

## Section Five: Payments for information

### WITNESS PAYMENTS IN CRIMINAL TRIALS, PAYMENTS TO CRIMINALS

## To pay, or not to pay

Payments for information or pictures are normally not affected by the Code. They are matters for the editor's discretion, except where they might threaten the integrity of the judicial process — which the Code committee recognises as paramount — or where they appear to encourage or condone crime.

It therefore imposes strict rules on payments to:

- Witnesses in criminal trials (Clause 15) to avoid the risk of their evidence becoming, or appearing, tainted in the eyes of a jury (civil cases are not affected, even where a jury is involved); and to –
- Criminals or their family or associates (Clause 16), so that these

people are not effectively glamorising, glorifying or profiting from crime.

While payments in either instance are relatively rare, they usually occur in controversial or high-profile cases, which means this is an area where the PCC has sometimes instituted its own investigations without a complaint being received. However, there is widespread agreement that there are occasions where such payments are necessary in the public interest — as when helping to expose or detect crime, for example.

The risks and the need for payment have to be weighed together and in Clauses 15 and 16 the Code sets out to balance one with the other.

## Witnesses: timing is crucial

### THE CODE SAYS...

#### Clause Fifteen — Witness payments in criminal trials

- (i) *No payment or offer of payment to a witness — or any person who may reasonably be expected to be called as a witness — should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.*
- (ii)\* *Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.*
- (iii)\* *Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.*

\* A public interest exemption may be available: [See Section Six](#)

In 2002, the Lord Chancellor's department announced a plan to introduce laws covering witness payments in criminal trials that would have exposed the media and journalists to the risk of fines and imprisonment.

Within months, the Editors' Code Committee persuaded the Government that changes to the self-regulatory Code would be more effective, and the legislative threat was dropped. The resulting Code revisions, introduced in 2003, severely limited the circumstances in which payments could be made.

The Code effectively creates two categories of restriction on payments or offers to witnesses or potential witnesses — one a qualified ban where payments may be defended in the public interest, and the other where there should be no payment in any circumstance: a total ban. The deciding factor is timing.

**The total ban** applies once proceedings are deemed active, using the threshold of the Contempt Court Act of 1981. Effectively, this is when an *arrest has been made, or an arrest warrant or summons issued, or a person is charged.*

It means there can be no payment or offer to anyone who is, *or is likely to be called as*, a witness. The total prohibition lasts until the question of guilt ceases to be a legal issue — such as when the trial is over, or the suspect is either freed unconditionally or has entered a guilty plea.

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**The qualified ban** applies where proceedings may not yet be active — but are likely and foreseeable. Here no payments or offers can be made — *unless there is a public interest in the information being published and an over-riding need to make a payment for this to be done.*

This begs several questions for editors.

**Active proceedings:** The first question to resolve is whether proceedings are active. If the answer is Yes, then the principal remaining issue under Clause 15i, when considering making offers of payment, is: *Could the potential payee reasonably be expected to be called as a witness?* If so, payment is prohibited.

In some cases it might be obvious that the prospective payee is a likely witness. In others, less so. In the absence of reliable police or other guidance, editors would need to make their own judgment — usually with legal advice — on what might be considered reasonable, before approaches were made.

**Proceedings not yet active:** If the judgment is that proceedings are not active, then there is the possibility of payment in the public interest. But the situation is not necessarily clear-cut.

Restrictions apply only if proceedings are *likely and foreseeable* — and if the potential payee *may be reasonably expected to be a witness*. It is again a crucial judgment. If the answer to either question is No, then restrictions do not apply under the Code.

*However, if the answer to both questions is Yes, then a new set of conditions kicks in to comply with Clause 15ii:*

**The public interest:** For now the only basis upon which a payment or offer may be made is that the information concerned *ought demonstrably to be published in the public interest* and that there is an *over-riding need to make or promise payment for this to be done.*

The editor would need to demonstrate both *how the public interest would be served* and why the necessity for payment was

*over-riding*, a particularly high threshold under the Code. But the responsibility does not end there.

**Influencing witnesses:** Editors have a duty of care not to allow their financial dealings to lead witnesses to change their testimony. The risks include witnesses withholding information in an attempt to preserve exclusivity or for other reasons, or exaggerating evidence to talk up the value of their story. Editors also need to be alive to the danger of journalists — intentionally or not — coaching or rehearsing witnesses or introducing to them extraneous information, which might later colour their evidence.

