

# IMLA Fellows Exam 2017

## QUESTION 1.

You are the City Attorney for the City of Las Mudas. You receive a phone call from the City's risk manager, Maeve Millay. Ms. Millay asks you to prepare a memorandum addressing potential liability arising out of a shooting that happened during the city police department's "shoot/don't shoot" public awareness exercises today. Ms. Millay wants to know, from a civil liability perspective, (1) who can sue and for what, (2) who are the potential defendants, and (3) if there are any limitations on the potential defendants' liability. Ms. Millay instructs you to call the head of the City's police department, Chief Pickett, for a run down on what happened.

When you call Chief Pickett he tells you it was a tragedy. He says that the exercise is one that the police department does once a year, and that nothing had ever gone wrong before. The exercise is called "shoot/don't shoot." It is a role playing exercise where a citizen plays the role of a police officer and the officer plays the role of a suspect. The citizen is given a fake gun and told to approach the car where the suspect, played by an officer, is and to determine whether or not to shoot. The purpose of the exercise is to increase public awareness of the amount of stress police officers are under when they are on patrol. To make the exercise as effective as possible, the department tries to make it as real as possible. The department uses a real car, the officer dresses up, and the guns are made to look real.

However, at today's "shoot/don't shoot" exercise, when the citizen, 68 year old Dolores Abernathy, approached the car, the officer, Officer Walter, exited the car and shot Mrs. Abernathy in the abdomen. Shockingly, the gun used by Officer Walter was not a fake gun. Mrs. Abernathy died within minutes from the wound.

The chief tells you that Mrs. Abernathy was a retired volunteer at a local hospital. She left behind her husband, Teddy, as well as one child who in turn has two children. The chief also tells you that in attendance at the shooting was her husband, Teddy Abernathy, as well as the 18 other participants in the exercise. All of them, including Mr. Abernathy, were within 10-15 feet of the shooting and were immediately escorted out of the vicinity of the incident.

Officer Walter does not have a perfect record. Officer Walter was let go from his job at the Town of Sweetwater for use of excessive force. The incident involved Officer Walter dragging a suspect out of his police car by the suspect's ankles. Also, just several months prior to today, he was taken off of patrol duty because he used excessive force in apprehending a suspect. That case, the chief reminds you, is being handled by outside counsel, and is still unresolved. The police chief adds, however, that Officer Walter was sent to a special training course to address his violent behavior.

The chief tells you that the police department did not inspect the gun that Officer Walter used before the shooting. The chief tells you, however, that Officer Walter had done exercises like this before with no incident and that the department has a fake gun specifically for his use in this exercise. The chief says that all of the officers are trained in firearm safety, and that he is shocked that this happened. Finally, the chief tells you that the type of bullet used is not a department issued bullet type and the gun used was Officer Walter's personal firearm.

Your written opinion to the risk manager must address all three of the risk manager's questions.

## QUESTION 2.

Your assignment is to draft a memorandum to the City Attorney to outline the issues to be faced in a civil rights action that was filed in state court in January of 2017. The facts pleaded are as follows:

In 2005, two municipal officers from your jurisdiction were involved in a shoot-out near a drive-in restaurant located next door to an apartment complex. Officer Riggs answered an “officer needs assistance” call and drove to the scene shortly after receipt of the call. Upon arrival, the Riggs saw a person pointing a firearm at a uniformed police officer (Officer Murtaugh) and immediately fired his weapon, but missed. The person he shot at turned and fired and Riggs was hit in the neck before he could get cover. Murtaugh immediately drew a weapon and fired at the shooter, Lucas 'Luke' Jackson, hitting him in the back and leaving him a paraplegic with limited use of his upper torso.

At the time of the incident, Riggs was working undercover and wearing plain clothes driving an unmarked vehicle. He did not have his badge or any identification as a police officer prominently displayed. Riggs died in the hospital two days later when an artery ruptured that the surgeons believed they had properly closed.

