

## **PART VII**

### **ACCESS TO INFORMATION AND EVIDENCE**

#### **CHAPTER 3**

##### **LIMITS ON DISCLOSURE AND DISCOVERY**

*Leon Marcel Kahl\**

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\* Postdoc at the University of Vienna, Institute for Procedural Law.

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## 1 INTRODUCTION AND OVERVIEW

- 1 This chapter deals with the limits of evidence gathering. It consists of three elements: interests and principles as to why a disclosure or discovery should be prohibited (Section 2); limits as to the stage of the proceedings up to which new evidence can be presented (Section 3); the extent to which an appellate court can review orders to produce evidence (Section 4).
- 2 The first part overlaps with Part VII Chapter 5 on the admissibility of evidence insofar as there is no clear distinction between evidence that is limited and evidence that is inadmissible.<sup>1</sup> Consequently, this chapter concerns privileges, privacy reasons, and proportionality as means to limit access to evidence. In contrast, Chapter 5 deals with relevance<sup>2</sup>, illegally obtained evidence<sup>3</sup>, hearsay<sup>4</sup>, and undue prejudice<sup>5</sup> as reasons for not admitting evidence.
- 3 The second part, which focuses on the limits up to which stage of proceedings evidence can be presented, also overlaps with the question of admissibility, namely regarding time: Whereas Chapter 5 concerns time limits and preclusion of specific pieces of evidence<sup>6</sup>, this chapter focuses more on the last point in time at which new evidence can be presented, including new evidence at the appeal stage.
- 4 In general, a distinction can be made between systems with broad discovery or disclosure (US, Israel, England) and those systems with evidence gathering only pertaining to specific pieces of evidence.<sup>7</sup> However, this does not lead to a different approach concerning the limits of taking of evidence. Rather, all systems essentially have similar reasons for limiting disclosure. Naturally, the details differ, and all systems entail their peculiarities. If one had to say which systems are the closest, it would be Israel and the US on the one hand, and Germany, Argentina, and Japan on the other. One systematic difference seems to be the distinction between absolute and qualified privilege that exists in the US and Israel. If a privilege is only qualified, this means that the court must conduct a balance of interests in order to ascertain whether to allow the evidence. Other states, however, recognize the concept of balancing interests when it comes to the admissibility of evidence.<sup>8</sup>

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<sup>1</sup> Cf L J Giannini, 'Admissibility of Evidence' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024) Part VII Chapter 5, para 4 <https://www.cplj.org/publications/7-5-admissibility-of-evidence> accessed 29 April 2025.

<sup>2</sup> See *ibid* para 22 ff.

<sup>3</sup> See *ibid* para 40 ff.

<sup>4</sup> See *ibid* para 55 ff.

<sup>5</sup> See *ibid* para 74 ff.

<sup>6</sup> See *ibid* para 10 ff.

<sup>7</sup> Cf *ibid* para 4.

<sup>8</sup> Cf *ibid* para 45 ff.

- 5 The interests and principles of why a disclosure or discovery should be prohibited are similar in most systems. All systems recognize what the US system calls an attorney-client privilege. The privilege can be waived by the party, not by the lawyer. Failure to waive it can, under German law, have the adverse effect that the fact purported by the opponent is deemed true.<sup>9</sup> All systems recognize protection against self-incrimination. In Germany and Japan, it includes relatives, and in England and the US only spouses. In the US, documents are not included. That spouses do not have to testify against their partner is, however, a privilege distinct from privileged communications between the spouses.<sup>10</sup>
- 6 Further, all systems recognize – to varying degrees – the protection of public interests, press and media, and trade secrets. Many systems recognize a doctor-patient and priest-penitent privilege.
- 7 Proportionality is a principle that is mentioned in England, the US, Israel, Argentina and Germany. In Argentina, one can further discern it when it comes to the maximum number of witnesses.<sup>11</sup> In Japan, it is neither mentioned nor relevant. Whereas it is always considered in Israel, it remains unclear what the practical effects are in the US. In England, the two overriding objectives of the Civil Procedure Rules (ECPR) are to deal with a case justly and – of importance here – at proportionate cost.<sup>12</sup>
- 8 All systems allow new evidence up until the last oral hearing. In most systems (Argentina, Germany, England, and Japan), the courts oversee evidence gathering.
- 9 Only Japan and England allow a separate challenge of an order to produce evidence. Otherwise, the entire judgment of the first instance must be challenged. To admit new evidence in appeal is possible, but limited.

## 2 INTERESTS AND PRINCIPLES THAT LIMIT EVIDENCE-GATHERING

### 2.1 Overview of the Legal Foundations and Concepts

- 10 At the outset, one needs to bear in mind the general distinction between systems where there is broad discovery or disclosure (US, Israel, UK) and those where individual documents need to be identified to be disclosed (Germany, Japan, Argentina).<sup>13</sup> The consequence of this appears to be a different significance of documentary as opposed

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<sup>9</sup> See below para 33.

<sup>10</sup> As to the latter privilege, see below para 63.

<sup>11</sup> See below para 132.

<sup>12</sup> Rule 1.1(1) ECPR, further see below para 129.

<sup>13</sup> For an overview see R Marcus, 'Introduction and General Themes' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024) Part VII Chapter 1, para 10 ff <https://www.cplj.org/publications/7-1-introduction-and-general-themes> accessed 29 April 2025.

to testimonial evidence.<sup>14</sup> Where rights to obtain documentary evidence gathering are broader, a witness (cross-)examination in trial may consist of reading a document to the witness and asking whether the witness had written it. This approach, where the (cross-)examination in trial may even seem superfluous to extract new information from a witness, is seldom possible in systems in which a party can only request disclosure of specific documents. There, the witness's obligation to tell the truth may reveal yet unknown facts when judges ask a witness to describe the course of events. However, one should bear in mind that, during discovery, documents are extensively used to extract additional information from witnesses through depositions.

- 11 The core of the analysis builds the law of document production. Here, all systems set limits regarding attorney-client privilege, self-incrimination, and public interest defences. It should be noted, however, that not all systems give document production a prominent role. This is evident, for example, in the systematic position of privileges in the German Code of Civil Procedure (GCCP) in the context of the examination of witnesses;<sup>15</sup> these privileges are extended to documents simply by reference.<sup>16</sup>
- 12 In the US, the main protection against the breadth of US discovery are so-called privileges<sup>17</sup>. These include protected communications such as the attorney-client privilege, the doctor-patient privilege as well as protection against self-incrimination, and in the public interest.<sup>18</sup> However, a general protection of privacy from a US perspective against the production of documents does not exist.<sup>19</sup>
- 13 In English law, where disclosure is also broader, its limits have evolved historically in the common law and in equity. Notably, the English Civil Procedure Rules, as the pivotal legal instrument in civil procedure, do not contain a list of pertinent privileges and immunities. There are scattered provisions in statutory laws. Privileges exist regarding correspondence with lawyers, the public interest, self-incrimination, trade secrets, and correspondence in settlement negotiations.<sup>20</sup> In general, disclosed documents may only be used for the proceedings in which they were disclosed unless publicly read or referred to by the court.<sup>21</sup>

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<sup>14</sup> It should be noted that in some systems the parties are seen as witnesses, while in others they are distinct. Where there is a distinction, the (informal) examination of the parties, as in Germany, may still play an important role in the court's determination of the facts.

<sup>15</sup> See Sec 383–390 GCCP.

<sup>16</sup> Sec 142(2) GCCP. Further, see below para 17. The situation is different, however, in Austria, where two distinct, yet similar, provisions are set forth for document production, Sec 305 Austrian Code of Civil Procedure (ATCCP), and witness examination, Sec 321–326 ATCCP.

<sup>17</sup> As to the term, see below para 23.

<sup>18</sup> For details see below para 30, 48, 69, 76.

<sup>19</sup> For details see below para 107 ff.

<sup>20</sup> For details see below para 45, 74, 78, 84, 95.

<sup>21</sup> Rule 31.22 ECP. For details see below para 120.

- 14 Israeli law on the limits of evidence gathering is similar to that of the United States and England. The primary protections are privileges, which are categorized as either absolute or qualified. Absolute privileges include the attorney–client privilege and the clergy–penitent privilege. In principle, even documents covered by absolute privilege must be listed in the disclosure affidavit. In practice, however, such documents are described only in vague terms that do not reveal their contents, and they are not subject to inspection.
- 15 In Israel, where privileges are qualified, the pertinent documents must be mentioned in the affidavit, even if they are not admissible in court on grounds of privilege. This is the case in particular when the privilege has been stipulated in order to encourage persons to cooperate in an investigation, as is the case with information received by the State Comptroller (an Israeli government audit entity), or reports prepared by State investigative committees or by the State Comptroller. However, the court may inspect the document and decide, after balancing the protected interests against the need to establish the facts of the case whether the privileged document should be disclosed wholly or partially.<sup>22</sup>
- 16 In Germany, as regards a party’s obligation to disclose, only specific documents can be demanded under Sec 142 and 144 GCCP. Equally, no party can be obliged to be examined.<sup>23</sup> However, if a party refuses to do so, the court may, at its discretion, take into account the conduct of the party as a whole and decide whether the alleged fact is proven.<sup>24</sup> The underlying principle is *nemo tenetur edere contra se*. No one is held to produce evidence against themselves. The reasons for this are the protection of privacy and trade secrets.<sup>25</sup> However, this principle has been contested in German literature<sup>26</sup> and is eroding in Union law obligations to produce documents.<sup>27</sup>
- 17 Further, third parties may refuse to testify based on personal grounds or for factual reasons. Personal grounds include the personal relationship between witness and party, like marriage, and professional obligations to secrecy, such as those of an attorney.<sup>28</sup> Factual reasons concern the avoidance of damages, self-incrimination, and trade

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<sup>22</sup> Cf U Goren, *Issues in Civil Procedure* (in Hebrew, 13th edn, Nevo 2020) 383, with further references.

<sup>23</sup> Sec 446 GCCP.

<sup>24</sup> Sec 446, 453(2), 454(1) GCCP.

<sup>25</sup> L Rosenberg and P Gottwald, *Zivilprozessrecht* (18th edn, C.H. Beck 2019) § 110, para 9.

<sup>26</sup> Prominently R Stürner, *Die Aufklärungspflicht der Parteien des Zivilprozesses* (Mohr Siebeck 1976); for an English summary of the work, see the presentation by P Gottwald, ‘Rolf Stürner, Die Aufklärungspflicht der Parteien des Zivilprozesses’ [https://www.mpi.lu/fileadmin/mpi/medien/institute/rev\\_Rolf\\_Sturner.pdf](https://www.mpi.lu/fileadmin/mpi/medien/institute/rev_Rolf_Sturner.pdf) accessed 12 March 2025.

<sup>27</sup> See B Hess, ‘Europäisches Zivilprozessrecht’ (2nd edn, De Gruyter 2021) para 11.35, 11.40–42; L M Kahl, ‘Evidence before German Courts’ (26 March 2025) 11–13, available at SSRN: <https://ssrn.com/abstract=5210728> accessed 29 April 2025.

<sup>28</sup> Sec 383 GCCP.

secrets.<sup>29</sup> The same reasons apply to document production<sup>30</sup> or the allowance of visual or expert evidence.<sup>31</sup>

- 18 In Japan, the system for ordering production of documents and other evidence is equally narrow: A party has the right to apply to the court to issue a document production order against the other party or a third party.<sup>32</sup> The production order is issued in favour of the court, not the party.<sup>33</sup> There are two types of document production obligations – those with grounds for refusal (so-called unconditional and conditional obligations) and those without.
- 19 An unconditional production obligation applies to documents whose existence or content the other party cites to support its allegations and who are in possession of that party;<sup>34</sup> and where the requesting party has a right under substantive law to require the holder of the document to deliver or inspect it.<sup>35</sup>
- 20 A conditional production obligation is in place regarding all other documents in possession of a party or a third party.<sup>36</sup> Grounds for refusal include self-incrimination, public interest, and professional secrets.<sup>37</sup>
- 21 Another production obligation concerns documents created to prove the rights or status of the requesting party or documents created to prove the legal relationship between this party and the holder of the document.<sup>38</sup> Whereas the wording of item (iii) implies that these documents are to be produced unconditionally, the case law of the Supreme Court allows for the refusal of production on grounds similar to those of item (iv).
- 22 In Argentina, the parties to a dispute and third parties must produce documents in their possession essential to resolve the dispute.<sup>39</sup> A third party may refuse production only if the document is its sole property and the production may harm the party.<sup>40</sup> There are no strict rules on when evidence cannot be taken. However, privacy serves as a constitutional right that may hinder the taking of evidence, subject to a proportionality

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<sup>29</sup> Sec 384 GCCP.

<sup>30</sup> Sec 142(2) GCCP.

<sup>31</sup> Sec 144(2) GCCP referring to sec 383 to 390 GCCP.

<sup>32</sup> Art 219 Japanese Code of Civil Procedure (JCCP). Available in English online at <https://www.japaneselawtranslation.go.jp/en/laws/view/2834/en> accessed 25 July 2024.

<sup>33</sup> Art 221 JCCP.

<sup>34</sup> Art 220(i) JCCP.

<sup>35</sup> Art 220(ii) JCCP.

<sup>36</sup> Art 220(iv) JCCP.

<sup>37</sup> For details see below para 72, 79, 87.

<sup>38</sup> Art 220(iii) JCCP.

<sup>39</sup> Art 387–388 Argentinian Code of Civil Procedure (ACCP).

