

THE PRESS STANDARDS BOARD OF FINANCE LIMITED

Editors' Code of Practice Committee

Agenda

Editors' Code of Practice Committee meeting

Newspaper Society offices, 8th Floor, St Andrew's House,
18-20 St Andrew's Street London EC4 3AY
10.30 a.m., Wednesday, March 14, 2007

1. Apologies
2. Minutes of October 12, 2006 (circulated).
3. Business arising:
 - Code Committee website
 - AV Guidance Note
 - Information Commissioner
4. Payments to criminals
5. ICAR report on PCC
6. Select Committee
7. Annual Code review - Appendix A
8. Other business
9. Next meeting

Appendix A: Code Review 2007

Appendix B: The current Code contained (tightly) in one page
of A4 is attached separately.

Appendix C: Trinity Mirror Proposal (this was the later
addition).

3.i Code Committee website: Estimates of the cost of setting up a site
piggy-backed on the PCC website were higher than anticipated. The

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website designers have suggested it might actually be cheaper (as well as preferable) to set up an independent Code Committee website and will now submit a fresh estimate.

3.ii **AV Guidance Note:** The Guidance Note as previously circulated to the Code Committee was issued, subject to one change. The PCC board raised questions over the original final paragraph which could have been interpreted as infringing on the Commission's jurisdiction and this was therefore deleted by PressBOF.

3.iii **Information Commissioner:** The ICO has submitted a first draft of his proposed guidance to the industry co-ordinating bodies. It will be discussed with them and the final draft as agreed by them can be included in the online versions of The Editors' Codebook, subject to this Committee's approval.

4. **Payments to criminals:** The Code Committee submitted a response, previously circulated, to the DCA consultation on Payments to Criminals. The DCA report and recommendations has yet to be published..

5. **ICAR study:** The Information Centre for Asylum and Refugees in the UK has conducted a length study of the efficacy of the PCC in relation to asylum seekers and others. It was funded by the Home Office, runs to 171 pages, and includes significant input from MediaWise. The study group found that the press broadly followed current guidelines, "Inaccurate terminology" was used in just one per cent of articles surveyed. *"However, coverage in all papers suggests journalists are preoccupied with a system in 'chaos' rather than (potentially more enlightening) discussion about the context of asylum - though this may be attributable to the priorities of politicians rather than intentional media bias."*

Suggested improvements included incorporating the term "immigration status" into the Code's discrimination categories (see para 29 below); providing clear advice on the meaning of the term "significant inaccuracy"; accepting third party complaints; and extending the Codebook's guidance on immigrant terminology.

6. **Select Committee:** The Chairman gave evidence to the Culture, Media and Sport Select Committee's inquiry into self-regulation of the press and the Code Committee made a submission (previously circulated). The general view was that the Code was broadly adequate but that it might be better implemented and enforced. It was accepted that Goodman was fully covered by the Code, as was Kate Middleton.

The Information Commissioner mentioned his proposed amendment and, while there was no specific discussion, there was clear expectation from within the Committee that something would emerge following today's Code Committee meeting. The ICO's proposal is put in paras 16-21 below, with alternative (or additional) options in para 28. The only other specific Code addition was for a conscience clause, based on an NUJ suggestion. That has been rejected previously, but has been reviewed again in para 40.

7. **Annual Code Review:** The Code has been reviewed in the light of suggestions from the public, civil society, the government, and Parliament, in the form of the latest Select Committee hearing. Recent changes in the legal climate have also been considered. Where appropriate, options or recommendations are included. The Review is separately numbered as Appendix A

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APPENDIX A

Code Review 2006

Clause 1 Accuracy - sub-clause iv

Current wording:

1 iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

1. An out-of-court libel settlement between *The Guardian* and the Russian billionaire Boris Berezovsky unusually involved a statement into court. The paper published the statement, but omitted mention of damages, which were still to be agreed. Berezovsky claimed this breached the paper's Code obligation to publish the outcome. While denying a breach of the Code, the Guardian ran a clarification, stating the amount of damages. However, it suggested the Code should be revised to avoid future difficulties.
2. Problems arise when the Code's voluntary ethos is overlaid on legal agreements. The cultures rarely mix. Although its origins are hazy, the sub-clause's probable purpose was to impose on newspapers defending libel cases in court an obligation to publish the final verdict, if they lost. The Code or PCC would not normally have a role in reinforcing legally binding out-of-court settlements. Any disputes on these would be settled in court.
3. In October, the Committee agreed in principle that the Code should be changed to reflect this, subject to a rewording that would satisfy newspaper lawyers. One form of words is:

