

Employment Law:
Handling Complaints of Harassment in the #METOO Era and Workplace Investigations

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In The News…

Restructuring of the management team at Uber after initial investigation of discrimination, sexual harassment, and bullying

Bill O'Reilly sued by woman who says he violated terms of settlement in a harassment case

News Anchor Charlie Rose fired at CBS less than a day after published reports of unwanted sexual advances made by eight women



Co-Founder of Disney Pixar, John Lasseter takes six-month sabbatical following reports of sexual harassment

Matt Lauer Fired at NBC for 'Inappropriate Sexual Behavior'

Scenario

- You just got back from a two-week vacation when your phone rings. You answer to find a woman on the phone who identifies herself as June.



Scenario



June says she worked for the Borough in 1979 and she was “taken advantage of” by male managers. She asks to speak to the Borough Manager.

Scenario

- What to do with June?
  - Tell her wrong number and hang up?
  - Attempt to investigate?
  - Put her in touch with the Borough Manager?
  - Listen attentively and empathize, but tell her there is nothing you can do?



Scenario

- Harsh as it may seem, the last response is likely all that is available
  - Check to see if others still work there from 1979
- Sexual harassment was not nationally recognized as unlawful in 1979



June 19, 1986

- “Harassment” is not in the text of Title VII
- Prior to 1986, most courts viewed “hostile environment” as simple interactions between men and women
- In 1986, Supreme Court decides *Meritor Savings Bank v. Vinson*



Scenario



- You are the Office Manager/HR person. An attractive young woman just hired tells you that the Development Director is making her very uncomfortable. She claims he comes into her office and stares at her breasts and often says how much he would like to make her his personal assistant. What can you do?

Scenario

- Stick your head in the sand?
- Consult with other managers to see if they will help you address the issue?
- Call a lawyer?
- Confront the issue head on?



Co-Worker Harassment

- Standard for liability is “knew or should have known”
- The real issue begins when you learn of events
- You must investigate and take action reasonably calculated to make the behavior stop



Supervisor Harassment

- Harassment by a supervisor can create liability without knowledge of the incidents. Why?
  - Supervisor:
    - Power to hire and fire
    - Power to direct work activities
    - Power to recommend hiring and firing



Supervisor Harassment

- Affirmative defense if no tangible job action
  - Employer took reasonable steps to prevent/correct
  - Employee unreasonably failed to report



Conducting Thorough Investigations



- Importance of Investigations
  - "Real time" defense to complaints, so it is important to know what events trigger obligation to investigate
  - Liability may be based largely on how you respond, so knowing proper procedures is essential

When Should You Begin?

- Upon Receipt of Notice of Potential Issue or Concern
  - Formal complaints
  - Informal complaints
    - "Just thought you should know…"
  - Observed behaviors
  - **Note**: No requirement that employee put complaint in writing before employer has duty to act



Investigations Cause More Good Than Harm

- Some supervisors and managers follow the "ostrich approach" to complaints – train them (and Council Members!) to know better
- Many benefits come from investigation
  - May provide an affirmative defense
  - May justify your actions
  - Can identify previously unknown concerns



How Prompt Is Prompt?



- Don’t underestimate the importance of acting promptly
  - Supreme Court mandates prompt investigations and swift remedial action
    - Burlington Indus. v. Ellerth, SCOTUS 1998
  - Preserves evidence and fading memories
  - Demonstrates to employees you have a sense of diligence and commitment to policies

How Prompt Is Prompt?

