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## The criminal responsibility for defamation of knowingly innocent

### КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА ОБМОВУ ЗАВІДОМО НЕВИНУВАТОГО

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#### Abstract

The scientific article analyzes the acute discussion in law enforcement practice and procedural science of the problem of the possibility of criminal prosecution of a suspect, accused of defaming a knowingly innocent person in the commission of a crime. The theoretical basis of the article are scientific works on criminal law and criminal procedural law (both domestic researchers and foreign experts). A set of general scientific, special scientific and philosophical methods of scientific knowledge has been used while preparing the scientific article, in particular dialectical, historical, comparative, dogmatic (formal-logical), system-structural analysis, modeling. It is substantiated in the article that the behavior of the suspect, accused, which is manifested in slandering of a knowingly innocent person, does not constitute the right to freedom from self-disclosure. It is also proved that both freedom from self-disclosure and the right to defense in criminal proceedings must have certain limits, in particular, it is rights and interests of other subjects protected by criminal law. We stated

#### Анотація

У науковій статті аналізується гостра дискусія у правоохоронній практиці та процесуальній науці щодо проблеми можливості кримінального переслідування підозрюваного, обвинуваченого за наклеп на завідомо невинну особу у вчиненні злочину.

Теоретичною основою статті є наукові праці з кримінального права та кримінального процесуального права (як вітчизняних дослідників, так і зарубіжних експертів). При підготовці наукової статті був використаний комплекс загальнонаукових, спеціальних наукових та філософських методів наукового пізнання, зокрема діалектичний, історичний, порівняльний, догматичний (формально-логічний), системно-структурний аналізу, моделювання.

У статті обґрунтовано, що поведінка підозрюваного, обвинуваченого, що виявляється в наклепі на завідомо невинну особу, не становить права на свободу від самовикриття. Також доведено, що як свобода від саморозкриття, так і право на захист у кримінальному провадженні мають мати певні

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that the suspect or accused should be liable for misleading the court and pre-trial investigation bodies even if such deception was used to protect against the suspicion (or accusation), to avoid criminal liability.

**Key words:** accused, defamation, false accusation, knowingly innocent, perjury of the suspect / accused, right to protection, suspect.

## Introduction

The practice of applying the norms of criminal and criminal procedural legislation (well, and, of course, the level of development of these norms) must exclude any illegal criminal prosecution and unlawful conviction of the innocent, unreasonable application to those not involved in the commission of an act prohibited by criminal law, any other measures of criminal law influence (Smith, Morgan & Lagnardo, 2018, p. 135).

Also, there is a negative trend: by deliberately false reports of criminal offences and deception a court or other authorized body, using the capabilities of criminal justice authorities, individuals seek: a) concealment of the criminal offence committed by them, b) unjustified release of relatives or acquaintances from criminal responsibility, c) concealment of one's own immoral behavior, d) elimination of competitors, e) illegal release from the obligation to compensate the damage, f) unreasonable receipt of insurance payments, etc.

As a result, law enforcement agencies are distracted, wasting time and effort, incurring material costs, verifying false information, and in fact distracting themselves from investigating and combating real criminal offences.

Criminal proceedings are often instituted for deliberately false reports of criminal offences and for deliberately perjuries, investigatory actions are carried out (often not cheap), measures of procedural coercion may be unreasonably applied to persons completely not involved in the commission of such acts.

The following illegal actions cause significant damage: 1) the interests of individuals (as a result

межі, зокрема це права та інтереси інших суб'єктів, що охороняються кримінальним законодавством. Ми визначили, що підозрюваний або обвинувачений повинен нести відповідальність за введення в оману суду та органів досудового розслідування, навіть якщо такий обман був використаний для захисту від підозри (або обвинувачення), щоб уникнути кримінальної відповідальності.

**Ключові слова:** підозрюваний, обвинувачений, завідомо невинуватий, наклеп, неправдиве обвинувачення, право на захист, завідомо неправдиві показання підозрюваного/обвинуваченого.

of possible unreasonable notification of suspicion, indictment, choice of precautionary measures, other significant violations of the rights and freedoms of the innocent); 2) normal activities of law enforcement agencies and their authority.

The above indicates the high public danger of deliberately false reports of criminal offences and deliberately perjuries (deceivment the court or other authorized body).

