



# WISCONSIN CIVIL JUSTICE COUNCIL, INC.

*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

## Myths v. Facts – Civil Litigation Reform (AB 773)

Plaintiff attorneys have circulated a memo with the Wisconsin Legislature that, unfortunately, is filled with misrepresentations in an effort to create confusion. Assembly Bill 773 is common sense legislation that has been amended considerably and passed by the Assembly on a voice vote. Below are some important facts responding to the myths being spread by the plaintiffs' bar.

**Myth:** AB 773 allows for the “destruction of evidence in civil court cases.”

**Fact:** AB 773 makes clear that a party may not destroy evidence, willy-nilly, when it learns of a potential lawsuit. AB 773 provides that a party is not required, outside of the ordinary course of business, to preserve four narrow categories of obsolete electronically stored information. Even for these exclusions, a party may seek a court order to preserve the data. **Importantly, AB 773 would not change current law as it relates to overall legal obligation to preserve relevant information in a case.**

- “[Wisconsin] law is well settled that a person or entity that reasonably anticipates being involved in litigation is required to preserve all potentially relevant information until the matter is concluded.” *Neumann v. Neumann*, 2001 WI App 61, 242 Wis. 2d 205, 626 N.W.2d 821.

Nothing in AB 773 changes this duty, except with respect to the four narrow categories of data. Any party that anticipates being involved in a litigation must still preserve potentially relevant information. Failure to do so will result in significant sanctions. **The plaintiff attorneys' memo is simply false and is an unfortunate attempt to mislead the Wisconsin Legislature.**

**Myth:** AB 773's discovery language is “unprecedented and not found in any other state.”

**Fact:** North Carolina state courts and Delaware federal courts have substantially similar language to AB 773 when it comes to the preservation of electronically stored information.<sup>1</sup> North Carolina's rule states that “absent a showing of good cause by the requesting party, the categories of electronically stored information [listed] need not be preserved.” The rule lists 11 categories of electronically stored information that does not need to be preserved. Delaware's rule is similar, but lists 13 categories that need not be preserved. The categories included in North Carolina's and Delaware's rules are similar to what is contained in AB 773.

### Conclusion

AB 773 is common sense legislation that updates Wisconsin's outdated civil discovery rules, along with other important reforms. As more and more information in civil litigation is stored electronically, the time and expense of producing this information has increased exponentially. The discovery provisions in AB 773 create narrow guidelines that attempt to address these concerns. Over 30 business organizations support AB 773.

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<sup>1</sup> See 10 Jud. Dist. Civil Sup. Rule 5.0 (Discovery); see also Delaware Del. Federal Court Rules, Notice of Default Standard for Discovery, Including Discovery of Electronically Stored Information (exempting 12 specific categories of ESI absent a showing of “good cause”).