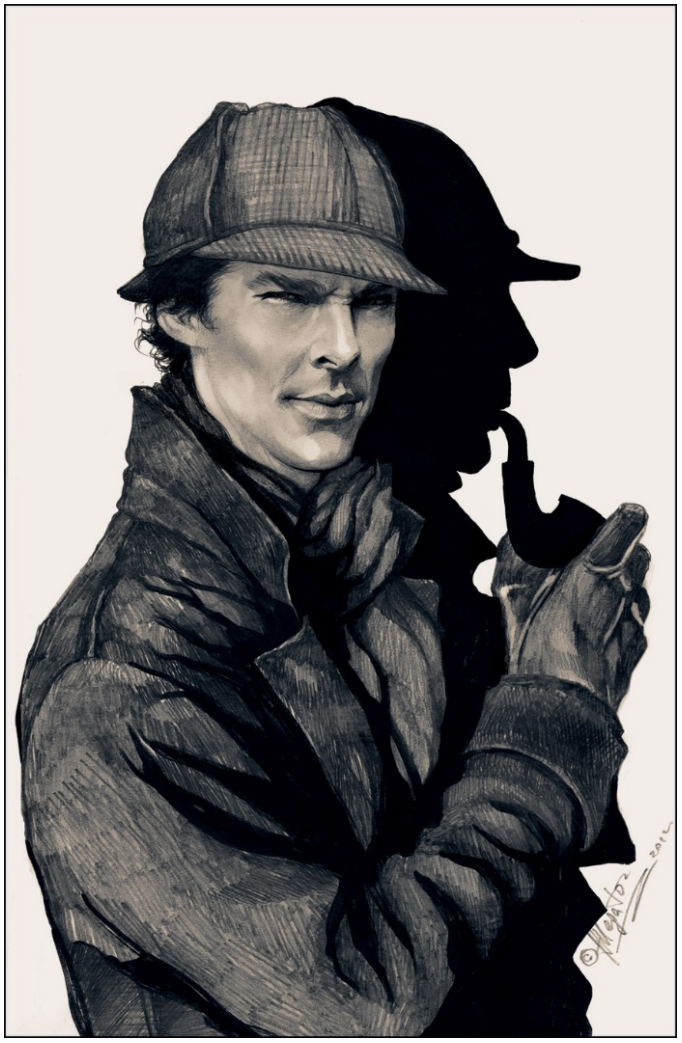
- Investigations conducted within days and completed within weeks are viewed positively by courts
  - Foster v. Twp. of Hillside, 3d Cir 1982

  But "important to keep in mind the entity's lines of command and organization format."
  - Waymire v. Harris County, 5th Cir 1996



Choosing the Investigator

- Objective
- Well-organized
- Credible
- Knows the law
- Knows policies
- Presents well on the stand



The Investigation

- Before getting started . . .
  - Has alleged discriminator/harasser been the subject of prior complaints?
  - Minimize contact between alleged victim and alleged harasser during investigation



The Investigation

- Be careful not to defame the alleged harasser
- Decide who will conduct the investigation
- Review relevant documents



Investigation Preparation

- Decide location (quiet, private, maybe off-site)
- Prepare preliminary statement and introduction
- Outline areas of inquiry
- Draft specific questions in advance, but maintain flexibility
- Maintain a list of documents "evidence" and update it throughout



Tips For The Investigator

- Stay neutral!
  - Do not make promises!
  - Do not "agree" with alleged victim or alleged harasser (or signal that you agree)
  - Do not downplay the seriousness of the situation
- **Focus – Were Borough policies violated?**



Tips For The Investigator

- Confidentiality:
  - Can you guarantee it?
  - Can you require it?
  - *Best practice:* ask every interviewee to maintain confidentiality
- Stress the prohibition against retaliation



Document The Investigation

- Take careful, appropriate notes
  - Questions and answers
  - No opinions!
  - Dates, location, who was present, etc.
- Mark everything “CONFIDENTIAL”
- Compile an Investigation Report

Closing The Investigation

- Has a violation of policy occurred?
- If yes, take appropriate remedial action as necessary
  - Decision maker should not be investigator
  - Consider what action is necessary to ensure that this does not happen again
    - Counseling, discipline, termination, reassignment
    - Borough-wide training
  - Close the loop with complaining party
  - Follow-up and ensure no retaliation



