

Forensic Disinformation as a Tactical and Forensic Means of Detecting and Solving Corruption Criminal Offenses

Larysa Bielik * ^a, Antonina Cheremnova ** ^b

* PhD in Law, Associate Professor, National University «Odessa Law Academy», Odesa, Ukraine, ORCID: <https://orcid.org/0000-0003-2183-6635>, e-mail: Larysa.bielik1@gmail.com

** Phd in Law, Associate Professor, Odessa RIFS, Odesa, Ukraine, ORCID: <https://orcid.org/0000-0002-0221-6337>, e-mail: cheremnova2506@gmail.com

^a Writing – original draft, project administration, methodology.

^b Writing – original draft.

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The article purpose is to study the peculiarities of implementing forensic disinformation as a tactical and forensic means for detecting and solving corruption criminal offenses. To achieve this goal, formal-logical and system-structural methods were used. Article 45 of the Criminal Code of Ukraine distinguishes two groups of corruption criminal offenses, during the detection and disclosure of which suspects (accused) provide false information about the method of preparation, commission or concealment of their criminal activity. The essence of criminal and forensic disinformation is compared. The author examines the practice of the US Supreme Court regarding the legality of using disinformation by police officers in identifying racketeers and corrupt organizations. The author substantiates the moral grounds for the use of forensic disinformation. It is noted that the legend remains an effective and classical means of its implementation, and the most common form is the tactical operation “staging”. The author distinguishes between the features of forensic and criminal staging. It is noted that forensic staging (as opposed to criminal staging) is a legitimate and constructive means of safeguarding and protecting the interests of an individual, society and the State from

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corruption criminal offenses. The author identifies the criteria for the use of forensic disinformation and defines its rules: 1) focus on the task; 2) validity, timeliness, mobility, efficiency, and flexibility; 3) compliance with the plan and the approved plan; 4) personnel, financial and logistical support; 5) situational validity, taking into account the personality of the offender; 6) creative approach with due regard for possible changes in the situation; 7) visualization.

Keywords: *corruption criminal offenses; forensic disinformation; investigative and operational search activities; detection and solving crimes.*

Research Problem Formulation

The scale of corruption in the activities of our government officials is staggering. Unfortunately, corruption is not a new problem for Ukraine. According to the international anti-corruption organization *Transparency International*, as of January 2023, Ukraine has slightly improved its performance: it received 33 points out of 100 in the *Corruption Perceptions Index (CPI)* for 2022, which means that this year our score increased by one point, and now our country ranks 116th out of 180 possible ¹.

Of course, this indicator is somewhat optimistic, but it is worth remembering that corruption is the basis for the global flourishing of the shadow economy. Corruption completely paralyzes the economic development of the state and destroys the principles of free and transparent business activity based on the principles of fair competition.

Despite a rather lengthy discussion, theorists and practitioners are still arguing over many problematic issues related to

the detection and disclosure of corruption-related criminal offenses.

In law enforcement practice, when detecting and solving corruption-related criminal offenses, officers of operational and investigative units are regularly forced to recognize false information provided by corrupt officials in order to avoid criminal liability. One of the most effective tactical means of recognizing the deception of corrupt officials is forensic disinformation, although recently, officers of operational and investigative units have been forced to prove the legality of its use. Given not only the theoretical but also the practical importance of forensic disinformation in the criminal justice system of Ukraine, the relevance of this issue is growing day by day and requires careful study and analysis.

Analysis of Essential Research and Publications

The theoretical, legal and practical aspects of the implementation of forensic disinformation are studied in the works

1 Україна — 116-та з-поміж 180 країн в Індексі сприйняття корупції / Детектор медіа [Електронний ресурс]. 07.02.2023. URL: <https://cs.detector.media/reforms/texts/185173/2023-02-07-ukraine-116-ta-z-pomizh-180-krain-v-indeksi-spryynyattya-koruptsii/> (date accessed: 06.11.2023).

written by: O. Bandurka ², V. Zhuravel ³, I. Kohutych ⁴, V. Lukashevych ⁵, M. Pohoretsky ⁶, V. Tishchenko ⁷, M. Stashchak ⁸, V. Shepitko ⁹ and other Ukrainian scientists. However, a significant number of issues remain the subject of debate in scientific and practical circles, and some of them, given the development of investigative and operational search practice,

require additional reflection and scientific substantiation.