<sup>40</sup> Art 389 ACCP; R Berizonce and E Oteiza, *Civil Procedure in Argentina* (Wolters Kluwer Law International 2021) para 375.

test balancing the degree of interference with the rights at stake (compare a civil traffic damages suit with an action to prevent child abuse).<sup>41</sup>

## 2.2 Privileges and Comparable Reasons to Refuse to Give Evidence

- 23 The analysis in this subsection starts with the peculiarity of its denotation. The common law term *privilege* refers to a category of immunity that limits the scope of evidence gathering. Other systems simply refer to the *right to refuse to give evidence*. Neither term is completely accurate. In essence, all jurisdictions refer to (i) the right and (ii) the obligation to refuse to give evidence, (iii) which can be waived by the protected party. The term *privilege* fails to capture the possibility of waiver, while *right* understates the potential obligation to refuse to give evidence. This chapter generally employs the common law term privilege. It identifies the most prominent privileges in the systems analysed.
- 24 In the US, evidentiary privileges are mainly the products of state law, not federal law.<sup>42</sup> For claims or defences not governed by state law, the US Federal Rules of Evidence (USFRE) provide that privileges should be determined by the courts according to the common law.<sup>43</sup> On occasion, the Supreme Court has refused to recognize privileges.<sup>44</sup> This variety of possible sources of privilege law means that sometimes there is a debate about which jurisdiction's privilege law should apply.
- 25 In Israel, according to case law, the party that alleges that a document is privileged has to plead it in its affidavit.<sup>45</sup> If it fails to do so, it will be allowed to rely upon the privilege only if the court is convinced that this omission was due to an error.
- 26 The inadvertent disclosure of documents constitutes a significant risk. As a US judge put it in 1991: 'The inadvertent production of a privileged document is a specter that haunts every document intensive case'.<sup>46</sup> This risk has since increased significantly due to the proliferation of electronic communications and the huge growth of discoverable information. To solve this, England and the US have adopted a similar approach:

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<sup>41</sup> In detail see below para 115.

<sup>42</sup> Rule 501 USFRE provides that 'in a civil case, state law governs privilege regarding a claim or defence for which state law supplies the rule of decision'.

<sup>43</sup> Rule 501 USFRE also provides: 'The common law – as interpreted by United States courts in the light of reason and experience – governs a claim privilege'.

<sup>44</sup> Prominent examples are *United States v Arthur Young & Co* (Supreme Court, US) [465 U.S. 805 (1984)] (refusing to recognize an 'accountant's privilege') and *Branzburg v Hayes* (Supreme Court, US) [408 U.S. 665 (1972)] (refusing to recognize a journalist's privilege to refuse to disclose the identity of a confidential informant).

<sup>45</sup> *HaMagen Insurance Co Ltd v Clalit Health Services*, CA 8221/05 (Israel), Nevo e-database (15 November 2005).

<sup>46</sup> *F.D.I.C. v Marine Midland Realty Credit Corp* (District Court, US) [138 F.R.D. 479, 479–80 (E.D. Va. 1991)].



- 27 In England, if a party has inadvertently allowed a privileged document to be inspected, its later use requires the permission of the court.<sup>47</sup> The US has reached a similar result over time.
- 28 In the US, the production of a privileged document could be viewed as a waiver of that respective privilege. This has led to several rule changes to address these challenges in avoiding waiver during discovery. First, in 1993, the rules were amended to require that parties withholding information from the production of documents on grounds of privilege provide details of what was being withheld.<sup>48</sup> In 2006 – as part of the ‘E-Discovery amendments’ to the Federal Rules – another provision was added to permit a party that had mistakenly produced privileged material to seek its return and prevent its use in the litigation.<sup>49</sup> However, due to concerns about the limits of the rulemaking power,<sup>50</sup> the provision did not purport to alter the scope of waiver, but only provide a method of bringing that question to the court’s attention. In 2008, Congress enacted Federal Rule of Evidence 502, which adopts provisions that effectively change the waiver doctrine. Most significantly, it provides that the former ‘subject matter’ scope of waiver would ordinarily not apply.<sup>51</sup> It also directs that ‘inadvertent disclosure’ would not result in a waiver if the privilege holder took ‘reasonable steps to prevent disclosure’.<sup>52</sup> Beyond that, it has empowered the court to order greater protections against waiver.<sup>53</sup>

### 2.2.1 Attorney-Client Privilege

- 29 The attorney-client privilege is an important privilege in all systems up to the point where the client abuses the privilege to advance a crime.<sup>54</sup>
- 30 From a US perspective, the lawyer-client privilege may be the oldest common law privilege. As explained by J Wigmore in the classic definition, it has several requirements, and is only available:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in

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<sup>47</sup> Rule 31.20 ECPD.

<sup>48</sup> Rule 26(b)(5)(A) US Federal Rules of Civil Procedure (USFRCP). This rule requirement has led many courts to direct that the parties provide a ‘privilege log’ listing each withheld item and the grounds for the claim of privilege regarding that item. According to some, this requirement has generated stupendous costs but little value, and there are proposals that the rules be changed to avoid waste in this regard.

<sup>49</sup> See Rule 26(b)(5)(B) USFRCP.

<sup>50</sup> See Title 28 USC Sec 2074(b) (forbidding rule changes that affect the scope of privileges).

<sup>51</sup> Rule 502(a) USFRE.

<sup>52</sup> Rule 502(b) USFRE.

<sup>53</sup> Rule 502(d) USFRE.

<sup>54</sup> For the crime-fraud limitation in the US, see *United States v Zolin* (Supreme Court, US) [491 U.S. 554 (1989)] (lawyer-client communications of members of the Church of Scientology could be subject to a subpoena by the US Internal Revenue Service on a showing that persuades a judge – based on an *in camera* inspection of the materials in issue – that there is a ‘factual basis adequate to support a good faith belief by a reasonable person’ that the client’s objective in consulting the lawyer was to commit a crime or fraud).

confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived.<sup>55</sup>

- 31 We will deal with a few aspects of the privilege in turn. First, the privilege protects only communications that are made in confidence, so the presence of third parties may destroy it. This consequence does not follow if the additional person is necessary to the professional relationship – such as a paralegal or secretary of the lawyer.<sup>56</sup> When parties with similar interests in litigation – such as co-defendants – confer in the presence of their lawyers, they may be protected by the ‘common interest’ doctrine. However, courts have upheld the disclosure of communications by unauthorized third parties who overheard conversations between a lawyer and a client.<sup>57</sup>
- 32 The purpose of the communication must be legal advice. Involvement in the general business activities of a client does not suffice.<sup>58</sup>
- 33 In other countries, such as Germany or Japan, attorneys are simply bound to maintain confidentiality concerning everything that becomes known to them in the exercise of their profession.<sup>59</sup> This leads to a corresponding privilege.<sup>60</sup> In Germany, the court may evaluate a party’s refusal to release the lawyer from an obligation of confidentiality. There, the principles of frustration of evidence apply: Generally, the court may deduce that the witness statement would have revealed facts unfavourable to the party refusing to release from the obligation, unless the party can invoke an interest in secrecy beyond the proceedings.<sup>61</sup>
- 34 In the US, the privilege is limited to communication with the client. This raises the question of who the client is for the purpose of privilege protection. Particularly in the case of corporations or other business entities, this question can be difficult to answer. Is it the entity or the human being making the communication?
- 35 Two questions emerge: (i) Is communication between employees and lawyers protected? (ii) Who has the right to waive the privilege when the employee has provided confidential information?
- 36 The first question is answered in the German and Japanese systems by the broader scope of the privilege: It is protected. As to the second question, German case law holds that

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<sup>55</sup> J Wigmore, *Evidence in trials and common law* (McNaughton edn, 1961) para 2292.

<sup>56</sup> See R Park, D Leonard, A Orenstein and S Goldberg, *Evidence Law* (3rd edn, West 2011) para 12.04.

<sup>57</sup> See *ibid.*

<sup>58</sup> See *ibid* para 12.06.

<sup>59</sup> For Germany, Sec 43a(2) German Federal Code for Lawyers, available at [https://www.gesetze-im-internet.de/englisch\\_brao/englisch\\_brao.html](https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.html) accessed 29 April 2025.

<sup>60</sup> Sec 383(1) No 6, 142(2) GCCP; Art 220(iv)(c), 197(1)(ii) JCCP.

<sup>61</sup> M Huber and S RöB, ‘§ 383 ZPO’ in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024) para 10.

personal confidentiality interests, even of former board members, do not defeat a corporation's claim against its attorney to release files.<sup>62</sup>

- 37 In the US, the discussion focused on the first question, with the second question treated as a *man in the middle* problem: For many US courts, the dividing line for corporate parties was the *control group* – the individuals who had the authority to make controlling corporate decisions. They did not insist that the company had no privilege, but (particularly with large organizations) resisted the idea that the privilege could apply to communications between the company lawyer and every employee of the company.
- 38 This limitation on the application of the privilege in the corporate setting could solve a conundrum – if the corporation is the client, could the employee who made disclosures to the company's lawyer claim that they were protected by the employee's attorney-client privilege? If not, a company could unilaterally decide to have its lawyer reveal the 'confidential' communications to others, even the prosecuting authorities.<sup>63</sup>
- 39 In 1981, the US Supreme Court rejected the 'control group' test for the attorney-client privilege recognized by the federal courts.<sup>64</sup> The Court's decision emphasized the 'Hobson's choice' (of take it or leave it) faced by the corporation's lawyer when the members of the 'control group' cannot supply the needed information, but the cloak of the privilege does not extend to communications with the corporate employees who can supply that information. However, some state courts have disagreed with this interpretation.<sup>65</sup> And some lawyers said that despite the 'Hobson's choice', identified by the Supreme Court, they had no choice but to ask the corporate employees with the information to disclose it: Even lawyers in jurisdictions which followed the severely limited 'control group' test essentially had to ignore it because otherwise they could not serve their clients. It has never made any sense to remain deliberately ignorant of the facts out of fear of adverse discovery.<sup>66</sup>
- 40 Naturally, the privilege can be waived. Then lawyers cannot refuse to give evidence.<sup>67</sup> In the US, one form of waiver is intentional relinquishment. Whether this can be reversed where the actual content of privileged communications has not been revealed is sometimes uncertain. Certainly, *selective disclosure* of some privileged communications – an issue that arises only in systems with broad evidence-gathering powers – is incompatible with maintaining privilege protection for other communications on the

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<sup>62</sup> Case IX ZR 243/17 (BGH, Germany), Judgment 17 May 2018 [NJW 2018 2319] para 17.

<sup>63</sup> See, eg, H E O'Leary, 'Criminal Antitrust and the Corporate Executive: The Man in the Middle' (1977) 63(10) American Bar Association Journal 1389 (describing the predicament of a middle-level executive told to speak candidly to the company's lawyer about corporate activities under investigation by the authorities).

<sup>64</sup> *Upjohn Co v United States* (Supreme Court, US) [449 U.S. 383 (1981)].

<sup>65</sup> See, eg, *Consolidation Coal Co v Bucyrus-Erie Co* (Supreme Court of Illinois, US) [432 N.E.2d 250 (Ill. 1982)] (retaining 'control group' test for the corporate attorney-client privilege).

<sup>66</sup> Panel Discussion, 'Antitrust Investigations after *Upjohn*' (1982) 51 Antitrust Law Journal 127, 133.

<sup>67</sup> For Germany, see Sec 385(2) GCCP; for Japan Sec 197(2) JCCP.

same general subject matter, as the disclosed material may place advice from one lawyer in the context of advice from others.

- 41 In Israel, the lawyer-client privilege is considered to be designed to ensure that the client is able to present his attorney with all pertinent information, without fear that the information will fall into the hands of others. Therefore, it is the client's right to refuse disclosure that is protected. Israeli statute law has evaded the problems of US doctrine. Sec 48 Evidence Ordinance [New Version], 5731-1971 reads:

(a) An advocate is not bound to submit as evidence any matters or documents which have passed between him and his client or a person acting on behalf of his client and which are substantively connected with the professional service rendered by him to his client, unless the client has waived the privilege. The same applies to an advocate's employee whom any matters or documents communicated to the advocate reached during his work in the service of the advocate.

(b) The provisions of subsection (a) shall apply also after the witness has ceased to be an advocate or the employee of an advocate.

- 42 Further, Sec 90 Chamber of Advocates Law, 5721-1961 provides:

An advocate shall not disclose in any legal proceedings or in any enquiry or search any communications or document passed between him and a client and substantively connected with the professional service rendered by him to the client, unless the client has waived the secrecy thereof.

- 43 In Israel, the privilege also covers documents the disclosure of which is requested by a third party who has come into possession of the documents.<sup>68</sup> It covers documents held in the hands of the lawyer, the client, or a third party. Also, materials prepared in anticipation of the submission of a claim are privileged.<sup>69</sup>

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<sup>68</sup> *Ploni v Kupat Holim Meuhedet*, Application for Permission to Appeal 6171/17 (Israel), Nevo e-database (4 September 2017). In that case, the pertinent documents came into the hands of a journalist.

<sup>69</sup> *Ellern Bank Ltd v Simcha Bunim Singer*, CA 327/68 (Israel), Nevo e-database (11 October 1968). This case concerned a claim based upon an insurance policy covering diamonds. The pertinent documents included investigation reports, documents and letters prepared by assessors and experts on behalf of the insurance agents and at their request, in order to investigate the merits of the claim before the proceedings had been initiated. The Supreme Court held that the documents were privileged. Further see below Sec 2.2.7.

44 The privilege only protects communications that are made in confidence. If the client divulges the information, the privilege is deemed to have been waived.<sup>70</sup>

45 In English common law, the legal professional privilege has been accepted as an absolute privilege, as evidenced by a criminal case before the House of Lords. Here, the applicant's solicitor was summoned to produce the communication with him in a murder trial where the applicant was a witness after having been acquitted. The House of Lords allowed the appeal against the production order. The crux of the case was that the applicant had lost a 'recognisable interest' in confidentiality once acquitted. Yet the privilege held:

The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal profession privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.<sup>71</sup>

46 The privilege is divided into the sub-categories of legal advice privilege and litigation privilege. Only the client can waive the privilege, not the lawyer.

### 2.2.2 Privileges for Doctors, Psychotherapists, Priests, and Other Professions

47 Most systems have similar privileges for professionals where it is important that clients can be completely open and who are therefore bound by confidentiality. Naturally, details differ. It seems difficult to recognize reasons for the differences – they may stem from the varying social status of the respective professions or simply from historical contingencies.

48 In the US, the common law did not recognize a doctor-patient privilege, but state legislatures have often done so by statute. However, the scope of these state laws varies widely.<sup>72</sup> Where applicable, this privilege is frequently lost when the patient puts their physical or mental condition at issue in a lawsuit, such as in a personal injury claim.

49 However, there are stronger policy justifications for protecting communications between a psychotherapist and a patient. In 1996, the US Supreme Court recognized a privilege for such communications.<sup>73</sup> Even this privilege may be restricted if the therapist concludes that the patient was a 'dangerous patient'.<sup>74</sup>

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<sup>70</sup> *Ken Navon Ltd v Itzhaki Ozel Ltd*, Application for Permission to Appeal 4876/16 (Israel), Nevo e-database (19 September 2016).

<sup>71</sup> *Regina v Derby Magistrates' Court* (House of Lords, UK), ex parte B [1996] AC 487 (HL).

