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ON LEGAL THOUGHT LEADER AND LEGAL THINKING ESPECIALLY CONCERNING INTERNAL INVESTIGATIONS

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I. INTRODUCTION

'Two lawyers, three opinions.' A well-known saying that is often part of communication not only among lawyers, but also in general. Related in a mocking way, it reflects the 'daily business' of a lawyer, who often can only give the answer to a person seeking advice: 'It depends.' Countless factors play a role in the assessment of legal issues, and in some cases even the slightest change results in a different assessment, so that one and the same set of facts, viewed from the perspective of different observers, can lead to differentiated views. Written law neither interprets itself nor fills its gaps independently.[1] And so, in everyday legal life, opinions are referred to, they are represented, rejected, and criticized. This is mostly done in legal literature, especially in journals, in which articles are published as essays or commentaries on a court decision by authors, members of different professions. The legislature creates laws, which are applied by the judiciary and legal practice and under which the facts are subsumed. The assessment of different facts thus leads to the further development of the law. For some of them, laws already exist, for others, in the form of unprecedented facts, no law exists yet. Unlike the factual circumstances in the study of the lawyer, life is not prepared in such a way that only existing laws are applicable. Rather, conflict situations arise with other facts, for which it is then necessary to find a solution by methodical procedure and legal way of thinking.[2] Experts from science and legal practice then comment on (practice-relevant) questions until a court is called upon to answer them. The arguments put forward by the court are later discussed and evaluated.

In particular, the topic of internal investigations, which first came into focus in the Siemens scandal in 2006, provides a practical illustration of the aforementioned. Until the first judicial decision in 2010[3] on the period up to the decision of the Federal Constitutional Court in 2018 in the diesel scandal[4] and the subsequent draft law[5], there were a large number of publications by authors from different professions that dealt with the topic and the associated legal problems and represented differentiated opinions.

Where do these authors get their opinions from? How and by whom are they subsequently discussed, do they show changes over the years? How does the law develop with regard to a topic? Is there a certain type among the authors who can be called an option-maker, even a "thought leader", whose view is of particular importance and is mentioned especially often? Does he practice a certain profession, how does he achieve recognition in society, in his sphere of influence and in his community?

The following article therefore first deals with the content of the concept of opinion, its definition and the bases and causes of different opinions, before an introduction to legal thought as the origin of legal opinion formation. Finally, the focus of the article deals with the legal thought leader of the topic of internal investigations, first elaborating on the content and the formation of law, before the person of the legal thought leader in type and characteristics concludes the article.

1 Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571 (2001).

2 Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571, 572 (2001).

3 LG Hamburg - Beschl. v. 15. 10. 2010 - 608 Qs 18/10.

4 BVerfG - Beschl. v. 27. 06. 2018 - 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1287/17, 2 BvR 1583/17; 2 BvR 1562/17.

5 Bundesministerium der Justiz und für Verbraucherschutz: Referentenentwurf, April 2020, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=1 (last visited July 7, 2020).

II. THE OPINION & THE LEGAL THINKING

An opinion or also view, opinion, conviction, evaluation, judgment, assessment or opinion are words that reflect people's thoughts about a factual object or person. They are personal views someone has about something,[6] which are formed in the minds of people and are partly the creation of their own thoughts, and partly based on the evaluations, statements, and research of others. The subjectivity of evaluation is therefore inherent in the concept of opinion.[7]

In accordance with Article 5 I of the Basic Law for the federal Republic of Germany,[8] everyone in Germany has the right to freely express and disseminate their opinions in speech, writing and pictures and to obtain information from generally accessible sources without hindrance. The protection therefore includes both freedom of information and freedom of opinion. An opinion is first of all a value judgment, which comprises a statement characterized by the element of opinion and opinion. Characterized by a subjective relationship of the utterer to the content of his statement, it cannot be characterized as true or false and, moreover, is not amenable to proof.[9] While the value judgment can rather be understood as opinion in the narrower sense, the term opinion also includes the communication of facts, which - strictly speaking - cannot be called an expression of opinion. Such factual assertions lack the characteristics of statement and own consideration, although they can also be classified as opinion, because and to the extent that they are prerequisites for the formation of opinion.[10] The concept of opinion is therefore broad. As a prerequisite for the expression of opinion, the formation of opinion, any kind of communication of information and opinion,[11] conditions freedom of information and vice versa, whereby freedom of information can be understood as the receipt and procurement of information.[12]

A. The bases and causes of (differentiated) opinion

An indispensable building block for forming an opinion is a reason or a basis, including a fact. In most cases, these are "heatedly debated topics" in society that experience a certain frequency of reporting. Different experts then express themselves and present the results of their (scientific) investigations. The often resulting difference finally provides for different opinions.