The qualification of these acts in practice, often involves errors, there is no unity of position and the judicial interpretation of these features. This is largely due to the imperfection of the norms of the Criminal Code of Ukraine, which provides responsibility for these actions, (deliberately false report of a crimes and deception the court or other authorized body), because the problems of qualification of these types of crimes are insufficiently developed in the theory of criminal law. A lot of issues are controversial: in particular, staging of a crime, defamation and self-defamation.

Scientists have already investigated the issue of criminal responsibility for deliberately perjuries of suspects / accused persons in relation to persons conducting criminal proceedings, as well as the admissibility of using deliberately perjuries of these participants in the process as a way to protect their own interests. At the same time, all problematic issues related to criminal responsibility for deliberately perjuries (including suspects, accused) have not been resolved. Many issues of this problem are debatable and need further scientific development. That is why, there is a need for an in-depth analysis of law enforcement practices related to this problem, appropriate doctrinal

approaches and the development of scientifically sound proposals for improving criminal responsibility for deception the court or other authorized body.

### Literature review

The privilege of not giving explanations, testimony about oneself is an important attribute of a fair legal proceedings. Therefore, its correct understanding is a guarantee that the fundamental rights of the participants in the process (first of all, the suspect or accused) will be respected. However, it should be noted that the content of the privilege against self-disclosure (as well as the exposure of close relatives, family members) is far from unambiguous. In particular, the question of the scope and boundaries of its actions are controversial, namely: whether the suspect or accused has the right to give perjuries (including in relation to another specific deliberately innocent person), protecting his self from suspicion or accusation? This issue is not clearly foreseen in the legislation, and there is no unity of opinion among researchers on it. In particular, Smith et al. (2018), Kornukov (2018), Dikarov (2010), Zheleva (2019) propose to establish criminal responsibility of the suspect, accused for giving perjuries to a certain participant in the legal proceedings. Smolkova (2016), Kashapov (2015), Adamenko (2004) are convinced that such behavior can not be considered an acceptable way of protection. But Smolyn (2012) as well as Kalinichenko (2015) directly say that such behavior is not due to his legitimate interests, contrary to the public interest.

Bahautdinov (2004), on the other hand, points out to the legitimacy of such conduct, noting that the accused does not violate any legal prohibitions, and, at the same time, draws attention to the fact that it is indirect evidence of the guilt of the suspect, accused. Another group of scholars, Kuchynska and Yavorskyi (2011), believe that the right of suspects or accused to give perjuries is linked to the need of effective secure the right to defense, the latter is incompatible with the obligation to give truthful testimony, giving deliberately perjuries does not contradict any principle of criminal procedure, from a moral point of view, any untruth must be condemned, but from a legal point of view, the accused must defend his innocence.

This scientific article is devoted to finding out which of the following approaches is the most reasonable, and justified.

### Methodology

The theoretical basis of the article are scientific works on criminal law and criminal procedural law (both domestic researchers and foreign experts). The normative and legal basis of this scientific work is the Model Criminal Code for the member states of the Commonwealth of Independent States (hereinafter - the CIS), the Criminal code of Ukraine and other post-Soviet states (namely, Republic of Azerbaijan, Republic of Belarus, Republic of Armenia, Georgia, Republic of Estonia, Republic of Moldova, Russian Federation, Republic of Kazakhstan, the Kyrgyz Republic, Republic of Latvia, Republic of Tajikistan), criminal codes and other normative acts of the Anglo-Saxon and Romano-Germanic systems of law, in particular: United States of America, Republic of Slovenia, Slovak Republic, Kingdom of Sweden, Swiss Confederation, Principality of Liechtenstein, Hungary, Kingdom of Denmark, Kingdom of Spain, Republic of Poland, Republic of Croatia, Republic of Korea, Criminal Procedural Code of Ukraine, Constitution of Ukraine. In addition, the relevant case law of the European Court of Human Rights (ECR), and decisions of the Supreme Courts of individual countries on the analyzed issue has been analyzed. A set of general scientific, special scientific and philosophical methods of scientific knowledge has been used while preparing the scientific article, in particular *dialectical* - to understand the problem of research, its structuring and step-by-step cognition, *historical* - to study the development of legislation on criminal responsibility for certain crimes against justice, *comparative* - to clarify the approaches to the criminalization of these acts in the laws of different countries, *dogmatic (formal-logical)* - for the analysis of legal constructions of separate bodies of the crimes provided by section XVIII of the Special part of Criminal Code of Ukraine for the purpose of revealing of existing lacks and formation of the offers directed on their overcoming, *system-structural analysis* - to study the relationship of the analyzed criminal law provisions with other norms and institutions of substantive and procedural criminal law, *modeling* - to construct models of criminal law prohibitions that can be used to improve criminal and criminal procedural law. At the same time, all methods of scientific research has been used in conjunction, which contributed to the objectivity, comprehensiveness and completeness of this scientific research.