Article Purpose

To investigate forensic disinformation as a tactical and forensic means in the detection and disclosure of corruption criminal offenses.

- 2 Бандурка О. М., Бандурка І. О. Злочинність і сучасність : монографія. Харків, 2020. 408 с.
- 3 Журавель В. А. Алгоритми в криміналістиці / Велика українська юридична енциклопедія : у 20 т. Т. 20 : Криміналістика, судова експертиза, юридична психологія // редкол.: В. Ю. Шепітько та ін. Харків, 2018. С. 20—22 ; Його ж. Злочини корупційної спрямованості. Там само. С. 322—323 ; Його ж. Об'єкт пізнання криміналістики. *Питання боротьби зі злочинністю* : зб. наук. пр. 2020. Вип. 39. С. 12—22. DOI: 10.31359/2079-6242-2020-39-12 (date accessed: 06.11.2023) ; Журавель В. А., Шепітько В. Ю. Розвиток криміналістики та судової експертизи в Україні: наближення до єдиного європейського простору / Правова наука України: сучасний стан, виклики та перспективи розвитку : монографія. Харків, 2021. С. 651—669.
- 4 Когутич І. І. Тактичні складові дій прокурора з укладення угоди про визнання винуватості обвинуваченим. *Криміналістика і судова експертиза*. 2021. Вип. 66. С. 190—200. DOI: 10.33994/kndise.2021.66.20 (date accessed: 06.11.2023).
- 5 Лукашевич В. Г. Докази та доказування в кримінально-процесуальному та криміналістичному вимірі. *Держава та регіони. Серія: Право*. 2016. № 1 (51). С. 76. URL: http://nbuv.gov.ua/UJRN/drp_2016_1_16 (date accessed: 06.11.2023).
- 6 Погорецький М., Старенький О. Негласні слідчі (розшукові) дії як засоби отримання доказів: окремі проблемні питання. *Право України*. 2018. № 8. С. 85—106. DOI: 10.33498/lopu-2018-08-085 (date accessed: 06.11.2023) ; Їх же. Чому результати НС(Р)Д не будуть доказами без розсекречування дозволів на їх проведення. *Закон і бізнес* [Електронний ресурс]. 2018. Вип. № 47 (1397). URL: <https://zib.com.ua/ua/135424.html> (date accessed: 06.11.2023).
- 7 Тіщенко В. В. Щодо поняття, завдань і змісту криміналістичної тактики. *Традиції та новації юридичної науки: минуле, сучасність, майбутнє* : мат-ли Міжнар. наук.-практ. конф. (Одеса, 19.05.2017). У 2 т. Т. 2. Одеса, 2017. С. 409—411. URL: <http://hdl.handle.net/11300/11608> (date accessed: 06.11.2023); Тіщенко В. В., Белік Л. С. Кримінальні та криміналістичні фікції як форми дезінформування у розслідуванні злочинів. *Правове життя сучасної України* : мат-ли Міжнар. наук.-практ. конф. (Одеса, 17.05.2019). У 2 т. Т. 2. Одеса, 2019. С. 395—397. URL: <https://hdl.handle.net/11300/21513> (date accessed: 06.11.2023) ; Тіщенко В. В. Криміналістичне розпізнавання в розслідуванні злочинів. *Там само*. (Одеса, 15.05.2020). У 3 т. Т. 3. Одеса, 2020. С. 325—327. URL: <https://hdl.handle.net/11300/13329> (date accessed: 06.11.2023).
- 8 Стащак М. В., Плєскач О. Ю. Використання дезінформації підрозділами кримінальної поліції в умовах правової держави. *Сучасні проблеми правового, економічного та соціального розвитку держави* : тези доп. Міжнар. наук.-практ. конф. (Харків, 27.11.2020). Харків, 2020. С. 168—170. URL: <https://dspace.univd.edu.ua/server/api/core/bitstreams/f27afe88-6df0-447b-82a8-563388f5b7bf/content> (date accessed: 06.11.2023).
- 9 Шепітько В. Теоретико-методологічна модель криміналістики та її нові напрями. *Теорія та практика судової експертизи і криміналістики*. 2021. Вип. 3 (25). С. 9—20. DOI: 10.32353/khrife.3.2021.02 (date accessed: 06.11.2023) ; Шепітько В., Шепітько М. Формування цифрової криміналістики як стратегічний напрямок розвитку науки. *Criminalistics and Forensic Expertology: Science, Studies, Practice* : XVII Medzinarodny Kongres Kriminalistika a Forenzne Vedy (Bratislava, Slovenská republika, 16—17.09.2021). Bratislava, 2021. С. 190.

