

# Practicalities & Pitfalls of Workplace Investigations



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# Speakers

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## Karen Kramer

- Kramer Workplace Investigations
- President of AWI

## Terry R. Leoni

- Principal/Founder, Leoni Law
- CCCBA BOD, 2021-2024

# Webinar's Focus

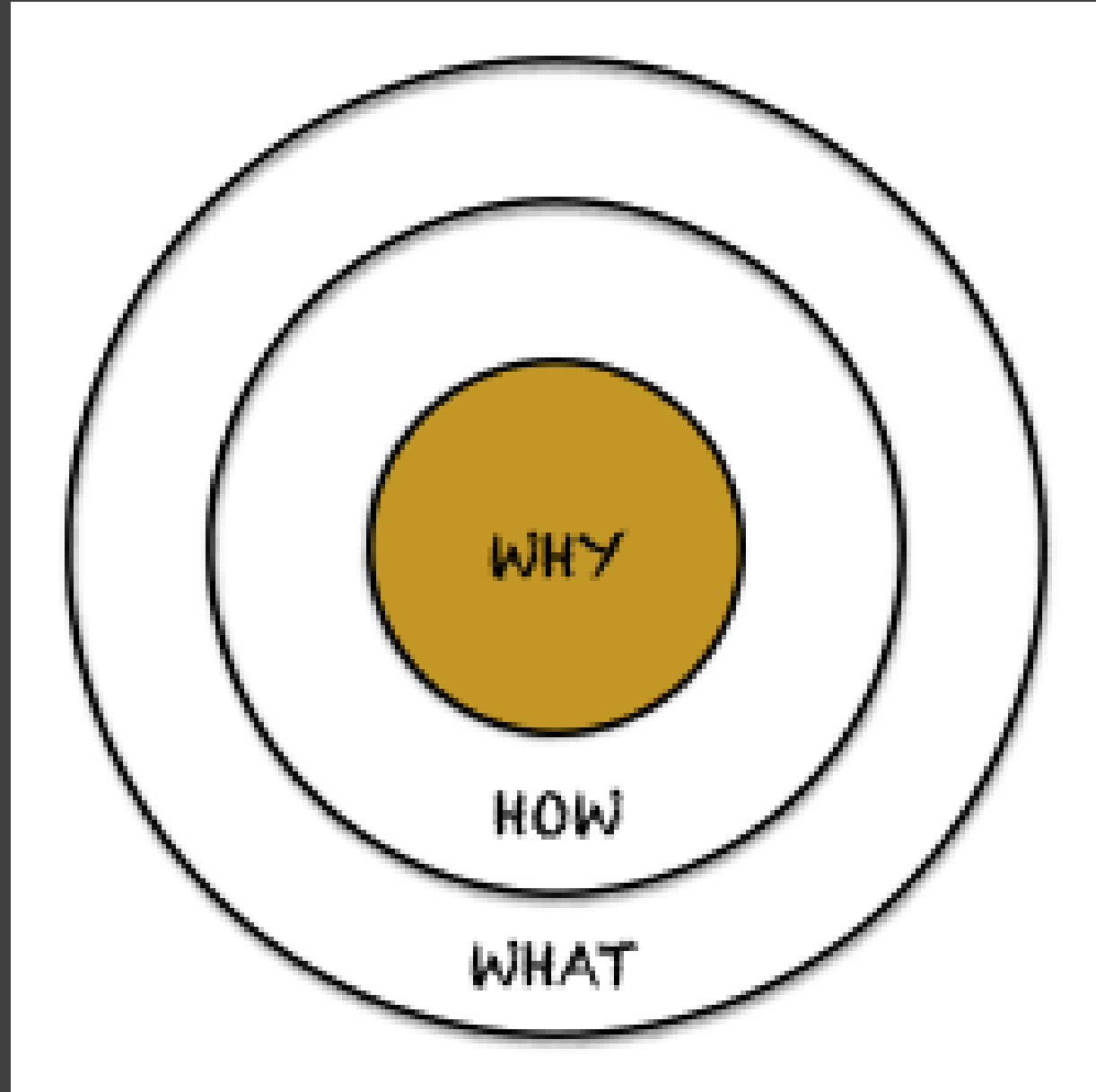
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1. Overview of big picture issues
2. Providing different perspectives
  - ✓ Karen - Employer & Investigator concerns
  - ✓ Terry – Employee concerns
3. Conclusion & Questions