Officer Murtaugh, in uniform at the time, was working as a member of a two-officer squad providing security services to the apartment complex. Although employed by the police department, the apartment complex was paying the department for the special services. The complex had been the source of numerous 911 calls, and had been the site of numerous incidents including murder, rape, armed (aggravated) robbery, domestic violence, and storage of stolen property. The municipality was about to use statutory abatement procedures to close down the structure, when an agreement was reached that required lighting, security cameras, on-site management 24/7, and mandated law enforcement to work security in the area.

The results of the efforts by the police and complex prior to this incident, led to a significant drop in the crime rate and while there were occasional domestic violence complaints, no major felonies involving the use of force had been reported during the previous six months.

Luke Jackson was eventually convicted of capital murder and sentenced to life imprisonment without parole after a jury trial. Prior to trial, defense counsel requested material on Riggs' disciplinary record and specifically on complaints of untruthfulness, and allegations of excessive force or deadly force use. The assistant city attorney assigned to the abatement matter was cooperating with the prosecuting attorney in the murder case, and reported that there were no such records. In fact, Riggs had been cautioned, or orally reprimanded (minor punishments) on four occasions for untruthfulness, and had been suspended once for excessive force, and received three written reprimands for improper use of deadly force, the last received just one month before this incident.

Pursuant to a FOIA request and a follow up after a news account on deadly force situations, Luke and his legal team learn in March 2015 about the disciplinary record. Further research reveals that the name of a witness was left out of the prosecutor's file because the police concluded that the witness statement, “the guy who fired was a nice guy, he did not have a bad reputation for violence or nothing” was not exculpatory. At trial the prosecution called a witness in rebuttal who testified that Luke was well known to carry a firearm, and had commented he would never be taken to prison alive. Despite Luke's attorney's request for background material on the witness during the trial, the prosecutor provided no

criminal history on this witness, who all now agree was a paid informant for the police. All of this information was provided to Luke or Luke's attorneys prior to December 2015.

Describe succinctly the issues that are presented by these facts, including whether limitations apply, how the city should defend the matter and if you recommend settlement.

### QUESTION 3.

You are the recently appointed City Attorney for Anytown, USA, a mid-sized city adjacent to a larger metropolitan area on one side, but also bordering on a significant agricultural area highly dependent on migrant labor located in the unincorporated portion of the same county. Some of Anytown's schools have a high concentration of children whose parents are non-native English speakers. School administrators believe it is possible that some of those parents are undocumented immigrants. Your Police Department has school resource officers assigned to each of the schools in the district and they have developed relationships of trust with students over the years.

Anytown has a full-time police department and also operates a jail at which misdemeanor offenders from several cities serve their sentences under an operating contract with Anytown. Anytown employs the jail staff.

Anytown relies heavily upon federal grant funding for a variety of its programs including CDBG grants, transportation projects, and various law enforcement activities, including a multi-jurisdictional narcotics enforcement task force. Some of Anytown's grants are pass-through grants whereby your city receives funds secured by the county or state in which Anytown is located. You are presently negotiating a federal loan which requires that Anytown's signatories to the loan certify that the city is in compliance with all applicable federal law and which will require re-certification of that compliance each time a draw on funds is made for the life of the loan. Representatives of the federal agency administering the loan have indicated that they consider "applicable federal law" to mean all federal laws applicable to your city and not simply federal laws applicable to the program that the loan funds are to be used for.

Anytown is located in the state of Nirvana, which has passed and implemented a citizen's initiative legalizing the manufacture, sale and use of recreational marijuana. Local governments that do not zone for and permit growing, processing and retail sales facilities are routinely threatened with the cut-off of sales tax revenue by the state assembly. Loss of Anytown's share of state sales tax revenue would have a substantial impact on the city's ability to provide even basic services.