**Conditional payments:** Potentially the most dangerous deal, in terms of tainting witnesses, is one in which payment is conditional on a guilty or not guilty verdict. The PCC has made clear that any deal linked to the outcome of the trial would be strictly prohibited as it might affect the witness's evidence or credibility.

*Finally, if all other hurdles have been cleared, there is one further obligation on editors.*

**Disclosure:** Once an editor is satisfied that the Code's requirements can be met, and payment or offer of payment is made, the payee should be told that *if they are cited to give evidence*, the deal must be disclosed to the prosecution and defence. This transparency is a deliberate safeguard against miscarriages of justice. It puts extra onus on potential witnesses to tell the truth, since they know they are likely to be cross-examined on the payment.

The PCC has laid down guidelines for compliance. It advises that:

- The payee should be informed in writing that, *should he or she be cited to give evidence*, the press is bound under the Code to disclose the deal to the relevant authorities.
- The prosecution and defence should be notified promptly, with full details of a payment or contract given in writing. The requirement to inform both sides may be satisfied, where appropriate, by

## KEY QUESTIONS

- **Are proceedings active?** Has there been an arrest, a warrant or summons issued, or charge? If so, there is a *total ban* on payments to witnesses or potential witnesses until the case is over.
- **If not active, are proceedings likely and foreseeable?** If not, restrictions don't apply. If they *are* foreseeable, then —
- **Could the potential payee reasonably be expected to be a witness?** If not, no restrictions apply. If he/she *is* a potential witness, then —
- **Is there a clear need to publish information in the public interest?** This would have to be demonstrable in order to proceed.
- **Is there an over-riding need for payment?** Would it be possible to obtain and publish the information in any other way?
- **Could the deal influence the evidence the potential witnesses give?**
- **Is payment conditional on the verdict?** This is totally prohibited.
- **Has the payee been told the deal will be disclosed to the court?**

notification to the prosecution for onward transmission to the defence.

There has been only one adjudication since the new rules were introduced, and it underlined the importance of timing of approaches. A prosecution witness in the trial of Kate Knight — who was later jailed for 30 years for attempting to murder her husband by lacing his food with anti-freeze — told the court that during an overnight break in her testimony she had been approached by a magazine offering a fee for an interview, once the trial was over. Although she had received other requests for an interview this was the only one that mentioned a fee.

The PCC launched its own investigation — as it often does with 'victimless' cases — and although there had been no impact on the trial, censured the magazine for its premature approach. The Commission said it was never acceptable for witnesses to be approached with offers of payment while giving evidence. (*PCC investigation, Full House Magazine: Report 73, 2008*).

**Lessons from the past:** Only one complaint had been upheld under the previous rules — revised in the wake of the Rosemary West trial in 1996 — and that was an inadvertent breach relating to the case of Gary Glitter.

An ambiguity in the contract in 1997 between the *News of the World* and a woman who had previously claimed to have been an underage partner of the pop singer appeared to suggest the payment was conditional on the outcome of the trial. In fact, at the time of the contract, the woman was neither a witness nor potential witness in the case. (*Taylor v News of the World, PCC Report 48, 1999*.)

The PCC launched an investigation into the case of Amy Gehring, a former teacher accused of intimate liaisons with pupils in 2002. It found that although payments had been made to former pupils, all complied with the requirements of the then Code and none was conditional on the outcome of the trial. (*A reader v News of the World, The Mail on Sunday, Daily Mail, Sunday People, Sunday Mirror: Report 57, 2002*).

However, the PCC has indicated that a newspaper's payment to an informant who was a potential witness in the case of an alleged plot to kidnap Victoria Beckham, which had not breached the Code in 2002, would probably have been a breach under the new rules. (*PCC investigation into News of the World: Report 63, 2003*).

## KEY RULINGS

Under the rules introduced in 2003:

- *PCC investigation into Full House magazine* (Report 73, 2008).

Relevant earlier rulings:

- *Taylor v News of the World* (Report 48, 1999).
- *A reader v News of the World, The Mail on Sunday, Daily Mail, Sunday People, Sunday Mirror* (Report 57, 2002).
- *PCC investigation into News of the World* (Report 63, 2003).

## Section Five: Payments for information

### PAYMENTS TO CRIMINALS

## Criminals: stories, not glories

The Code, from its inception in 1991, has taken a tough line on payments to criminals, with a blanket ban on deals unless they could be justified in the public interest. While that approach reflected public concerns over criminals being seen to profit from their actions, or glamorising or glorifying crime, the Code has never assumed *all* such payments to be inherently undesirable.

