

Witness payments in criminal trials

IN 2002 the Lord Chancellor's department announced a plan to introduce laws covering witness payments in criminal trials, which would have exposed the media and journalists to the risk of fines and imprisonment. In response, the Editors' Code Committee persuaded the Government that strengthening the self-regulatory Code would be more effective and the legislative threat was dropped.

The threat of legislation had followed payments to witnesses in a number of high-profile and controversial cases, including those of serial killer Rose West and disgraced pop star Gary Glitter.

In Glitter's case, the judge said: "Here is a witness who first made public her allegations of sex abuse in return for the payment of £10,000 and who stands to make another £25,000 if you convict the defendant on any of the charges. That is a clearly reprehensible state of affairs. It is not illegal, but it is greatly to be deprecated."

So self-regulation responded to that sorry state of affairs by

WHAT THE CODE SAYS

- 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 to these sub-clauses may be available. See [Page 120](#).

producing much stronger rules regarding payments to witnesses. The resulting Code revisions, introduced in 2003, severely limited the circumstances in which payments could be made. And Editors should note that IPSO can launch an investigation into a payment to a witness even if there is no formal complaint.

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 circumstances: a total ban.

To comply with the Code, editors must answer a series of tough questions and satisfy strict conditions.

The total ban applies once proceedings are active. Proceedings are active when a suspect is arrested, an arrest warrant or summons is issued, or a person is charged – and they remain active until they are over.

If proceedings are active, the Code imposes a total ban on payments to anyone who is or is likely to be a witness. The prohibition lasts until the question of guilt ceases to be a legal issue. That means when the trial is over, when the suspect enters a guilty plea, or when the suspect is freed unconditionally.

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.

These conditions pose several questions for editors.

Active proceedings: The first question is to resolve 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 if proceedings are likely and foreseeable – and if the potential payee may reasonably be 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 involving the public interest kicks in to comply with Clause 15ii:

The public interest: 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 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, regarding disclosure.

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 laid down guidelines for compliance. It advised 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 notification to the prosecution for onward transmission to the defence.

There has been only one adverse adjudication involving payments to witnesses since the Code's provisions were changed and it demonstrated the importance of timing when approaching witnesses.

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

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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 the regulator can do in ‘victimless’ cases – and although there had been no impact on the trial, censured the magazine for its premature approach.

The magazine’s editor said the letter had been sent prematurely by the writer because of a misunderstanding. It had since reviewed its working practices to ensure that this would not be repeated.

The PCC said: “The terms of Clause 15 are absolutely clear: there should be no offer of payment to a witness while proceedings are active. This is to prevent payments having any real or perceived influence on the administration of justice.

“On this occasion, there was fortunately no evidence that the trial had been affected by the offer. But it is never acceptable for witnesses to be approached with offers of payment while they are giving evidence, and the journalist’s actions could have had extremely serious consequences.”

PCC investigation into an offer of payment by Full House magazine:
www.pcc.org.uk/cases/adjudicated.html?article=NTExNw