Closing The Investigation

- If no policy violation is found, close the loop with the alleged victim and alleged harasser, and ensure that no retaliation occurs
- Regardless of finding:
  - Alleged victim and alleged harasser should receive an explanation of the action taken, why it was taken, etc.
  - Discipline should be included in personnel file
  - Investigation report should remain confidential and maintained separately from personnel file
  - **Ensure no retaliation**



Scenario



- You learn from a male employee that the Finance Manager has been propositioning him for sex every day. She always offers $100. The employee has only ever declined these advances and the Finance Manager normally walks away, leaving the money behind. The Finance Manager has been with you for 30 years. When you confront her, she says she is in love with the male employee.

Scenario

- What steps do you take:
  - Suspend the manager and send her to training?
  - Provide written discipline and a last chance agreement?
  - Termination?



What Is "Reasonably Calculated to Stop the Harassment"?



- What works depends on the person
- Is this a lack of understanding, poor judgment, or a character flaw?
- Don't have to terminate even if the victim asks for that result


ANY
QUESTIONS
?



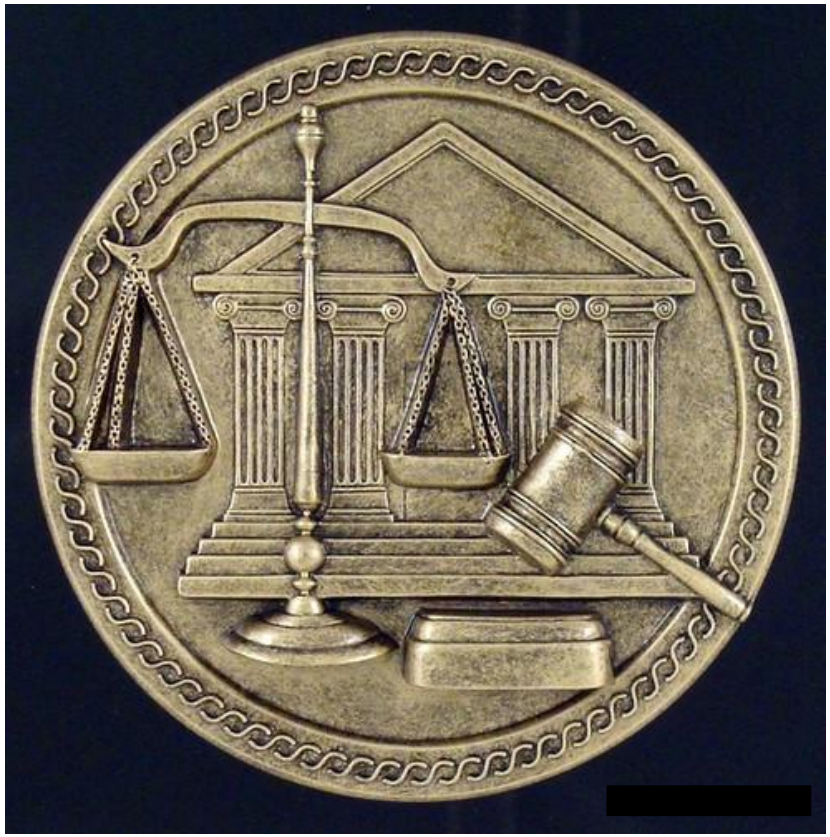
The Importance of Investigative Findings

Don’t Wimp Out

Find *Something*



The Burden of Proof



How much “proof” does it take?

If you think you know what happened, make a finding.

The Presumption of Innocence

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

- Universal Declaration of Human Rights, Article 11 Section 1

The Presumption of Innocence

Well, sort of!

Subject of investigation gets:

to tell his/her side



The Presumption of Innocence

Well, sort of!