Research Methods

Using the formal logical method, the author determines the peculiarities of the use of criminal and forensic disinformation by officers of operational search and investigation units as a tactical and forensic means of detecting and solving corruption crimes. Using the systemic-structural method, the author analyzes the peculiarities of the use of criminal and forensic disinformation and identifies the criteria by which it can be stated that forensic disinformation is specifically used in the course of detection and disclosure of this category of crimes.

Main Content Presentation

Ukrainian legislation provides for criminal liability for providing deliberately false testimony, and defamation (dissemination of deliberately false information that discredits the dignity and honor of another person or undermines his or her reputation). Ukrainian criminal law contains a long list of crimes based on the preparation, commission, and concealment of deliberately false information.

This list includes corruption criminal offenses. Thus, in the note to Article 45 of the Criminal Code of Ukraine (hereinafter - *the CC of Ukraine*), corruption criminal offenses are “*criminal offenses under Articles 191, 262, 308, 312, 313, 320, 357, 410, if committed through abuse of official position, as well as criminal offenses under Articles 210, 354, 364, 3641, 3652, 368-3692 of this Code*”¹⁰.

Analyzing the content of Article 45 of the Criminal Code of Ukraine, we see that the legislator conditionally divides corruption criminal offenses into two groups.

The first group includes:

- misappropriation, embezzlement or seizure of property through abuse of official position (Article 191 of the Criminal Code of Ukraine);
- stealing, appropriating, extorting firearms, ammunition, explosives or radioactive materials or obtaining them by fraud or abuse of office (Article 262 of the Criminal Code of Ukraine);
- stealing, misappropriation, extortion of narcotic drugs, psychotropic substances or their analogues or their acquisition through fraud or abuse of official position (Article 308 of the Criminal Code of Ukraine);
- stealing, misappropriation, extortion of precursors or their acquisition through fraud or abuse of official position (Article 312 of the Criminal Code of Ukraine);
- theft, misappropriation, extortion of equipment intended for the manufacture of narcotic drugs, psychotropic substances or their analogues, or seizure of such equipment by fraud or abuse of office, and other illegal actions with such equipment (Article 313 of the Criminal Code of Ukraine);
- violation of the established rules for the circulation of narcotic drugs, psychotropic substances, their analogues or precursors (Article 320 of the Criminal Code of Ukraine);
- stealing, misappropriation, extortion of documents, stamps, seals, obtaining them by fraud or abuse of office, or damaging them (Article 357 of the Criminal Code of Ukraine);

10 Кримінальний кодекс України від 05.04.2001 р. № 2341-III (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (date accessed: 06.11.2023).

- theft, misappropriation, extortion by a serviceman of weapons, ammunition, explosives or other munitions, vehicles, military and special equipment or other military property, as well as their acquisition through fraud or abuse of office (Article 410 of the Criminal Code of Ukraine).

These crimes can be considered corruption only if their subject belongs to the category of persons defined in parts 3, 4 of Article 18 of the Criminal Code of Ukraine and the note to Article 364 of the Criminal Code of Ukraine ¹¹.