Both the facts and the results are provided as information. Both in radio, press, magazines and social networks, authors disseminate their own or others' opinions and give an opinion. Shortly after important events occur, they are reported. After receiving the information, opinions are formed, which are dependent on people's values, profession, life situation, knowledge, and previous life experiences, and significantly influence the process. Many factors, on the basis of which a fact is evaluated, commented, criticized or advocated, are therefore decisive for the formation of opinions.

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6 Deutsches Wörterbuch von Jakob Grimm und Wilhelm Grimm, Version 01/21, https://woerterbuch-netz.de/?sigle=DWB&sigle=DWB&mode=Vernetzung&lemid=GM03450#0, (last visited March 7, 2021).

7 Starck/Paulus: v. Mangoldt/Klein/Starck Kommentar zum Grundgesetz, Art. 5 Rn. 74.

8 It means the german „Grundgesetz".

9 Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 47.

10 Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 48.

11 Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 75, 76.

12 BVerfGE 27, 71; Christian von Coelln: Zur Medienöffentlichkeit der Dritten Gewalt: rechtliche Aspekte des Zugangs der Medien zur Rechtsprechung im Verfassungsstaat des Grundgesetzes, 139 (2005); Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 75, 76.

The aforementioned also applies to the formation of legal opinion and legal thinking, in which opinions drive the further development of the law. Based on their profession, values, life situation, knowledge and experience, lawyers also form their opinions after becoming familiar with the facts of the case, which are then commented on, criticized or endorsed.

B. Legal thinking as the basis for the formation of legal opinion

While the events of everyday life can be easily differentiated, in 'law' the question of the emergence of different opinions arises because the law and jurisprudence have regulations ready. Differentiated opinions arise above all where legal regulations are lacking. The complexity and constant change of life mean that there is no all-encompassing and conclusive set of rules that provides an answer to all present and future legal questions.[13]

With the help of legal thinking, existing laws and application practices must therefore be differentiated and supplemented in order to find an appropriate solution even for unprecedented problems. Legal thinking requires both legal understanding and the ability to work methodically in order to solve, through interpretation and the further development of the law, those problems for which neither the law nor jurisprudence provides a solution. At the same time, the power of lawyers, and especially of judges, is to be limited, although their critics consider this to be superfluous, since in the end a judge decides as he or she decides.[14]

The jurist must be able to approach unknown problems, to develop his own disputes and solutions and to defend his own view against foreign arguments in order to make the decision comprehensible and verifiable and to achieve legal certainty.[15] The basis for this is Savigny's canon of four laws learned in law school: 'Wortlaut' (wording), 'Systematik' (systematics), 'Geschichte' (history) and 'Telos' (telos), which every lawyer, whether professor at the university or practitioner, has to apply to the unknown facts of a case when subsumption under existing laws is impossible. The more complex and less clear the legal situation, the more extensive the application of the legal canon.[16] Because each jurist executes this differently, one and the same circumstance interpreted by different persons leads to different results. The reason for this is, among other things, the personalities, the professional career and the daily environment -therefore something subjective-, which decisively influences the evaluation of a legal problem and therefore the formation of opinion. Also, legal thinking and the formation of opinions are always subjective. Legal thinking therefore requires not only that a legal dogmatic institute or a legal practical institution is known (from the inside), it must also be able to be viewed in its historical, theoretical and real conditions (from the outside), to be relativized and to be placed in larger contexts.[17] Unlike the formation of opinions on other topics, legal opinions are not formed on the basis of topics disseminated in the media, but rather through the application of what has been learned.

[13] Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571 (2001).

[14] Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung,* ZfPW, 94, 97-98 (2019).

[15] Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung,* ZfPW, 94, 99 (2019).

[16] Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung,* ZfPW, 94, 100 (2019).

[17] Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung,* ZfPW, 94, 119-120 (2019).

In addition, there are the different professional experiences and working principles, whereby a distinction must be made here in particular between those of university science in the form of professors and those of practice in the form of lawyers and judges.

