggerating	Precedent with customers
	Medical assistance		Insurance premiums
	Hurt feelings		Fair deal
	Power imbalance- Value dollar is a big company		

**Prepare
Settlement
Briefs
(without
prejudice)**

Factual summary

Issues: law and practical

Relief sought: and options available

What do you want -map analysis of conflict and solutions

Settlement analysis: interest of client, settlement discussions update,
opinions on quantum,
impediments and possible solutions,
summary of relevant procedural orders

Annex previous settlement offers, counter offers

A one page will say statement from key witnesses

Expert reports where necessary. Tab and highlight the relevant portions

Your 3 best cases

identify the parties who will attend the conference.

Further without prejudice offers can be exchanged prior to the JSC being convened

At times the settlement judge may request copies of pleading and witness statements

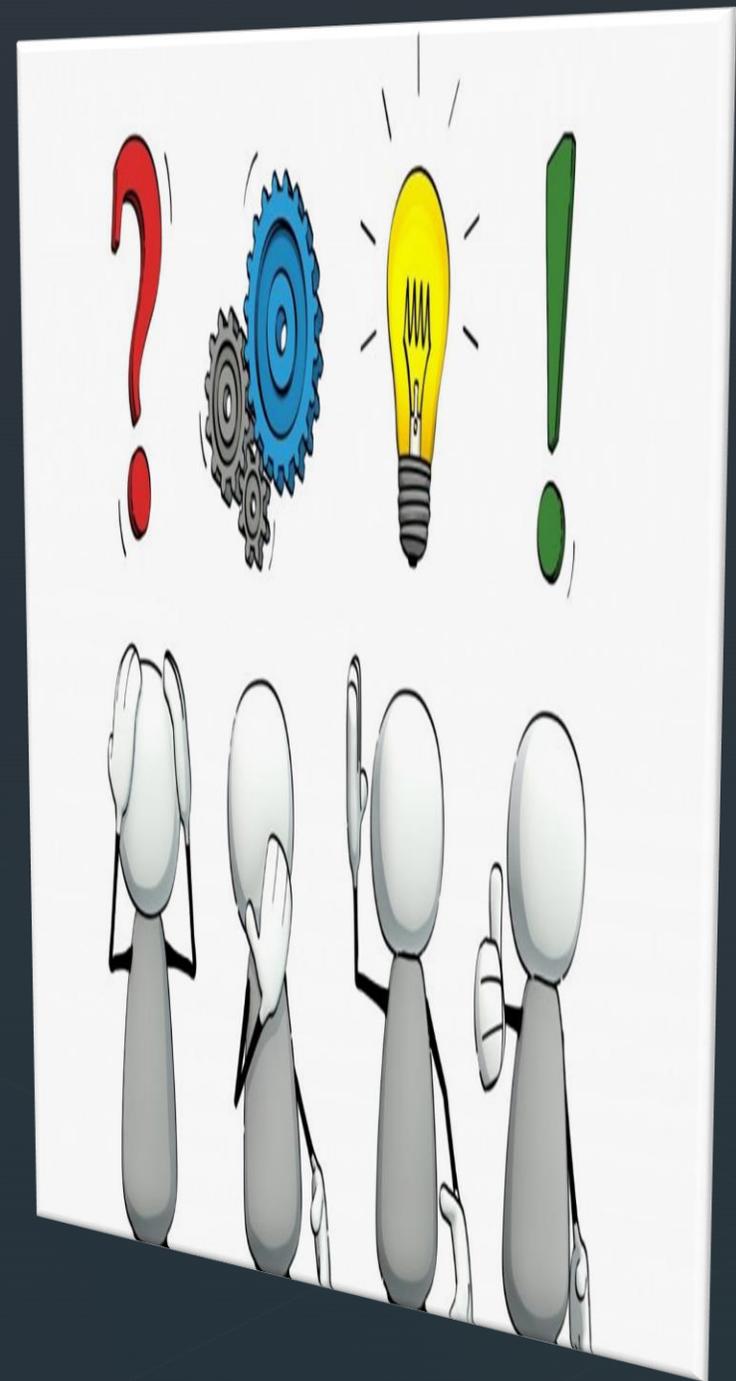
TABLE SETTING

OBJECTIVE: CREATING RAPPORT/COMFORT/TRUST

- Venue for discussions
- Table design
- Meal/Refreshment options
- Props
- Documentation
- Site visits



1. **Who should attend?**
2. **How to involve institutional clients: Who participates, authority to settle? In house counsel?**
3. **Other participation? Experts, witnesses, supporters.**
4. **Encourage honesty/ build trust**



Roles and Responsibility

Judge: The Facilitator

Lawyers: Identifies BATNA and WATNA

Identifies interests and concerns

Considers options, possible outcomes

Prepares briefs, materials

Prepares client

Parties: Responsible for authorizing agreement

Recognition of wants, needs and interests

Understanding of BATNA and WATNA

Willingness to listen and participate openly

Openness to compromise (vs. Willingness to compromise)



