Discovery Reform *

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Abstract

Discussions of discovery reform are informed by a widespread impression that discovery abuse is common, but empirical evidence is either insufficient or contradicts this impression. Most discovery abuse studies are anecdotal and often biased. Also, most civil cases do not involve extensive discovery. Some types of discovery reform may offer real savings, however, and the perception of abuse may be a valid basis on which to launch some reform effort

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Discovery reform efforts have been controversial and have had equivocal results. For example, the California Civil Discovery Act of 1986 did not change the perception of abuse in the state, and courts generally have been unwilling to enforce its tougher provisions with sanctions.

Some commentators have recommended mandatory disclosure as a means of increasing information to the parties to facilitate settlement. Opponents argue that mandatory disclosure is incompatible with the American adversarial system, and it will generate unnecessary costs related to litigation over noncompliance. Experience with the federal disclosure rule (FRCP 26) has offered little useful information because of uneven application. A similar Arizona rule seems to have lowered costs and sped settlement only in simple cases.

* This paper is one in a series of six papers in this volume on issues relating to reducing litigation costs. The other papers are*: What are the Costs of Litigation?*, *Local Rules*, *Alternative Dispute Resolution*, *Using New Technologies*, and *Appeals*.