Subject of investigation gets:

to tell his/her side

offer exculpatory "evidence"



The Presumption of Innocence

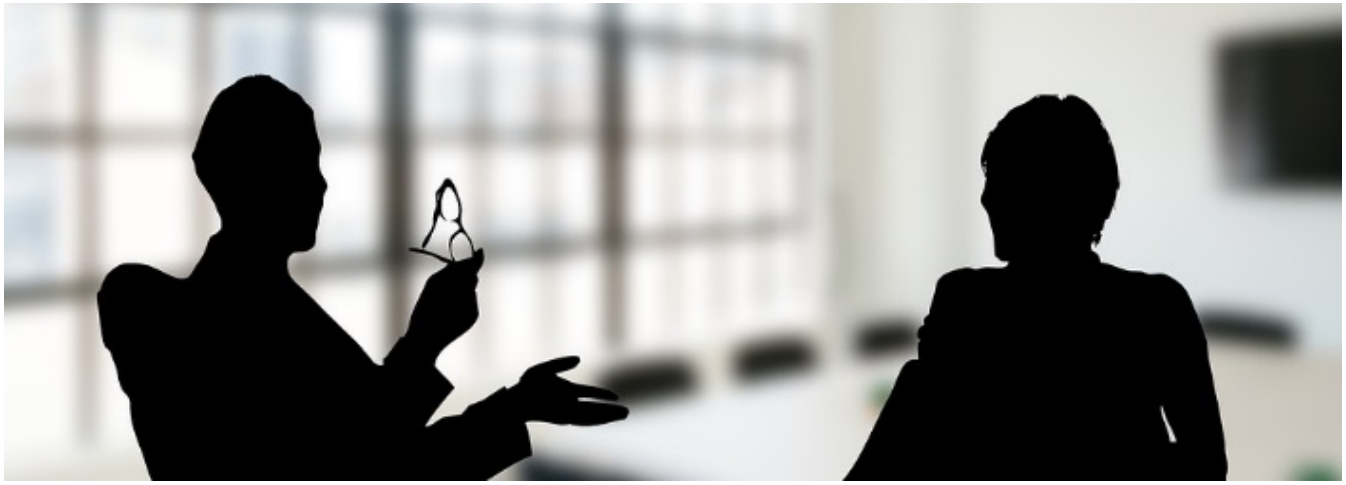
Well, sort of!

Subject of investigation gets:

to tell his/her side

offer exculpatory "evidence"

say why complainant might lie



Perfection is Impossible



- Investigation doesn't have to be perfect
- Must be fair, thorough, and impartial