The second group consists of corruption crimes that contain an unlawful corruption component:

- misuse of budgetary funds, making budgetary expenditures or granting loans from the budget without the established budgetary allocations or with their excess (Article 210 of the Criminal Code of Ukraine);
- bribery of an employee of an enterprise, institution or organization (Article 354 of the Criminal Code of Ukraine);
- abuse of power or official position (Article 364 of the Criminal Code of Ukraine);
- abuse of authority by an official of a legal entity of private law regardless of its organizational and legal form (Article 364¹ of the Criminal Code of Ukraine);
- abuse of power by persons providing public services (Article 365² of the Criminal Code of Ukraine);
- acceptance of an offer, promise or receipt of an unlawful benefit by

an official (Article 368 of the Criminal Code of Ukraine);

- bribery of an official of a legal entity of private law, regardless of its organizational and legal form (Article 368³ of the Criminal Code of Ukraine);
- bribery of a person providing public services (Article 368⁴ of the Criminal Code of Ukraine);
- offering, promising or giving an unlawful benefit to an official (Article 369 of the Criminal Code of Ukraine);
- abuse of influence (Article 369² of the Criminal Code of Ukraine) ¹².

Given the peculiarities of these corruption criminal offenses, in practice, there are certain difficulties in detecting and solving them. The analysis of criminal proceedings under the above-mentioned articles of the Criminal Code of Ukraine shows that criminals (in order to avoid criminal punishment) provide false information about the corruption criminal offense they have committed. Such information acquires the status of criminal disinformation, as it misleads employees of operational and investigative units; liability arises for its provision.

Criminal disinformation is a means of achieving a criminal intent that criminals use to commit and conceal corruption criminal offenses. In contrast, forensic (operational or investigative) disinformation is a permissible, lawful and effective element of the system of means used by officers of operational and investigative units in the detection and disclosure of corruption criminal offenses.

11 Кримінальний кодекс України URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (date accessed: 06.11.2023).

12 Ibid.

The perpetrators of corruption-related criminal offenses are highly educated and often have substantial practical experience in a particular field, so they purposefully use both traditional and modern criminal disinformation technologies. In this context, employees of operational and investigative units constantly monitor the latest criminal disinformation technologies.

A legend remains a rather effective and classic means of forensic disinformation. Investigators effectively use this tool during the interrogation of accused (suspects) who deny their involvement in corruption-related criminal offenses. As a tactical element, the legend is more often used in practice by officers of operational and investigative units during the implementation of operational and investigative means or during covert investigative search actions on a separate order of the investigator.

In studying and analyzing the problem of disinformation in the operational and investigative activities aimed at detecting and solving corruption criminal offenses, it is worth paying attention to the following important circumstances. The defense, representing the interests of its corrupt client, constantly appeals to the fundamental inadmissibility of using any form of disinformation by the officers of the detective and investigative units. This position of the lawyer is quite understandable, but do they correctly interpret the essence of forensic disinformation? It is quite obvious, for example, that covert infiltration of an employee into a criminal corruption

formation (group) in order to expose their criminal activities cannot be carried out without the use of forensic disinformation. Since without the application of misleading information (for example, without misleading the other members of the corrupt formation (group) about his or her identity or true intentions), such an employee will not be able to penetrate them, he or she will not obtain information about corrupt activities (corruption schemes) in which these formations (groups) participate or are organized. Obviously, forensic disinformation and forensic deception are the things without which officers of detective and investigative units will not be able to collect information about the criminal and his criminal activities. Of course, it is not allowed to incite a person to commit a crime, which the legislator has unambiguously stipulated in Article 271 “*Control over the commission of a crime*” of the Criminal Procedure Code of Ukraine (hereinafter — *the CPC of Ukraine*)¹³.

We have analyzed foreign practices on the matter. For example, the Supreme Court of the United States of America actively uses the provisions of “*The Racketeer Influenced and Corrupt Organizations Act, RICO Act*”¹⁴, which has been in effect since the fall of 1970, and as a result, distinguishes between a criminal situation artificially created for an innocent person and the creation of a “*trap*” for a criminal. In this context, provocative actions exist if employees of operational search or investigative units incited or encouraged a person to commit a corruption criminal

13 Кримінальний процесуальний кодекс України від 13.04.2012 р. № 4651-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 06.11.2023).

