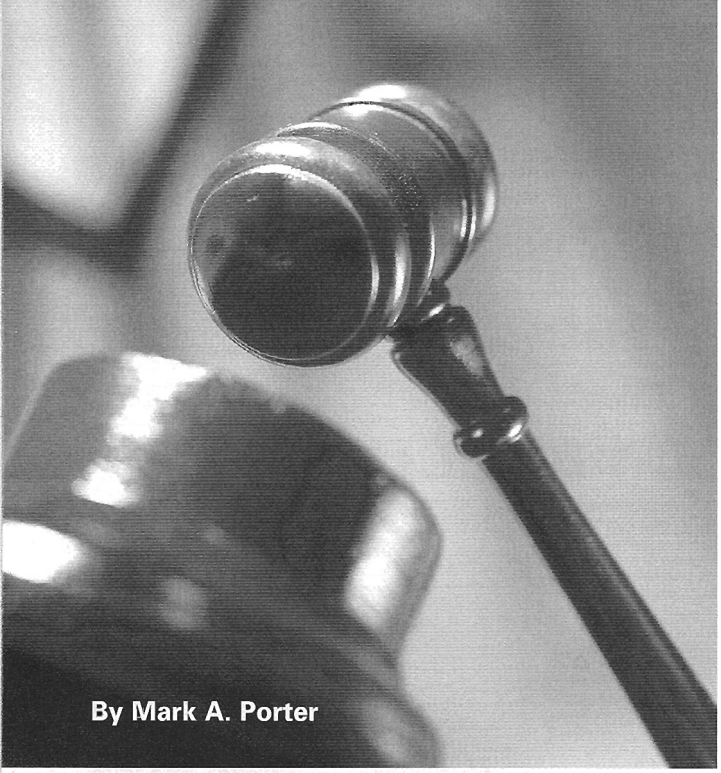

By Mark A. Porter

ACT 563: The FOP Got It First, Got It Right

"When a law enforcement agency suspects one of its employees of criminal wrongdoing, their relationship becomes a strained and complex one."

Aguilera – v – Baca, Calf Court of Appeals (Dec, 2007)

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On December 29, 2006, Act 563 – the *Garrity* protection statute – became law in Michigan. It capped a nearly 5-year effort by your State Lodge, which led the efforts to counteract the increasingly hostile reactions to the *Garrity* rule that were seen in both the Federal and State Courts.

You can (and should) download your own copy of the statute for quick reference.[1] The statute – if carefully followed by the officer under investigation – bars the use of a compelled statement, and the evidence derived by way of the statement – from use against the officer in a criminal prosecution.

The *Garrity* statute is certainly not a "minimalist" statute, as claimed by some police organizations – quite the contrary. And a recent survey of *Garrity* cases across the country shows just how important this statute has become.

A quick review of the *Garrity* rule adds some perspective to its importance. *Garrity* – v – New Jersey created a Federal rule of criminal law evidence, based upon the 5th Amendment of the U.S. Constitution.[2] Like the Miranda rule, it bars the "use" of a compelled and coerced statement and any derived evidence contained in the statement at a criminal trial against the defendant-officer.

Garrity, however, is *"Miranda* in reverse." There is no "right to remain silent" once a valid *Garrity* order is given by the officer's employer. Instead of an officer having the right to remain silent, the legal question becomes whether the officer was truly threatened with a job sanction – such as suspension or termination – if the order to give a statement was refused.

Because *Garrity* is a rule of criminal law evidence, a *Garrity* claim only comes alive when the officer who made the statement is on trial as a criminal defendant. It has nothing to do with labor contracts or department manuals – and only the officer's own criminal defense attorney can pursue the *Garrity* claim during a criminal trial.