Following the issuance of the Presidential Executive Order regarding Sanctuary Cities, your City Council is the focus of attention from citizens wishing to know what the Council's response to the Executive Order is going to be. Some citizens insist that your city council should immediately adopt a "sanctuary city" designation while others are equally adamant that Anytown should not only fully comply with the terms of the Executive Order, but should also consider entering into a contract with the federal government to actively enforce federal immigration law.

In reviewing the history of Anytown's position related to sanctuary cities, you discover that the City Council had previously considered adopting legislation declaring Anytown to be a "Sanctuary City" but that the motion had failed by a vote of 3 to 4 several years earlier. Since that time, however, the City's Police Chief has adopted an operating policy that its officers would not inquire of victims, witnesses or suspects as to their immigration status. The jail, you learn, does not have a standard operating procedure with respect to inquiries from ICE, which has led to inconsistent responses. For example, you learn that on occasion, the jailors have held over misdemeanants after their sentences have been served in response to verbal requests from ICE agents.

Your City Council is unclear as to how to respond to the Executive Order and the conflicting messages from citizens about adopting sanctuary city status. They are particularly concerned regarding the provision in the Order that grants the Secretary of Homeland Security discretion to determine whether a local jurisdiction is a sanctuary city.

Prepare a memorandum for your City Council addressing the potential impacts of the Executive Order on Anytown's present programs and practices. Include discussion of applicable federal, state and local laws and regulations and identify what additional information might be necessary in order to fully advise your Council. Be sure to address scenarios where your Council concludes that it does wish to formally adopt sanctuary city status, where it does not wish to enact sanctuary city legislation and where it wishes to avoid having sanctuary city status attached to it by virtue of its practices and programs by decision of the Secretary of Homeland Security.

#### **QUESTION 4.**

Relations between the City and its police union had been good for several years, but lately with a change in union leadership things have not been that harmonious. Shortly after the change in union leadership, the union unexpectedly held a sudden meeting and vote of no confidence in the Police Chief and Mayor.

The union concerns involve a hodge-podge of miscellaneous complaints including the Chief letting the Mayor use his official police vehicle for personal use (which both the Chief and Mayor deny), lack of support by the city administration for funding for what the union claims are needed upgrades to equipment (which the Chief and Mayor dispute are needed), failure to promote officers whose names are on the civil service list (the Chief, who is the appointing authority subject to a right of rejection by the Mayor, wants to use an assessment center interview panel instead of the exam results to determine who is the best candidate for promotion- an option recently made available to the city by state law and approved by the city council), an announcement by the Mayor that she was going to create a Citizens Review Commission of Police Complaints to hold hearings on any complaints against police officers (the Mayor feels it is needed to restore public confidence in the police and city after several incidents of alleged police brutality while the union contends the police are not understood by the public). The union is split on these issues with some of the officers claiming that they were not provided with any proof of these allegations before or at the union meeting where the vote was taken.

The vote received widespread coverage in the media, with the union issuing press releases and the Mayor and Chief issuing denials. Now, the union is posting these complaints and others regarding operation of the police department and other divisions of the city on social media. Some of the complaints include information on police operations such as shift assignments, assignments to certain sectors of the city, internal budget information and views about which officers the chief likes and dislikes. Several of the social media postings are anonymous, but some of them identify the poster as an officer including some in the union leadership. The union officers all deny involvement with the postings, claiming that someone is using their identity to post.

With that background, the City Manager, an appointee of the Mayor, who is responsible for the day to day operation of the city and is your appointing authority, calls you, the newly appointed City Attorney, into his office. Both the Chief and Mayor have complained to him about the union vote and the social media postings. They want to discipline the officers who have made what they claim to be false charges against them for conduct unbecoming and for disclosing internal information about the police department. They also want the police employees ordered to stop criticizing other city departments. The City Manager wants you to investigate the matter and make a recommendation to him as to what actions the city can take or not take.

The Chief has civil service protection and the Mayor is elected by popular vote. The Mayor is in the midst of a hotly contested election campaign. She stops by your house over the week-end, something she has never done before. The Mayor explains to you how important it is to her that the union leadership be held accountable for what she sees as misconduct by the union leadership. She asks that you keep her informed directly and not tell the City Manager of this request.