Findings are Important



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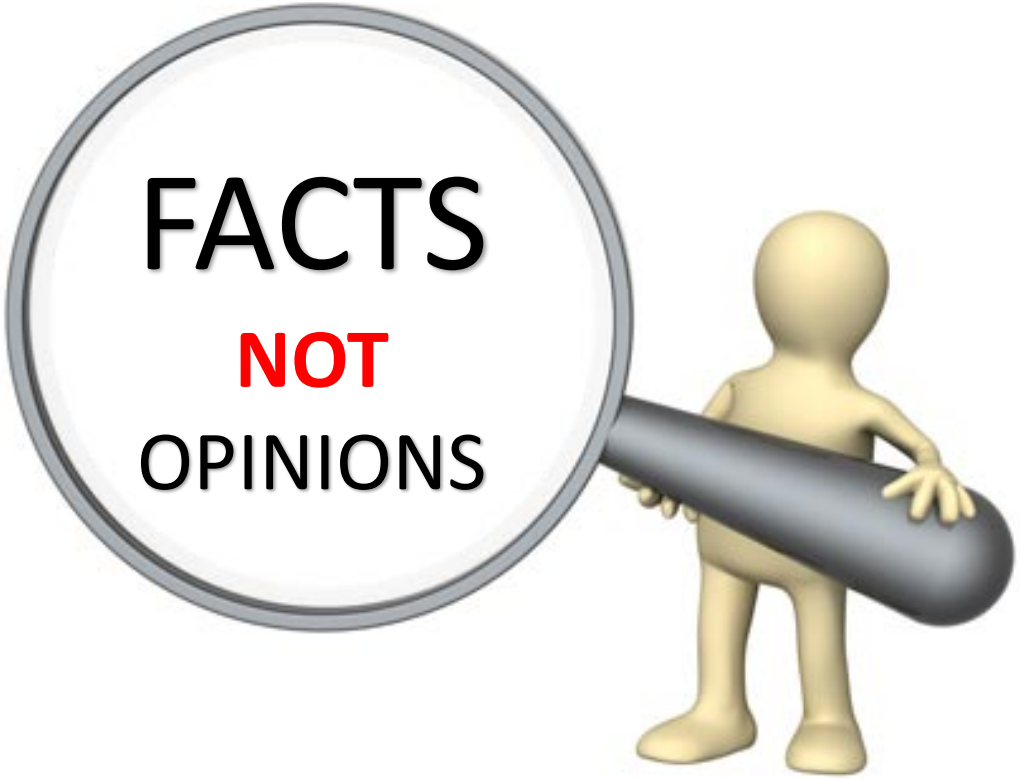
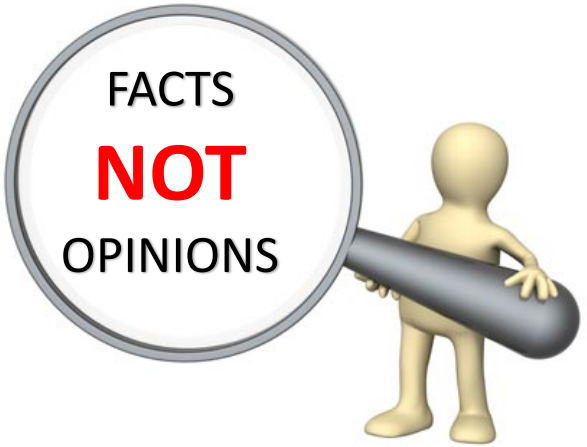


Findings are Important

"totally unfounded and without substance, retaliatory[,] fabricated[,] and vindictive in nature."

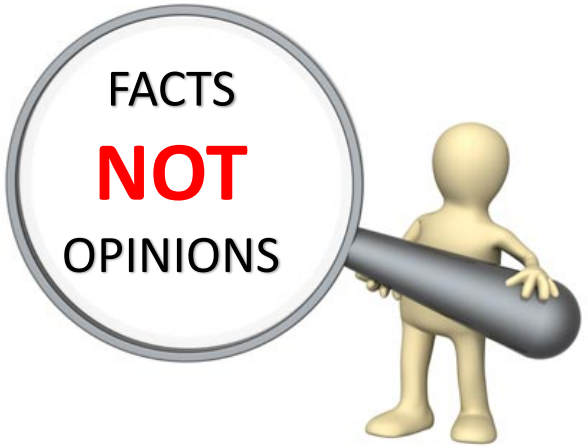


Waymire v. Harris County, 5th Cir. 1996

Findings are Important

NOT:

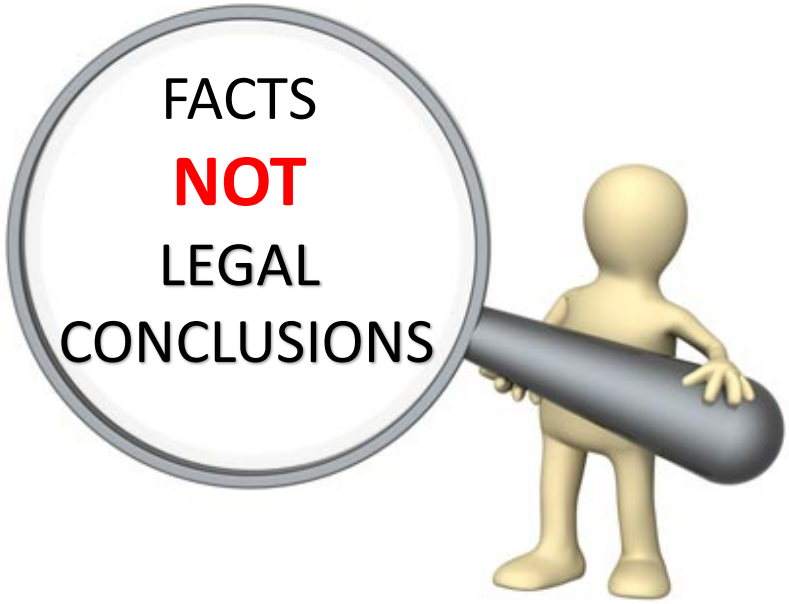
- Joe is a male-chauvinist pig.
- Joe made a racist comment.