"A publication must report fairly and accurately the final outcome of a court hearing disposing of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published."
4. This is intended to confine the Code obligation to publishing the *final* outcome (e.g. including damages) of actions that include a court adjudication, thus avoiding problems such as in the Berezovsky case. It would, however, allow for exceptions, where *mutually agreed* - as when the claimant might not want further publicity. It would not cover other actions for defamation that did not come to court.
5. **Headlines:** At the last review, it was decided that headlines should be included specifically in the Accuracy clause. This was withdrawn following reservations about the wording. It has now been agreed with the PCC to leave the issue for the time being.

Clause 3 Privacy - Trinity Mirror proposal (see also Princess Caroline below)

Current wording:

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.

ii) It is unacceptable to photograph individuals in private places without their consent.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

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6. Trinity Mirror suggested in 2005 that the privacy clause should reflect PCC jurisprudence, which embraces the concept that privacy is not an absolute right, but can be compromised by conduct or consent - people can invade their own privacy. The reasoning was that while judges hearing privacy cases are obliged to take account of the Code, they interpret it as they see fit - they are not permitted to take into account PCC adjudications. This means judges are interpreting the Code very differently, causing problems for newspapers, especially where people who put their private life into the public domain - sometimes for money - try to withdraw it from the public arena at will.
7. In 2005, media lawyers were divided on the benefits of a change. The Code Committee decided against the proposed amendment on the grounds that the benefits were not clear; it was too selective; it might encourage public reticence; and it interpreted the Code too narrowly. The committee agreed the matter could be revisited if necessary. Now, Trinity Mirror has renewed its proposal.
8. Trinity Mirror suggests there should be a new sub-clause which would state:
When determining whether there has been an intrusion into an individual's private life, the PCC will take into account any similar matters that he/she has previously disclosed publicly.
9. In a series of rulings, including by Mr Justice Eady, judges at injunction hearings have not always taken into account the PCC's concept of a right to privacy that can be compromised. The suggested amendment would mean judges would have to take into account such self-publicity. There now seems a broad consensus among lawyers and elsewhere that a change in the Code could help to redress the balance.
10. An issue arises. Apparently, judges addressing the Code routinely ignore the preamble and the Public Interest panel, believing them not to be part of the numbered document. If the aim is to ensure judges take account of the whole of the Code, then it would make sense to specify that the provisions of the preamble and the Public Interest panel are included. This could be achieved by amending the preamble's first paragraph, which would read:

Suggested amendment in bold

All members of the press have a duty to maintain the highest professional standards. **This The Code, which includes this preamble and the public interest exceptions below, sets the benchmark for those ethical standards, protecting both the rights of the individual and the public's right to know...**

Privacy - the Princess Caroline case

From Dr Chris Pounder, Pinsent Masons Solicitors

11. Dr Pounder (in a two-line email giving no supporting evidence) suggests the Code should be reviewed in the light of the ECHR ruling in favour of Princess Caroline (Von Hannover) of Monaco, who had maintained that despite her title she was not a public office holder and had consistently complained about the intrusive activities of press photographers when she and her family were going about their private lives.
12. One legal opinion (Jonathan Coad) published in 2004 suggested: *The most obvious impact of this judgment is on press photography, since a clear "public interest" is now required to justify a photograph of a person who neither holds public office nor is engaged in an "official" activity. The ubiquitous pictures of celebrities in public places are no longer justifiable, and prominent individuals therefore have at least some privacy rights even in public places. The contextual test in the PCC Code of locations in which an*

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individual has "a reasonable expectation to privacy" is now obsolete under this new ruling.