## Discussion and results

In practice, there are many situations in which the suspect or accused, denying his own guilt in committing the crime charged against him, defames other specific persons. The reasons for this behavior can be different: 1) the desire to avoid criminal responsibility, 2) to ensure that the sentence imposed on him is milder, 3) to take revenge on others, etc.

The consequence of such actions may be: further unreasonable suspicion (accusation), and, possibly, even the conviction of not guilty person of a criminal offence.

Two radically opposite positions were expressed among scientists regarding the possibility of bringing a suspect, accused to criminal responsibility for these actions.

Proponents of the first position Kuchynska and Yavorskyi (2011) are convinced that the suspect or accused is not liable for deception of a court or body conducting the pre-trial investigation, because defame of the innocent belongs to the method of protection not prohibited by criminal legislation (p. 22-23), this is one of the manifestations of freedom from self-disclosure. (Law No. 4651-VI, 2013, art. 7, 18) The main argument of Kuchynska and Yavorskyi (2011) consists in that suspect or accused are not mentioned as a subjects of a crime which is foreseen in the art. 384 of the Criminal code of Ukraine, "deception a court or other authorized body". A witness and victim are among the special subjects of this crime (which consists in giving deliberately false testimony). (p. 23)

It should be noted that a similar approach to solving this issue is demonstrated by the developers of the Draft of the new Criminal Code of Ukraine (n.d., art. 7.5.10.) and legislators of almost all countries of the CIS (in particular it is foreseen in the art. 297 of the Law No. 787-IQ (1999), art. 401 of the Law of the Republic of Belarus No. 285-3 (1999), art. 338 of the Law of the Republic of Armenia No. 3P-528 (2003), art. 307 of the Law No. 63-F3 (1996), art. 420 of the Law of the Republic of Kazakhstan No. 226-V (2014), art. 345 of the Criminal code of the Law of the Kyrgyz Republic No. 19 (2017), art. 312 of the Law of the Republic of Moldova No. 985 (2002), art. 351 of the Law of the Republic of Tajikistan No. 684 (1998), art. 175 of the Law of Estonia No. L-60500 (2001), art. 238 of the Law of the Republic of Uzbekistan No. 2012-XII (1994). Apparently, they adopted the provisions

of the Law No. 7-5 (1996), in which suspect, accused is not foreseen as a subject of the crime, deception a court or other authorized body (art. 329).

According to Bahautdinov (2004), the law does not explicitly prohibit the accused from defending himself by accusing other people of committing a crime incriminated against him. The scholar argues that only when the law prohibits these actions it can be alleged that this participant is illegally protected (p. 127).

These considerations have been reasonably criticized. After all, the testimony of the accused, which contains a knowingly false denunciation, is such a piece of evidence that under the unfavorable outcome of various circumstances can play a decisive role in sentencing a person not involved in the crime (Smolkova, 2016, p. 6), (Kashapov, 2015, pp. 54-58), (Smolyn, 2012, pp. 27-28), (Kalinichenko, 2015, pp. 77-78), (Zheleva, 2019, pp. 70-74), (Kornukov, 2018, pp. 172-173).

The Supreme Court of the RSFSR states that if the accused reports knowingly false testimony against others, claiming, for example, that he did not commit the crime, pointing to another specific person as a criminal or underestimating his own role in committing a crime by slandering the accomplices, his actions should be considered as a perfectly acceptable way of protection. If the accused gives knowingly false testimony, going beyond the charges against him, he is liable for knowingly false reporting of a crime. (Simonov case, 1991) The Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation was guided by the same considerations in Neznamov case (1997).

Thus, the logic of the supporters of the first of these positions is as follows: since the law does not prohibit defamation of a knowingly innocent suspect (accused), this participant in the process may resort to defaming a particular person for personal protection. The authors of the article strongly disagree with this approach; on the contrary, they completely share the opposite point of view.

