# P.A. 563: Michigan Acts to Protect Garrity

By Mark A. Porter

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The *Garrity - v - New Jersey* decision was issued by the U.S. Supreme Court in 1967. Since that time – as detailed in the previous articles of ***The Peace Officer*** – that decision has been under constant attack by various prosecuting agencies, as well by the Federal and State Courts.

Now, however, the Michigan Legislature and the Governor have forcefully acted to incorporate the *Garrity* rules into statutory law – Public Act 563 of 2006. Act 563 codifies and secures your rights as a citizen, as well as a public safety employee. The single most important fact is that for the first time, Act 563 creates uniform *Garrity* guidelines for all of the State's law enforcement agencies, prosecuting attorneys, and courts.

You can be justifiably proud of the long and determined efforts that your State Lodge undertook over the last 4-years that led to the enactment this new law. Through persistence, persuasion, and passion, the State Lodge has achieved a true triumph – Act 563 is the first statute of its kind in the nation.

The details of those legislative efforts are detailed elsewhere in this magazine. There is also an important chart that details what Act 563 does – and does not do – that follows this article.

For now, let's take a quick overview of the new law. Act 563 addresses three important areas of the law: *criminal law procedures, administrative actions,* and *public access* through the Freedom of Information Act. These issues meet at the center of the legal cross roads: the intersection at which the department's internal investigations meet the Fifth Amendment rights possessed by all citizens.

**Criminal Law Procedures:** For the first time in our nation's history, Act 563 codifies the *Garrity* rule that involuntary statements given by public safety employees *cannot* be used against them as defendants in a criminal proceeding or trial. This exclusionary rule also extends to ***"any information derived from that involuntary statement."***

The Act also defines an "involuntary statement" as follows:

> .... information provided by a law enforcement officer, ***if compelled under threat of dismissal or any other employment sanction,*** by the law enforcement agency ***that employs*** the law enforcement officer.

That definition is extremely important – and it parallels all of the prior articles on *Garrity* published over the last year in ***The Peace Officer.*** Let's break it down into its elements:

*First,* the involuntary statement ***must*** be ***compelled.*** Act 563 eliminates any uncertainty as to whether you, as the individual officer, can "self-invoke" *Garrity* on your own – ***you cannot.*** The Act also states that there must be a *specific* order to make the involuntary statement. Simply telling an officer to "Write a report," or "Give me a memo" ***will not*** suffice under Act 563 – and the Courts will so interpret the Act.

*Second,* the involuntary statement must be at the order of ***the department that employs*** the officer. Again, this parallels the original *Garrity* decision, as well as the information contained in past ***Peace***

*Officer* articles. It is ***not*** the authority of the badge carried by an investigator – it's the "power of the paycheck" that defines the *Garrity* order. In regards to any other outside law enforcement agency – you have the same rights as any citizen. Any statement given to an outside law enforcement or prosecuting agency ***will not*** be covered by either *Garrity or Miranda.*

*Third,* the order to give the involuntary statement ***must*** contain an explicit ***"threat of dismissal or any other job sanction"*** by the department that employs the officer. Job sanctions include loss of pay, rank, service time, or seniority – in other words, definite damage to the officer who receives the order.

Law enforcement management and command officers should refer to the article in Winter, 2006, ***Peace Officer*** magazine, where a "Top Ten" list of *Garrity* procedures was given. Number Three was: *"Don't muddle the Garrity warning – **be explicit!"*** The threat of job sanction cannot be tentative – it must be assertive and definitive with the threat that discipline ***will*** follow a refusal to obey the *Garrity* order.

Remember – *Garrity* and Act 563 define a situation that is "*Miranda* in reverse." There is ***no*** right to remain silent, based upon the penalty of job sanctions. The explicit threat of job sanctions is, in fact, your ***only*** assurance that you will be covered by Act 563.