14 RICO Offenses (Racketeer Influenced and Corrupt Organizations). Prepared by the Office of the General Counsel. 29 p. URL: https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_RICO.pdf (date accessed: 06.11.2023).

offense by deliberately misleading him/her about the legality of his/her actions and using means that encouraged such a person to commit illegal actions that he/she would not have committed if he/she was not inclined to such activities ¹⁵.

Thus, when solving corruption-related criminal offenses, forensic disinformation can not only be but should be used as an auxiliary tool to identify true information. For instance, in Chapter 21 “Covert Investigative (Detective) Actions” (hereinafter - *CIDA*) of the CPC of Ukraine, the national legislator stipulated, in particular, the inspection and seizure of correspondence (Article 262), the removal of information from electronic communication networks (Article 263) and electronic information systems (Article 264), which does not fully comply with the generally accepted norms of morality. At the same time, the negative moral perception of these articles of the CPC of Ukraine by the society ¹⁶ is not a prohibition for their implementation, as they are less evil than corruption criminal offenses, because the purpose of these *CIDAs* is certainly moral, especially given that the permission to conduct them is granted by the court ¹⁷.

Decision-making in this context is the result of moral principles and appropriate actions. This is possible only when officers of operational search or investigative units have no other opportunity to obtain truthful information in any other way: as a result of these measures, they achieve a positive result.

We consider it appropriate to formulate the question of the admissibility of using forensic disinformation to detect and solve corruption criminal offenses as follows: when (under what circumstances) such disinformation remains the only possible tactical and forensic means of obtaining truthful information, under what conditions it can be used, and, of course, to define clear limits of its use.

When implementing forensic disinformation, the person against whom it is used always retains the right to choose how to behave, and general human rights must be respected.

In view of the above, forensic disinformation should be implemented as a tactical and forensic tool that misleads a suspected corruption criminal offense about the true state of events, while initiating them to take active actions that will demonstrate their true attitude to specific events, with the obligatory simultaneous documentation of this attitude. Since forensic disinformation is implemented by employees of operational and investigative units, it is an independent method of operational and investigative activity, or an element of a certain method of cognition and proof, or a tactical operation or operational combination.

An analysis of criminal proceedings on corruption-related criminal offenses shows that forensic disinformation is most often implemented in the form of a tactical “*staging*” operation. Forensic disinformation in the form

15 RICO Offenses URL: https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_RICO.pdf (date accessed: 06.11.2023).

16 Кримінальний процесуальний кодекс України URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 06.11.2023).

17 Інструкція про організацію проведення негласних слідчих (розшукових) дій та використання їх результатів у кримінальному провадженні : затв. наказом Генпрокуратури, МВС, СБ, Адмін. Держприкордонслужби, Мінфіну, Мін'юсту України від 16.11.2012 р. № 114/1042/516/1199/936/1687/5. URL: <https://zakon.rada.gov.ua/laws/show/v0114900-12#Text> (date accessed: 06.11.2023).

of staging is the antithesis of criminal disinformation - criminal staging carried out by perpetrators of corruption criminal offenses to counteract the detection and disclosure of such offenses, when the perpetrator misleads employees of operational and investigative units, judges, experts to conceal their corruption and avoid criminal punishment.

Forensic staging (as opposed to criminal staging) contains a legitimate constructive means of safeguarding and protecting the interests of individuals, society, and the state from corruption-related criminal offenses. The forensic staging, which is organizationally, tactically, and technically supported, is aimed at misinforming the corrupt criminal. Such disinformation is essential, for example, during a tactical operation to expose bribe-takers. This is done by conducting an operational experiment (as an operational and investigative measure) or as a special investigative experiment (as one of the forms of CIDA under Art. 271 *“Control over the commission of a crime”* of the CPC of Ukraine with the participation of a person from whom the subject of the unlawful benefit is extorted. As part of such an operation, the person who provides the object of the unlawful benefit, under the close supervision of the operational and investigative units, imitates the behavior expected of the extortionist who is detained after the transfer of the object of the unlawful benefit, the characteristics of which are previously recorded by the operational and investigative units in the criminal proceedings.