<sup>72</sup> See Park et al (n 56) para 12.13.

<sup>73</sup> *Jaffee v Redmond* (Supreme Court, US) [518 U.S. 1 (1996)].

<sup>74</sup> Park et al (n 56) para 12.15.

50 In Israel, the doctor-patient and psychotherapist-patient privileges are qualified privileges, in the sense that after disclosure, the court may decide, after reviewing the privileged materials and considering the circumstances of the case, whether the other party may inspect these documents. The qualified nature of these privileges is expressed in the Evidence Ordinance. Accordingly, Sec 49 Evidence Ordinance [New Version], 5731-1971 reads:

(a) A physician is not bound to give evidence on any matter relating to a person who has availed himself of his services if such matter reached him in the course of his work as a physician and it is one of the matters which, by reasons of their nature, are generally communicated to a physician in reliance on his keeping them secret, unless that person has waived the privilege *or the court has found that the necessity to disclose the evidence for the purpose of doing justice outweighs the interest in its non-disclosure*. The same applies to a person whom any matter communicated to a physician or a medial institution or as a member of a professional team working with the physician in attending patients [emphasis added].

(b) The provisions of subsection (a) shall apply also after the witness has ceased to be a physician or to work as specified in the latter part of that subsection.

(c) Where privilege is claimed under this section, the claim shall be dealt with *in camera*. If the court decides to hear the testimony, it may hear it *in camera*.

51 A similar rule is provided in Sec 50 Evidence Ordinance [New Version], 5731-1971, with respect to expert psychologists, ie, psychologists defined as experts for the purpose of this section, according to an order issued by the Minister of Health, with the consent of the Minister of Justice.

52 In English law, there is no privilege for either doctors or clergy.<sup>75</sup>

53 In the US, communications between parishioners and clergy are widely regarded as privileged – for example, confessions under the doctrines of the Roman Catholic Church. A proposal to add such a privilege to the Federal Rules of Evidence (Rule 506) was rejected, though.

54 In Israel, the religious clergyman privilege, like the attorney-client privilege, is absolute, as provided in Sec 51 Evidence Ordinance [New Version], 5731-1971:

A minister of religion is not bound to give evidence on any matter told him in confession and the disclosure of which is forbidden him by the laws of his religion.

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<sup>75</sup> A privilege for clergy was rejected already in the nineteenth century, *Wheeler v Le Marchant* (Court of Appeal, England and Wales, UK) [1881] 17 Ch.D 681 (CA).

55 In Japan and Germany, the list of professional privileges is extensive. The Japanese wording of the law on document production refers to ‘secrets learned in the course of one’s duties by professionals such as a doctor, lawyer, or religious person’.<sup>76</sup> The law on refusal to testify is even broader:

(ii) a person who is or was a doctor, dentist, pharmacist, pharmaceuticals distributor, birthing assistant, attorney at law (this includes registered foreign lawyers), patent attorney, defense counsel, notary, or person engaged in a religious occupation is examined with regard to any fact learned in the course of duty that shall remain confidential;

(iii) the witness is examined with regard to a matter that involves a ... professional secret.<sup>77</sup>

56 In Germany, a privilege exists for clergy<sup>78</sup> and persons to whom facts are entrusted, by virtue of their office, profession, or status,<sup>79</sup> for example, members of parliament, lay judges, arbitrators, mediators, legal representatives and employees of financial institutions, medical doctors, psychotherapists, attorneys, notaries, tax accountants.<sup>80</sup> These persons may not refuse their testimony if they have been released from their confidentiality obligations.<sup>81</sup> If not released, the same principles for frustration of evidence apply as for attorneys.<sup>82</sup>

### 2.2.3 Privileges for Family Members

57 Regarding privileges for family members other than (self-)incrimination, no trend exists between the systems evaluated. Only the US, Germany and Argentina have family privileges.

58 US law recognizes two sorts of privileges regarding married couples.<sup>83</sup> Such privileges are recognized by the federal courts and by state statutes and case law.<sup>84</sup> The adverse spousal testimony privilege permits a spouse to refuse to testify against a spouse. The general justification is that a spouse’s testimony would threaten marital harmony.

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<sup>76</sup> Art 220(iv)(c) JCCP.

<sup>77</sup> Art 197(1)(ii) and (iii) JCCP.

<sup>78</sup> Sec 383(1) No 4 GCCP.

<sup>79</sup> Sec 383(1) No 6 GCCP.

<sup>80</sup> Rosenberg and Gottwald (n 25) para 22.

<sup>81</sup> Sec 385(2) GCCP.

<sup>82</sup> See above para 33.

<sup>83</sup> The question of same-sex marriage and other non-traditional arrangements, in regard to such privileges, may be evolving. But it is likely that considerable formality would be necessary to claim coverage, particularly as to the privilege against adverse spousal testimony. It might be too easy for someone to claim such a relationship to prevent adverse testimony by an alleged romantic partner.

<sup>84</sup> See Park et al (n 56) para 12.15-12.17.



- 59 There are different views on whether the spouse who is a party to the lawsuit can invoke this privilege even though the other spouse is willing to testify. The US Supreme Court has held that only the witness spouse has this privilege; if they are willing to testify the other spouse cannot prevent them from doing so.<sup>85</sup> This privilege ends when the marriage ends. It also does not apply if the spouses are on opposite sides of the lawsuit, such as in a divorce action, or if one is suing the other for a tort, such as battery.
- 60 Despite a few exceptions, there are no similar privileges for other family relationships. A few US states recognize a privilege for confidential communications between a parent and child, but there are no such protections for communications among siblings or with other relatives.
- 61 In Germany, privileges for family relationships reach further (Sec 383(1) GCCP), namely fiancés (No 1), spouses (No 2, 2a), and close family of a party (No 3), that is parents(-in-law), (great-)grandparents, brothers and sisters(-in-law), aunts, uncles, nieces, nephews, not however cousins. The rationale is to protect a close relative from a conflict of conscience, as witnesses in civil proceedings are obliged to tell the truth under threat of criminal punishment. Consequently, the law allows witnesses to ‘stay out’.<sup>86</sup> The court must not evaluate such refusal to the detriment of either party.<sup>87</sup>
- 62 Because German family privileges are so broad, there are some exemptions where close family members must give evidence (Sec 385 GCCP): the witness was involved as a witness for a legal transaction (No 1); the witness is to testify about the births, marriages, or deaths of family members (No 2), or facts concerning property matters governed by the family relationship (No 3); the witness is to testify actions that the witness allegedly took with a view to the legal relationship at issue as the predecessor in title of a party or as its representative (No 4).
- 63 US law makes a further distinction with a different emphasis than German law, where the right to waive the privilege always lies with the witness: the protection of confidential communications between spouses during the marriage continues after the marriage ends in the case of so-called marital confidences.<sup>88</sup> The presence of a third person – even a close relative like a child – destroys the confidentiality required for the privilege to apply. This privilege belongs to the spouse who made the disclosure, and the other spouse may not testify to that communication even if willing to do so.
- 64 The closest parallel in German law can be found in the criminal law concept of *offence-free space*. Relevant cases relate to mail of prisoners who make derogatory remarks

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<sup>85</sup> *Trammel v United States* (Supreme Court, US) [445 U.S. 40 (1980)]. The idea was that if the witness spouse is willing to testify, there seems little marital harmony to preserve.

<sup>86</sup> Huber and Röß (n 61) para 1.

<sup>87</sup> Case I ZR 68/16 (BGH, Germany), Judgment 27 July 2017 [NJW 2018 68] para 28; Huber and Röß (n 61) para 10.

<sup>88</sup> *Wolfe v United States* (Supreme Court, US) [291 U.S. 7 (1934)] 14.



about prison personnel in letters to family members or other persons of trust (the cases come before the courts because prison mail is controlled). The German Federal Constitutional Court held that privacy protects such messages where a person writes in a 'shielded area'.<sup>89</sup> Consequently, German law solves the problem of protecting the confidential word substantively, while US law opts for a procedural solution.

- 65 Israel has a family-related special rule: the record of statements made in the family court by minor children is privileged.<sup>90</sup> The child is heard by the court without any of his parents, or their lawyers, being present. The court will not provide in its decision details from the statements made by the child, unless the child agrees that the court will disclose his statements, wholly or partially, and the court considers that such disclosure is in the best interests of the child.
- 66 In Argentina, the family privilege takes place early in the proceedings: direct relatives or spouses, even if legally separated, cannot be called as witnesses, except for signature recognition.<sup>91</sup>

#### 2.2.4 Self-Incrimination

- 67 Protection against self-incrimination during civil proceedings is known to all analysed systems. This is not surprising as also the European Court of Human Rights (ECtHR) recognized the privilege as an international standard.<sup>92</sup> Differences arise as to its substantive and personal scope.
- 68 In effect, all jurisdictions extend the privilege to spouses. Admittedly, doctrinally in the US, this is not framed as an extension of the protection against self-incrimination, but rather as one of two marital privileges aimed at protecting the marriage.<sup>93</sup> The reason to speak of an extension of protection from self-incrimination is that in some systems like Germany, Austria and Japan the protection against self-incrimination is mentioned in the civil procedure code all in one breath with the incrimination of family members.<sup>94</sup>
- 69 The US Constitution protects against compelled self-incrimination in criminal cases.<sup>95</sup> This privilege belongs to the individual, and the witness cannot claim it to protect any

<sup>89</sup> Case 1 BvR 285/06 (BVerfG, Germany), Chamber Order 23 November 2006 [NJW 2007 1194].

<sup>90</sup> Rules 51–55 Civil Procedure Rules in the Court for Family Affairs, 5781-2020 (Israel).

<sup>91</sup> Art 427 ACCP.

<sup>92</sup> *O'Halloran and Francis v United Kingdom*, Case 15809/02 and 2564/02 (ECtHR) Judgment 29 June 2007 [ECLI:CE:ECHR:2007:0629JUD001580902], para 46.

<sup>93</sup> See above para 58.

<sup>94</sup> For example, Sec 384 No 2 GCCP reads: 'Witnesses may refuse to testify: [...] On questions, the answer to which would result in the witness, or [a family member], being dishonoured, or if this would entail the risk of their being prosecuted for a criminal offence or an administrative offence'. Sec 321(1) No 1 ATCCP and Art 196, 220(iv)(a) JCCP are similar.

<sup>95</sup> US Constitution, Amendment V: 'No person shall be [...] compelled in any criminal case to be a witness against himself'.

other person. But it only applies if there is a realistic prospect that answering the questions would subject the witness to a risk of criminal prosecution.<sup>96</sup> A witness can invoke the privilege in any proceedings, but must take the witness stand and invoke it, and in civil cases, the other side can ask the jury to draw an adverse inference from the invocation of the privilege. However, because the privilege can be waived by testimony, subjecting the witness to cross-examination on all matters covered in direct testimony or during deposition, it must be asserted broadly. Thus, witnesses who assert this privilege may refuse to answer *any* questions for fear of being deemed to have waived the privilege. When there are parallel civil and criminal proceedings, parties may seek to defer depositions in the civil proceedings until the criminal proceedings are concluded.<sup>97</sup>

- 70 The German system draws the line differently so that waiver does not become an issue. We have seen that if the witness is a relative of the party, the witness can broadly refuse to give evidence, regardless of whether incrimination is imminent.<sup>98</sup> Otherwise, a witness may refuse to answer specific questions, which may expose them or a relative to the risk of prosecution for a criminal or administrative offence.<sup>99</sup> But the privilege goes further: A witness may even refuse to testify if the answer may cause a proprietary loss to the witness or a relative.<sup>100</sup> This is the case if the statement would reveal a claim or facilitate its assertion.<sup>101</sup> Yet, mere indirect damage would not suffice, eg, if the witness is the director or shareholder of a limited company with a separate legal personality.<sup>102</sup> Finally, a witness may refuse to testify if the answer would dishonour the witness or a relative.
- 71 The provisions on testimony also apply to document production.<sup>103</sup> Once again, the scope is narrower in the US. The US Supreme Court has held that this privilege does not apply to documents in a person's possession, even if they may incriminate the person.<sup>104</sup> Given the pervasive reliance on digital communications in twenty-first century society, there are abundant opportunities to capture incriminating documentary evidence.
- 72 In Japan, refusal of document production and testimony to avoid self-incrimination are somewhat similar to the general family privilege under German law<sup>105</sup>: A person may refuse to produce documents or testify concerning matters that may result in criminal prosecution or conviction of the holder or her (past) relatives. Relatives include spouse; current or past relatives within the fourth degree or relatives by marriage within the

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<sup>96</sup> See, eg, *Malloy v Hogan* (Supreme Court, US) [378 U.S. 1 (1964)].

<sup>97</sup> See generally Park et al (n 56) para 12.18.

<sup>98</sup> See above para 61.

<sup>99</sup> Sec 384 No 2 GCCP.

<sup>100</sup> Sec 384 No 1 GCCP. However, the exception under Sec 385 applies, see above para 62.

<sup>101</sup> Huber and Röß (n 61) para 3.

<sup>102</sup> Ibid.

<sup>103</sup> Sec 142(2) GCCP.

<sup>104</sup> *Fisher v United States* (Supreme Court, US) [425 U.S. 391 (1976)].

<sup>105</sup> See above para 61.

third degree; wards or guardians.<sup>106</sup> Furthermore, like in Germany, the protection extends to cases where the reputation of such person would be harmed.<sup>107</sup>

- 73 In Israel, a person does not have to give evidence which may lead to charges against them. If the court rejects such request, this evidence must not be used against them.<sup>108</sup> While the Evidence Ordinance further prescribes privileges concerning the testimony of spouses, parents and children in criminal proceedings, no similar rules are to be found for civil proceedings.
- 74 In England, the privilege against self-incrimination is a long-established common law privilege.<sup>109</sup> The rule is that no one is bound to answer any question if the answer could, in the opinion of the judge, expose the deponent to any criminal charge, penalty, or forfeiture, which the judge regards as reasonably likely to be preferred or sued for. The rule applies to oral evidence, interrogatories, and the discovery of documents. It comprises the privilege of incrimination of spouses or civil partners. For civil proceedings, the rule is laid down in Sec 14(1) Civil Evidence Act 1968:

(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—

(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and

(b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

### 2.2.5 Public Interest

- 75 In all analysed systems, public interest forms another reason not to give evidence. Differences arise as to whether this interest is subject to review by courts, supervisory authorities, or not at all.