INGREDIENTS OF PROCESS- THE THREE C's

COMPASSION

COLLABORATION

CONSENSUS

THREE PILLAR DUTIES IN JSC

**DUTY TO
ACT IN
GOOD
FAITH**

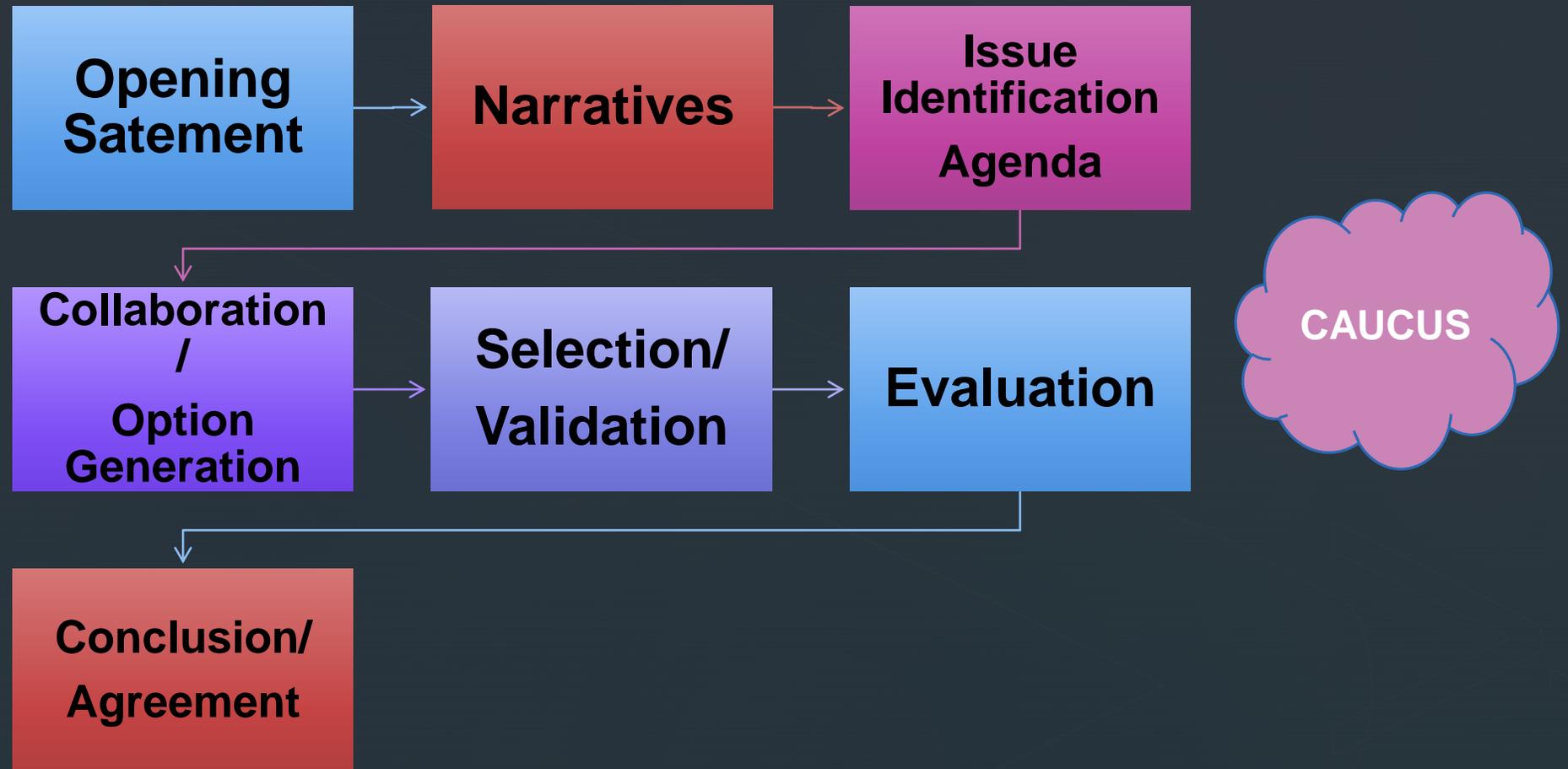
**DUTY
TO
COLLABORATE**

**DUTY TO
PARTICIPATE**

**Moraldo v
Obrien CV2017-
857**

GENERAL STAGES JSC

BASIC DEMO-VIDEO



HOW TO MAKE BEST USE OF JSC TIPS FOR ATTORNEYS





750

SHOW ME THE MONEY!
MONETARY VS NON MONETARY OUTCOMES

A close-up photograph of Tom Cruise in a white shirt, holding a mobile phone to his ear and shouting with his mouth wide open. The background is blurred, showing what appears to be an office or control room setting.

**SHOW ME
THE MONEY!**

- **Plan your strategy and work with your client**
- **Take breaks**
- **Use the caucus**
- **Exchange data**
- **Assist both parties and the Judge (do the heavy lifting?)**
- **Be creative not argumentative**
- **Consider apologies**
- **Work out details of agreements**
- **Consider various forms of consent orders (Tomlin orders)**

Emerging areas in the spectrum-mini trial, binding JSCs, draft judgments, post judgment JSC

IMPRUDENT SETTLEMENT
AND IMBALANCE OF POWER

DEMOCRATISING JUSTICE- OUR LIVED EXPERIENCE- A NEW NORM

82% of the Parties in the sample felt the JSC

- Allowed a party to identify the strengths and weaknesses of his case;
- Allowed a party to identify the strengths and weaknesses of the other side's case;
- Moved the parties toward settlement; and
- Preserved a relationship between the parties



TAKE AWAYS

- **Justice for the litigant means a peaceful outcome that addresses their real concerns through a peaceful process**
- **The litigant wants to be heard and wants an audience with a judge or person in authority**
- JSC is an important step in the local judicial process
- The docketed Judge and JSC Judicial officer would become a tag team encouraging settlement
- **Attorney play an important collaborative and supporting role**
- **Key focus is on just results through your creativity and collaboration**
- Self determination must be paramount
- The mantra: Resolution by Trial if necessary but Resolution is not necessarily by Trial
- **Let Compassion Collaboration and Consensus be your guide**

“Break a vase, and the love that reassembles the fragments is stronger than that love which took its symmetry for granted when it was whole. The glue that fits the pieces is the sealing of its original shape.”

SIR DEREK WALCOTT