Scientific work means to give space to one's thoughts and thus -specialized on one topic- to represent a process of persistence, the progress of which depends on an 'inspiration' that cannot be forced even with the help of the greatest effort. Pre-thinking and re-thinking, as well as constantly questioning the knowledge already gained, are made possible by a lack of time and content constraints or censorship.[18] In contrast, the practice often has to react promptly to a problem it is not familiar with and is not free in its choice of topics or working methods. The decision of short, fast-moving processes, adapted to constantly changing circumstances, therefore often leads to a different opinion than the investigation and decision of the same circumstance without time specification and pressure.

The result is differentiated views on a problem in literature and case law, whereby the view that then becomes established through dissemination can be described as the prevailing opinion. How a legal opinion develops and is disseminated, and on which factors this depends, is to be assessed based on the example of internal investigations.

III. INTERNAL INVESTIGATIONS

Internal investigations first came into focus in connection with the siemens affair in 2006 and have received renewed attention as a result of the diesel scandal. They are therefore the basis of many legal publications.

A. Definition

Although internal investigations have been widely used in both Germany and the United States and have been the subject of numerous publications, there is no general definition and no uniform understanding. Sometimes they are described as voluntarily commissioned, cause-related investigations of contractual or administrative processes by external experts,[19] sometimes they serve to uncover violations of existing laws and other rules.[20] Still others include only compliance-relevant breaches of duty in the scope of application,[21] while another part restricts the application to persons and only focuses on the clarification of breaches of duty resulting from actions of the company management.[22] Finally, another opinion includes violations of the law by managers and employees,[23] while others do not limit the scope of application but allow investigations to take place without the involvement of external

[18] Susanne Baer, *Wissenschaftsfreiheit als verteilte Verantwortung,* FuL 214, 215 (2017).

[19] Thomas Knierim: Thomas Rotsch Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion, 77, 78 (2012).

[20] Alexander Behrens, *Internal Investigations: Hintergründe und Perspektiven anwaltlicher "Ermittlungen" in deutschen Unternehmen*, RIW 22 (2009); Hans-Joachim Gerst, *Unternehmensinteresse und Beschuldigtenrechte bei Internal Investigations – Problemskizze und praktische Lösungswege –,* CCZ 1 (2012).

[21] Volker Vogt, *Compliance und Investigations – Zehn Fragen aus Sicht der arbeitsrechtlichen Praxis -,* NJOZ 4206 (2009).

[22] Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations,* NZA 240 (2006).

[23] Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht,* wistra 373, 374 (2009).

parties.[24]

Despite this multitude of different views, there is basically a uniform understanding according to which internal company investigations are private investigations, not initiated by the state, but by the company itself, by external investigators in connection with impending or already ongoing state investigations, which are being or are to be conducted against the company itself or members of the company, and with the help of which breaches of duty, in particular criminal offenses, can be systematically clarified within the company.[25] In this case, a representative of the company then voluntarily commissions a special forensic investigation in which external experts, mainly a law firm or auditors, examine the processes within the company in detail and, in particular, investigate the structurally anchored or individual misconduct with regard to accounting and regulatory issues.[26]

The aim of conducting internal investigations is both to clarify the facts of the case and to investigate the truth, to avoid/reduce financial losses and liability risks, and to avert damage to prestige, which is of particular concern to well-known companies.[27]

The basis of the discussions and the content of the publications on internal investigations, however, is neither the lack of uniformity of a definition nor the implementation by external or internal parties. Rather, the implementation in the company - especially concerning the employees - entails corresponding legal questions and problems, which are judged differently by legal experts in the form of lawyers, judges, and university professors.

B. Legal issues related to the subject matter

The differentiation from state proceedings and the lack of applicability of the German Code of Criminal Procedure (StPO) lead to legal problems, some of which affect the company's employees, some of which are connected with the search of the premises and some of which only become relevant in the criminal proceedings that may follow the internal investigations. Questions arise here as to the permissibility and selection of the investigative measures that can be chosen in the course of the investigations, in particular in order to obtain documents of the employees and management that may yield

[24] Alexander Behrens, *Internal Investigations: Hintergründe und Perspektiven anwaltlicher "Ermittlungen" in deutschen Unternehmen*, RIW 22, 23 (2009); Nicolas Ott & Cäcilie Lüneborg, *Internal Investigations in der Praxis – Umfang und Grenzen der Aufklärungspflicht, Mindestaufgriffsschwelle und Verdachtsmanagement,* CCZ 71, 73 (2019).