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<sup>106</sup> Art 196, 220(iv)(a) JCCP.

<sup>107</sup> Art 196 JCCP.

<sup>108</sup> Sec 47 Evidence Ordinance [New Version], 5731-197 (Israel), 'Incriminating evidence'.

<sup>109</sup> Summarized in *Blunt v Park Lane Hotel Ltd* (Court of Appeal, England and Wales, UK) [1942] 2 KB 253 (CA).

- 76 The US recognizes a privilege for military or state secrets when disclosure might harm the national defence or US international relations.<sup>110</sup> This privilege is absolute. It is assessed by the court hearing the matter. There is also ‘executive privilege’ for certain confidential presidential communications.<sup>111</sup>
- 77 In Israel, national interests and public interests are covered in Sec 44–46 Evidence Ordinance. If the security of the state or foreign relations are concerned, no evidence shall be given unless a Supreme Court judge finds that, in a balance of interests, disclosure is more important.<sup>112</sup> If only a public interest is concerned, the court dealing with the matter is to balance the interests.<sup>113</sup> Such petitions shall be heard *in camera*.<sup>114</sup> In one such case, the Israeli Supreme Court accepted the condition made by the State, for inspection of certain documents, which contained sensitive security information, that the plaintiffs and their representatives would obtain the appropriate security clearance that would allow them to view these classified materials.<sup>115</sup>
- 78 In England, public-interest immunity is a principle of common law under which documents may be withheld from disclosure and inspection where disclosure would be damaging to the public interest. In the leading case of *Duncan v Cammell Laird and Co Ltd* concerning damage claims for a sunk submarine, the House of Lords held that the executive could impede the production of documents – here the plans of the submarine – if contrary to the public interest, without review by the court.<sup>116</sup> In *Air Canada v Secretary of State for Trade*, the House of Lords ruled that a judicial review of the governmental invocation of public interest against discovery should only take place if the documents seem likely to support the case of the party that seeks discovery.<sup>117</sup> Under Rule 31.19 ECPR, a person can apply to the court to withhold inspection or disclosure of a document on the ground that disclosure would damage the public interest.
- 79 In Japan, a person can refuse to produce documents containing matters that may harm the public interest or substantially hinder the performance of public affairs.<sup>118</sup> The same

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<sup>110</sup> See *United States v Reynolds* (Supreme Court, US) [345 U.S. 1 (1953)]; see generally Park et al (n 56) para 12.19.

<sup>111</sup> *United States v Nixon* (Supreme Court, US) [418 U.S. 683 (1974)].

<sup>112</sup> Sec 44 Evidence Ordinance.

<sup>113</sup> Sec 45 Evidence Ordinance.

<sup>114</sup> Sec 46 Evidence Ordinance.

<sup>115</sup> *State of Israel v Hizi*, Application for Permission to Appeal 7114/05 (Israel), Nevo e-database (11 December 2007). See further G Raguan, ‘The State Secrets Privilege: From Evidentiary Privilege to Executive Immunity in the United States’ in P Sharvit Baruch and A Kurz (ed), *Law and National Security: Selected Issues* (Institute for National Security Studies 2014) 127–129, available at <https://www.jstor.org/stable/resrep08957.11?seq=1> accessed 29 April 2025.

<sup>116</sup> *Duncan v Cammell Laird and Co Ltd* (House of Lords, UK) [1942] AC 624 (HL).

<sup>117</sup> *Air Canada v Secretary of State for Trade* (House of Lords, UK) [1983] 2 AC 384 (HL).

<sup>118</sup> Art 220(iv)(b) JCCP.

applies to the witness examination of a public officer as regards confidential information, unless the supervisory government agency approves.<sup>119</sup>

- 80 German and Japanese law are closely aligned in this regard. Public officers can only act as witnesses if supervisory authorities give their consent under special provisions.<sup>120</sup> Regarding document production, no special provisions exist in the civil procedural code; accordingly, the general rules apply.<sup>121</sup>

### 2.2.6 Trade, Technical, Professional, and Similar Secrets

- 81 Trade and similar secrets are protected by all analysed systems; scopes differ.
- 82 The German system provides for quite broad reasons to refuse to give evidence, namely when facts are entrusted to persons by virtue of their office, profession, or status.<sup>122</sup> Further, a witness can refuse to answer questions if to do so would require the witness to disclose a technical or trade secret.<sup>123</sup> The secret may belong to the witness or a third party whose secret the witness is obligated to keep.<sup>124</sup> This needs to be distinguished, though, from judicial safeguards to protect trade secrets in proceedings by limiting a party's access to secret documents, excluding the public from the hearing or redacting parts of the judgment to be published.<sup>125</sup>
- 83 Finally, a witness may refuse to testify if the answer can cause a proprietary loss to the witness or if the party is a relative.<sup>126</sup> This is the case if the statement would reveal a claim or facilitate its assertion<sup>127</sup>. Yet, mere indirect damage would not suffice, eg, if the witness is the director or shareholder of a limited company with separate legal personality.<sup>128</sup> Nor is it sufficient if the witness has signed a non-disclosure agreement including a penalty clause because the witness is not at fault and must, therefore, not pay the penalty if legally obliged to testify.<sup>129</sup>

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<sup>119</sup> Art 191 JCCP.

<sup>120</sup> Sec 376, 383 No 6 GCCP; Art 47 German Constitution.

<sup>121</sup> Sec 142(2), 383 No 6 GCCP; Art 47 German Constitution.

<sup>122</sup> Sec 383(1) No 6 GCCP.

<sup>123</sup> Section 384 No 3 GCCP.

<sup>124</sup> M Huber and S Röß, '§ 384 ZPO' in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024) para 5.

<sup>125</sup> Sec 16 German Act on the Protection of Trade Secrets, available at: [https://www.gesetze-im-internet.de/englisch\\_geschgeh/englisch\\_geschgeh.html#p0107](https://www.gesetze-im-internet.de/englisch_geschgeh/englisch_geschgeh.html#p0107) accessed 29 April 2025, based on Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 2016/943 of 8 June 2016 (EU) available at <https://eur-lex.europa.eu/eli/dir/2016/943/oj/> accessed 29 April 2025. See also Hess (n 27) para 11.55–57.

<sup>126</sup> Sec 384 No 1 GCCP.

<sup>127</sup> Huber and Röß (n 61) para 3.

<sup>128</sup> *Ibid.*

<sup>129</sup> Case 29 W 1352/97 (OLG München, Germany), Order 18 June 1997 [NJW-RR 1998 1495].

- 84 In the US, trade secrets are protected by state laws. For example, under the Texas Rules of Evidence, a person can refuse to disclose a trade secret owned by them, unless the court finds that non-disclosure will tend to conceal fraud or otherwise work injustice.<sup>130</sup>
- 85 In England, the protection of trade secrets is part of the law of equity; at the same time, it is influenced by the Trade Secrets Regulations 2018<sup>131</sup> which is still in force after Brexit even though it is based on the EU Trade Secrets Directive 2016/943.
- 86 In Israel, the rule regarding non-disclosure of commercial secrets reflects the adoption of the proportionality test as the yardstick for deciding arrangements under which documents containing trade secrets are disclosed. The test is if 'the interest in non-disclosure of the evidence is greater than the need to disclose it for the purposes of the doing of justice'.<sup>132</sup> The court must also take account of the position presented by third parties to whom the trade secrets arguably belong.<sup>133</sup>
- 87 Japan foresees a privilege not only for trade and professional secrets,<sup>134</sup> but also for documents prepared exclusively for the use of the person (legal entity or natural person) who possesses them.<sup>135</sup> This latter privilege originates from pressure exercised by the business community, centred on large companies that were often sued by consumers. In such cases, it was not uncommon for the consumer to request disclosure of the company's internal documents. In many cases, disclosure was not refused on the basis of trade secrets or business secrets. Therefore, the business communities and several other groups strongly insisted on introducing a provision which would allow the refusal of a document production order on the grounds that it was a document prepared for the internal use of the organisation only. However, this reason for refusal has been criticized since its enactment, and calls for its abolition have been made in the academic literature.<sup>136</sup>

### 2.2.7 Work Product

- 88 Not far removed from this Japanese internal use privilege is the privilege of work product known in the US and Israel.

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<sup>130</sup> Rule 507(a) Texas Rules of Evidence (US). Cf in this context also the 'counsel's eyes only' protective court orders, see below para 108.

<sup>131</sup> Trade Secrets (Enforcement, etc) Regulations 2018, SI 2018/597 (UK), available at <https://www.legislation.gov.uk/uksi/2018/597/contents/made> accessed 29 April 2025.

<sup>132</sup> Sec 23 Commercial Torts Law, 5759-1999 (Israel).

<sup>133</sup> *Rami Levi Hashikma Marketing Ltd v Dahan*, Application for Permission to Appeal 2376/13 (Israel), Nevo e-database (8 July 2013).

<sup>134</sup> Art 197(1)(ii), (iii), 220(iv)(c) JCCP.

<sup>135</sup> Art 220(iv)(d) JCCP.

<sup>136</sup> The contents of the amendment proposal of the group represented by K Miki are included in K Miki and K Yamamoto (ed), *Civil Litigation Law Amendment Issues* (2012, Yuhikaku Publishing).

- 89 This protection guards against required disclosure of work done by an attorney or prepared at an attorney's direction in anticipation of litigation. It does not, therefore, protect work done by lawyers for other reasons, such as providing business advice to their clients about the client's general business. Even where information is gathered in anticipation of litigation, the protection does not cover factual information garnered by a party in anticipation of litigation, even if obtained by counsel. Thus, an interrogatory asking for the identity of all witnesses to the accident at issue in a case must be answered, including witnesses identified by the lawyer in preparation for litigation.
- 90 In the US, this protection is not 'absolute', but can cover many activities of lawyers and others working to prepare for pending or prospective litigation. First recognized by the US Supreme Court in 1947<sup>137</sup>, it is now embedded in a Federal Rule.<sup>138</sup>
- 91 Because this protection is not absolute in the US, the other side can obtain work product materials if it can show that it has a 'substantial need' for them and that it 'cannot, without undue hardship, obtain their substantial equivalent by other means'.<sup>139</sup> Given the breadth of US American discovery, and the variety of means for pursuing it, such showings are not often made. However, even if such a showing is made, an attorney's 'opinion work product' is almost sacrosanct.<sup>140</sup>
- 92 In Israel, this privilege applies only to documents prepared for the litigation and does not cover documents that would have been prepared in any case, regardless of the expectation that proceedings will take place.<sup>141</sup>

### 2.2.8 Settlement Negotiations

- 93 Important in this context are further privileges for information exchanged in the course of settlement negotiations. Common law jurisdictions recognize privileges in this regard.

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<sup>137</sup> *Hickman v Taylor* (Supreme Court, US) [329 U.S. 495 (1947)].

<sup>138</sup> Rule 26(b)(3) USFRCP.

<sup>139</sup> Rule 26(b)(3)(A)(ii) USFRCP.

<sup>140</sup> See Rule 26(b)(3)(B) USFRCP (directing that if the court orders disclosure of work product based on a showing of need, it 'must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation'). In the same vein, consider Section 2018.030(a) California Code of Civil Procedure (US): 'A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances'.

<sup>141</sup> *Bank Discount Ltd v Shiri*, Application for Permission to Appeal 2235/04 (Israel), Nevo e-database (27 June 2006); *Hadassah Medical Organization (CC) v Gilad*, Application for Permission to Appeal 1412/94 (Israel), Nevo e-database (8 November 1995). In this case, the Supreme Court held that the report prepared by a commission of inquiry, appointed by the *Hadassah* hospital to investigate a case of possible medical negligence, was not privileged. The establishment of such committees of inquiry was part of a procedure carried out regularly by hospitals to rectify mistakes and improve medical services, not necessarily in anticipation of litigation; cf Goren (n 22) 383 f.



- 94 In Israel, documents and materials exchanged between parties in the course of settlement negotiations are not admissible in court, provided that these documents or statements are the product of *bona fide* exchange between the parties.<sup>142</sup> The privilege also extends to documents prepared for the purpose of Alternative Dispute Resolution (ADR) proceedings. The conditions for such a privilege have been stipulated in a Supreme Court decision<sup>143</sup>: (1) The privilege applies not only to the materials prepared when the ADR proceedings were pending, but also when such proceedings were anticipated. Proof that there was a real dispute between the parties at that time, and the degree of sincerity and seriousness of the contacts between the parties, as well as the expectation that ADR proceedings will take place, serve as a yardstick for the existence of such proceedings. (2) The materials were prepared predominantly in order to serve a party during the ADR proceedings, regardless of whether they were prepared while the proceedings were taking place or in anticipation that they will take place. (3) There may be exceptional cases in which a weighty public interest may overcome the value of maintaining the privilege and justify the disclosure of the privileged materials. It is only both parties who can waive the privilege, not the mediator.<sup>144</sup>
- 95 In English law, this is called without prejudice privilege: documentation, particularly correspondence, which arises in the course of settlement negotiations, may give rise to a without prejudice privilege. Such documents cannot be used as evidence in court by either side. However, the parties may waive this privilege.
- 96 In the US, the substantially equivalent privilege is referred to as settlement privilege, under which a claim cannot be (dis-)proven by conduct or a statement made during negotiations about the claim.<sup>145</sup>
- 97 Other systems, like Germany, do not have such strict rules. Rather, the parties' submissions or offers will usually not be regarded as binding, but the documents submitted may be used. In case of mediation, only the mediator and those involved in the administration of the mediation process shall not be compelled to give evidence in subsequent proceedings;<sup>146</sup> other submissions are not protected either.<sup>147</sup>

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<sup>142</sup> Goren (n 22) 386.

<sup>143</sup> *Bank Discount Ltd v Shiri*, Application for Permission to Appeal 2235/04 (Israel), Nevo e-database (27 June 2006).

<sup>144</sup> *Levi v Drori*, Application for Permission to Appeal 1496/15 (Israel), Nevo e-database (21 May 2015).

<sup>145</sup> Rule 408(a)(2) USFRE.

<sup>146</sup> Sec 4 German Mediation Act, available at [https://www.gesetze-im-internet.de/englisch\\_mediationsg/index.html](https://www.gesetze-im-internet.de/englisch_mediationsg/index.html) accessed 29 April 2025. This provision is based on Art 7 Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 2008/52/EC of 21 May 2008 (EU), available at <https://eur-lex.europa.eu/eli/dir/2008/52/oj/eng> accessed 29 April 2025.