After she leaves, you begin to think that becoming a doctor as your mother wanted you to do was not such a bad idea after all. However, you know you need to get going on your assignment and complete

it quickly before things get more complicated. The City Manager expects to meet with you in three days for a briefing on what needs to be done. As you are looking into the matter, you learn that some posts used the city's technology system which prohibits use of the system for more than de Minimis personal use.

Draft a memo for the City Manager addressing all issues, including what could and should be done.

## QUESTION 5.

You are the City Attorney for a Midwestern community with a population around 100,000. You are sitting at your desk one afternoon when you receive a call from one of the permit clerks. She advises you that there is a woman at the counter who wants to obtain a permit for her pet kangaroo. Assuming that you misunderstood the clerk, you proceed to the permit desk where you confirm that the woman does, in fact, have a pet kangaroo. The kangaroo, Joey, is smartly dressed in a coat and tie and is being transported in a large car seat because he can only hop a short distance before falling over. Apparently, Joey was injured as a joey and needs constant care.

Despite his good looks and mild temperament, you inform the woman that the City does not allow kangaroos within the City limits. Unfortunately, she will not take no for an answer, returns home, and immediately sends an e-mail to all five of your council members requesting a permit. As Staff begins the process of considering how to address this situation, the woman utilizes Joey's Facebook page to complain about the injustice of kangaroo prohibition in your City. Before long, Joey becomes an internet sensation and the Council is under increasing pressure to accommodate the kangaroo. To add to the complexity of this already bizarre situation, the woman has indicated that she suffers from severe depression. She claims that Joey is a "service animal" and should be treated as such. The City Manager asks you to research the issue and write a Memo summarizing the law on this situation. Draft a Memo to the City Council providing some background and answer the following questions:

1. What, if any, federal laws pertain to keeping exotic animals? How would these laws apply to the instant situation?
2. What, if any, federal agencies regulate or otherwise provide information or guidance on exotic animals?
3. What state laws might address this situation?
4. Is there any validity to the woman's claim that the kangaroo is a service animal?

After he reviews the Memo you provide, the City Manager requests that you put the kangaroo matter on the next City Council meeting for discussion and possible action. As you might imagine, a number of Joey supporters show up for the meeting. The woman is allowed to make a presentation. Mercifully, Joey does not participate. Under increasing pressure from citizens, the Council requests that you draft an ordinance which allows for exotic animals. Prepare an ordinance regarding exotic animals that would be supported by state and federal law and that balances the rights of the animal owner with the safety of the public and advise the Council of its authority to enact such an ordinance.

## QUESTION 6.

Assume these facts for the following question:

*You are the City Attorney for Hometown, USA. Hometown is a home rule municipality operating under the City Manager form of government. Assume Hometown operates all of the municipal functions of the largest municipal jurisdiction which you currently serve. Hometown's City Council has in place a zoning ordinance, and subdivision regulations, as well as building codes and business licensing ordinances. Hometown maintains the local streets, operates the local water and wastewater utilities. During an average week, the following legal issue arises, requiring you to provide legal advice:*

Hometown, USA is a rapidly growing community. Demands of growth are stressing the existing infrastructure. Realizing that they are behind the curve, Mabel Mayberry, the City Manager, wants to push the cost of new development back on developers and future residents, through the adoption of whatever new City ordinances may be necessary. Mrs. Mayberry raises these issues at a meeting of Hometown Department Heads, without the City Attorney present. Rocky Cloudview, the Planning Director, recommends adoption of a new transportation plan, to map out the general roadway alignment for future streets. He also points out that most of the new development is residential, bringing in more residents and the need for development of related commercial development, offices, and manufacturing facilities for more balanced land uses in the community. Ideally, he says, Hometown should have a complete comprehensive plan in place to guide development, but these take time to develop and Hometown does not yet have a comprehensive plan.