13. The Code Committee considered this in September 2004, soon after the ruling and decided it was too early to reach any decision. Two years on, Von Hannover is one of a number of rulings, sometimes conflicting, which are taken into account in the courts. Other judgments have gone in other directions.
14. The Code does not define a reasonable expectation of privacy. Even if it is argued that the reasonable expectation might be altered by the judgment, that need not affect the wording of the Code, although it might be a matter for the PCC to take into account. The issue remains as to whether the Code's reference to "private places" is made obsolete. But if that distinction were removed, people would always have an expectation of privacy unless there was consent (or a public interest). That would outlaw crowd pictures or street scenes.
15. In the absence of unanimous legal advice that this is a definitive judgment with which the Code is automatically at variance, there would seem no present need for change.

Privacy - Information Commissioner's proposal

16. Consideration of the Information Commissioner's proposal for a change to the Code, after the publication of *What Price Privacy?* was postponed in October, pending a meeting with him. However, he has now formally submitted the proposed amendment for inclusion in the Code Review. It suggests an additional sub-clause, which would state: —
 - iii) It is unacceptable, without their consent, to obtain information about any individual's private life by payment to a third party or by impersonation or subterfuge. It is unacceptable to pay any intermediary for such information which was, or must have been, obtained by such means.
17. This appears to go beyond the remit of either the current Code or the law. First, it makes the obtaining of any private information - not just protected data - an automatic breach. Second, it makes the act of payment to a third party a critical test. The current test is whether a failure to respect private life (including digital communications) constitutes an intrusion. If it does, it is unacceptable, whether or not payment is involved.
18. Currently, the preamble requires editors and publishers to take care to ensure that the Code is observed rigorously by all editorial staff and external contributors, including non-journalists. Arguably, this would cover third parties, paid or not. The Code covers subterfuge explicitly. As impersonation involves misrepresentation, it is covered implicitly.
19. The Code Committee would need to decide whether activity acceptable without payment is inherently unacceptable when money changes hands. Is information automatically tainted by payment? Does it appear to condone breaching the Code? Would a genuine intrusion into privacy be any less so if payment had not been made?
20. Possible options: If the Committee felt payment was not an issue, then it might be that the Information Commissioner's proposal would serve little purpose. However, in the current climate it may be worth considering other ways to address his concerns.
21. For example, should we add an explicit reference to *accessing, digitally-held private information*? Alternatively, while relevant to Clause 3, it might be more apt in Clause 10, (Clandestine Devices). A possible wording is suggested in para 28 below.

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Clause 4 - Harassment

22. Following public criticism of the Kate Middleton media scrum, both the Privacy and Harassment clauses have been reviewed. Both appear tight. There could be little room for a reasonable expectation of privacy given the genuine public interest in any announcement of a royal engagement. The more appropriate clause would be Harassment, which bars persistent pursuit, allows for a 'desist' message, and specifically mentions freelancers.
23. The 'desist' mechanism worked in the Middleton case, though concerns have been raised about how long it took. There seems little room for strengthening the Code. Unless Committee members have a further proposal, no action is therefore recommended at this stage. If necessary, it could be revisited in the light of the Select Committee report.

Clauses 6/8 - Children and Hospitals

24. [redacted] a consultant orthopaedic surgeon at the Royal Aberdeen Children's Hospital, suggests the protection for child patients is less than the Code provides for children in school. He believes parents and other third parties might be persuaded to take photographs for the press, because they do not always understand the full implications for the child's welfare. On occasions the father and mother disagree on the right course, and sometimes the parents are themselves under investigation in relation to the child's injuries.
25. He suggests: Advice should be sought from the relevant clinician as to whether the publishing of images of the child in hospital would be appropriate. Where an editor chose to ignore the advice, he or she would need to have good reasons for doing so.
26. Possible options: It would be possible to harmonise schools and hospitals in Clause 6 iii, by changing it to state: Children must not be approached or photographed at school without permission of the school authorities or while in hospital without seeking advice from the responsible clinician. However disputes would almost certainly arise where it was parents, rather than journalists, taking the photographs.
27. Clause 10 - Clandestine devices and subterfuge

Current wording

- i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs.
- ii) Engaging in misrepresentation or subterfuge, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

28. If the Committee wished for alternative changes to those proposed by the Information Commissioner in the Privacy clauses, it is worth reviewing Clause 10, which is arguably more relevant in this area. While the Code mentions intercept of emails, and prohibits the unauthorised removal of documents or photographs, it does not specifically embrace information held in digital format, or hacking. Also, while it embraces contributors and non-journalists in the preamble, these are not specified. It would be possible here to mention agents or intermediaries.
29. In reality, both these areas are probably already covered by the Code. It seems unlikely that, in the spirit of the Code, accessing

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and copying private information from a computer without consent, would be any more acceptable to the PCC than unauthorised removal of photographs or documents. Nor - as was demonstrated by the Goodman case - would the use of an intermediary or agent if the aim was to circumvent the Code. That being so, there might be a case for covering both explicitly here.