*\* Feel free to ask questions in the “Chat” throughout the webinar*



# The Why & The Who



# Why Conduct an Investigation?

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- EEOC & FEHA mandate that employers have an affirmative duty to take all reasonable steps to prevent discrimination & harassment from occurring in the workplace.
- In addition, “prompt, thorough, & impartial investigations” should be conducted in response to a complaint of harassment, discrimination, &/or retaliation (*Cotran* case)
- Finally, EEOC & FEHA mandate that appropriate corrective action when necessary



# “In response to a complaint...”

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- What triggers an investigation?
  - Generally, the standard is “knew or should have known”
  - Use a “reasonable suspicion” analysis
- Have written policies
- Employers should err on the side of caution & not make an ad hoc determination

“I know it when I see it”

Justice Potter Stewart,  
*Jacobellis v. Ohio* 378 U.S. 184 (1964)

# “In response to a complaint...”

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- Obligations of a Supervisor
  - Being informed directly
  - Observing /overhearing misconduct
- Does a Co-worker trigger the same obligation?
- What about a “casual complaint”?
- Does it need to be formal, in writing, or use legal jargon?
- What about “can I tell you something in confidence”?
- What about anonymous complaints?



# “In response to a complaint...”

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- Response should be consistent & equal among all employees
- Employers should have a written policy to avoid disparate treatment in response to a complaint





# 4 Types of Sexual Harassment

## Verbal/ Written

Remarks of a sexual nature about a person's clothing, personal behavior or body. Sexually explicit statements, questions, jokes, or anecdotes.  
Requesting sexual favors or dates.  
Spreading rumors about a person's personal or sexual life.  
Coercion of sexual activity by threat of punishment.  
Excessive and unwelcomed flirting.

## Physical

Impeding or blocking a person's physical movement.  
Inappropriate and unwanted touching of a person and/or their clothing.  
Other inappropriate touching including kissing, hugging, patting, stroking or rubbing.  
Playing music with offensive or degrading language.  
Purposefully brushing up against another person.

## Non-Verbal

Looking a person's body up and down.  
Making derogatory gestures or facial expressions of a sexual nature.  
Frequently following or standing too close to a person on purpose.  
Whistling or staring in a sexually suggestive or offensive manner.

## Visual

Displaying sexually suggestive objects, pictures, cartoons, posters, calendars or computer screens.  
Showing other people sexually suggestive text messages or emails.  
Sharing sexually inappropriate images or videos, such as pornography, with co-workers.

The law defines sexual harassment as, unwelcome verbal, visual, non-verbal or physical conduct of a sexual nature or based on someone's sex that is severe or pervasive and affects working conditions or creates a hostile work environment.

Resource: U.S. Equal Employment Opportunity Commission (EEOC) / [www.eeoc.gov](http://www.eeoc.gov)

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## Types of Complaints that Trigger an Investigation

- Harassment - Quid Pro Quo
- Harassment - Hostile Work Environment
- Discrimination/Protected Class
  - includes perceived & actual membership
- Retaliation/Whistleblower
- Think beyond the traditional issues

# Take a stand against Workplace Bullying

## Common Signs of Workplace Bullying

- ✗ Abusive or offensive language
- ✗ Unwelcome behavior
- ✗ Unreasonable insults or criticism
- ✗ Teasing and spreading rumors
- ✗ Trivializing work achievements
- ✗ Exclusion or isolation

## Tips for Creating a Positive Workplace

- ✓ Know what bullying looks like
- ✓ Watch for workers that could be targeted
- ✓ Focus on job performance
- ✓ Promote a positive workplace culture
- ✓ Investigate complaints promptly
- ✓ Provide training on workplace policies
- ✓ Encourage a zero-tolerance environment
- ✓ Call bullying what it is