[25] Matthias Dann, *Compliance- Untersuchungen im Unternehmen: Herausforderung für den Syndikus,* AnwBl. 84, 85 (2009); Lambertus Fuhrmann, *Internal Investigations: Was dürfen und müssen die Organe beim Verdacht von Compliance Verstößen tun?,* NZG 881, 882 (2016); Jürgen Wessing: Hauschka/Moosmayer/Lösler (Hrsg.) Corporate Compliance, § 46 Rn. 1 (2016); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit,* ZIS 508, 509-510 (2011); Hendrik Reuling & Christian Schoop, *„Internal Investigations" im Lichte des Koalitionsvertrags 2018 – Notwendige Inhalte einer gesetzlichen Regelung,* ZIS 361 (2018).

[26] Thomas Knierim, *Das Verhältnis von strafrechtlichen und internen Ermittlungen,* StV 324, 328 (2009); Thomas Rotsch Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion, 77, 78-79 (2012); Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations,* NZA 240 (2006).

[27] Lambertus Fuhrmann, *Internal Investigations: Was dürfen und müssen die Organe beim Verdacht von Compliance Verstößen tun?,* NZG 881, 885 (2016); Hans-Joachim Gerst, *Unternehmensinteresse und Beschuldigtenrechte bei Internal Investigations – Problemskizze und praktische Lösungswege –,* CCZ 1 (2012); Thomas Knierim, *Das Verhältnis von strafrechtlichen und internen Ermittlungen,* StV 324, 328 (2009); Hendrik Reuling & Christian Schoop, *„Internal Investigations" im Lichte des Koalitionsvertrags 2018 – Notwendige Inhalte einer gesetzlichen Regelung,* ZIS 361, 362 (2018).

results. Can the personnel file be inspected? Can e-mails and documents be searched and seized?[28] However, the predominant basis for discussion here is the so-called 'interviews'[29] conducted with the company's employees, where it is initially questionable whether there is an obligation to participate and testify vis-à-vis the external parties and whether the employee, as a result of an affirmative answer to this question, can make use of a right to refuse to testify in the interviews or in subsequent criminal proceedings.[30] In this context, it is also discussed whether the findings obtained from the private investigations may be confiscated and subsequently utilized.[31]

Since the emergence of the topic in 2006, the above-mentioned issues have been discussed in numerous publications, most of which have appeared in journal articles, with the result that differentiated views have been expressed. While the evaluation initially focused on the issues of civil law, in particular labor law, the obligation to participate and to testify, and the nemo-tenetur principle under criminal law,[32] the content of the essays changed after the first court decision by the Hamburg Regional Court

[28] Jürgen Wessing: Hauschka/Moosmayer/Lösler (Hrsg.) Corporate Compliance, § 46 Rn. 25-43 (2016); Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations,* NZA 240, 241-243 (2006); Jürgen D. W. Klengel & Ole Mückenberger, *Internal Investigations – typische Rechts- und Praxisprobleme unternehmensinterner Ermittlungen,* CCZ 81, 83-86 (2009); Volker Vogt, *Compliance und Investigations – Zehn Fragen aus Sicht der arbeitsrechtlichen Praxis -,* NJOZ 4206, 4210-4212 (2009).

[29] Hierbei handelt es sich um eine Befragung von Mitarbeitern, bei der zum einen Aussagen abgerungen werden können, zum anderen anhand von Mimik und Gestik der Wahrheitsgehalt einer Aussage ausgewertet und das Risiko hinsichtlich der Vornahme etwaiger Verdunklungshandlungen abgewogen werden kann. Um Verstöße aufzuklären, werden diejenigen Mitarbeiter hinzugezogen, die verdächtig sind, sich an solchen beteiligt zu haben oder Wahrnehmungen im Zusammenhang mit diesen gemacht haben könnten. Diesbezüglich werden Fragen betreffend den Aufgabenbereich des Mitarbeiters aber auch sein Umfeld betreffend gestellt; Burkhardt Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger"– Ein Beitrag zur aktuellen Compliance-Diskussion,* NJW 1703, 1705 (2008); Jürgen D. W. Klengel & Ole Mückenberger, *Internal Investigations – typische Rechts- und Praxisprobleme unternehmensinterner Ermittlungen,* CCZ 81, 82 (2009); Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen,* NJW 2374 (2017); Lena Rudkowski, *Die Aufklärung von Compliance-Verstößen durch „Interviews",* NZA 612 (2011); Hans Theile, Marcele Janina Gatter & Tobis C. Wiesenack, *Domestizierung von Internal Investigations*, ZStW 803 (2014).

