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Navigating Discipline:

Understanding *Garrity* Rights And Their Implications

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Presented by
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Navigating Discipline

Understanding *Garrity* Rights And Their Implications

October 9, 2024

10:00 AM PT / 1:00 PM ET

60 minutes

Attendees of this webinar will gain insights into the legal principles behind *Garrity* rights and how they apply to police, fire, and corrections personnel and will have the opportunity to engage with a legal expert to get their specific *Garrity*-related questions answered.

- **Employees' *Garrity* Rights:** Understand the critical protections *Garrity* rights offer public safety employees during internal investigations.
- **Safeguarding Statements:** Learn how *Garrity* Rights protect against self-incrimination.
- **Case Studies And Examples:** Delve into real-life scenarios where *Garrity* rights have played a pivotal role in disciplinary actions.

Presented By Richard Poulson

Mr. Poulson has been representing labor unions for his entire career, representing union clients in collective bargaining, interest and grievance arbitration and employment-related litigation. He is a partner with the Philadelphia, Pennsylvania firm of Willig, Williams & Davidson, where he focuses on advising and representing police, fire, paramedic and other uniformed employees regarding municipal affairs and public employment. He earned his B.A. from La Salle University (1992) and his J.D. from the Catholic University of America, Columbus School of Law (1997). Rick is the Executive Director of LRIS. Since its inception in 1981, LRIS has been a valuable resource for public safety labor relations. LRIS conducts labor seminars, publishes a monthly newsletter, and currently has five books in print.

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Navigating Discipline, Part 2: Understanding *Garrity* Rights

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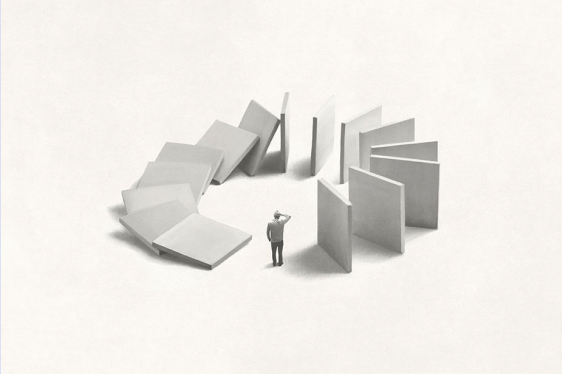

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GARRITY:
The Right Not To Incriminate

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Garrity v. New Jersey

- Investigation into "ticket-fixing scheme" in Belmar and Barrington, New Jersey.
- Six officers were told that if they did not cooperate with the investigation, they would be fired. They gave statements, and criminal charges resulted.
- 5-4 decision, with majority opinion written by William O. Douglas.

Justice William O. Douglas

Image Source: Harris & Ewing

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Garrity v. New Jersey

Conclusion:

The use of the statements in the criminal cases violated the self-incrimination clause of the Fifth Amendment and due process clause in the Fourteenth Amendment.

"We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

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The *Garrity* Rule

A Simple Statement of the Rule

If an employee is compelled by threat of possible job forfeiture to make an oral or written statement . . .

Then

Neither the statement nor the fruits of the statement may be used against the employee in a subsequent criminal prosecution of the employee.

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The *Garrity* Rule, Part 2: *Gardner v. Broderick*

- Gardner was an NYPD officer who was subpoenaed to appear before a grand jury investigating alleged corruption of police officers in relation to illegal gambling.
- Gardner was asked to sign a "waiver of immunity" and was told if he refused to sign the waiver, he would be fired. He refused and was fired.

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The *Garrity* Rule, Part 2: *Gardner v. Broderick*

"The mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."

9

The *Garrity* Rule, Part 2: *Gardner v. Broderick*

"If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey*, supra, the privilege against self-incrimination would not have been a bar to his dismissal."

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Can An Employer Force An Employee To Give A Statement?

***Homoky v. Ogden* (7th Cir. 2016)**

So long as the appropriate immunity is given to the statement and notice of the immunity to the employee, *Garrity* does not prohibit a public employer from ordering an employee to provide a statement with potential criminal implications.

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When Is The Employee Compelled To Answer Questions?