## Types of Complaints that Trigger an Investigation

- Bullying/Abusive Conduct
- Ethical Issues
- Internal policy violation(s) &/or Misconduct
  - especially violence, threats, etc
  - criminal or general unlawful conduct

# “Prompt, Impartial, Thorough”

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## ■ Prompt

- Initiated & conducted in a timely manner
- Timeline based on complexity, seriousness, number & availability of witnesses, etc.
- Other ongoing investigations
- Deadlines or Statute of Limitations (1 yr v. 3 yrs)
- Explain any delay in completing the investigation in the report



# “Prompt, Impartial, Thorough”

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- Impartial ... “The Who”
  - Unbiased, neutral party
    - Actual bias – knowledge of the issue &/or parties
    - Perceived bias – parties should perceive neutrality
  - Not “embroiled” or involved in the controversy
    - Witness to the events, overheard the events, told of the events, etc.
  - Perception of fairness is as important as actual fairness
  - Should be trained & experienced investigator



## Internal vs External Investigators

### Internal

- ✓ Less Expensive
- ✓ Understands culture, politics, players
- ✓ Quicker
- ✓ Appears pro management
- ✓ Appearance of bias



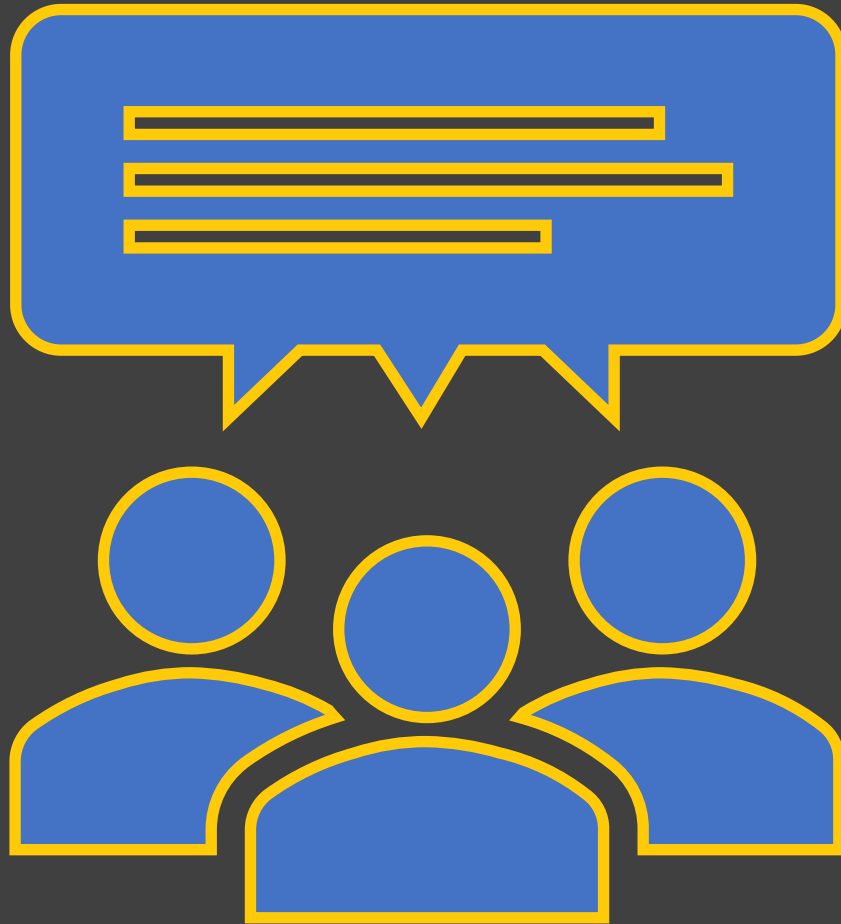
### External

- ✓ Better honed skills
- ✓ Neutral/impartial
- ✓ No HR
- ✓ Compliant against Sr. Manager
- ✓ Extremely serious charges
- ✓ Increased costs
- ✓ Doesn't know culture, politics, players
- ✓ No established credibility