[30] Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht,* wistra 373, 375-377 (2009); Wolf-Tassilo Böhm, *Strafrechtliche Verwertbarkeit der Auskünfte von Arbeitnehmern bei unternehmensinternen Untersuchungen,* WM 1923 (2009); Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen,* NJW 2374, 2375 (2017); Hendrik Reuling & Christian Schoop, *„Internal Investigations" im Lichte des Koalitionsvertrags 2018 – Notwendige Inhalte einer gesetzlichen Regelung,* ZIS 361, 363-364 (2018); Lena Rudkowski, *Die Aufklärung von Compliance-Verstößen durch „Interviews",* NZA 612, 613 (2011); Sascha Süße, *Gesetzliche Vorgaben für interne Untersuchungen – Ein Weg zur Beseitigung von Rechtsunsicherheiten bei der Kooperation in Wirtschaftsstrafverfahren?* ZIS 350, 357 (2018); Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!,* NStZ 68, 70 (2009).

[31] Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht,* wistra 373, 377 (2009); Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen,* NJW 2374, 2378-2379 (2017); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit,* ZIS 508, 512 (2011); Markus Rieder & Jonas Menne, *Internal Investigations – Rechtslage, Gestaltungsmöglichkeiten und rechtspolitischer Handlungsbedarf,* CCZ 203 (2018); Hendrik Reuling & Christian Schoop, *„Internal Investigations" im Lichte des Koalitionsvertrags 2018 – Notwendige Inhalte einer gesetzlichen Regelung,* ZIS 361, 365-367 (2018); Ingeborg Zerbes, *Unternehmensinterne Untersuchungen,* ZStW, 551, 561–570 (2013).

[32] Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations,* NZA 240, 241-243 (2006); Burkhardt Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger"– Ein Beitrag zur aktuellen Compliance-Diskussion,* NJW 1703 (2008); Matthias Dann & Kerstin Schmidt, *Im Würgegriff der SEC? – Mitarbeiterbefragungen und die* Selbstbelastungsfreiheit, NJW 1851 (2009); Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!,* NStZ 68 (2009); Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC,* StV 41 (2009); Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht,* wistra 373 (2009).

in 2010. From this point on, the problem of confiscating the interview transcripts and the other documents resulting from the conduct of the investigations was increasingly discussed in the literature.[33] A decisive turning point in publications on the subject was therefore the first decision and therefore opinion by a court. The question is, on what basis is the opinion expressed by the court based and which author's opinion is most recognized in the community?

IV. THE PERSON OF THE MASTERMIND IN THE FURTHER DEVELOPMENT OF THE LAW OF INTERNAL INVESTIGATIONS

'Science is the captain and practice, they are the soldiers.'[34] A quote according to which scientists and their work are given an exposed position in relation to practice. The designation of practitioners as soldiers makes their actions appear as determined by instructions and shaped by orders.
The person of the opinion-maker, the legal thought leader, is decisive in connection with the further development of the law on a subject; he or she has an influence on the publications, the views expressed and the development of case law, so that the question arises as to whether this person belongs to academia or to practice. It is partly assumed that the judge, hence a practitioner, is to a certain extent responsible for the development of the law. However, the latter oversteps his bounds when he presumes to engage in positive social shaping and thus becomes a lawmaking judge.[35] This leads to the conclusion that the judge participates only in part in the further development of the law. Still others argue that the further development of law must remain the task of the democratic sovereign, since written law and the methods of interpreting and applying it are a cultural achievement based on the will of the legislature and social compromises.[36] Moreover, it must be taken into account that different legal issues come into focus among members of different professions, and opinion is shaped by subjective characteristics. Legal thought leaders can therefore not be determined in general, but only on a topic-by-topic basis.

