Gambling with *Garrity*

Will YOU Take the Risk?

By Mark A. Porter

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Public Act 563 of 2006 – the *Garrity* protection legislation – has been in effect for six months, as of this writing. Although all appears to be placid on the surface, however, there are still some organizations that actively refuse to acknowledge that the Act exists.

They deny the major impact of the new statute on law enforcement in general and its impact on an officer's individual rights in specific.

Having sat on the sidelines for four years, while the FOP and other professional law enforcement groups carried the legislative efforts, these "don't worry – be happy" organizations continue to damage their own members by spewing out ill-advised and out-of-date "advice."

You'll recall from past articles in The Peace Officer that as we entered the new century, various Federal and State prosecuting agencies had begun to hone in on *Garrity* to try and kill it by a thousand cuts – or in the alternative, to grind it down as far as possible.

Many officers and police organizations, however, continued to insist that *Garrity* was a self-invoked, all-powerful defense to ***any*** adverse action taken against them – despite mounting court decisions to the contrary.

Just last year, in fact, a Michigan police organization brought up *Garrity* during a hearing for an Unfair Labor Practice against its employer. The Association tried to claim that an officer's *Garrity* statement couldn't be admitted at the ***administrative*** hearing held at the Michigan Employment Relations Commission.

The MERC, however, didn't buy it, noting that the officer's Association "offered no support for its contention that the [*Garrity*] transcript is inadmissible." It noted that Federal Courts do not prohibit the introduction of *Garrity* statements "in ***other than criminal proceedings.***" [1]

Act 563 was designed to eliminate, as far as possible, the confusing and unfounded claims as to what was – and was not – a true *Garrity* statement. If an officer's statement was not strictly clothed in the immunity and protection of *Garrity*, the officer could suffer grievous consequences, once a criminal charge was forthcoming.

I recently had the honor to appear on behalf of the FOP at a regional meeting of command officers from various law enforcement departments in the Metro Detroit area. These command officers – from state, county, and local departments – were all interested in developing a regional *Garrity* procedure, based upon Act 563, and with the assistance and agreement of the county prosecutor.

This plan is truly an admirable and cutting edge approach to achieving a uniform application of *Garrity*. Unfortunately, another "association" that also appeared at the meeting set out to intentionally muddy the waters – and thereby endanger its own members.

Relying on 40-year old myths, the association claimed that the ***individual officer*** – not the employer – can create *Garrity* immunity. Immunity, according to this claim, isn't "granted," it is "asserted" by the individual officer – simply by slapping a self-styled association "rights" sheet onto any statement that the officer feels may be important.

According to this claim, an officer can walk into a Grand Jury proceeding, and when questioned by the prosecutor, the officer can then proclaim ***himself*** to be immunized. The officer then magically becomes untouchable by any criminal indictment issued by the Grand Jury.

Such a claim certainly runs contrary to every statute, court rule and legislative committee procedure – but, no matter – it sounded dramatic.

The side-line sitting association also claimed that ***every*** statement given by an officer is covered by *Garrity*, as long as it is pursuant to an order given by a command officer. Again – no legal grounding or basis was given – just an assertion that slapping the association's "rights"sheet on any statement gives the officer instant immunity.

Finally, the self-aggrandizing association asserted that Act 563 "creates problems," and is "merely a disclosure" statute that has "no impact" on *Garrity* cases. Apparently, the coalition of professional police organizations that supported the Act – Chiefs; Sheriffs; Deputies; and the Prosecuting Attorneys Association of Michigan – had it all wrong. Ditto the entire Michigan Legislature and the Governor.

The entire band, in other words, was out of step – but certainly not the off-key piccolo in the back row.

So who do you trust when ***YOU*** face a possible *Garrity* situation? Let me suggest that the safest course is to look where the ultimate decisions are made – in the Federal courts.

Garrity, after all, is a Federal, court-made "exclusionary" rule that defines what evidence cannot be permitted at trial because of serious Constitutional questions. In 1967 the U.S. Supreme Court issued a rare grant of authority to public employers to ***intentionally*** breach the 5th Amendment right to remain silent, in return for a higher goal – to determine ***administratively*** if an officer should be removed from service.

The trade-off, however, was a *quid pro quo* promise that ***the employer*** would grant immunity against the use of the statement or its derivative evidence against the officer in a ***criminal*** trial.

The Federal Court of Appeals for the 6th Circuit covers the states of Michigan, Ohio, Kentucky, and Tennessee. Based in Cincinnati, Ohio, the Court has the first review of the Federal District Courts' interpretation of *Garrity* – and the Federal Courts of Appeals are rarely overturned by the U.S. Supreme Court. So what does the Federal 6th Circuit say in response to an association's claims of "instant, individualized immunity?" Let's take the claims one by one:

> **First Claim:** "The officer creates his/her own, individual *Garrity* immunity after the employer orders the officer to make a compelled statement, regardless of what theemployer wants or orders."
>
> **FALSE!** When a Mansfield, Ohio, police officer sued his employer for breaking the employer's promise of immunity in return for the compelled statement, here's what the Federal 6th Circuit Court stated:
>
> To comport with *Garrity*, a state employer who compels an employee to make incriminating statements ***must not only promise not to use those statements in a criminal proceeding against the employee, but must also keep that promise.***
>
> [Officer] McKinley's claim is that [Lt.] Fortney and his colleagues broke that promise by compelling him to incriminate himself ***under the false promise of Garrity immunity*** and by turning the incriminating statements over to the prosecutor, who then prosecuted McKinley for the very crimes about which McKinley was compelled to make incriminating statements. As we have discussed, McKinley has offered enough evidence of this claim to proceed to trial. (Emphasis added) [2]

The officer's employer creates both the *Garrity* warning ***and*** promises the *Garrity* immunity – and Act 563 codifies this ruling into the Michigan statute. **MCL 15.391.**

> **Second Claim:** "***Any*** compelled statement, made under orders from an employer's command officer, is covered by *Garrity* immunity."
>
> **FALSE!** The 6th Circuit of the Federal Court of Appeals has stated that ***unless*** the officer is ***specifically*** ordered to waive the 5th Amendment right to silence by a command officer, *Garrity* does ***not*** apply:
>
> Although there is ***no evidence*** here that Chief Fechko required Officers Lingler and Gezymalla to waive their privilege against self-incrimination, the officers contend that a waiver of the privilege is implicit in ***any*** statement given by a public employee under threat of disciplinary action. The case law ***does not support this contention*** – and *Garrity*, to repeat, teaches that any such [self-invoked 5th Amendment] waiver would have been ***ineffective.....***
>
> Plaintiffs who wear the uniforms of police officers "can make ***no tenable claim*** that a Fifth Amendment violation occurred when the Police Department ***merely exercised its legitimate right,*** as an employer, to question them about matters narrowly relating to their job performance." (Emphasis added) [3]

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Lingler has been the law of this Federal Circuit – including Michigan – for 5-years. Yet the same phony claims of "immunity" are made by a "professional" association, to the direct detriment of its members.

Third Claim: The new *Garrity* law is a "hindrance" and not a help, because it is only a "disclosure" law that is "minimalist" in its impact.

FALSE! Section-2 of the Act states:

> An involuntary statement made by a law enforcement officer, ***and any information derived from that involuntary statement,*** shall ***not*** be used against the law enforcement officer in a criminal proceeding. MCL 15.393 (Emphasis added)

That section of the statute is most certainly ***not*** a "minimalist" rule of evidence. It also demonstrates why the new statute must be strictly and carefully followed by all members of the law enforcement department where a *Garrity* interview will be conducted.

The cautionary warning for strict compliance is even more important, given the complete refusal of an obstructionist association to alert its members to another *Garrity* Court ruling:

> As a matter of Fifth Amendment right, *Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. *Garrity*, 385 U.S. at 500, 87 S Ct 616. However, *Garrity* does ***not*** preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation ***or making false statements during it.*** (Emphasis added) [4]

It is for that reason that the FOP's sample warning at the end of this article includes that specific admonition to the officer – putting the officer and any reviewing court on notice that the *Garrity* warning was clear, that it was explicit, and that it fully advised the officer of the officer's responsibilities and perils.

To summarize: The command officer intending to invoke the *Garrity* warning has an inherent management right to do so, but there is also a legal obligation to give both prongs of the *Garrity* order:

1. the promise of job sanctions for a refusal to comply; and,
2. the promise of ***criminal*** prosecution immunity that is based upon information in the Garrity statement related to the matter under investigation.

There is ***NOTHING*** that is invoked by the individual officer. There is only a choice to comply with the order, or to refuse and suffer the job sanctions that flow from the refusal.

Because the FOP has long recognized that both command and line officers have a huge stake in these issues, it has taken an objective approach that looks at the concerns of both sides.

So, the question for each officer reading this article becomes this: ***who*** will take the *Garrity* Gamble, and blindly follow an association's claims that are flat-out wrong and dangerous?

Will you?

[1] City of Detroit and the DPOA, 19 MPER ¶ 15 (Feb 01, 2006)

[2] McKinley – v – City of Mansfield Ohio, 404 F3d 418, at pg-439, Fn-24 (2005)

[3] Lingler – v – Fechko, 312 F3d 237, at pg-240 (2002)

[4] McKinley – v – Mansfield, 404 F3d 418, at pg-427

SAMPLE GARRITY WARNING AND IMMUNITY NOTICE THAT COMPLIES WITH 2006 P.A. 563

"I am hereby ordering you to surrender all of your rights to remain silent under the **5th Amendment** to the United States Constitution, and under **Article 1, Section 17** of the Michigan Constitution.

If you do not do so, I am informing you that this department will take immediate and certain adverse actions against you, including discipline up to and including discharge from this department.

You are further ordered to tell the truth at all times during this interview, and failure to do so will subject you to administrative and/or criminal actions against you.

If you fully comply with this order, your statements cannot be used against you in any criminal proceeding, but they will be used by this department for any administrative action that may be deemed necessary.

Do you understand the order that I have just read to you? _____(Answer)_____

Is it your intention to obey this order and to fully and truthfully participate in this interview?"_____(Answer)_____

_____ _____
Dated (Signed) (Officer Ordered to Make Statement)

_____ _____
Dated (Signed) (Association Representative)

_____ _____
Dated (Signed) (Command Officer Issuing Order)