And this other position comes down to the fact that the suspect / accused should be responsible for misleading the court and pre-trial investigation bodies (of course, *de lege ferenda* - in the case of appropriate changes to Article 384 of the Criminal Code of Ukraine) - even if the purpose of such deception was protection against

suspicion (or accusation), avoidance of criminal liability.

There are plenty of followers of this second approach. For example, some researchers are convinced (and the authors of the article completely agree with) that slandering another person is a manifestation of an illegal need of the suspect / accused to avoid responsibility; they consider it illegal for the accused to seek to use justice for slander, to convict a knowingly innocent person in retaliation for lawful acts (Adamenko, 2004, p. 32); and propose to deprive the suspect / accused of the rights he normally uses to satisfy his interests contrary to the law, indicating, *inter alia*, the right of the accused to defame the innocent. Proponents of this position point out that in the case of unlawful remedies involving knowingly false accusations of another person, the accused should be prosecuted because: a) the right to defense is neither absolute nor unlimited; b) its implementation should not restrict the rights of the other people (Dikarov, 2010, p. 59).

The authors of the article agree with the above position and believe that the unlimited possibility of protecting one's own interests by slandering others is unacceptable; the suspect / accused does not and cannot in principle have the right to defame the innocent; slandering the innocent is a manifestation of an illegal method of defense.

At the same time, the authors of the article defend the position according to which the composition of the misleading court or other authorized body should not be extended to any attempts of the perpetrator to avoid criminal liability. What is decisive here is the absence of slander of a particular person in the commission of the criminal offense that was incriminated to the suspect / accused.

By the way, this is the approach advocated by the authors of a number of states, believing that there is no reason to give the suspect, the accused an unjustified opportunity to lie with impunity about a knowingly innocent person (even if such behavior is a way to avert suspicion / accusation). Relevant acts are recognized as criminally punishable acts, for example, in Article 370 of the Law of Georgia No. 2287 (1999), Article 300 of the Law of Latvia No. L-56383 (1998), Article 156 of the Law of Korea No. 293 (1953), Article 283 of the Law of the Republic of Slovenia No. KZ-1 (2008), Art. 345 of the Law of the Slovak Republic No. 300-2005 (2005), Article 5, Section 15 of the Law of Sweden No. SFS1962:700 (1962), Article 303 of the Law of

Switzerland No. RS 311.0 (1937), §112 of the Law of the Principality of Liechtenstein No. 1988-037 (2011), Article 268 of the Law of Hungary No. Act C (2012), §281 of the Law of the Kingdom of Denmark No. 909 (2005), Article 304 of the Law of the Republic of Croatia No. 71-05-03/1-11-2 (2011), Article 164 of the Law of Germany No. L-51220 (1998), Article 456 of the Law of the Kingdom of Spain No. 10-1995 (1995), Article 234 of the Law of the Republic of Poland No. 88.553 (1997) etc.

As it was already mentioned, some supporters of the approach according to which the suspect / accused has the right to lie about another person with impunity refer to the implementation of this participant's process of freedom from self-disclosure as an argument in favor of such a position. In this regard, it should be noted that the Law No. 4651-VI (2013) among the principles of criminal proceedings determines, in particular, freedom from self-disclosure and the right not to testify against close relatives and family members (paragraph 1, part 1 of Article 7).

The content of a certain procedural freedom is determined, in particular, by the following procedural guarantees:

- no person can be forced to admit his guilt in committing a criminal offense or forced to give explanations, testimonies that may be grounds for suspicion, accusation of committing a criminal offense by him or his close relatives or family members (Law No. 4651-VI, 2013, s. 1, 3 Art.18);
- each person has the right not to say anything about the suspicion or accusation against him, at any time to refuse to answer questions, as well as to be immediately notified of these rights (Law No. 4651-VI, 2013, p. 2 Art. 18. s. 4, 5 p.3 Art.42);
- the absence of criminal liability of the suspect, accused of knowingly false testimony, in contrast to the victim and the witness (Law No. 4651-VI, 2013, p. 9 Art. 224).

However, the question then arises as to whether there is unlimited freedom from self-disclosure and exposure of close relatives and family members. Namely: is it always lawful to give knowingly false testimony by suspects, accused. This issue seems to require a more careful approach.