At the request of the State Lodge, the law firm again ran a nationwide legal search for *Garrity* cases, across all Federal Courts and State Courts of Appeals. The survey covered January, 2007 through April, 2008 – and it again showed that *Garrity* issues are becoming more prevalent in both the Federal and State Courts. The results, however, are sobering. A total of 26 *Garrity* cases were found in just 14-months, and here is what happened:

Cases supporting the *Garrity* exclusion: 3

Cases rejecting the *Garrity* exclusion: 23

The *Garrity* cases have begun to break down along three lines of legal disputes: *administrative hearings; criminal trials;* and *officer lawsuits against the employer.* Here's how the cases sorted out:

1. Administrative Hearings: Nine of the cases arose when public employees tried to use *Garrity* as a shield to prevent testimony and evidence at hearings such as trial boards, arbitrations, unfair labor practice hearings, and occupational license revocations.

   All Federal and State Courts have consistently held that *Garrity* does not apply to administrative hearings – only criminal trials. The officer cannot refuse to testify, nor claim immunity from adverse results. This has been the rule in Michigan since 1977.[3]

   One of the most important – and troubling – *Garrity* administrative cases came from California. A public defender (employed by the County) was accused of misconduct, and refused to take part in a *Garrity* interview conducted by the County, which was acting as his employer.

   The public defender – being a lawyer, after all – filed suit against the County. The result has sent shock waves through the law enforcement community on all sides.[4] The California Court of Appeals ruled that no employer has the right to immunize testimony from an employee – unless that power is granted by a Court Order or a statute.

   The California Appeals Court, in effect, obliterated the *Garrity* rule for both the management and the officers of every California public safety department – and thereby threw out Chief *Garrity* along with the bath water.

   The California case, as of this date, is on appeal to the California Supreme Court; and the earliest that a written decision could come back from that Court would be sometime in 2009. This case, however, may very well be the *Garrity* test case that eventually returns to the U.S. Supreme Court.

   In the meantime, for public safety employees and employers in Michigan, it proves that your State Lodge was correct in its dogged determination to enact Act 563 – thereby giving both the employer and the employee a firm ground to continue using properly-conducted *Garrity* interviews.

2. Criminal Trials: *Garrity* appeared in just 5-cases wherein the officer was a criminal defendant – and in 3-cases, the Courts rejected the *Garrity* protections. Two State Court cases are worth noting:

   The New Hampshire Supreme Court ruled that a police union steward does not have a "privilege" to withhold information told to him by officers during an investigation, if the steward is then subpoenaed on a criminal case before a grand jury.[5] As in the California case, the New Hampshire Court was very protective of "traditional" powers held by judges and attorneys – and it refused to create another "lay person" privilege that was not already established at law.

   By contrast, a very bright light came from the Georgia Supreme Court, which upheld the *Garrity* rule in a case involving statements compelled from a probation officer. The Georgia Court decision is also noteworthy for its careful review of the deep splits between the various Federal and State Courts about how to apply the *Garrity* rule. It is well worth a trip to the Court's website to read the opinion.[6]

   For now, however, Georgia stands as the exception in its steadfast support of the *Garrity* rule. In Ohio, for instance, the Ohio Court of Appeals acknowledged that an officer's *Garrity* rights had been violated when the department investigator used the information to give the prosecutor and the State Grand Jury information regarding potential witnesses. The Court of Appeals, however, said that the violations were "harmless errors," and upheld the conviction.[7] The "harmless error" rule is also commonly found in Michigan criminal (conviction) appeal decisions – it was used in no less than 74 cases between January, 2007 and April 2008 in the Michigan Courts.

3. Officer Lawsuits: During the past 5-years, numerous public safety officers in various States have sued their employers using the *Garrity* rule as evidence that their departments intentionally violated their Constitutional rights during I-A investigations. The 14-month survey discovered 12-lawsuits across the nation which used *Garrity* as a foundation – all of which have been dismissed without a trial.