Findings are Important

NOT:

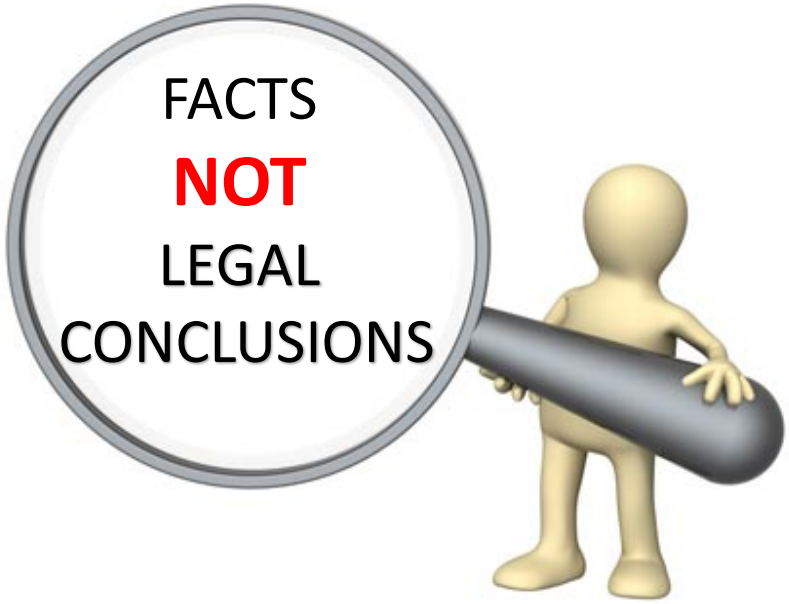
- Joe created a hostile work environment.



Findings are Important

NOT:

- Joe created a hostile work environment.
- Joe harassed Joyce.



It Makes a Difference









After the Investigation: Litigation Issues

Be Prepared For The Press

- In today's environment, we must be ready with a statement
- One spokesperson
- Legal review of script
- Borough representatives need to be on the same page...

  no dissenters



The Investigator's Depo

Prep, prep, prep!

Be reasonable.

Remember, the investigation does NOT have to be perfect.



The Investigator's Depo

Get your story out.

Use the paperwork.

Don't be afraid of "why" questions.



New Legislation



- Generally, attorneys' fees and money paid in settlement or litigation is tax deductible
- Trump's Tax Bill, recently passed, contains a provision that addresses that problem
- Under the Tax Bill, these funds are no longer tax deductible if the settlement contains a gag order