Also remember that the Courts place high evidentiary value on the fact that the officer obtained representation through a labor association or attorney – *don't go it alone!*

Act 563 does not, however, completely bar a prosecuting agency from obtaining the actual *Garrity* statement. You may recall that this dispute first arose in Garden City, Michigan, in early 2003 – when the local prosecutor refused to clear three GCPD officers in a fatal force incident unless the department surrendered their *Garrity* statements.[1]

The officers were not, unfortunately, represented by the FOP. Their association sided with the prosecutor's demands, and took no action. The Garden City Police Chief, however, along with other law enforcement associations, mounted a legal challenge to the prosecutor's demands.

That legal battle, in turn, led to the quest of the State Lodge to give statutory protections to *Garrity* statements.

Act 563 has now clarified this procedure for all 83 counties in the State. In order to justify obtaining *Garrity* statements, a prosecuting agency must proceed under the Investigative Subpoena and Immunity Act, found at MCL 767A.1 – 767A.9.

The prosecuting agency must petition a district or circuit court with documentation that demonstrates that the *Garrity* statement is required to further the investigation of a ***felony,*** as defined by Michigan law [MCL 767A.2].

The reviewing judge must then find "reasonable cause" to believe that the investigative subpoenas are required – and must issue a written order granting the subpoenas [MCL 767A.3].

The officer who was ordered to make the statement, however, and/or the department holding the statement, can challenge the investigative subpoena through the courts [MCL 767A.6].

A court hearing must be held prior to the statement being released to the prosecuting agency. Any release that is ordered, however, is exempt from the Freedom of Information Act by both Act 563 and the Investigative Subpoena Act.

If you find out that an investigative subpoena has been issued for a *Garrity* statement, it is important that you notify the State Lodge ***at once!*** We must ensure that compliance with Act 563 is both meticulous and consistent – so don't wait until *Garrity* has left the building.

**Administrative Procedures:** Act 563 confirms that the *Garrity* statement can be used for its intended purpose – the internal, administrative review of the department's employees. The statement can be used in administrative hearings [including arbitrations] by either the department or the advocates of the officer – just as envisioned by the U.S. Supreme Court in 1967.

**Public Access:** Perhaps the most immediate impact of Act 563 will be the ***complete*** exemption of the actual *Garrity* statement from the Michigan Freedom of Information Act [FOIA].

No longer will the various news media be able to publish *Garrity* statements out of context, with the intent of conducting "trials by public ridicule."

This apprehension was not unfounded. Consider this interesting point of view, taken from one of the State's largest newspapers:

> Of course, admissions of wrongdoing may be embarrassing for particular officers. And for their department supervisors. So what? There *should* be risks for wrongdoing by uniformed public servants, and public embarrassment should be one of the least of them.
>
> After all, police officers are authorized to kill people.
> ***The Detroit News,*** Nov. 27, 2006.

The term "rogue cops" was also popular among the editorials of the State's newspapers. We were supposed to believe that hundreds of public safety officers were running rampant through the cities, towns, and villages of Michigan – and only a private media corporation that makes money by selling advertisements could save the public.

In end, however, the hysterical, misleading, and downright false editorials that flooded the Michigan Legislature during its deliberations of Act 563 had the reverse effect of persuading the legislators that the concerns of the State Lodge were indeed well-founded.

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Act 563 now states that the *Garrity* statement can be released if the officer who made the statement consents ***in writing*** to its publication. Aside from that option, a court order is required for nearly all disclosures which may, in the end, reach the public. This provision of the Act applies to both criminal and civil cases that involve the possible release of the *Garrity* statement.

I must advise you that ***the I-A report itself will still be*** subject to release under the FOIA, and through routine subpoenas. A major source of distorted and malicious publication, however, has been cut off by the passage of Act 563.

I had the honor of representing the State Lodge in testimony before both the Michigan Senate and House Judiciary Committees – and I was truly impressed by the concern, insight, and probing questions of all of the Legislators.

Both sides of the aisle were deeply interested in protecting your rights as a public employee and a citizen of this State. Yet they were also careful to balance these concerns with the need for a fair and just system of law for all people of Michigan.

Just as the U.S. Supreme Court did in the *Garrity* decision of 1967, the Michigan Legislature and the Governor got it right. Now, it is up to all of us to uphold their trust and to each day rise to the highest level of our chosen professions.

[1] *In re Homicide of Lance Morton, 258 Mich App 507 (2003)*