***United States v. Camacho* (S.D. Fla. 1990)**

An employee is considered "ordered" to answer questions or write a report if:

1) the employee subjectively believes that he is compelled to give a statement upon threat of loss of job; *and*
2) the employee's belief is objectively reasonable at the time the statement is made.

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What Makes The Employee's Belief Reasonable?

Factors that bear on the reasonableness of an employee's belief:

- What was the rank and assignment of the person who conducted the interview?
- Where and under what circumstances was the interview conducted?
- What are the Department's rules?
- Was the employee told he/she was free to leave?
- Did the interviewer say anything about the consequences of failing to answer?
- Was the interview recorded?

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What Makes The Employee's Belief Reasonable?

***United States v. Lewis* (S.D.N.Y. 2021) (PSLN Jan 2022)**

- Correctional officer alleged to have accepted bribes in return for facilitating the smuggling of drugs into facility.
- Officer provided statements and signed "voluntary statement" form which provided that no adverse employment consequences would follow solely from her refusal to answer questions in the interview.
- Statement will be rejected as involuntary *"only where the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his free choice to admit, to deny, or to refuse to answer. It must amount to a choice 'between the rock and the whirlpool.'"*

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What Makes The Employee's Belief Reasonable?

***United States v. Zambrano* (N.D. Ill. 2021) (PSLN Jan 2022)**

- Police officer accused of stealing $50,000 in drug-buy money. Agents interviewed the officer for around four hours. Officer moved to suppress the statements from his interview, citing Garrity.
- Court rejected the officer's arguments, noting that "the biggest problem with Zambrano's argument was that before he answered any questions, he signed a form acknowledging that the interview was voluntary, that he did not have to answer any questions, and that he would not be disciplined for refusing to answer questions."

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When Should The Employee Know An Investigation Is Criminal?

State of Florida v. Socarras (Fla. Dist. Ct. App. 2019)

- "When detained in the instant case, Socarras was stopped by an officer in the middle of the night, held at gunpoint, handcuffed, frisked, and transported in the back of a police cruiser to an unknown precinct. He was subjected to ultraviolet scan, relieved of his service weapon, read Miranda warnings, and divested of his police vehicle, which was treated as evidence."
- "Under these circumstances, it is unfathomable that a reasonable person, particularly an experienced law enforcement officer, would not be aware that a criminal investigation had commenced."

(PSLN May 2019)

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Who Must Be Provided Garrity Warnings?

Wilson v. State (Alaska 2021) (PSLN Jan 2022)

- *Garrity* warnings need only be given to the employee, not to the employee's attorney.
- Even though the employer knows that the employee is represented by counsel.

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Garrity & Routine Reports

United States v. Smith (11th Cir. 2016)

- "*Garrity* does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both the remote possibility of criminal prosecution if he files the report and arguably even speculative possibility of termination if he declines to do so."
- "Rather, the touchstone of the *Garrity* inquiry is whether the defendant's statements were coerced and therefore involuntary."
- However . . .

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Garrity & Routine Reports

State v. Reps (Minn. Dist. Ct. 2015)

- Indictment dismissed where prosecutor introduced in grand jury proceedings written report from trooper involved in collision where two motorists died.
- Court finds that trooper could reasonably believe that his report, which he was ordered to give by his commander, was required as a condition of employment.

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Garrity & *Miranda*

United States v. Smith (11th Cir. 2016)

The giving of *Miranda* warnings is a strong indicator that an employee cannot reasonably believe that his/her answers to questions were compelled as a condition of employment.

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Garrity & Miranda

Foltz v. City of St. Louis, 2023 WL 5688659 (Mo. App. 2023)(PSLN Nov 2023)

- Giving both *Garrity* and *Miranda* warnings creates critical uncertainty over whether interview is internal or criminal.
- Officer wrongfully terminated for refusing to cooperate during investigation after Garrity warnings, where employer created uncertainty by including criminal investigator and providing *Miranda* warnings at outset of so-called "internal" interview.

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What Does "Use" Mean?

Rule: If public employer compels employee to answer questions or provide a written statement upon threat of possible job loss, then neither the employee's answers or statement nor the fruits of the answers or statement can be used to criminally prosecute the employee.

Test: Whether the prosecution has improperly relied on Garrity evidence is usually tested through what have been called "Kastigar hearings," bearing the name of a Supreme Court decision describing the process.