Settlements

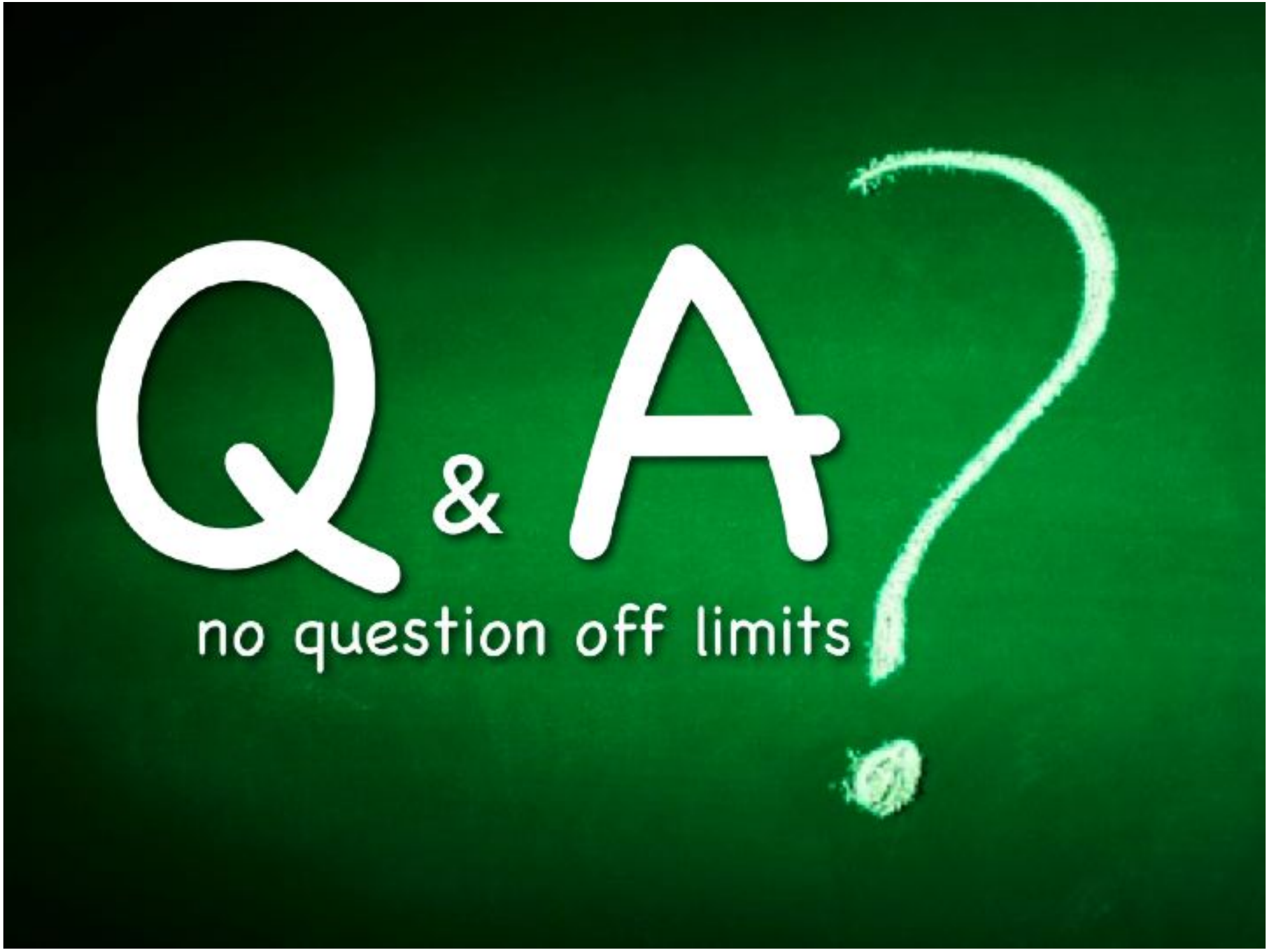


- Business Decision or Implicit Admission?
  - Nearly All Claims Settle
    - Cost of Litigation too High
    - Risk at Trial too Great
    - When to Settle?
  - Settlements Include:
    - Non-Disparagement
    - Non-Disclosure/Confidentiality

Settlements

- How to Enforce Non-Disclosure Terms
  - Specify material breach if violated
  - All settlement payments repaid
  - Liquidated Damages
- But Beware . . . Work with your Solicitor as you may get information requests




Q & A
no question off limits