# “Prompt, Impartial, Thorough”

- Internal v. External Investigator??
  - Cost
  - Experience level of investigator, i.e. HR v. trained investigator (attorney or licensed PI)
  - Size of Employer
  - Complexity of issue(s) being investigated
  - Job/rank of accused and other parties
- Do not use employer's legal counsel
- Attorney/Client & Work Product Privilege
  - “in anticipation of litigation & at the direction of counsel”



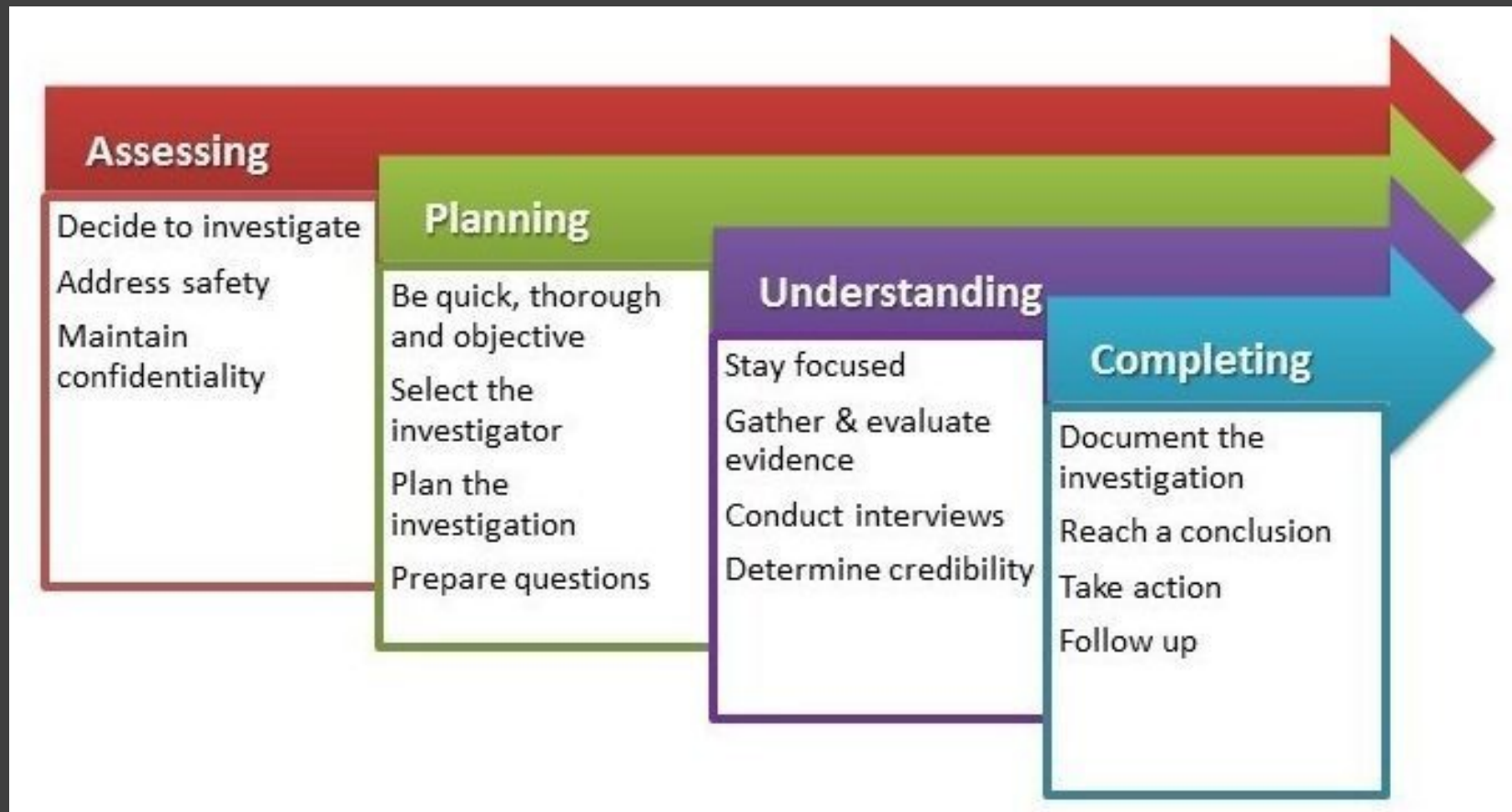


## “Prompt, Impartial, Thorough”

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- Thorough
  - Not merely one side of things, i.e. actual or perceived bias
  - Interview “all” relevant parties
  - Gather & review “all” relevant evidence
  - meaningful attempt to uncover the truth, not merely a rubber stamp