Kastigar v. United States, 406 U.S. 441 (1972).

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What Does "Use" Mean?

State v. Ward (Ga. App. 2021) (PSLN Jan 2022)

- Former police officer convicted of child molestation.
- Two prosecutors admitted that they had read transcripts of the officer's internal affairs interview.
- In reversing the officer's conviction, the Court held that "the State did not meet its burden … of proving that it did not make derivative use of Ward's *Garrity*-protected statements…"

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What Does "Use" Mean?

State v. Flynn (Ohio Mun. Ct., 2023) (PSLN Sept 2023)

- Beware the risks of conducting concurrent criminal and administrative investigations.
- Officer accused of dereliction of duty related to investigation of crimes against children. Misdemeanor.
- Charges dismissed because Garrity statement was provided to prosecutor's office and prosecutor failed to prove that the statement was not used as part of its investigation – even when primary investigator was walled off from administrative investigation materials.

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Which Statements Are Protected?

Delaware v. MacColl (Del. Super. 2022) (PSLN Sept 2022)

- Officer-involved shooting investigation. Allegation that officer switched gun barrel after shooting.
- Officer denied charges during IA interview after being provided Garrity warning and ordered to answer questions. Later "clarified" during second interview.
- Officer charged criminally with providing false statements during interview. Moved to suppress the IA statement. Denied.

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Which Statements Are Protected?

Delaware v. MacColl (Del. Super. 2022) (PSLN Sept 2022)

- *"Garrity did not rewrite the Fifth Amendment. Garrity immunity parallels Fifth Amendment immunity, and the Fifth Amendment does not protect perjury. So Garrity does not protect false testimony. Indeed, Garrity protection is not a license to lie."*
- *"Accordingly, every post-Garrity decision has held that Garrity immunizes only truthful statements made by police officers under penalty of termination. False statements are not considered 'coerced' under the Fifth Amendment or Garrity."*

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Garrity Immunity is Self-Executing

Scatchell v. Board of Fire and Police Commissioners, 2022 IL App (1st) (PSLN Dec 2022)

- Officer invoked 5th Amendment rights and refused to testify at an internal disciplinary hearing regarding allegation of theft of time – officer called out sick and went hunting (with a convicted felon).
- Officer represented by counsel at hearing. No active criminal investigation. No Garrity warning/form issued
- Officer terminated for insubordination, appealed … and lost.

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Garrity Immunity is Self-Executing

- *"Having been afforded protection against self-incrimination by this immunity, the employee may be subject to adverse employment action if they remain silent."*
- *"Neither the Board nor the Village ordered Scatchell to waive his Garrity immunity; to the contrary, they repeatedly told him that he would be protected by Garrity immunity and thus had no fear of self-incrimination if he testified before the Board. Scatchell's right against self-incrimination was never in doubt; it remained intact because of the immunity afforded him."*

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How Far Does The Prohibition On "Use" Extend?

***Garrity* is a rule of criminal procedure and does not prohibit the use of a compelled statement in a non-criminal forum.**

Hoban (2019)

- *Garrity* does not prohibit the use of compelled statements in a subsequent civil lawsuit against the employee.

Chasnoff (2015)

- *Garrity* does not create a privilege prohibiting disclosure under a public records law.

MacColl (2022)

- *Garrity*-insulated statements regarding past events under investigation must be truthful to avoid future prosecution for such crimes as perjury and obstruction of justice.

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Garrity Warnings

***Hoffman v. Peace Officer Standards and Training Council* (Utah App. 2022) (PSLN June 2022)**

- *Garrity* warnings need not include the possibility that answers could result in decertification.
- "If a public employee is required to answer as a condition of their employment, the employer must remove the threat that the officer's statements given in a disciplinary interview could later be used against them in a subsequent criminal prosecution." That's it!

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Miscellaneous *Garrity* Questions

***Guitierrez* (2015)**

Garrity does not apply to non-testimonial evidence such as a portable breath test.

However...

***Shoemaker* (2019)**

Garrity requires exclusion of the results of alcohol testing where the employee was told she would be terminated if she refused to be tested. The Court reasoned that the consent to the test was not voluntary.