<sup>147</sup> For criticism see Hess (n 27) para 12.12 with further references.



### 2.2.9 Journalists' Sources

- 98 This is a privilege that many systems have to a varying degree. Its extent appears to be relevant to the World Press Freedom Index ranking.<sup>148</sup>
- 99 In Israel, the Supreme Court held that, even though such a privilege is not mentioned in the Evidence Ordinance, reporters cannot be compelled to disclose their information sources.<sup>149</sup> Such a privilege is necessary to preserve and promote the freedom of the media, which is a necessary aspect of freedom of expression in a liberal, democratic society. The Supreme Court held further that, since this privilege is given in the public interest, it has to be balanced against other public interests, and is therefore qualified. Its limits are to be determined in each case at the discretion of the court.
- 100 In the US, the Supreme Court held that a journalist could not invoke the First Amendment (freedom of speech) to withhold confidential information from a grand jury.<sup>150</sup> In the aftermath, many US states enacted rules to shield journalists from having to disclose their sources.<sup>151</sup>
- 101 In England, in media and communications claims, Rule 53.6 ECPR protects the sources of information: Unless the court orders otherwise, a party will not be required to provide further information about the identity of the defendant's sources of information.
- 102 In Germany, a privilege extends to press and broadcasting staff concerning the author or contributor of articles or broadcasts and documents, or the source thereof.<sup>152</sup>
- 103 In Japan, no explicit provision exists. However, the Japanese Supreme Court held that the privilege for professional secrets<sup>153</sup> extended to a reporter, requiring a balance of interests between media and judiciary.<sup>154</sup>

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<sup>148</sup> The 2022 questionnaire asks: 'Does the law guarantee the secrecy of journalists' sources?' in Reporters without borders, 'World Press Freedom Index: questionnaire 2022' (2022), 4 question no 5, [https://rsf.org/sites/default/files/medias/file/2022/04/RSF\\_Index\\_Questionnaire\\_2022\\_EN.pdf](https://rsf.org/sites/default/files/medias/file/2022/04/RSF_Index_Questionnaire_2022_EN.pdf) last accessed 07 August 2024.

<sup>149</sup> *Ben Zion Zitrin v The Disciplinary Tribunal of the Bar Association*, Civil Applications 298/86 (Israel), Nevo e-database (7 April 1987).

<sup>150</sup> *Branzburg v Hayes* (Supreme Court, US) [408 U.S. 665 (1972)] (refusing to recognize a journalist's privilege to refuse to disclose the identity of a confidential informant).

<sup>151</sup> *Branzburg v Hayes* (Supreme Court, US) [408 U.S. 665 (1972)] Annotation, available at <https://supreme.justia.com/cases/federal/us/408/665/> accessed 07 August 2024.

<sup>152</sup> Sec 383(1) No 5 GCCP.

<sup>153</sup> Art 197(1)(iii) JCCP.

<sup>154</sup> *X v Y*, 1421 Saibansho Jihô 13 (Supreme Court, Japan), Judgment 03 October 2006. See also Y Taniguchi and others, *Civil procedure in Japan* (3rd edn, Juris 2018) 444, note 531.

### 2.2.10 Other Reasons

- 104 In Japan, there is a privilege for documents related to criminal proceedings.<sup>155</sup> However, limited disclosure may be requested under the procedures of the Japanese Code of Criminal Procedure and the procedures approved by case law of the Supreme Court. The origin of this privilege was the executive's fear that the rules in the system of disclosure of evidentiary documents and case records in criminal proceedings would be circumvented by the system of disclosure in civil proceedings. The idea is that if a document is needed as evidence in civil proceedings, it shall be obtained according to the disclosure system in criminal proceedings. However, police officers, public prosecutors' offices, and criminal courts that store documents related to criminal proceedings cannot properly determine the necessity and relevance of specific evidence in civil proceedings. Consequently, proposals to abolish the privilege have been made. In addition, several recent Supreme Court decisions allow the obtaining of documents related to criminal proceedings by the document production order within civil proceedings, under strict requirements considering the disclosure system of the Code of Criminal Procedure.
- 105 In England, a special provision pertains to requests for evidence in foreign courts, eg, under the Hague Evidence Convention. The provision allows for the evidence to be taken but not released to the foreign court until it has been determined whether a foreign privilege applies.<sup>156</sup>

## 2.3 Privacy as a Limit to Evidence Gathering

- 106 Privacy as such does not play a major role as a limit to evidence gathering for three reasons: First, systems have opted for broader or narrower approaches to access to information, regardless of privacy. While broad approaches – such as US discovery – leave little room for privacy concerns, narrow approaches are not primarily aimed at protecting privacy either; rather, they are based on the principle of not arming the opposing party with the tools to win the case.<sup>157</sup> Consequently, privacy is concerned, but only as an ancillary effect. Second, what could be conceptualized as privacy privileges, already covered by other, more concrete notions, such as privileges for family members, trade secrets, or protection of journalists' sources. Third, privacy is often not at issue when it comes to the limits to evidence gathering, but rather when it comes to the admissibility of evidence gathered in violation of privacy, eg, testimony about a private conversation that was overheard by a third party. As a result, this subsection appears to

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<sup>155</sup> Art 220(iv)(e) JCCP.

<sup>156</sup> Rule 34.20 ECPR.

<sup>157</sup> See above para 16.

be a collage of what each of the systems analysed emphasizes as being related to privacy:<sup>158</sup>

- 107 In the US, although the Supreme Court has recognized that privacy is constitutionally protected in certain circumstances, and privileges like the marital privileges may provide significant protections for privacy interests, there is no general privilege for privacy. As a prominent former federal judge noted in 1976: ‘A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the Fourth Amendment’.<sup>159</sup> On the contrary, the American attitude is that ‘the law has a right to every person’s evidence’. In 1985, a federal judge, when asked to compel the *Coca-Cola Company* to disclose the formula for Coca-Cola through discovery, remarked: ‘Except for a few privileged matters, nothing is sacred in civil litigation’.<sup>160</sup>
- 108 Given the broad scope of American discovery, there is a risk that it could undermine privacy interests. An important safeguard of these interests is the power of a federal court to issue a protective order to protect the subject of discovery from ‘annoyance, embarrassment, oppression, or undue burden or expense’.<sup>161</sup> Such orders may require that confidential information turned over through discovery be used only for the litigation of the pending case. In some patent disputes, they may even require that the information be disclosed only to outside counsel, and not even to the client (particularly important with regard to intellectual property). This is also the case for the European Patent Court.<sup>162</sup>
- 109 However, this does not amount to anything approaching a privilege. An example is provided by financial information about a party. In US litigation, there are often claims for punitive damages, and a conventional reference point for determining an appropriate amount of such damages is the defendant’s wealth. As a consequence, there may often be an effort to obtain such financial details through discovery. However, some states afford initial protection against such discovery.<sup>163</sup>
- 110 Other confidential materials are similarly subject to discovery. Naturally, social media postings, even behind ‘privacy walls’, are often subject to discovery. For example,

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<sup>158</sup> For this subsection, also see the analysis in Marcus (n 13) para 101-113.

<sup>159</sup> S Rifkind, ‘Are We Asking Too Much of Our Courts?’ (1976) 15(2-3) *Judges’ Journal* 43.

<sup>160</sup> *Coca-Cola Bottling Co v Coca-Cola Co* (District Court, Delaware, US) [107 F.R.D. 288, 290] (District of Delaware 1985).

<sup>161</sup> Rule 26(c)(1) USFRCP.

<sup>162</sup> Art 58 Agreement on a Unified Patent Court (EU), Rule 262A Rules of Procedure of the Unified Patent Court (EU).

<sup>163</sup> See, eg, Sec 3295(c) California Civil Code (US) (precluding discovery by a plaintiff regarding defendant’s financial condition until plaintiff establishes a ‘substantial probability’ of prevailing on its claim for punitive damages).

plaintiffs in workplace harassment or sexual harassment cases have been required to turn over personal diaries.<sup>164</sup>

- 111 There is a source of partial protection for social media materials and similar digital information. The US Stored Communications Act<sup>165</sup> forbids disclosure of such communications by internet service providers. Literature on the Act emphasizes that it is out of date (it was adopted in 1986) and also that it is extremely difficult to interpret and apply.<sup>166</sup> Perhaps the most important point about this protection is that it only protects against disclosures by internet service providers, and has no effect on discovery demands directed to the user, as with plaintiffs asked to hand over their social media postings.
- 112 In the member states of the European Union, the General Data Protection Regulation (GDPR)<sup>167</sup> plays the central role regarding protection of privacy. Yet, the impact on access to evidence does not appear to be significant. This is evident by a 2023 decision of the Court of Justice of the EU (CJEU).<sup>168</sup> The court had to decide to what extent the GDPR barred the production of a documentation. The case concerned a Swedish construction contract, in which the defendant claimed to have been overcharged by the plaintiff and applied for production of tax records showing that the number of hours invoiced did not correspond the number of workers employed. The CJEU held that the GDPR was applicable to the question and that it was for the national court to balance the interests concerned under the principle of proportionality, thereby elaborating on the concept of data minimization.<sup>169</sup>
- 113 The US Advisory Committee on Civil Rules addressed this issue in its report on the April 2024 meeting, with a view to whether protective orders under Rule 26(c) USFRCP could ameliorate the privacy concerns raised by the GDPR.<sup>170</sup> This question is to be addressed by a subcommittee.
- 114 The German system distinguishes between prohibitions on the taking and on the use of evidence. Privacy concerns may constitute a reason to prohibit the use of evidence and,

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<sup>164</sup> See, eg, *Zises v Department of Social Services* (District Court, New York, US) [112 F.R.D. 223] (E.D.N.Y. 1986); *Simpson v University of Colorado* (District Court, Colorado, US) [220 F.R.D. 354] (District of Colorado 2004).

<sup>165</sup> Title 18 USC Sections 2701-12.

<sup>166</sup> For discussion, see T Ackerman, 'Consent and Discovery Under the Stored Communications Act' (2009) *The Federal Lawyer* 42, 42; O Kerr, 'A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It' (2004) 72 *George Washington Law Review* 1208.

<sup>167</sup> Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, 2016/679 of 27 April 2016 (EU).

<sup>168</sup> *Norra Stockholm Bygg AB v Entral AB*, Case C-268/21 (CJEU), Judgment 2 March 2023 [ECLI:EU:C:2023:145].

<sup>169</sup> See Art 5(1) lit c GDPR.

<sup>170</sup> Advisory Committee on Civil Rules (Report 9 April 2024), para 6224–6626 available at [https://www.uscourts.gov/sites/default/files/2024-04-09\\_agenda\\_book\\_for\\_civil\\_rules\\_meeting\\_fina\\_l\\_4-9-2024.pdf](https://www.uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_fina_l_4-9-2024.pdf) accessed 29 April 2025.

therefore, render it inadmissible<sup>171</sup> if a constitutionally protected fundamental right, particularly the general right of privacy under Articles 2(1), 1(1) of the German Constitution, is violated. A violation only follows from a balancing of interests – the right to privacy, on the one hand, and the interest in the use of the evidence, on the other.<sup>172</sup> For example, the courts have held that it is inadmissible to use telephone conversations that have been recorded or listened to<sup>173</sup>, clandestine video recordings<sup>174</sup>, or the readings from diaries<sup>175</sup>. However, secret recordings are permissible evidence if they are justified for the defence against criminal acts.<sup>176, 177</sup>

- 115 Argentina is somewhat similar to Germany. Its procedural laws do not contain strong limitations on access to evidence based on the protection of privacy or intimacy. However, privacy has a constitutional status. Thus, it can prevent the taking of evidence in ways that violate privacy (for example, appointing experts to apply scientific techniques to sources of evidence that require invading the privacy of a party, or questions to a witness that may unduly affect someone's privacy). It can also prevent the introduction of evidence obtained in violation of the right to privacy (for example, confidential documentation or audio and video records illicitly obtained). Finally, evidence that has been introduced in the proceedings might have not to be assessed if it was obtained in violation of the right to privacy. In all cases, the judicial decision on admissibility or validity of evidence depends on a flexible jurisprudential proportionality test with no statutory rigid provision that requires courts to balance the level of invasion of privacy against the rights at stake.
- 116 In Israel, privacy does not enjoy absolute protection. If it has been violated, evidence can be used when the injured party agrees, the court allows for it, or the wrongdoer is exempted.<sup>178</sup> The court may allow for the disclosure of evidence that if it is relevant, necessary and proportionate.<sup>179</sup>

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<sup>171</sup> On admissibility of illegally obtained evidence, see Giannini (n 1) para 38–51.

<sup>172</sup> Case 1 BvR 1611/96, 1 BvR 805/98 (BVerfG, Germany), Order 9 October 2002 [BVerfGE 106 28] para 59.

<sup>173</sup> Case VIII ZR 70/07 (BGH, Germany), Judgment 17 February 2010 [NJW-RR 2010 1289] juris-para 28.

<sup>174</sup> Case 12 U 180/01 (OLG Karlsruhe, Germany), Judgment 8 November 2001 [NJW 2002 2799] juris-para 9.

<sup>175</sup> Case 4 StR 519/63 (BGH, Germany), Judgment 21 February 1964 [BGHSt 19 325] juris-para 19.

<sup>176</sup> Case VI ZR 104/57 (BGH), Judgment 20 May 1958 [BGHZ 27 284] juris-para 11.

<sup>177</sup> For more examples see Rosenberg and Gottwald (n 25) § 111, para 24.

<sup>178</sup> Sec 32 Protection of Privacy Law, 5741-1981 (Israel).

<sup>179</sup> *Sales v Sales*, Application in Family Appeal 3542/04 (Israel), Nevo e-database (20 June 2005). Information regarding a person's income and his economic situation is private and protected as such. Using a spouse's information without that spouse's permission is an infringement of privacy. However, in a case litigated between the spouses, the court may order its disclosure and inspection by the other spouse, if its disclosure is relevant, necessary and proportionate. The Court noted that, since the family court proceedings are conducted *in camera*, the infringement of privacy is limited, and the materials are not exposed to the public at large.