Steven Stopsign, the Traffic Engineer, says that the transportation plan would be a good idea, in both the developing areas and in the existing city, because Hometown really needs to increase the width of right of way to allow for street widening and utilities. Peter Pipesize, the Public Works Director who recently moved in from out of state, suggests that impact fees are the way some other communities pay for new growth, but realizes that he does not have money in his budget to fund a study to support the need for the fees. He suggests looking to see if any types of new fees or taxes could be used to support infrastructure expansion.

Randall Rec, the Parks and Recreation Director, notes the significant increases in usage at parks facilities and in recreation programs, and states the need for more parkland in the developing areas of the community. Myra Moneybags, the Finance Director, relates that since the new development is only residential, there has been some increase in property tax values with the growth, but the cost of rooftops is much greater than commercial or industrial development. Bruce Bizness, the Economic Development Director, agrees with Myra, stating that Hometown needs to recruit businesses to relocate and they need to adopt whatever ordinances they can to facilitate commercial and industrial growth. He also suggests putting economic incentives in place, including using eminent domain to acquire real property in areas where they want to see commercial and industrial development.

Ms. Mayberry contemplates all of this information, and after further discussion, decides to recommend that the City Council take the following steps:

- (1) Adopt a new transportation plan, including a map identifying the general location of future arterial roadways within the city and extending to the developing areas. She believes that adopting a comprehensive plan could be too time consuming, so does not propose to take that step yet. The transportation plan also lists general requirements for width of right of way required for the different classifications of streets, all of which are wider by at least ten (10) feet than any of the existing rights of way in Hometown.
- (2) Require the developers for all development and redevelopment projects to dedicate the right-of-way required for any road segments located within the boundaries of their project to the city, regardless of when any of the new roads would be constructed as no funding mechanism for the construction has been identified;
- (3) Adopt a parkland dedication ordinance, requiring any new development to dedicate real property for establishment of public parks, with the amount of land dedicated to be based on the acreage being developed;
- (4) Adopt an ordinance establishing impact fees to generate income for infrastructure; and
- (5) Adopt a policy regarding the use of eminent domain for economic development purposes.

Rocky Cloudview is ready to get the ball rolling, so he drafts a proposed transportation plan, including the map, and places it on the next agenda for Hometown's Planning and Zoning Commission. Joe Dallas, a local developer, attends the Commission meeting and hears about the proposed plan. Upon closer review of the map, Dallas becomes concerned that a proposed roadway will bisect a large development tract which he owns. Dallas communicates his concerns to City Councilmembers that he knows.

The City Council requests your legal advice in a closed meeting concerning the City's authority to adopt the measures favored by Ms. Mayberry, including the proposed transportation plan, what adopting the plan and other measures mean legally, and any risks or liabilities that adoption might create. How do you respond? What legal advice would you provide?

Be sure to include in this response the legal analysis of the proposed growth management and land use policies under the law of your jurisdiction, referencing relevant statutory requirements or other limitations.

## **QUESTION 7.**

In Sin City there are rumors of sexual harassment by an Administrator which the Human Resources Officer is investigating internally and a long time employee was asked if she witnessed this behavior and she described several incidents where this Administrator acted inappropriately and in a sexually harassing manner. The longtime employee/witness was subsequently fired. The Human Resources office believed that the termination was justified on various other grounds (allegations of tardiness, performance problems, etc.) and that since this former employee merely answered questions in an internal investigation and had not investigated or initiated any complaint there were no federal protections available to her.

As the City Attorney you have just been advised of the termination and the underlying circumstances. Please discuss your advice to your governing body concerning the potential lawsuit by the terminated employee in light of the implications of whether or not the employee's participation in an internal investigation may be considered protected activity under Title VII. Discuss whether your opinion would change if the internal investigation was triggered by an EEOC charge/complaint made by another employee but not the long-term employee who was terminated. Please cite to appropriate Circuit and U.S. Supreme Court authority.