# The How





# Scope

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- The employer & investigator should develop a mutual understanding of the scope of the investigation, i.e. what issues will be investigated
  - subject(s) of complaints
  - parties & witnesses
  - type of materials & evidence to be used & obtained
  - single incident or ongoing pattern of conduct
  - organizational issue v. directed at employee



# Scope

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- What about “scope creep”?
  - “continuous, unexpected growth”; issues that arise or are raised during the investigation not part of the original scope
  - include or separate in a new investigation/report
  - document, document, document



# Interviews

- Order of interviews
- Notice
  - Public v. private employees (POBR, FOBR, recent PERB decision)
  - written notification
  - scope
  - past practice
- Order to participate
- Consistency
- Other statutory or contractual requirements

## Understanding California's Peace Officers Bill of Rights

### KEY TAKEAWAYS

#### Peace Officer Bill of Rights

The Peace Officers Bill of Rights dictates how personnel records, privacy issues, interrogation tactics and searches can be handled when public safety officers are **facing investigation or discipline**.

#### Right to Privacy

- Photos, addresses and phone numbers may not be released to the media without consent.
- Locker searches are prohibited without a search warrant or an officer's presence or consent.
- Officers may refuse polygraph examinations.

#### Transparent Files

- Officers must be made aware of any adverse comments in personnel files.
- Officers must have access to review their own personnel files.
- Officers are given 30 days to respond in writing to adverse comments.

#### Interrogation Rights

- Prior to interrogation, the officer must know the name, rank and command of every party involved.
- Off-duty interrogation is generally prohibited.
- Threats, offensive language and rewards are prohibited.
- Officers may request representation.

# Interviews

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- Scheduling of the interviews
  - on-duty
  - flexibility
  - location
- Recorded
- Working with a party's or witnesses' representative/attorney before the interview





# Conducting the Interviews

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- Admonishments – confidentiality, anti-retaliation
- Permitting a representative
  - Public/unionized v. private
  - Witness v. complainant/subject
  - Objections/obstructionist representative
- Confidentiality of the interview/investigation
  - Blanket confidentiality orders
- Request to go “off the record”
- Neutral, open-ended questions v. interrogation/argumentative

# The End (Findings & Report)

**INCIDENT INVESTIGATION**  
**SUMMARY**

Event:	Incident Date:
Location:	Review Date:
Reported by:	
Summary:	

# Focus on the Goal of the Investigation

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- Did the investigator use the appropriate standard of proof, i.e. generally preponderance of the evidence
- Did the investigator determine the following:
  - What happened?
  - Who was involved?
  - How did it happen?
  - When did it happen?
  - All relevant information
- Investigator's role is as a fact-finder, not a head-hunter





# Written Report

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- Document methodology & chronology/steps taken
- Witnesses statements & credibility
  - EEOC guidance language re: credibility factors
  - actual memory issues v. actual dishonesty
  - corroboration
  - **demeanor**
- Evidence relied upon
- Organization of report (by witness or issue)





# Written Findings

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- Evidentiary standard
  - Generally, decision-maker needs to know if the alleged conduct “more likely than not occurred”, i.e. 50.1%
  - Substantiated/Sustained v. Unsubstantiated/Not Sustained
- Only make findings are issues within scope of investigation
  - violation of policy
  - violation of the law



# Questions & Thank You!



Terry R. Leoni | Leoni Law  
925.699.1800  
tleoni@leonilawfirm.com



Karen Kramer,  
Kramer Workplace Investigations  
925.838.6435  
karen@kramerlaw.net