Forensic disinformation in the form of a tactical operation is also a means of tracking down a corrupt criminal who is hiding from operational and investigative units, the court, or evading criminal

punishment for corruption-related criminal offenses.

Let us highlight the criteria that indicate the implementation of forensic disinformation in the detection and disclosure of corruption criminal offenses:

- the imitation component of demonstrating the verbal or non-verbal behavior of a corrupt criminal;
- the ability of the developed forensic disinformation to influence the psychological state of the corrupt criminal and mislead him/her about the true state of events;
- the presence of imitation components in the course of certain activities (e.g., operational cover documents, means of disguising appearance, etc.);
- the use of certain attributes and details in a specific typical or atypical situation.
- Forensic disinformation should be based on certain rules:
- directly relate to the tasks to be performed during the detection and disclosure of corruption criminal offenses;
- be reasonable, timely, and effective;
- be flexible, given its connection with other components of the whole process;
- be implemented taking into account the developed idea and features of the approved plan, as well as the necessary personnel, financial and logistical support;
- have situational validity, taking into account the personality of the corrupt offender;
- be based on a creative approach in analyzing and evaluating the

current situation, with due regard for possible changes in such a situation, as well as the expected results, opportunities, and directions of its use in the future;

- be as veiled as possible in order to exclude the possibility of exposing it or its sources.

Conclusions

The results of the implemented forensic disinformation as a tactical and forensic tool must be recorded by the responsible persons of the operational and investigative units in charge of the materials of the proceedings on the corruption criminal offense. One of the characteristic features of such disinformation is its point nature and limited information impact within the place and time of its implementation, so the timely recording of the results obtained in this way is a mandatory rule for an effective implementation process. Forensic disinformation as a tactical and forensic means of detecting and disclosing corruption criminal offenses is developed and implemented only when it is impossible to successfully resolve the problematic situation without it (in any other way): it is used only during the implementation of operational search activities or investigative search actions.

Криміналістична дезінформація як тактико-криміналістичний засіб виявлення та розкриття корупційних кримінальних правопорушень

Лариса Белік, Антоніна Черемнова

Мета статті — дослідити особливості реалізації криміналістичної дезінформації як тактико-криміналістичного засобу виявлення й розкриття корупційних кримінальних правопорушень. Для

досягнення мети застосовано формально-логічний і системно-структурний методи. За ст. 45 Кримінального кодексу України виокремлено дві групи корупційних кримінальних правопорушень, під час виявлення та розкриття яких підозрювані (обвинувачені) надають неправдиві відомості про спосіб підготовки, скоєння або приховання своєї злочинної діяльності. Зіставлено сутність кримінальної та криміналістичної дезінформації. Досліджено практику Верховного Суду США щодо законності використання дезінформації поліцейськими під час виявлення рекетирів і корумпованих організацій. Обґрунтовано моральні підстави для застосування криміналістичної дезінформації. Зауважено, що ефективним і класичним засобом її реалізації залишається легенда, а найбільш поширеною формою — тактична операція «інсценування». Розмежовано особливості криміналістичного та кримінального інсценування. Зазначено, що криміналістичне інсценування (на відміну від кримінального) є законним і конструктивним засобом забезпечення та захисту інтересів особистості, суспільства й держави від корупційних кримінальних правопорушень. Виокремлено критерії застосування криміналістичної дезінформації, визначено її правила: 1) спрямованість на виконання завдання; 2) обґрунтованість, своєчасність, мобільність, дієвість, гнучкість; 3) відповідність задуму й затвердженому плану; 4) кадрове, фінансове й матеріально-технічне забезпечення; 5) ситуаційна обґрунтованість з урахуванням особистості злочинця; 6) творчий підхід з обов'язковим урахуванням можливих змін ситуації; 7) візуалізація.

Ключові слова: корупційні кримінальні правопорушення; криміналістична дезінформація; кримінальна дезінформація; слідча й оперативно-розшукова діяльність; виявлення та розкриття злочинів.

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Declaration of Competing Interest

The authors declares that there is no conflict of interest.

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