At first glance, as already noted, the argument in favor of the right of the suspect, accused of "lawful lying" is Article 384 of the Law No.

2341-III (2001), which establishes liability for misleading the court or other authorized body. Thus, Part 1 of this article, in particular, points to the knowingly false testimony of only the witness and the victim. That is, the subject of a criminal offense in this form (knowingly false testimony) is a special, exclusively a witness or a victim. Thus, based on the principle "everything that is not forbidden is allowed", the "lie" of the suspect, the accused is allowed. Finally, the right to false testimony of a suspect or accused actually derives from the provisions of the Law No. 4651-VI (2013), which provides only the obligation of a witness and a victim to give true testimony.

However, considering Art. 384 of the Law No. 2341-III (2001), which establishes liability for knowingly false testimony of only a witness and a victim as an expression of absolute freedom of a suspect, accused of self-disclosure or exposure of close relatives and family members, seems too hasty and unsystematic conclusion.

First of all, it is worth paying attention to the terminology used in the criminal procedure legislation of Ukraine, namely: it indicates freedom from self-disclosure and the right not to testify against close relatives and family members (Law No. 4651-VI, 2013, s. 1 part 1 of Art. 18).

Thus, in fact, freedom from self-disclosure and exposure of close relatives and family members (Law No. 4651-VI, 2013, art. 18) means the right not to testify against oneself or such persons, even if the person gives false testimony. However, this does not mean that a person has the right to testify falsely against others or to provide false information, the responsibility for which is determined by special norms of the criminal law of Ukraine, as a way to protect oneself or close relatives and family members from exposure.

That is, the "procedural lie" of the suspect or accused is in fact "permissible" in relation to himself or the relevant close relatives and family members, but may not violate other relations protected by law.

At the same time, the criminal law of Ukraine has a whole "bunch" of norms that can be applied in case a person submits false evidence (testimony, material, written) in order to protect himself from self-disclosure or exposure of close relatives and family members.

With regard to the submission of false material and /or written evidence, Part 1 of Article 384 of

the Law No. 2341-III (2001) alternatively, along with the knowingly false testimony of a witness, a victim, explicitly states about the submission of knowingly unreliable or forged evidence. This form of misleading court or other authorized body is relatively new. At the same time, the legislator does not restrict the subjects of committing such a socially dangerous act within the criminal offense by indicating a special subject, such as a witness or a victim. That is, the suspect, the accused are also the subjects of a criminal offense in the form of submission of knowingly unreliable or forged evidence (material evidence and / or documents).

As for the knowingly false testimony of the suspect, the accused, despite the fact that such participants in the process are not the subjects of a criminal offense under Art. 384 of the Law No. 2341-III (2001), but they may be the subjects of other criminal offenses, the objective side of which is the submission of knowingly false information or concealment of relevant information provided by the criminal law of Ukraine as independent components, such as:

- knowingly false report of a criminal offense (Law No. 2341-III (2001) during the testimony of suspects, accused - when such information does not relate to the investigated criminal proceedings and persons who may be involved in it. After all, freedom from self-disclosure or exposure of close relatives and family members does not mean the possibility of false exposure of others.
- failure to provide help to a person, who is in a condition dangerous to life, where such help could have been provided, or failure to inform appropriate institutions or persons of this person's condition, where this has caused grievous bodily injuries (Law No. 2341-III (2001), art. 136). For example, when such non-disclosure during interrogation is a form of protection against exposure (for example, a suspect /accused is aware that such a person in a life-threatening condition may provide information that would harm the suspect, accused or his close relatives, family members).
- concealment of data on a person's fate or whereabouts in case of enforced disappearance (Law No. 2341-III (2001), art. 146-1). For example, for the same reasons as in the above case.
- concealment or intentional distortion of information about the ecological condition or morbidity of the population (Law No. 2341-III (2001), art. 238) during

interrogation with the parallel disclosure of such information to the population by the person concerned.

- knowingly false information about the threat to public safety, destruction or damage to property (Law No. 2341-III (2001), art. 259) in order to delay the pre-trial investigation, "delay" the interrogation to have time to hide the traces of the crime, etc.