These cases are important in that the Courts usually go into great detail as why *Garrity* was not violated by the various tactics of the departments – thereby laying the foundations for future I-A investigations. Here are some of the more glaring examples:

The most serious of these attempts went before the New York Supreme Court (Appellate Division) in 2007, on behalf of the New York State Troopers. Upset by the bad publicity from a series of police I-A investigations over the last 10-years, the New York State Courts have severely restricted New York police unions from representing their members during "critical incident" situations.

In the most recent legal battle, the New York Courts completely banned the Troopers' Association from pursuing its lawsuit to represent troopers under investigation for critical incidents – saying that the Association "had no standing" to represent its members for such matters. The ban included the Association's claim to *Garrity* rights on behalf of its members – which, the Court said, were superseded by the Department's own, self-created policy manual.[8]

Writing itself into circles, the New York Court declared that since no trooper had yet been criminally charged, there was no need to worry about *Garrity*'s Constitutional protections – therefore, no representation would be allowed during the I-A investigations.

Contrast this problem to Michigan, where the FOP automatically enrolls the members of its bargaining units in the nationwide FOP Legal Defense Plan. The legal problems created by the New York Courts are thus avoided – and there is no question of "standing" for the Legal Defense Fund lawyer to represent you. The lawyer represents you and you alone in any criminal investigation by any department.

In addition, any Michigan FOP member can enroll in the FOP Legal Defense Fund, regardless of whose name is on the labor contract where the officer works.

Another recent case involves the 6th Circuit of the Federal Court of Appeals that covers Michigan, Ohio, Kentucky, and Tennessee. A Nashville, Tennessee, Metro PD officer was involved in an off-duty disturbance at a tavern, during which he identified himself as an officer. Another citizen called the department, and the officer was ordered by the responding supervisor to immediately go to the department and submit to a breathalyzer test. He was also ordered to submit a written report the next day – both of which he did.

The officer was not told if the investigation was administrative; criminal; or both. Failure to obey the order, however, would be insubordination, regardless of his off-duty status. The officer complied – was not charged administratively or criminally – and then sued the department in Federal Court, claiming a violation of his Constitutional rights.

Both the Federal District and Appeals Courts dismissed the lawsuit. The Courts ruled that the officer had not been "seized," because he had not been physically arrested or detained. Had he refused the orders and left the station, he may have been fired – but that is not a "Constitutional" issue, merely an "administrative" possibility. The orders to take the breath test and write statements were compelled – but not illegal.[9] The Federal Court of Appeals ruling creates binding precedent for all Federal District Courts in Michigan.

In Los Angeles County, California, several deputies were accused during their shift of using excessive force on an arrested subject. The duty station's Captain ordered all of the officers to remain at the station after their shift. He came into the room where they were waiting and "in a harsh, accusatory manner" accused the officers of excessive force and cover-ups.

The Captain threatened termination and criminal charges – and he ordered all officers to cooperate with the Sheriff Department's Internal Criminal Investigation Bureau, which only handles criminal I-As against officers. The officers were not released from duty until more than 6-hours after their shift – but they were paid overtime.

The criminal investigation against the deputies continued for over 2-months during which time the County District Attorney requested that the department obtain *Garrity* statements and forward them for review – and the department complied with the request.

Finally, after several months of review by the offices of both the County and Federal District Attorneys, the deputies were cleared – and they then sued the Sheriff's Department in Federal Court. Once again, the case was dismissed, this time by a 2-1 vote at the Federal 9th Circuit Court of Appeals.[10]

The Court of Appeals said that the "veteran officers" surely knew that their detention at the station was "administrative" in nature, and not a "physical detention" that would imply a seizure and arrest.

As for the compelled statements, there was no Constitutional violations because the officers were never charged – and so the statements were never "used" against them in a criminal trial.

And the Court fell back upon the old-standby claim so often used by departments and Courts alike, when searching for excuses – that the Sheriff's Department is a "paramilitary organization" which must maintain discipline through its orders and commands, regardless of how threatening and derogatory.