Possible wording:

- i). ...mobile telephone calls, messages or emails; or by the unauthorized removal of documents, or photographs; or by accessing digitally-held private information without consent.
- ii). Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only etc....

Clause 12 Discrimination - proposal from the NUJ

30. The Committee rejected a proposal from the NUJ last year that refugee status should be added to the list of specified discrimination categories. We said it was difficult to define and that endless extension of the list would weaken the existing protection. The union has now reworded its proposal, substituting immigration status. The NUJ suggests this would cover a refugee, asylum seeker, immigrant or migrant. Mention of this status would be permitted only where it was relevant to the story, or was not pejorative or prejudicial.
31. Immigration status is the term used in a Home Office-funded report by ICAR (Information Centre about Asylum and Refugees in the UK) into the working of the PCC Code, and as a consequence is likely to feature increasingly in suggestions from other pressure groups. The NUJ disputes that endless extension of the list is a problem, on the grounds that the Code should stop all discrimination, regardless of how long the list.
32. Possible options: The Committee would need to decide if this is a legitimate exception to its long-held rule that tight control should be maintained on the number of discrimination categories.

Other proposals

33. Contempt of court:
34. Former *Sunday Times* journalist [] complains of a dangerous trend in the press to flout contempt laws, which could deny suspects a fair trial or lead to cases being dropped because a fair trial would be impossible. It can also stir racial prejudice, as in the case of arrests of Muslims in War on Terror investigations. He says newspapers publish government and police leaks regardless of sub judice implications, citing the Forest Gate raid as an example. He is supported by his MP, Oliver Letwin, and the shadow attorney-general, Dominic Grieve, who says Lord Goldsmith shares their concerns. Other press commentators have also suggested the line is being crossed.
35. [] complained to the PCC against *The Independent* for allegedly breaching the contempt law, but was not successful. He asked Sir Christopher Meyer to issue a general warning to newspapers to stay within the law. Failing that, he wanted the Code amended to address the problem. He says it is not fit for purpose in that this issue is not covered by the Accuracy or Discrimination clauses.
36. The Code is not the law. The issue of substantial risk of serious prejudice allows wide latitude for interpretation. If senior law officers issue warnings, then the press would ignore them at its peril. Whether the PCC would wish to issue its own alerts would be a matter for the Commission alone. If accuracy or discrimination is at issue, these matters could already be complained of under the Code.

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37. **Possible options:** In principle, no change seems necessary. However, the Committee should be aware of the parallel issue of payments to witnesses, where clauses effectively setting out the law were inserted in the Code, in the face of Lord Irvine's threat to introduce legislation, supported by custodial sentences for journalists.
38. **Jigsaw identification:**
39. The jigsaw identification rules have worked well. However this year, the Kent Messenger was fined £1,000 after a friend identified a former child rape victim, even though the paper had followed the Code. This clause has been reviewed - after consultation with the KM editorial director - in the light of that. The KM admitted the offence only to spare the victim from having to appear in court. The friend had guessed the name of the victim because the paper had published her age. No change appears necessary, although it would be a useful example for the Codebook.
40. **Conscience Clause:**
41. The NUJ raised with the Select Committee the possibility that a conscience clause should be inserted to allow individual journalists to abstain from work which they believed was not compliant with the terms of the Editors' Code. The Code Committee has previously considered a similar NUJ proposal in 2004. It was rejected because the principal responsibility for ensuring compliance rested with the editor, as emphasised in the revised preamble in the 2004 Code Review.
42. Compliance with the Code is also written into journalists' contracts of employment. A conscience clause would clash with the employees' obligation to carry out his duties under instruction from the editor. No change appears necessary.
43. **Defaming murder victims:**
44. Following apparent rejection of her complaint to the PCC, has suggested that the code be changed to prevent the publication of malicious falsehoods against murder victims who can't fight back.