Even such a cursory review of procedural and substantive criminal law shows that the freedom of self-incrimination or exposure of close relatives and family members in criminal proceedings has certain limits. They are the rights and interests of other subjects protected by criminal law. And the absence of responsibility for the knowingly false testimony of a suspect / accused in Article 384 of the Law No. 2341-III (2001) "Misleading a court or other authorized body" does not mean impunity for such acts. Liability should follow other special rules, which provide for liability for so-called verbal criminal offenses, which consist in the reporting of false information, its distortion.

It is worth noting, that under the current legal regulation in the relevant field of law, when the lie of the suspect, accused in the testimony is, in fact, unpunished (of course, except the above mentioned rare simulated cases), unpunished are also actions of unfair lawyers who persuade suspects, accused - their clients, to refute the suspicions brought against them / or the accusations by slandering a knowingly innocent person. After all, the incitement to a certain act is recognized as a crime, when the act to which they are incited is a crime as well. Therefore, the responsibility for the lawyer's actions aimed at assisting a suspect / accused in slandering a knowingly innocent person in committing an offense in criminal proceedings against his client, is worth establishing at the legislative level, as well as providing an effective mechanism for bringing the guilty person to justice.

In the United States, giving false testimony before a court or grand jury is considered a crime punishable by a fine or imprisonment for a term not exceeding 5 years or both, as well as the subordination of another person of perjury.

Thus, under § 1623 of Section 18 of the U.S. Code of Laws a defendant who knowingly gave false testimony or used any document, knowing the same to contain any false material declaration, before the court or grand jury, is liable under this paragraph. In addition, under § 1622 of this section the inciting of another

person to give false testimony is criminalized as well. (Law No. 772, 1948).

Under the Model Rules of Professional Conduct (ABA, 1983), "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law" (rule 1.2.d). Besides, Rule 4.1. reads "in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client", unless such disclosure is prohibited by the confidentiality rule.

So, if the lawyer knows that the client is going to give false testimony under oath before the court in order to avoid criminal liability, he shall explain to the client all legal consequences of his actions, so that he "weighed" everything and chose a way of law-abiding behavior. When the client's position has not changed, and he still decides to give false testimony, the lawyer shall not take part in the interrogation of the defendant under oath, unless he will be accused of subordination of perjury.

In particular, the lawyer's conduct was found to be ethical by decision of the Supreme Court of the United States. Mr. Whiteside was charged with murder. During the discussion of the defense strategy with the lawyer, the accused stated that he may have seen a metal object (most likely a gun) in the hands of the victim, although this statement contradicted the testimony he had given earlier. The lawyer before the court explicitly stated that he had an ethical obligation to report about false testimony to the court. After all, Mr. Whiteside was found guilty of the crime he was charged with. Mr. Whiteside subsequently instituted proceedings for a violation of his right under the Sixth Amendment to the US Constitution as regards the right to effective defense. But, the US Supreme Court found the lawfulness of the lawyer's conduct and noted that the right to defense does not include the right to have a lawyer who will facilitate the giving of false testimony; on the contrary, a lawyer representing a client in criminal proceedings should act in compliance with the law, and such lawful conduct have to conform the goal of the trial - the search for truth. (Nix v. Whiteside, 1986).

Item 4.4 of the General Code of Rules for Lawyers of the European Community defines as well that a lawyer must in no case provide the court with manifestly inaccurate or false information. (Law No. 994\_343, 1988).

This approach to determine the ethical component of a lawyer's professional activity seems very appropriate. Due to the fact that the lawyer's relationship with the client guarantees the principle of confidentiality, it is impossible to verify whether the lawyer adheres to the principle of the rule of law and legality in exercising of professional obligations, while there is no effective mechanism of checks and balances. That is why Rule 1.6. The Model Rules of Professional Conduct (ABA, 1983), defines not only the need to follow the confidentiality rule, but the exceptions under which a lawyer may disclose information constituting a lawyer's secret to the extent necessary to prevent adverse consequences as well.

The Rules of Lawyer's Ethics (Legal act No. n0001891-17, 2017), determines that it is strictly forbidden for a lawyer to use illegal and unethical means in fulfilling a client's orders, in particular, to incite witnesses to give knowingly false testimony, to use illegal methods of pressure on the opposite party or witnesses (threats, blackmail, etc.), to use their personal links (or in some cases - its special status) to influence directly or indirectly on the court or other body before which it represents or defend the clients interests, use information obtained from a former client, whose confidentiality is protected by law, use other means contrary to a current law or these Rules (art. 25).