Both the Los Angeles County and Nashville cases will be published in Federal volumes – meaning that they create precedent for future considerations. The Federal Courts of Appeals in three separate Circuits (the 6th, 7th, and 9th) have now ruled that police officers have no Constitutional claims for abusive department tactics during I-A investigations unless they are physically detained and/or arrested by their own department. These three Federal Circuits cover 14-States, including Michigan. Three major points need to be emphasized from these cases:

First, in all of the cases from these Circuit Courts, the officers were verbally abused and threatened with job sanctions – as well as ordered to report to various locations and to "cooperate" in criminal investigations against themselves. None of the officers, however, ever demanded to know if they were actually "under arrest" or whether they were physically barred from leaving their stations.

In this one regard, *Garrity* situations mirror *Miranda* guidelines – unless there is an actual arrest or physical detention, the Constitutional protections of the 4th and 5th Amendments [unlawful seizure and the right to remain silent] do not apply. The threat of a job loss is not enough to qualify for either arrest or detention.

Second, unlike the *Miranda* rule, where the prosecution must show that the statement was "voluntary," the Federal and State Courts have placed the burden for proving *Garrity* protections squarely on the individual officers themselves – and have raised the legal bar as far as possible to block the officers' claims.

The Courts want to make sure that *Garrity* statements can be used in criminal trials against the officers – but not in civil lawsuits where the officers are the plaintiffs.

Third, Michigan's Act 563 expressly prohibits the collusion between a prosecuting agency and the officer's department to obtain *Garrity* statements, as happened in California. Not only is Act 563 the strongest protection that an officer has during I-A investigations, Michigan is the *only* State that has the *Garrity* protections codified into the statute books – thanks to the work of the FOP.

In a recent Federal Court case involving a pharmacist employed by the U.S. Veterans Administration, the 2-1 majority again ruled against the pharmacist's claim that his *Garrity* rights were violated.[11] The lone dissenting justice noted that there is a deep split between the Federal Courts of Appeals about whether the governmental employer is obligated to advise an employee of the rights and immunities under *Garrity.*

Of the 13 Federal Circuits, four Circuit Courts of Appeals now have ruled that the employer does not have to advise an employee of any *Garrity* rights or obligations – while three other Federal Circuits have ruled that there is such an obligation. The other six Federal Circuits are undecided – including the Federal 6th Circuit Court of Appeals, which encompasses Michigan.

During the 14-month period of the survey, these important cases have again reshaped the *Garrity* rule – and it's now safe to say that within the next few years, the U.S. Supreme Court will most likely revisit *Garrity* for the first time since its debut in 1967. The probability, however, should not be seen as a comforting thought.

You can take some comfort, however, in the fact that your State Lodge never abandoned its efforts to build in the protections that Act 563 provides. It is something to think about, when it comes time to decide what organization truly safeguards your career.

[1] MCL 15.391-395, at www.michiganlegislature.org.

[2] 385 US 483 (1967)

[3] *Local 502 v Lucas,* 79 Mich App 445 (1977)

[4] *Spielbauer v County of Santa Clara,* 146 Cal App 4th 914 (June, 2007)

[5] *In re Subpoena,* No. 2006-640, (June 13, 2007)

[6] *State v Aiken,* 646 SE2d 222 (06/04/2007) at www.gasupreme.us.

[7] *State v Parsons,* 2007-Ohio-4812, Ohio App Dist 4 (09/13/2007)

[8] *PBA of NY State Troopers Inc v NYSP,* No 501721 (NY App Div 07/26/2007)

[9] *Pennington v Nashville et al,* No. 07-5180, CA6 (01/10/2008)

[10] *Aguilera v Baca et al,* No. 05-56617, CA9 (12/27/2007)

[11] *Sher v US Dept of Veterans Affairs,* No. 06-1537, CA1 (05/29/2007)