

SIXTEEN THINGS THAT EVERY TROOPER SHOULD KNOW ABOUT “GARRITY”

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1. There is no “*Garrity* violation” if the government never uses a *Garrity* statement (or the fruits of the statement) in a criminal case against the officer. A constitutional violation only occurs at the time of trial, when the statement is improperly used. *Chavez v Martinez*, 538 US 760 (2003); *In re Grand Jury Subpoena*, 75 F3d 446 (CA 9,1996).
2. A *Garrity* statement must be turned over to the defense attorney in a criminal prosecution (not involving the officer who gave the statement) if the statement might assist the defense or provide impeachment of an officer who testifies as a witness in the criminal case. The defense attorney does not need to make a request for this evidence. This disclosure must be made even if the prosecutor did not receive or consider that *Garrity* statement in bringing charges against a person. *US v Agurs*, 427 US 97 (1976); *US v Bagley*, 473 US 667 (1985).
3. A *Garrity* statement may be obtained and reviewed by a prosecutor or grand jury, through subpoena or court order. *Stover v US*, 40 F3d 1096 (CA 10, 1994); *In re Grand Jury Subpoena*, 75 F3d 446 (CA 9,1996).
4. Nothing in the constitution or federal law prohibits a law enforcement employer from giving the *Garrity* statements of its officers to the news media or the public. Only individual state laws (e.g., an exemption under a state freedom of information act) can afford such a protection. *Herald Co, Inc v Kent County Sheriff's Dept*, 261 Mich App 32 (2004).
5. An officer’s *Garrity* statements may be obtained by a plaintiff in a civil case who is suing the officer and used against the officer at trial in the civil case. *Chism v County of San Bernardino*, 159 FRD 531 (CD Cal, 1994).
6. If an officer gives an untruthful statement after having been given an appropriate *Garrity* warning, the statement may be used in a prosecution against the officer for perjury,

misconduct in office, or obstruction of justice (although it cannot be used against the officer for the underlying crime that was being investigated when the statement was given). *US v Veal*, 153 F3d 1233 (CA 11, 1998).

7. In many states, *Garrity* protections only apply if the officer believes that he or she will be fired for refusing to answer questions from a supervisor and there is a law that mandates dismissal of public employees who fail to giving an accounting of their job duties upon the order of a supervisor. See *United States v Indorato*, 628 F2d 711 (CA 1, 1980). In other states, it is not necessary that a law be in place providing for discharge in order for the statement to be protected, so long as the officer was threatened with discharge or discipline by the interviewer. See *United States v Friedrich*, 842 F2d 382 (CA DC, 1988). Learn which standard is applied in your state.
8. Officers who write *Garrity*-type disclaimers on routine reports (e.g., I am submitting this report only because I am required to do so and I do not waive my Fifth Amendment rights, etc.) are not immunizing their statements against use in a subsequent criminal proceeding against the officers. *Indorato*, supra; *Friedrich*, supra.
9. *Garrity* protections cannot merely be assumed by an officer who is being questioned by supervisors. The officer must be given a direct order to answer or face disciplinary action, and must be told that the answers will not be available for use in a criminal prosecution for the crime under investigation. *Indorato*, supra; *Friedrich*, supra.
10. Officers who refuse to answer questions that might incriminate themselves by invoking the Fifth Amendment, and who are never given a *Garrity* warning, may be fired if the Department can prove misconduct or criminal acts independent of the officers' account of the incident. *Harrison v Wille*, 132 F3d 679 (CA 11,1998).
11. Officers who take the Fifth Amendment and remain silent when questioned about an alleged criminal act when they are not in custody can have their silence introduced against them at their criminal trial. *Jenkins v Anderson*, 447 US 231 (1980).
12. In the prosecution of a police officer whose *Garrity* statement has been given to the charging entity (i.e., the prosecutor, grand jury, or another law enforcement agency), the officer may request a *Kastigar* hearing. In a *Kastigar* hearing, the government bears the burden of proving that none of the evidence it proposes to use in the prosecution was derived from the officer's *Garrity* statement. *Kastigar v US*, 406 US 441 (1972); *In re Grand Jury Subpoena*, 75 F3d 446 (CA 9,1996).
13. Before a law enforcement agency may discharge an officer for refusing to answer questions upon a direct order, it must first advise him that the answers cannot be used against him in a criminal prosecution. Absent such a warning, a discharge for refusing to answer questions will not stand. *City of Evanston v Franklin*, 384 F3d 838 (CA 7, 2004). The warning would not be required, however, if the questions pertained only to a breach of departmental policies

or rules, and had no possible criminal overtones.

14. An officer who gives a compelled statement under *Garrity* cannot later be impeached with that statement in a criminal trial because involuntary statements may not be used for impeachment. *Plaster v City of Houston*, 721 SW2d 421 (Tex App, 1986).
15. Reaffirmation of *Garrity*-protections in collective bargaining agreements is important, and may close holes that are left open by recent court opinions which erode *Garrity*. See *McKinley v Mansfield*, 404 F3d 418 (CA 6, 2005) (Ohio appellate court reversed conviction of officer whose *Garrity* statement was used at criminal trial on breach of contract grounds).
16. If an internal affairs investigator provides a *Garrity* Statement to the prosecutor, and that statement is improperly used by the prosecutor against the officer at trial, the officer may successfully sue the internal affairs investigator under 42 USC §1983 for violation of the officer's civil rights. The prosecutor, however, has immunity, even if he knew the statement was inadmissible. *McKinley v Mansfield*, 404 F3d 418 (CA 6, 2005).