- 117 Further, the protection of a bank's customers against disclosure of information regarding their bank accounts, savings, etc, reflects the client's right to privacy, the principle of good faith, expressly or implicitly, underlying the bank-client relationship, as well as the banking customs, their role as agents and their fiduciary duty towards their clients.
- 118 The scope of the duty of secrecy, provided in Sec 15A Israeli Banking Ordinance, 1941, and the obligation not to divulge any information delivered and not to present any document submitted under the Banking Ordinance or under the Banking (Licensing) Law, were determined after a principled, concrete balancing of the interests involved.<sup>180</sup>
- 119 The Israeli Supreme Court held that even though the banks' secrecy obligations were not mentioned in the Evidence Ordinance, the privileges mentioned in the Ordinance are not a closed list.<sup>181</sup> In a case brought against the bank to disclose the bank records of a deceased customer, the Supreme Court held that the privilege, arising from the bank's secrecy obligation, is a qualified one. The customer's privacy rights must be balanced against the right of another person to gain access to the information for one reason or another. In striking that balance, the court has to take into account the following considerations:<sup>182</sup>
- The necessity and importance of the information contained in the bank records to decide the dispute among the parties;
  - The existence of a *prima facie* evidential basis that justifies the disclosure of the bank accounts. Mere allegations do not suffice;
  - The absence of alternative evidence that does not infringe on the other party's privacy;
  - The scope of disclosure may not exceed that which is required to do justice in those proceedings.
- 120 In England, it was held that there was no principle of law by which documents were protected from disclosure by reason of confidentiality alone.<sup>183</sup> Further, Rule 31.22 ECPR sets limits on the subsequent use of disclosed documents and completed electronic document questionnaires. A party may only use the documents for the purposes of the proceedings, unless the owner of the document has consented, the document has been referred to in a public hearing or the court has given permission. Conversely, the court can also disallow the reuse in case of referral upon a party's application.

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<sup>180</sup> *Union Bank of Israel v Azoulay*, Application for Permission to Appeal 6546/94 (Israel), Nevo e-database (6 July 1995).

<sup>181</sup> *Skoler v Djerbi*, Application for Permission to Appeal 1917/92 (Israel), Nevo e-database (23 November 1993).

<sup>182</sup> *Union Bank of Israel v Azoulay*, Application for Permission to Appeal 6546/94 (Israel), Nevo e-database (6 July 1995).

<sup>183</sup> *Science Research Council v Nasse* (House of Lords, UK) [1980] AC 1028.

## 2.4 The Role of Proportionality

121 We have seen in several instances above that proportionality plays a role in the form of balancing interests in order to assess whether a limit to evidence gathering applies. This subsection focuses on proportionality as another reason for limiting evidence gathering, especially because it is too costly or too burdensome. In all the systems analysed – except for Japan – proportionality plays a role, with cost being the most prominent factor in the balancing process.

122 As should be evident, US American discovery can be costly and burdensome for the party providing the evidence. Since 1983, the Federal Rules have directed courts to consider ‘proportionality’ when making decisions regarding discovery.<sup>184</sup> In 2015, that consideration was re-emphasized. Regarding the 2015 rule amendment, Chief Justice Roberts observed in his 2015 year-end report that the change was a ‘big deal’.<sup>185</sup> The new rule reads:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

123 There is uncertainty about the actual impact of this proportionality effort.<sup>186</sup> In part, this is because the weight to be given to the interests involved is difficult to assign. On the one hand, the party resisting discovery should ordinarily make a fairly definite showing of the costs and burdens that compliance might entail. On the other hand, one is confronted with the old credo ‘Thou shalt not ration justice’.

124 Mere money hardly suffices to measure the importance of some litigation. When proportionality was re-emphasized in the 2015 amendments, the Committee Note accompanying the rule change stated that

monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note [regarding the original adoption of proportionality in the rules] recognized ‘the significance of the substantive issues, as measured in philosophic, social, or institutional terms’. Thus the rule recognizes that many cases in public

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<sup>184</sup> See Rule 26(b)(1) USFRCP.

<sup>185</sup> See 2015 Year-End Report on the Federal Judiciary, from Chief Justice Roberts, 6, available at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> accessed 11 August 2024.

<sup>186</sup> Compare K R Berman, ‘Reinventing Discovery Under the New Federal Rules’ (2016) 42(3) *Litigation* 22 (‘It’s a whole new ball game’) with L F Pulgram, ‘The Discovery Rules Have Changed: But Will We?’ (2016) 42(3) *Litigation* 18 (questioning whether American lawyers will actually change their habits).



policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.<sup>187</sup>

- 125 Shortly after the Chief Justice's 2015 year-end report, a district judge invoked the Chief Justice's statements and forecast that '[t]he proportionality standard is the instrument by which judges and practitioners are to bring about a change in the culture of discovery'.<sup>188</sup> Views of judges and lawyers on whether such a culture change has occurred vary widely.
- 126 In Israeli law, cost-related considerations have always been taken into account by the courts when ordering disclosure.<sup>189</sup>
- 127 In Germany, proportionality is no overarching principle in procedural law like in England.<sup>190</sup> Yet, proportionality can be identified as a limit to the taking of evidence in certain cases. For example, there are several cases in which evidence may not be taken if it cannot reasonably be expected to be taken. These include document production of a third party<sup>191</sup>, the tolerance of visual or expert evidence<sup>192</sup>, the personal appearance to a hearing<sup>193</sup>, and acceptability of examination<sup>194</sup>. As a general rule, the taking of evidence cannot reasonably be expected if the gravity of the intrusion outweighs the significance of the matter in dispute.<sup>195</sup> While this is a matter of balance, it is not limited to the privileges above, but goes further: For instance, a German court has refused to admit as evidence a surgical procedure that would risk harming or even killing the opposing party.<sup>196</sup> Also, a third party may refuse document production if the third party cannot spare the documents, not even for a short period of time.<sup>197</sup> However, it should be noted that proportionality is a standard only very rarely applied outside of privacy concerns.<sup>198</sup>

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<sup>187</sup> Committee Note to 2015 amendment to Rule 26(b)(1) USFRCP.

<sup>188</sup> *Waters v Drake* (District Court, South District of Ohio, US) [222 F.Supp.3d 582, 605] (S.D. Ohio 2016).

<sup>189</sup> Cf eg, *Ploni v Plonit*, Application for Family Appeal 3542/04 (Israel), Nevo e-database (20 June 2005); *The Council of Higher Education v Haaretz Daily Newspaper Ltd*, Appeal Administrative Petition 9135/03 (Israel), Nevo e-database (19 January 2006); *State of Israel v Hizi*, Application for Permission to Appeal 7114/05 (Israel), Nevo e-database (11 December 2007).

<sup>190</sup> See below para 129.

<sup>191</sup> Sec 142(2) sentence 1 GCCP.

<sup>192</sup> Sec 144(2) sentence 1, 371(3) GCCP.

<sup>193</sup> Sec 141(1) sentence 2 GCCP.

<sup>194</sup> Sec 372a(1) GCCP.

<sup>195</sup> W Zimmermann, '§ 371 ZPO' in W Krüger (ed), *Münchener Kommentar zur Zivilprozessordnung* (6th edn, C.H. Beck 2020) para 28.

<sup>196</sup> Case 8 U 166/83 (OLG Düsseldorf, Germany), Judgment 14 June 1984 [VersR 1985 457].

<sup>197</sup> A Stadler, '§ 142 ZPO' in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024) para 8.

<sup>198</sup> See above para 114.



128 Furthermore, expert witnesses must give notice if the costs of the expert opinion are clearly disproportionate to the value of the subject matter in dispute.<sup>199</sup> This is the case if the costs amount to about 50 % of the value in dispute.<sup>200</sup>

129 In England, the concept of proportionality dominates the Civil Procedure Rules, starting with the ‘overriding objective of enabling the court to deal with cases justly and at proportionate cost’.<sup>201</sup> Proportionality relates to the amount of money involved, the importance of the case, the complexity of the issue, and the financial position of each party.<sup>202</sup> It applies when the court exercises any power conferred on it by the ECPR, including disclosure orders.<sup>203</sup> The effect of this is illustrated by what was decided in a case following the Lord Woolf’s reforms:

[T]he Parties no longer have any absolute right to insist on the calling of any evidence they choose provided only that it is admissible and arguably relevant. The court may exclude admissible and relevant evidence or cross-examination which is disproportionately expensive or time-consuming, provided that to do so accords with the overriding objective.<sup>204</sup>

130 For example, expert evidence is limited to a single joint expert.<sup>205</sup> Accordingly, Lord Woolf stated

The starting point is: unless there is no reason for not having a single expert, there should be only a single expert.<sup>206</sup>

131 It is to be noted, however, that a single and court-appointed expert is the rule in other systems like Germany<sup>207</sup>, Japan<sup>208</sup>, and Argentina<sup>209</sup>.

132 In Argentina, proportionality is an issue raised when evidence collection is challenged from a constitutional perspective, for example, when privacy is at stake or when a forced body search to obtain an expert opinion is at issue. Further, the system imposes a peculiar proportionality limit on evidence gathering: the number of proposed witnesses is restricted to eight. If strictly necessary, the judge can order to hear more.<sup>210</sup> By

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<sup>199</sup> Sec 407a(4) sentence 2 GCCP.

<sup>200</sup> M Huber, ‘§ 407a ZPO’ in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024) para 9.

<sup>201</sup> Rule 1.1(1) ECPR.

<sup>202</sup> Rule 1.1(2)(c) ECPR.

<sup>203</sup> Rule 1.2, 31 ECPR.

<sup>204</sup> *GKR Karate (UK) Ltd v Yorkshire Post Ltd* (Court of Appeal, UK) [2000] 1 WLR 2571, 2577 (CA).

<sup>205</sup> Rule 35.7 ECPR.

<sup>206</sup> *Peet v Mid-Kent Healthcare Trust* (Court of Appeal, UK) [2002] 1 WLR 210, 215 f (CA).

<sup>207</sup> Sec 404(1) GCCP.

<sup>208</sup> Taniguchi and others (n 155), 435.

<sup>209</sup> Art 460–462 ACCP; Berizonce and Oteiza (n 40) para 400.

<sup>210</sup> Art 430, 452 ACCP.

comparison, in England it is the expression of proportionality that the court can order a single witness to be heard to prove a fact even though the party bearing the burden of proof has named several.<sup>211</sup>

133 In Japan, there are no provisions in the Code of Civil Procedure, as in other states, and also in practice proportionality does not play a role in the course of disclosure of evidence. However, as the example of a court-appointed expert shows, what in some systems is an expression of proportionality is self-evident in other systems. Hence, from a comparative perspective, it seems that proportionality is already exercised in many Japanese rules.

### **3 LIMITS AS TO UNTIL WHICH STAGE OF THE PROCEEDINGS NEW EVIDENCE CAN BE PRESENTED**

134 While evidence can generally be submitted until the end of the last oral hearing, there is a tendency in the analysed systems to encourage parties submit evidence as early as possible. Accordingly, courts retain the power to disallow late evidence to ensure efficient dispute resolution.

#### **3.1 General; Limits to New Evidence in the First Instance**

135 In the US, disclosure must take place early in the proceedings – the USFRCP speak of initial and pretrial disclosure.<sup>212</sup> Supplements or corrections are to be made in a timely manner.<sup>213</sup> If a party fails to disclose or to supplement, the court may order that it is not allowed to use this information; yet, other sanctions, in addition or instead, like the payment of expenses caused by the failure, remain possible.<sup>214</sup>

136 In Israel, the general rule is that the parties must present all evidence in one step. In particular, no further evidence may be submitted after both parties have been heard by the court of first instance. After this point in the proceedings, rebuttal evidence may be presented only with the permission of the court. Such permission may be requested after the defence has finished presenting its evidence. Permission will be granted only in exceptional cases where the claimant has been taken by surprise by the arguments or evidence presented by the other party. Permission may also be granted if the presentation of such evidence is necessary to undermine the credibility of a defence witness. In any case, it is within the discretion of the court of first instance to decide this matter and an appellate court will intervene only for serious reasons taking into account

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<sup>211</sup> Rule 32.1(2) ECP. The example follows from M Stürner, 'The Search for Principles: Paradigmenwechsel im englischen Zivilprozessrecht?: Zugleich eine Besprechung von Neil Andrews, English Civil Procedure, 2003' (2004) 103 Zeitschrift für Vergleichende Rechtswissenschaft 349.

<sup>212</sup> Rule 26(a)(1) and (3) USFRCP.

<sup>213</sup> Rule 26(e) USFRCP.

<sup>214</sup> Rule 37(1) USFRCP. See further R Marcus, '§ 2289.1 Automatic Exclusion of Undisclosed Information' in C Wright and A Miller (ed), *8B Federal Practice and Procedure* (3rd edn, Thomson West).

the nature of the additional evidence, the stage of the proceedings, the question of whether the requesting party was, or should have been, aware of the other party's evidence and the like. However, it is recognized that there are cases in which the need to uncover the truth outweighs the interest in the finality of the judicial proceedings.<sup>215</sup>

- 137 The English system starts with the general rule that a case is to be dealt with expeditiously and fairly.<sup>216</sup> Particularly, the parties are under a duty to disclose all relevant evidence before trial. This duty applies during the proceedings. New evidence may ordinarily be introduced at any stage of the proceedings.<sup>217</sup> However, the court may use its power to control evidence to exclude evidence that would otherwise be admissible.<sup>218</sup>
- 138 For example, the High Court admitted two additional witness statements on the day of the trial.<sup>219</sup> Both additional witness statements provided explanatory evidence for documents that had been disclosed as part of continuing disclosure. Where information becomes available after directions for filing and serving have been issued, it is not 'late', and it is not a defence to sanction (the sanction being inadmissibility of the evidence).
- 139 Before the Woolf Reforms, the process of discovery was in the hands of the parties.<sup>220</sup> The post-Woolf approach is to limit disclosure to the minimum necessary. The ultimate responsibility has now shifted to the judges as active case managers.<sup>221</sup> The court issues the order for standard disclosure<sup>222</sup> and orders for specific disclosures<sup>223</sup>.
- 140 So-called pre-action protocols applicable in some types of cases<sup>224</sup> are meant to further reduce the need for (even standard) disclosure. Their objective is to encourage early exchange of information, enable parties to avoid litigation, and support the efficient management of proceedings where litigation cannot be avoided.<sup>225</sup>
- 141 In Germany, there are no rules specifically for the presentation of new evidence; the general rules apply here: Evidence submitted after the oral hearing is inadmissible.<sup>226</sup> Further, the court is in charge of the time limits; the presiding judge sets these limits and

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<sup>215</sup> See Rule 66 Israeli Civil Procedure Regulations, 5779-2018 (ICPR).