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MIRANDA:
The Right To Know Your Rights

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Miranda And The Workplace

- How *Miranda* interacts with *Garrity* and *Weingarten*.
- If an employee is ordered to remain on the premises or face potential termination, is the employee in custody for *Miranda* purposes?
  - What if the employee is required to wait for hours in a locked interview room? Or in the back of a patrol car?

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Miranda Factors

The experience level of the officer.	Whether the treatment was consistent with that allowed by department guidelines or general policy.	The occurrence of physical contact or threats of physical restraint.	Explicit refusal of permission to depart.
Isolation of the officer.	Permission to use the restroom without accompaniment.	The officer's being informed that s/he was the subject of a criminal investigation.	Whether the subordinate officer was spoken to "in a menacing or threatening manner."
Whether the subordinate officer was under constant surveillance.	Whether superior officers denied a request to contact an attorney or union representative.	The officer's ability to retain law enforcement equipment, including weapons and badges.	The duration of detention and the subordinate officer's receipt of overtime pay.

Driebel v. City of Milwaukee, 298 F.3d 622, 638 (7th Cir.2002).

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Miranda Questions

Characterizing work-related demands as seizures whenever an officer feels compelled to obey them would not further any interest protected by the Fourth Amendment, and it would significantly interfere with the effective management of police forces. To determine whether a police officer has been seized for purposes of the Fourth Amendment, our sister courts of appeals have recognized that the distinction between situations in which the police department issues orders in its capacity as an employer and those in which it acts as the law enforcement arm of the state.

Gwynn v. City of Philadelphia, 2013 WL 3027288 (3d Cir. 2013)

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Home "Arrest"

Here, plaintiff alleges only that her fear of adverse employment action restrained her freedom of movement. Plaintiff alleges she was 'seized' during regular work hours every day for over seven months because DHS threatened to fire her if she did not follow the order to be duty stationed at home. This is not a seizure within the meaning of the Fourth Amendment.

Nelson-Baca v. Oregon (2021)

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The Tone of Questioning

The transcript and audio recording of Zambrano's interview, and the surrounding undisputed circumstances, provide ample facts, on their own, to show that he was not in custody. As the interview began, Zambrano and the agents exchanged calm, friendly greetings. Zambrano was not under arrest and was never told he was under arrest. The agents thanked him for coming in, which points to the voluntariness of the arrangement of the interview. The tone remained calm, courteous, and even friendly and joking at times throughout the interview. Plus, the agents were solicitous of his comfort, asking several times if he needed anything to drink or a break.

United States v. Zambrano (2021)

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The Tone of Questioning

Crucially, Lewis signed a form confirming that her statement was voluntary and that she could stop the interview at any time without suffering an adverse employment action solely for her refusal. The Government points out that Lewis never ever asked or tried to leave the interview. Finally, the DOI agents gave no affirmative indications that Lewis was not, in fact, free to leave the interview. The audio recordings reflect that investigators repeatedly explained that Lewis was free to go, not under arrest, and permitted not to speak with them should she decline to do so. The DOI agents also promptly terminated their questioning when Lewis indicated she wanted it to stop.

United States v. Lewis (2021)

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Miranda Questions

> Although the security measures inside of the prison unit created a unique situation for leaving the building, Penadela was free to terminate the interview and leave the premises at any time. We find that a reasonable person would not believe his freedom of movement was restrained to the degree associated with a formal arrest.

Penadela v. State, 2011 WL 723485 (Tex. App. 2011)

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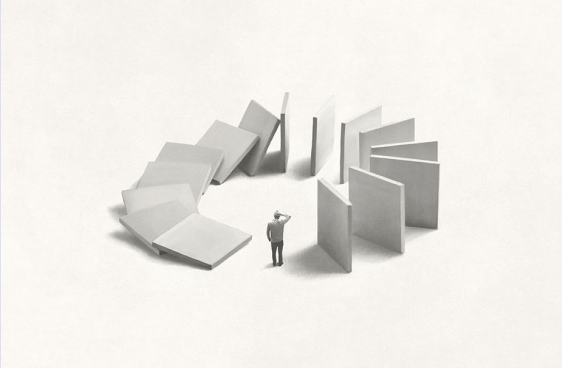

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