A lawyer may be subject to disciplinary proceedings in case of violation of the prohibitions set forth in this article. However, the harm done to a knowingly innocent person (especially if he is knowingly falsely accused of committing a serious or especially serious crime) as a result of promoting unfair defense tactics is disproportionately huge and does not correspond to the punishment a lawyer is subject to if his guilt is proven.

In addition, it is almost impossible to establish a violation of Article 25 of these rules by a lawyer, since all documents that are necessary to prove the violation have the status of lawyer's secret. Article 10 of the Rules of Lawyer's Ethics (Legal act No. n0001891-17, 2017) provides that documents and information may lose the status of lawyer's secret with the written consent of the client. However, even with the written consent of

the client to disclose information constituting a lawyer's secret, a lawyer, in order to protect his professional rights and guarantees, has the right to continue to keep information and documents in the status of a lawyer's secret. In this case, the lawyer is not responsible for the refusal of any persons, bodies and institutions to disclose legal secrecy and provide access to it. It means that, the lawyer may, but is not obliged to, disclose the lawyer's secret.

In view of the above, it is expedient to introduce exceptions to the rule of confidentiality concerning cases of disclosure of lawyer's secret, as well as to exclude the rule establishing a lawyer's right to refuse to disclose information constituting lawyer's secret with the written consent of such person.

Analyzing of the relevant problem, it should be noted that both the Law No. 254k/96-VR (1996, p.6 art.55) and the domestic CPC (2012, p.1 art. 22) do not foresee any means of protection. The freedom of a suspect / accused to give any evidence in criminal proceedings without the risk of being prosecuted for misleading a court or other authorized body should be subject to statutory restrictions on cases of knowingly giving false testimony against other specific persons on crimes (or other socially dangerous acts) and misdemeanors that they did not actually commit.

In the judgment of the European Court of Human Rights (the case law of which is a source of law in Ukraine as well), the Strasbourg Court stated that "the possibility for the accused to be further prosecuted for the statement on his defense should not be considered a violation of his rights under paragraph 3 "c" of Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms. It would be an exaggeration to believe that the basic ground for the right of persons accused of a criminal offense to defend themselves is the idea that they should not be prosecuted if defending, they deliberately arouse false suspicions of conduct to be punished, concerning a witness or any other person involved in criminal proceedings". (Brandstetter v. Austria, 1991, p. 32).

Thus, the European Court of Human Rights also states (as well as the authors of this article) that the use of suspects / accused slanders of knowingly innocent persons (even for their own defense) does not exclude the prosecution of such a suspect, accused for these actions - of course, if such liability is provided at the legislative level.



## Conclusions

The above mentioned gives grounds for the following conclusions:

- 1) it is substantiated that the behavior of the suspect, accused, which is manifested in slandering of a knowingly innocent person, does not constitute the right to freedom from self-disclosure;
- 2) it is proved that both freedom from self-disclosure and the right to defense in criminal proceedings must have certain limits, in particular, it is rights and interests of other subjects protected by criminal law;
- 3) it is stated that the suspect or accused should be liable for misleading the court and pre-trial investigation bodies even if such deception was used to protect against the suspicion (or accusation), to avoid criminal liability; it is considered expedient to borrow the experience of those states whose legislation provides for the criminal liability of a suspect, accused for slandering a knowingly innocent person;
- 4) it is noted that there is no responsibility for knowingly false testimony of the suspect, accused in Article 384 of the Law No. 2341-III (2001) "Misleading of a court or other authorized body". That does not mean absolute impunity for such acts. The responsibility for these actions should come under other special rules, which provide liability for so-called verbal criminal offenses, which are manifested in giving of false information or its distortion, if there are appropriate grounds.
- 5) the importance of establishing the responsibility of a lawyer for assisting his client - a suspect / accused in slandering of a specific knowingly innocent person in criminal proceedings, at the legislative level, as well as providing an effective mechanism for bringing such a lawyer to justice, is proved;
- 6) it is suggested to introduce exceptions to the rule of lawyer's confidentiality, concerning cases of disclosure of lawyer's secret, as well as to exclude from the law rules that allow a lawyer to refuse to disclose information constituting lawyer's secret despite the client's written consent.

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