<sup>216</sup> Rule 1.1(2)(d) ECPR.

<sup>217</sup> Rule 31.11 ECPR.

<sup>218</sup> Rule 32.1 ECPR.

<sup>219</sup> *Jones v Owen* (High Court, UK) [2017] EWHC 1647 (Ch).

<sup>220</sup> See Rules of the Supreme Court Order 24 (UK) (out of force).

<sup>221</sup> Cf Rule 1.4 ECPR.

<sup>222</sup> Rule 31.5 ECPR.

<sup>223</sup> Rule 31.12 ECPR.

<sup>224</sup> A list of the pre-action protocols is to be found here: <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

<sup>225</sup> Cf Para 1.4 Practice Direction – Pre-Action Conduct and Protocols (UK). They apply eg, on package travel claims.

<sup>226</sup> Sec 296a GCCP.

closes the oral hearing<sup>227</sup>. If the court sets a deadline for the submission of evidence, with which a party does not comply, the evidence is inadmissible, unless the admission of the evidence into the proceedings would not delay the process of dealing with and terminating the legal dispute, or the party provides a sufficient excuse for such delay.<sup>228</sup> If a party breaches its duty to expedite the proceedings by failing to request the taking of evidence in a manner consistent with diligent conduct of the proceedings,<sup>229</sup> or by failing to request the taking of evidence where the opponent may respond until the oral hearing<sup>230</sup>, the court may refuse the request if, in its discretion, the settlement of the dispute would be delayed and the party's delay is due to gross negligence.<sup>231</sup>

- 142 New evidence means any evidence that could have possibly been introduced by the end of the last oral hearing. This is clear from a provision on subsequent proceedings<sup>232</sup>: new objections can only be introduced in a new set of proceedings if their objective grounds did not exist before the end of the last oral hearing in the prior proceedings. The purpose of this provision is to safeguard *res judicata* and, therefore, legal certainty.
- 143 Civil proceedings in Japan are divided into two main stages. The first stage is for marshalling of issues and evidence,<sup>233</sup> while the evidence is examined at the second stage, which is similar to the trial stage in the US.<sup>234</sup> The marshalling stage is designed to identify the case's major issues and important pieces of evidence early in the proceedings to resolve the dispute promptly and efficiently. Once a common understanding of the issues and evidence has been reached, the examination focuses on those points. Thus, once the marshalling stage has been completed, the parties will generally only be able to present evidence at the subsequent trial stage, which is important for finding the truth of the case. However, there is no direct sanction for disregarding the result of this stage. Consequently, as in Germany, the last opportunity to present new evidence is the last oral hearing.
- 144 Also as in Germany, it is the court that has the power to determine that new evidence can no longer be presented. If the presentation of evidence is delayed, either intentionally or by gross negligence, and were to delay the procedure, the court may refuse to admit the presentation of the evidence.<sup>235</sup>
- 145 The civil procedure codes of the Argentinian states are generally strict as to when evidence must be submitted. The rule is that parties must *present* evidence in their

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<sup>227</sup> Sec 136(4) GCCP.

<sup>228</sup> Sec 296(1) GCCP.

<sup>229</sup> Sec 282(1) GCCP.

<sup>230</sup> Sec 282(2) GCCP.

<sup>231</sup> Sec 296(2) GCCP.

<sup>232</sup> Sect 767(2) GCCP.

<sup>233</sup> Art 164–178 JCCP.

<sup>234</sup> Art 179–233 JCCP.

<sup>235</sup> Art 157 JCCP.

possession (particularly documents) and *offer* all other evidence (identify it) in their first pleadings. Otherwise, it is inadmissible. New facts or new evidence are exempted. Here, different time limits with rigid rules of preclusion apply.

### 3.2 Limits to New Evidence in Appellate Proceedings; Reopening of Proceedings due to New Evidence

- 146 In all the systems analysed, there is at least a tendency to disallow new evidence in appeal. Everywhere, the appellate courts retain discretion.
- 147 In the US, whereas the parties have broad access to information in the first instance, the appellate court will only consider the record of the lower court. If a party moves to reopen the proceedings, it must show that newly discovered evidence existed at the time of the trial, but that it was excusably ignorant of the facts despite of its due diligence. Further, the newly discovered evidence must be admissible and capable to probably change the outcome of the first trial.<sup>236</sup> Interestingly, on their face the provisions are similar to the ones in Austria, where proceedings can be reopened in cases of *nova reperta* (newly appeared).<sup>237</sup> In practice, however, applications differ: whereas in the US, such motions are only very rarely granted, Austrian courts are much more lenient.
- 148 In Israel, in general a party must not submit new evidence in appeal. Exceptions are made when the appellate court holds that that the new evidence may affect the result of the appeal and that, either the evidence could not have been known to the party acting in due diligence and could therefore not have been presented in time to the court of first instance or the presentation of the new evidence is necessary to prevent the miscarriage of justice.<sup>238</sup>
- 149 In Germany, the consideration of new facts on appeal has been limited since 2002. Facts, and therefore evidence, which could not be presented at first instance because they only came to light after the last oral hearing<sup>239</sup>, or because the appellate court (or of the

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<sup>236</sup> Rules 59 and 60(b)(2) USFRCP, see also M K Kane, '§ 2808 Grounds for New Trial—Newly Discovered Evidence' in C Wright and A Miller (ed), *8B Federal Practice and Procedure* (3rd edn, Thomson West).

<sup>237</sup> Section 530(1) No 7 ATCCP.

<sup>238</sup> Rule 144 ICPR.

<sup>239</sup> Sec 529(1) No 2, 531(2) sentence 1 No 3 GCCP.

doctrinally so-called second instance<sup>240</sup>) views the case differently<sup>241</sup>, or because facts were not presented because of a procedural error by the court of first instance<sup>242</sup>, are admissible. In the third instance, new facts cannot be introduced and the Federal Court of Justice reviews judgments only on points of law.<sup>243</sup>

- 150 As to the possibility of using new evidence in subsequent proceedings, German law provides that, generally, new proceedings can only be initiated based on facts arising from events, new proceedings can generally only be initiated based on facts arising from events that occurred after the last oral hearing.<sup>244</sup> In addition, the case may be reopened if a party finds or is able to use a document that would have led to a more favourable decision.<sup>245</sup> It is also possible to reopen the case if a criminal offence has led to the judgment (wrongful oath<sup>246</sup>; forged document<sup>247</sup>; knowingly false testimony or expert opinion<sup>248</sup>; criminal offence in the development of the judgment by a party representative or judge<sup>249</sup>).
- 151 Eventually, the hearing can be resumed after the last oral hearing and before the judgment of first instance is rendered if facts are presented that would constitute a reason to reopen the proceedings also after pronouncement of the judgment.<sup>250</sup>
- 152 In Japan, parties are allowed to present new evidence in the second instance.<sup>251</sup> However, since the second instance court may also rely on the result of the examination of evidence at first instance,<sup>252</sup> the motion to admit the documents, goods, witnesses as evidence may be denied at the discretion of the court if the court considers that the

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<sup>240</sup> There is a terminological divergence between legal systems. Some refer to first, second, and third instances (eg, Germany), while others speak of a trial court, court of appeal, and supreme court (eg, England). One might object to the use of the term *instance*, as it can imply the possibility of a (nearly) full review of the case, whereas appeals in cassation or revision are typically limited to points of law and do not permit a reassessment of factual findings. However, the terminology itself does not necessarily indicate the ambit of review. Accordingly, the following paragraphs adopt the terminology used in each respective jurisdiction. For a general assessment of appeal see C Giabardo, 'Availability of a First Appeal' in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (eds), *Comparative Procedural Law and Justice* (2024) Part VIII Chapter 1 <https://www.cplj.org/publications/8-1-availability-of-a-first-appeal> accessed 29 April 2025.

<sup>241</sup> Sec 531(2) sentence 1 No 1 GCCP.

<sup>242</sup> Sec 531(2) sentence 1 No 2 GCCP.

<sup>243</sup> This results from a comparison of Sec 513(1) GCCP and Sec 545(1) GCCP.

<sup>244</sup> Sec 767 GCCP.

<sup>245</sup> Sec 580 No 7b GCCP.

<sup>246</sup> Sec 580 No 1 GCCP.

<sup>247</sup> Sec 580 No 2 GCCP.

<sup>248</sup> Sec 580 No 3 GCCP.

<sup>249</sup> Sec 580 No 4, 5 GCCP.

<sup>250</sup> Sec 156(2) No 3 GCCP.

<sup>251</sup> Art 297 JCCP.

<sup>252</sup> Art 298(1) JCCP.

evidence examined in the first instance is sufficient and the new evidence is unnecessary.

- 153 However, the third instance court only has the power to hear points of law and not of facts,<sup>253</sup> so it is not possible to present new evidence at the third instance.
- 154 In England, although the appellate court has all the powers of the lower court and may accept new evidence,<sup>254</sup> it will rarely do so as this would run counter to the ‘cards on the table approach’ of disclosure. Consequently, the rule is that the appellate court will not hear oral evidence or accept evidence that had not been before the lower court.<sup>255</sup>
- 155 Ordinarily, the appellate courts will only permit new evidence if it could not have been obtained with reasonable diligence for use at trial. However, where it is alleged that a judgment was obtained by fraud, such restrictions will not normally apply.<sup>256</sup>
- 156 In England, a case can be reopened after appeal under three conditions: to avoid real injustice, if the circumstances are exceptional and make it appropriate to reopen the appeal and if there is no alternative effective remedy.<sup>257</sup> Purpose of this strict standard is to safeguard the finality of the judgment. However, the court can reopen proceedings at its discretion if orders and judgments made but not yet sealed.<sup>258</sup> This discretion is to be exercised in light of the ‘overriding objective of enabling the court to deal with cases justly’.<sup>259</sup>
- 157 In Argentina, if the first instance court has denied the production of evidence and, consequently, a party has lost, this party may ask the appellate court to produce the evidence as part of the appellate review (so-called *replanteo de prueba*).

#### 4 REVIEW OF ORDERS TO PRODUCE EVIDENCE

- 158 Regarding the appellate review of orders to produce evidence, there is no consensus among the systems analysed. In the US and Israel, review is limited to after the final judgment has been rendered; Germany and Argentina exceptionally provide for isolated review of orders; however, in Japan and England, generally every order can be appealed. Yet, except for Japan, all of them tend to be reluctant to review orders solely for the production of evidence. In this context, it should be noted that while this section focuses

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<sup>253</sup> Art 321(1) JCCP.

<sup>254</sup> Rule 52.20(1)(c) ECPR.

<sup>255</sup> Rule 52.21(2)(a), (b) ECPR.

<sup>256</sup> *Ras Al Khaimah Investment Authority v Azima* (Court of Appeal, UK) [2021] EWCA Civ 349.

<sup>257</sup> Rule 52.30(1) ECPR.

<sup>258</sup> *AIC Ltd v Federal Airports Authority of Nigeria* (Supreme Court, UK) [2022] UKSC 16 available at <https://www.bailii.org/uk/cases/UKSC/2022/16.html> accessed 29 April 2025.

<sup>259</sup> Rule 1.1 ECPR, also see above para 129.



on the appellate review of orders to produce evidence, such orders are neither subject to any particular standard or means of review.

- 159 In the US, most trial court judges come to the bench with decades of hands-on experience as trial attorneys in the court over which they ultimately preside. Appellate judges do not necessarily come from the trial court bench and may not have similar experience with the kinds of decisions that trial courts must make about permitting or denying discovery.
- 160 As a consequence, the limits of evidence gathering are ordinarily administered by trial courts. Under the ‘final judgment rule’ prevailing in the US, recourse to the appellate courts is ordinarily not permitted until the entire case is over in the trial court.<sup>260</sup> By that time, discovery disputes may seem an unimportant bygone. Often, the party unhappy with a discovery ruling has ultimately won the case. The ordinary standard of review is *abuse of discretion* – unless the trial court openly flaunted the applicable legal standard, the appellate court will not disturb the decision unless it is far beyond the pale. And given the multitude of factors that influence such decisions in individual cases, this will rarely be the case.
- 161 Israeli law is close to that of the US. As part of the reform of the ICPR, which came into effect on 1 January 2021, Israel adopted the *final judgment rule*. Consequently, recourse to the appellate courts is ordinarily not permitted until the entire case has been heard in the trial court. By then, discovery disputes will have become moot like in the US. To be sure, even before that, the appellate court’s review was strictly limited, and intervention could be expected only if the trial court had erred substantially in its application of the law.
- 162 In Germany, generally, orders concerning the production of evidence can only be challenged together with the final judgment.<sup>261</sup> Exceptions, where orders can be challenged separately, are the lawfulness of the refusal to testify<sup>262</sup> and the order not to refuse an expert.<sup>263</sup> The order instructing one or the other manner of taking evidence cannot be appealed.<sup>264</sup> There is no specific standard for review of orders concerning evidence production.
- 163 In Argentina, rulings on admission or refusal of evidence offered by the parties to be produced during the trial are generally not subject to immediate appellate review.<sup>265</sup> However, case law provides for exceptional cases of immediate appellate review where

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<sup>260</sup> See C Wright, A Miller and R Marcus, *Federal Practice & Procedure* (3rd edn, Thomson West 2010) § 2006 (reviewing the limited opportunities for immediate appellate review of discovery rulings).

<sup>261</sup> Sec 512 GCCP.

<sup>262</sup> Sec 387 GCCP.

<sup>263</sup> Sec 406(5) GCCP.

<sup>264</sup> Sec 355(2) GCCP.

<sup>265</sup> Art 379 ACCP.



the damage caused by a court order relating to evidence must be remedied without delay, eg, when serious constitutional rights or guarantees would be infringed if the evidence were produced.

- 164 In England, any decision of a court may be appealed.<sup>266</sup> However, there will generally be a review, not a rehearing.<sup>267</sup>
- 165 In Japan, the court order to produce evidence can be challenged separately. The appellate court may freely decide anew. This power of the appellate court has nothing to do with the organization of the courts.

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<sup>266</sup> Usually subject to permission to appeal, see Rule 52.6 ECPR.

<sup>267</sup> Rule 52.21 (1) ECPR.