A. Further development of the law on the subject of internal investigations

Since the emergence of the topic of internal investigations in 2006, there have been numerous publications discussing the issues. The change of the discussed topics over the years is clear. While at the beginning, in addition to labor law and thus civil law issues - for example, the employee's obligation to cooperate and testify in the so-called interviews - the violation of the nemo-tenetur principle and

[33] Hans-Joachim Fritz, *LG Hamburg: Beschlagnahmefähigkeit von im Rahmen von unternehmensinternen Untersuchungen durch beauftragte Rechtsanwälte angefertigten Befragungsprotokollen – faktische Einschränkung der Auskunftspflichten von Mitarbeitern – „nemo tenetur"-Grundsatz im Arbeitsrecht*, CCZ 155 (2011); Margarete Gräfin v. Galen, LG Hamburg: *Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank,* NJW 942 (2011); Matthias Jahn & Stefan Kirsch, *Anmerkung zu einer Entscheidung des LG Hamburg, Beschluss vom 15.10.2010 (608 Qs 18/10; StV 2011, 148) - Zur Geltung des Beschlagnahmeverbots für Erkenntnisse, die ein Anwalt im Wege der internen Untersuchung in einem Unternehmen gewinnt,* StV 151 (2011); Frank P. Schuster, *Anmerkung zu LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs. 2 StPO*, NZWiSt 424 (2012); Matthias Jahn & Stefan Kirsch, *LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen m. Anm.,* NStZ 713 (2012); Hartmut Schneider, *LG Braunschweig: Beschlagnahmefreie Unterlagen* NStZ 308 (2016); Christian Graßie & Mayeul Hiéramente, *Durchsuchungen bei Anwälten - eine Zeitenwende?,* BB 2051 (2018); Carsten Momsen, *Volkswagen, Jones Day und interne Ermittlungen,* NJW 2362 (2018).

[34] da Vinci, Leonardo: überliefertes Zitat, 1452 – 1519.

[35] Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung,* ZfPW, 94, 109-110 (2019).

[36] Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571 (2001).

the fair trial requirement are discussed in particular,[37] the usability and seizability of the results resulting from the employee surveys are problematized and discussed in later publications - predominantly after the publication of the first court decision in 2010.[38]

The literature in this regard comes from the pens of practitioners, mostly lawyers, university scientists and such persons who are professionally active both in university science and in practice. Considering the multitude of published literature and its authors, it can be stated that it is a person professionally active both in practice and university science, who publishes several times at short intervals on current topics and finds its citation in many publications and court decisions. Being a professor full-time and a judge part-time, this person is described as a hybrid type. Her publications have been regular and constant from 2006 to 2018, reacting to current events in terms of content and finding mention in publications by other authors.[39] In addition, there are numerous publications by lawyers who express their opinions on current problems and discuss other opinions. However, the publications of authors working exclusively in university science are neither as constant nor as up-to-date in terms of content as the publications of practitioners are. Especially their publications of the years 2013/2014, therefore some years after the emergence of the topic, treat it more generally than they can keep up in the current discourse regarding the problems.[40]

It is striking that Prof. Jahn as a hybrid type, in addition to numerous publications from practice by lawyers and a few from university science, has published essays on this topic in 2009, as well as in

[37] Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations,* NZA 240 (2006); Burkhardt Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger"– Ein Beitrag zur aktuellen Compliance-Diskussion,* NJW 1703 (2008); Rüdiger von Rosen, *Rechtskollision durch grenzüberschreitende Sonderermittlungen,* BB 230 (2009); Matthias Dann & Kerstin Schmidt, *Im Würgegriff der SEC? – Mitarbeiterbefragungen und die* Selbstbelastungsfreiheit, NJW 1851 (2009); Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC,* StV 41 (2009); Christoph Knauer & Erik Buhlmann, *Unternehmensinterne (Vor-)Ermittlungen – was bleibt von nemo-tenetur und fair-trail?,* AnwBl. 387 (2010); Hans-Joachim Fritz, *LG Hamburg: Beschlagnahmefähigkeit von im Rahmen von unternehmensinternen Untersuchungen durch beauftragte Rechtsanwälte angefertigten Befragungsprotokollen – faktische Einschränkung der Auskunftspflichten von Mitarbeitern – „nemo tenetur"-Grundsatz im Arbeitsrecht*, CCZ 155 (2011); Hans Theile, *„Internal Investigations" und Selbstbelastung,* StV 381 (2011); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit,* ZIS 508 (2011).