PCC rulings had made clear that a lifetime ban would be unfair on reformed criminals or those whose convictions were spent. It was also a potential violation of their human rights.

In 2003, the PCC produced guidance on the sort of cases most likely to breach the rule on payments to criminals — and those which generally would not.

### THE CODE SAYS...

#### Clause Sixteen — Payments to criminals\*

- (i) *Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates — who may include family, friends and colleagues.*
- (ii) *Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.*

\* A public interest exemption may be available: [See Section Six](#)

#### Least likely offenders included:

- Book serialisations, which were anyway in the public domain;
- Cases where no direct payment was made to a criminal or associate — i.e. when a payment was made to a charity to secure the material;
- Payments where publication was in the public interest;
- Articles which made significant new information available to the public.

#### Most likely offenders included:

- Articles glorifying crime — no complaint about an article that did so had ever been rejected;
- Payment for kiss-and-tell stories about romance or sex;
- Payments for irrelevant gossip, which intrudes on the privacy of others.

The Code Committee reflected these realities by introducing in June 2004 an additional defence, permitting payment to a criminal without the necessity for it to be in the public interest — but only if the material published *did not seek to exploit a particular crime, or glorify or glamorise crime in general.*

**Exploitation and glamorising crime:** The burden would be on the editor to prove that there was genuinely no intentional exploitation of a particular crime or of glamorising or glorifying crime generally, and demonstrate that it was not reasonable to expect that to be the outcome.

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**Was a criminal or associate paid?** Friends, neighbours and family members fall within this group. A picture of a criminal bought from her boyfriend has been held to breach the Code.

To justify payment, the publication would need to be able to satisfy the PCC on each of these counts. If it felt confident of doing so it could proceed, *even if no public interest justification existed*.

In 2006, a magazine article headlined *Why I Slept With My Own Son* was the first to fail both these tests. A mother convicted of unlawful sex with her teenage son had described the offence in the article and said the only thing she regretted was being caught. That was evidence of exploiting a particular crime and justifying it.

She and her son were paid by an agency, which was paid by the magazine. The PCC ruled that while the mother had a right to express her view, there was no conceivable public interest in her being paid. (*Moffat MP v Chat magazine: Report 73, 2006*).

But when a Sunday newspaper paid £460 to a petty criminal who claimed — falsely — to have served community service at the same time as the then Lord Chief Justice conducted undercover research into non-custodial sentences, it was cleared of a breach.

The Commission ruled that, while some people might object to

payment to someone with a criminal record, he was not exploiting a particular crime, nor did he glorify crime in general. Expressing honest views about experiences on a community service scheme was not sufficient to engage the terms of the Code. Had it done so, it would be unduly restrictive of stories about prison life from the perspective of a criminal. (*Thames Valley Probation Area v Mail on Sunday: Report 74, 2007*)

**The public interest** defence remains in Clause 16ii for relevant cases — and can be used with Clause 16i or alone — but has been revised to cover both the act of payment to criminals and the subsequent publication.

This means a newspaper which pays a criminal, in the genuine and reasonable belief that it would be the only way to elicit information of public interest, is covered. However if, once the deal is done, no such material of public interest emerges, nothing should be published as a result.

The rule was tightened in June 2004 after a Scottish paper (*Mclnnes v Daily Record: Report 62, 2003*) paid a convicted criminal for an interview, expecting him to reveal vital, and undisclosed, details of the crime. But he did not — and the paper published the interview, regardless. It was not a breach then. It would be now. It is a further safeguard against fishing expeditions, which are not allowed under the Code and which now — if fruitless — could also prove expensive.

## KEY RULINGS

- *Moffat MP v Chat magazine* (Report 73, 2006).
- *Thames Valley Probation Area v Mail on Sunday* (Report 74, 2007).
- *Mclnnes v Daily Record* (Report 62, 2003).

## KEY QUESTIONS

In clause 16i:

- **Does this information seek to exploit a particular crime?**
- **Does it seek to glamorise or glorify crime in general?**

In Clause 16ii, the test ahead of a payment or offer:

- **Is there good reason to believe payment will elicit material which ought to be published in the public interest?**
- **Could it have been obtained in any other way?**

The test after payment or offer and ahead of publication:

- **Is the material which has emerged genuinely in the public interest?** If not, publication should be cancelled — even if payment has been made.