**ABBREVIATIONS AND ACRONYMS**

ACCP	Code of Civil Procedure (Argentina)
ADR	Alternative Dispute Resolution
Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BVerfG	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court) (Germany)
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
ECLI	European Case Law Identifier
ECPR	Civil Procedure Rules (England & Wales)
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ie	<i>id est</i> (that is)
JCCP	Code of Civil Procedure (Japan)
juris-para	paragraph(s) on database juris.de
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
Sec	Section/Sections

supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UP	University Press
US / USA	United States of America
USC	United States Code
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
USFRE	Federal Rules of Evidence (US)
v	versus
vol	volume/volumes

## LEGISLATION

### International/Supranational

Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 2016/943 of 8 June 2016 (EU).

Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 2008/52/EC of 21 May 2008 (EU).

58 Agreement on a Unified Patent Court (EU).

Rules of Procedure of the Unified Patent Court (EU).

Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, 2016/679 of 27 April 2016 (EU).

### National

*Bundesrechtsanwaltsordnung* (Federal Code for Lawyers) (Germany).

California Code of Civil Procedure (US).

Civil Code of California (US).

Civil Procedure Regulations 2021 (Israel).

Civil Procedure Rules 1998 (UK).

Civil Procedure Rules in the Court for Family Affairs, 5781-2020 (Israel).

Code of Civil Procedure 1996 (Japan).

Commercial Torts Law, 5759-1999 (Israel).

Constitution of the United States (US).

Evidence Ordinance [New Version], 5731-197 (Israel).

Federal Rules of Civil Procedure (US).

Federal Rules of Evidence (US).

*Gesetz zum Schutz von Geschäftsgeheimnissen* (Act on the Protection of Trade Secrets) (Germany).

*Grundgesetz* (Basic Law for the Federal Republic of Germany) (Germany).

*Mediationsgesetz* (Mediation Act) (Germany).

Practice Direction Pre-Action Conduct and Protocols (UK).

Protection of Privacy Law, 5741-1981 (Israel).

Rules of the Supreme Court Order 24 (UK) (out of force).

Texas Rules of Evidence (US).

Trade Secrets (Enforcement, etc) Regulations 2018, SI 2018/597 (UK).

United States Code (US).

*Zivilprozessordnung* (Code of Civil Procedure) (Germany).

## CASES

### International/Supranational

*O'Halloran and Francis v United Kingdom*, Case 15809/02 and 2564/02 (ECtHR) Judgment 29 June 2007 [ECLI:CE:ECHR:2007:0629JUD001580902].

*Norra Stockholm Bygg AB v Entral AB*, Case C-268/21 (CJEU), Judgment 2 March 2023 [ECLI:EU:C:2023:145].

### National

#### Germany

Case 1 BvR 1611/96, 1 BvR 805/98 (BVerfG, Germany), Order 9 October 2002 [BVerfGE 106 28].

Case 1 BvR 285/06 (BVerfG, Germany), Chamber Order 23 November 2006 [NJW 2007 1194].

Case 12 U 180/01 (OLG Karlsruhe, Germany), Judgment 8 November 2001 [NJW 2002 2799].

Case 29 W 1352/97 (OLG München, Germany), Order 18 June 1997 [NJW-RR 1998 1495].

Case 4 StR 519/63 (BGH, Germany), Judgment 21 February 1964 [BGHSt 19 325].

Case 8 U 166/83 (OLG Düsseldorf, Germany), Judgment 14 June 1984 [VersR 1985 457].

Case I ZR 68/16 (BGH, Germany), Judgment 27 July 2017 [NJW 2018 68].

Case IX ZR 243/17 (BGH, Germany), Judgment 17 May 2018 [NJW 2018 2319] para 17.

Case VI ZR 104/57 (BGH), Judgment 20 May 1958 [BGHZ 27 284].

Case VIII ZR 70/07 (BGH, Germany), Judgment 17 February 2010 [NJW-RR 2010 1289].

#### Israel

*Bank Discount Ltd v Shiri*, Application for Permission to Appeal 2235/04 (Israel), Nevo e-database (27 June 2006).

*Ben Zion Zitrin v The Disciplinary Tribunal of the Bar Association*, Civil Applications 298/86 (Israel), Nevo e-database (7 April 1987).

*Ellern Bank Ltd v Simcha Bunim Singer*, CA 327/68 (Israel), Nevo e-database (11 October 1968).

*Hadassah Medical Organization (CC) v Gilad*, Application for Permission to Appeal 1412/94 (Israel), Nevo e-database (8 November 1995).

*HaMagen Insurance Co Ltd v Clalit Health Services*, CA 8221/05 (Israel), Nevo e-database (15 November 2005).

*Ken Navon Ltd v Itzhaki Ozel Ltd*, Application for Permission to Appeal 4876/16 (Israel), Nevo e-database (19 September 2016).

*Levi v Drori*, Application for Permission to Appeal 1496/15 (Israel), Nevo e-database (21 May 2015).

*Ploni v Kupat Holim Meuhedet*, Application for Permission to Appeal 6171/17 (Israel), Nevo e-database (4 September 2017).

*Ploni v Plonit*, Application for Family Appeal 3542/04 (Israel), Nevo e-database (20 June 2005).

*Rami Levi Hashikma Marketing Ltd v Dahan*, Application for Permission to Appeal 2376/13 (Israel), Nevo e-database (8 July 2013).

*Skoler v Djerbi*, Application for Permission to Appeal 1917/92 (Israel), Nevo e-database (23 November 1993).

*State of Israel v Hizi*, Application for Permission to Appeal 7114/05 (Israel), Nevo e-database (11 December 2007).

*State of Israel v Hizi*, Application for Permission to Appeal 7114/05 (Israel), Nevo e-database (11 December 2007).

*The Council of Higher Education v Haaretz Daily Newspaper Ltd*, Appeal Administrative Petition 9135/03 (Israel), Nevo e-database (19 January 2006).

*Union Bank of Israel v Azoulay*, Application for Permission to Appeal 6546/94 (Israel), Nevo e-database (6 July 1995).

*Union Bank of Israel v Azoulay*, Application for Permission to Appeal 6546/94 (Israel), Nevo e-database (6 July 1995).

*Sales v Sales*, Application in Family Appeal 3542/04 (Israel), Nevo e-database (20 June 2005).

## UK

*AIC Ltd v Federal Airports Authority of Nigeria* (Supreme Court, UK) [2022] UKSC 16.

*Air Canada v Secretary of State for Trade* (House of Lords, UK) [1983] 2 AC 384 (HL).

*Blunt v Park Lane Hotel Ltd* (Court of Appeal, England and Wales, UK) [1942] 2 KB 253 (CA).



*Duncan v Cammell Laird and Co Ltd* (House of Lords, UK) [1942] AC 624 (HL).

*GKR Karate (UK) Ltd v Yorkshire Post Ltd* (Court of Appeal, UK) [2000] 1 WLR 2571, 2577 (CA).

*Peet v Mid-Kent Healthcare Trust* (Court of Appeal, UK) [2002] 1 WLR 210, 215 f (CA).

*Ras Al Khaimah Investment Authority v Azima* (Court of Appeal, UK) [2021] EWCA Civ 349.

*Regina v Derby Magistrates' Court* (House of Lords, UK), ex parte B [1996] AC 487 (HL).

*Science Research Council v Nasse* (House of Lords, UK) [1980] AC 1028.

*Wheeler v Le Marchant* (Court of Appeal, England and Wales, UK) [1881] 17 Ch.D 681 (CA).

## US

*Branzburg v Hayes* (Supreme Court, US) [408 U.S. 665 (1972)].

*Branzburg v Hayes* (Supreme Court, US) [408 U.S. 665 (1972)].

*Coca-Cola Bottling Co v Coca-Cola Co* (District Court, Delaware, US) [107 F.R.D. 288, 290] (District of Delaware 1985).

*Consolidation Coal Co v Bucyrus-Erie Co* (Supreme Court of Illinois, US) [432 N.E.2d 250 (Ill. 1982)].

*F.D.I.C. v Marine Midland Realty Credit Corp* (District Court, US) [138 F.R.D. 479, 479–80 (E.D. Va. 1991)].

*Fisher v United States* (Supreme Court, US) [425 U.S. 391 (1976)].

*Hickman v Taylor* (Supreme Court, US) [329 U.S. 495 (1947)].

*Jaffee v Redmond* (Supreme Court, US) [518 U.S. 1 (1996)].

*Malloy v Hogan* (Supreme Court, US) [378 U.S. 1 (1964)].

*Simpson v University of Colorado* (District Court, Colorado, US) [220 F.R.D. 354] (District of Colorado 2004).

*Trammel v United States* (Supreme Court, US) [445 U.S. 40 (1980)].

*United States v Arthur Young & Co* (Supreme Court, US) [465 U.S. 805 (1984)].

*United States v Nixon* (Supreme Court, US) [418 U.S. 683 (1974)].

*United States v Reynolds* (Supreme Court, US) [345 U.S. 1 (1953)].

*United States v Zolin* (Supreme Court, US) [491 U.S. 554 (1989)].

*Upjohn Co v United States* (Supreme Court, US) [449 U.S. 383 (1981)].

*Waters v Drake* (District Court, South District of Ohio, US) [222 F.Supp.3d 582, 605] (S.D. Ohio 2016).

*Wolfe v United States* (Supreme Court, US) [291 U.S. 7 (1934)].

*Zises v Department of Social Services* (District Court, New York, US) [112 F.R.D. 223] (E.D.N.Y. 1986).

#### Japan

*X v Y*, 1421 Saibansho Jihô 13 (Supreme Court, Japan), Judgment 03 October 2006.

## BIBLIOGRAPHY

‘Does the law guarantee the secrecy of journalists’ sources?’ in Reporters without borders, ‘World Press Freedom Index: questionnaire 2022’ (2022), 4 question no 5, [https://rsf.org/sites/default/files/medias/file/2022/04/RSF\\_Index\\_Questionnaire\\_2022\\_EN.pdf](https://rsf.org/sites/default/files/medias/file/2022/04/RSF_Index_Questionnaire_2022_EN.pdf) last accessed 07 August 2024.

Ackerman T, ‘Consent and Discovery Under the Stored Communications Act’ (2009) *The Federal Lawyer* 42.

Advisory Committee on Civil Rules (Report 9 April 2024) [https://www.uscourts.gov/sites/default/files/2024-04-09\\_agenda\\_book\\_for\\_civil\\_rules\\_meeting\\_final\\_4-9-2024.pdf](https://www.uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_final_4-9-2024.pdf) accessed 29 April 2025.

Berizonce R and Oteiza E, *Civil Procedure in Argentina* (Wolters Kluwer Law International 2021).

Berman K R, ‘Reinventing Discovery Under the New Federal Rules’ (2016) 42(3) *Litigation* 22.

Chief Justice Roberts, ‘2015 Year-End Report on the Federal Judiciary’ <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> accessed 11 August 2024.

Giabardo C, ‘Availability of a First Appeal’ in B Hess, M Woo, L Cadiet, S Menétrey, and E Vallines García (eds), *Comparative Procedural Law and Justice* (2024) Part VIII Chapter 1 <https://www.cplj.org/publications/8-1-availability-of-a-first-appeal> accessed 29 April 2025.

Giannini L J, ‘Admissibility of Evidence’ in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024) Part VII Chapter 5, para 4 <https://www.cplj.org/publications/7-5-admissibility-of-evidence> accessed 29 April 2025.

Goren U, *Issues in Civil Procedure* (in Hebrew, 13th edn, Nevo 2020).

Gottwald P, ‘Rolf Stürner, Die Aufklärungspflicht der Parteien des Zivilprozesses’ [https://www.mpi.lu/fileadmin/mpi/medien/institute/rev\\_Rolf\\_Sturner.pdf](https://www.mpi.lu/fileadmin/mpi/medien/institute/rev_Rolf_Sturner.pdf) accessed 12 March 2025.

Hess B, *Europäisches Zivilprozessrecht* (2nd edn, De Gruyter 2021).

Huber M, ‘§ 407a ZPO’ in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024).

Huber M and Röß S, ‘§ 383 ZPO’ in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024).

----- , '§ 384 ZPO' in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024).

Kahl L M, 'Evidence before German Courts' (26 March 2025) <https://ssrn.com/abstract=5210728> accessed 29 April 2025.

Kane M K, '§ 2808 Grounds for New Trial—Newly Discovered Evidence' in C Wright and A Miller (ed), *8B Federal Practice and Procedure* (3rd edn, Thomson West).

Kerr O, 'A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It' (2004) 72 *George Washington Law Review* 1208.

(R Marcus)

----- , 'Introduction and General Themes' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024) Part VII Chapter 1, para 10 ff <https://www.cplj.org/publications/7-1-introduction-and-general-themes> accessed 29 April 2025.

Miki K and Yamamoto K (ed), *Civil Litigation Law Amendment Issues* (2012, Yuhikaku Publishing).

O'Leary H E, 'Criminal Antitrust and the Corporate Executive: The Man in the Middle' (1977) 63(10) *American Bar Association Journal* 1389.

Park R, Leonard D, Orenstein A and Goldberg S, *Evidence Law* (3rd edn, West 2011).

Pulgram L F, 'The Discovery Rules Have Changed: But Will We?' (2016) 42(3) *Litigation* 18.

Raguan G, 'The State Secrets Privilege: From Evidentiary Privilege to Executive Immunity in the United States' in P Sharvit Baruch and A Kurz (ed), *Law and National Security: Selected Issues* (Institute for National Security Studies 2014).

Rifkind S, 'Are We Asking Too Much of Our Courts?' (1976) 15(2-3) *Judges' Journal* 43.

Rosenberg L and Gottwald P, *Zivilprozessrecht* (18th edn, C.H. Beck 2019).

Stadler A, '§ 142 ZPO' in H-J Musielak and W Voit (ed), *Zivilprozessordnung: Mit Gerichtsverfassungsgesetz: Kommentar* (21st edn, Franz Vahlen 2024).

Stürner M, 'The Search for Principles: Paradigmenwechsel im englischen Zivilprozessrecht?: Zugleich eine Besprechung von Neil Andrews, English Civil Procedure, 2003' (2004) 103 *Zeitschrift für Vergleichende Rechtswissenschaft* 349.

(R Stürner 1976).

(Y Taniguchi and others 2018)

Wigmore J, *Evidence in trials and common law* (McNaughton edn, 1961).

Wright C, Miller A and Marcus R, *Federal Practice & Procedure* (3rd edn, Thomson West 2010).

Zimmermann W, '§ 371 ZPO' in W Krüger (ed), *Münchener Kommentar zur Zivilprozessordnung* (6th edn, C.H. Beck 2020).