[38] Hans-Joachim Fritz, *LG Hamburg: Beschlagnahmefähigkeit von im Rahmen von unternehmensinternen Untersuchungen durch beauftragte Rechtsanwälte angefertigten Befragungsprotokollen – faktische Einschränkung der Auskunftspflichten von Mitarbeitern – „nemo tenetur"-Grundsatz im Arbeitsrecht*, CCZ 155 (2011); Hans Theile, *„Internal Investigations" und Selbstbelastung,* StV 381 (2011); Margarete Gräfin v. Galen, LG Hamburg: *Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank,* NJW 942 (2011); Matthias Jahn & Stefan Kirsch, *Anmerkung zu einer Entscheidung des LG Hamburg, Beschluss vom 15.10.2010 (608 Qs 18/10; StV 2011, 148) - Zur Geltung des Beschlagnahmeverbots für Erkenntnisse, die ein Anwalt im Wege der internen Untersuchung in einem Unternehmen gewinnt,* StV 151 (2011); Imme Roxin, *Probleme und Strategien der Compliance-Beratung in Unternehmen,* StV 116 (2012); Frank P. Schuster, *Anmerkung zu LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs. 2 StPO*, NZWiSt 424 (2012); Matthias Jahn & Stefan Kirsch, *LG Bonn: Kartellrechtliches Ermittlungsverfahren,* NZWiSt 21 (2013); Hans Theile, Marcele Janina Gatter & Tobis C. Wiesenack, *Domestizierung von Internal Investigations*, ZStW 803 (2014); Hartmut Schneider, *LG Braunschweig: Beschlagnahmefreie Unterlagen* NStZ 308 (2016).

[39] Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC,* StV 41 (2009); Matthias Jahn, *Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO*, ZIS 453 (2011); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit,* ZIS 508 (2011); Matthias Jahn & Stefan Kirsch, *LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen,* NStZ 713 (2012); Matthias Jahn & Stefan Kirsch, *Kartellrechtliches Ermittlungsverfahren,* NZWiSt 21 (2013); Matthias Jahn & Stefan Kirsch, *LG Braunschweig: Beschlagnahmefreiheit von Unterlagen bei internen Erhebungen,* NZWiSt 37 (2016); Dierlamm, Brak-Mitteilungen 195 (2018); Michael Kubiciel: Juris Praxiskommentar 16/2018, Anm. 1; Carsten Momsen, *Volkswagen, Jones Day und interne Ermittlungen,* NJW 2362 (2018).

[40] Ingeborg Zerbes, *Unternehmensinterne Untersuchungen,* ZStW, 551, 561–570 (2013); Theile/Gatter/Wiesenack, ZStW 2014, S. 803.

2011, 2012, 2013 and 2016, and is cited in a large number of publications.[41] In addition to general approaches already discussed, on which he expresses his opinion, he contributes new ideas and theses of his own and often publishes following a printed court decision.[42] It can therefore be stated that - with regard to the topic of internal investigations- it is a hybrid type that reacts to current, practice-relevant topics, whose views are discussed and quoted. It therefore holds a pacemaker position, a position of legal thought leader.

B. Characteristics of the person of the legal mastermind

It follows from the above that it is the publications of a hybrid type whose content is linked to current events that are much noticed and cited. From this it can be concluded that a legal thought leader of a topic must come into contact with this topic and be receptive to it. With regard to a practice-oriented topic, he must have a sense for the importance and necessity of this in the future and accompany the discussions throughout from the beginning. It is also important that the publications he produces are published in the right place so that they can be noticed. An essay published in a journal, read exclusively by university professors, will not attract the attention of lawyers and judges working in practice; rather, they will not become aware of it at any time. A legal thought leader on the subject matter in question here should therefore be interested in and sensitive to current events in practice and have the ability to place his publication in the right place.

In addition, an objective approach to a topic is required in order to develop an opinion that does not necessarily follow and agree or disagree with what has been said so far. Rather, an opinion that is to gain recognition in the community must contain new aspects.

At the beginning it was mentioned that the judge is responsible for the further development of the law. To a certain extent, this can be agreed with, since both practice and university science are guided by judicial decisions with regard to their decision-making. Prof. Jahn's tactic of publishing his publications as commentaries following a judicial decision is therefore not insignificant in terms of recognition.

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41 Wolf-Tassilo Böhm, Strafrechtliche Verwertbarkeit der Auskünfte von Arbeitnehmern bei unternehmensinternen Untersuchungen, WM 1923 (2009); Matthias Dann & Kerstin Schmidt, Im Würgegriff der SEC? – Mitarbeiterbefragungen und die Selbstbelastungsfreiheit, NJW 1851 (2009); Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!,* NStZ 68 (2009); Thomas Knierim, *Das Verhältnis von strafrechtlichen und internen Ermittlungen,* StV 324, 328 (2009); Hans-Joachim Gerst, *Unternehmensinteresse und Beschuldigtenrechte bei Internal Investigations – Problemskizze und praktische Lösungswege –,* CCZ 1 (2012); Frank P. Schuster, *Anmerkung zu LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs. 2 StPO*, NZWiSt 424 (2012); Imme Roxin, *Probleme und Strategien der Compliance-Beratung in Unternehmen,* StV 116 (2012); Wolfram Bauer, *Keine Beschlagnahmefreiheit für Unterlagen eines mit internen Ermittlungen beauftragten Rechtsanwalts*, StV 277 (2012); Oliver Milde, *LG Mannheim: Zur Beschlagnahmefähigkeit von Unterlagen im Gewahrsam eines Zeugen*, CCZ 78 (2013); Martina de Lind van Wijngaarden & Philipp Egler, *Der Beschlagnahmeschutz von Dokumenten aus unternehmensinternen Untersuchungen* NJW 3549 (2013); Detlef Klengel & Christoph Buchert, *Zur Einstufung der Ergebnisse einer „Internal Investigation" als Verteidigungsunterlagen im Sinne der §§ 97, 148 StPO*, NStZ 383 (2016); Peetr Kootek, *Unternehmensinterne Compliance-Ermittlungen,* wistra 9 (2017); Christian Graßie & Mayeul Hiéramente, *Durchsuchungen bei Anwälten - eine Zeitenwende?,* BB 2051 (2018); 1; Astrid Lilie-Hutz & Saleh R. Ihwas, *Ein Ausblick auf Internal Investigations nach den VW/Jones Day-Entscheidungen*, 349 (NZWiSt 2018).

42 Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC,* StV 41 (2009); Matthias Jahn, *Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO*, ZIS 453 (2011); Matthias Jahn & Stefan Kirsch, *LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen,* NStZ 713 (2012); Matthias Jahn & Stefan Kirsch, *Kartellrechtliches Ermittlungsverfahren,* NZWiSt 21 (2013); Matthias Jahn & Stefan Kirsch, *LG Braunschweig: Beschlagnahmefreiheit von Unterlagen bei internen Erhebungen,* NZWiSt 37 (2016).

The person of an opinion or pacemaker and legal thought leader therefore needs, depending on the topic, both an objective approach, a flair and the possibility to become aware of current issues and the ability to place the publications in such a way that a perception by as many authors as possible can be achieved.

V. CONCLUSION

The "legal thought leader" of the topic of internal investigations is professionally active both scientifically and thus researching, as well as in practice, legally. Most of the other publications are penned by lawyers and therefore practitioners, with the result that opinions are formed more in practice than in scientific research. In this context, however, it should be mentioned that this is a practice-oriented topic and therefore the shaping of the implementation in practice is the logical consequence. The closeness of the work to the case, the involvement in everyday life with its constantly changing circumstances and the time pressure of a decision-making process not only influence the content, but also the publication density and speed.

The publications in connection with the topic of internal investigations clearly show that –as with the general opinion-forming process- in particular the profession, the environment and the way of life have an influence on the frequency of publications, the selection of the place of publication and thus the formation of legal opinion. While the majority of publications on practice-oriented topics are written by practitioners, the majority of opinions on general legal doctrine are penned by members of the academic community. The latter, in turn, do not come into contact with the current problems of practice, so that they cannot develop a feeling for such topics before others have seen them.
The characteristics of a person of opinion maker, a legal thought leader, are therefore also dependent on the subject matter with respect to which an opinion is to be formed. Therefore, the subjective inheres in legal opinions usually in the profession exercised by the person of the author.

Therefore, the person of the legal thought leader cannot be determined in general for the subject of "law", but depends on the nature of the subject and the professional branch of those who deal with it. The legal thought lives from the common cooperation of the persons working both in practice and in the university science and their experience.