

# ***Surviving Discovery***

## Rules & Realities

April 2012

Copyright © Anthony J. Battaglia April 2012

# Goals

- Highlight some core concepts, and
- Discuss 10 Tips to help you succeed by more than the skin of your teeth.

# Core Concepts

- You will spend a majority of your time and your clients money doing discovery.
- Unless discovery in specific case dictates otherwise, “documents” includes Electronically Stored Information (“ESI”).
- Disclosure (Initial, Expert & Pretrial) under Rule 26 includes ESI.
- ESI is “information that is stored in a medium from which it can be retrieved and examined.”

# ***Core Concepts, cont.***

- You can not escape it, ESI is everywhere, computers, PDA's, back ups, printers, wireless routers, fax machines, thumb drives, portable drives & storage devices, I-Pods.

# ***10 Survival Tips!***



# ***1. Don't Forget Rule #1***

---

- Fed. R. Civ. P.1.
  - *They (The Rules) shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.*



**Please do not irritate, annoy, bother, irk,  
harass, badger, tease, torment, provoke,  
madden, taunt, anger, displease, pester,  
bully, exasperate, rile or vex our animals.**

## ***2. Plan and Preserve Early***

---

- Don't do discovery in a vacuum, have a theme and make a plan.
- Be specific in your demands for discovery.
- Preserve your data, make sure your client does it too, and make a prompt request for the other side to preserve their data.



# ***3. Meet & Confer Like You Mean It!***

---

- See Rule 26 ( c ) and (f)
- Pick up the phone or set a meeting.
- Insist on face to face, unless one side is out of the district
- Avoid e:mails, letters and faxes (and don't send them to the court unless asked).

# ***3. Meet & Confer Like You Mean It!***

- Don't play games.
- Be earnest in your demands and agreements. Seek what you really need.
- Remember turnabout is fair play.
- Agree to a protocol for ESI and Privilege
- Don't forget Rule #1

# 4. *Be a Rules Geek*

---

- The 7 D&D rules:
  - Fed. R. Civ. P. 16, 26, 30, 33, 34, 37 and 45.
  - Read them often!
- The Committee Notes.
  - The legislative intent
  - Was it stylistic or a substantive change?
- The JNET Resource (for super geeks)
  - [www.uscourts.gov/rules/index/html](http://www.uscourts.gov/rules/index/html)

# ***And Don't Forget About Local Rules!***

---

- Districts have:
  - Local Rules
  - General Orders
  - Standing Orders
  - Case Management Plans
  - Form 26(f) Reports, Instructions & Orders
  - Guidelines
  - Protocol's & Default Protocols

# ***5. Remember, You Are Not Alone!***

---

- Clients, partners, associates, paralegal's, secretaries, house counsel, litigation counsel, experts, consultants, legal vendors all should be on the same page.
- Discuss the details & the Rules.
- Work as a team from planning to execution of the disclosure and discovery process.
- In short, communicate!

# ***It is Important!***

“For the current ‘good faith’ discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained to determine how best to locate, review, and produce responsive documents.”

Judge Major, *Qualcomm v. Broadcom*, 05cv1958, Doc. 718, Page 17-18, 1/7/08.

# **6. Be Careful What You Ask For!**

- Too Much?
- Too Little?
- Right Format?

# ***Electronic to paper – size relationship***

- 1 GB (=1,000 MB) roughly equals 65,000 pages
- . . . or 10,833 documents
- . . . . . or 26 bankers boxes

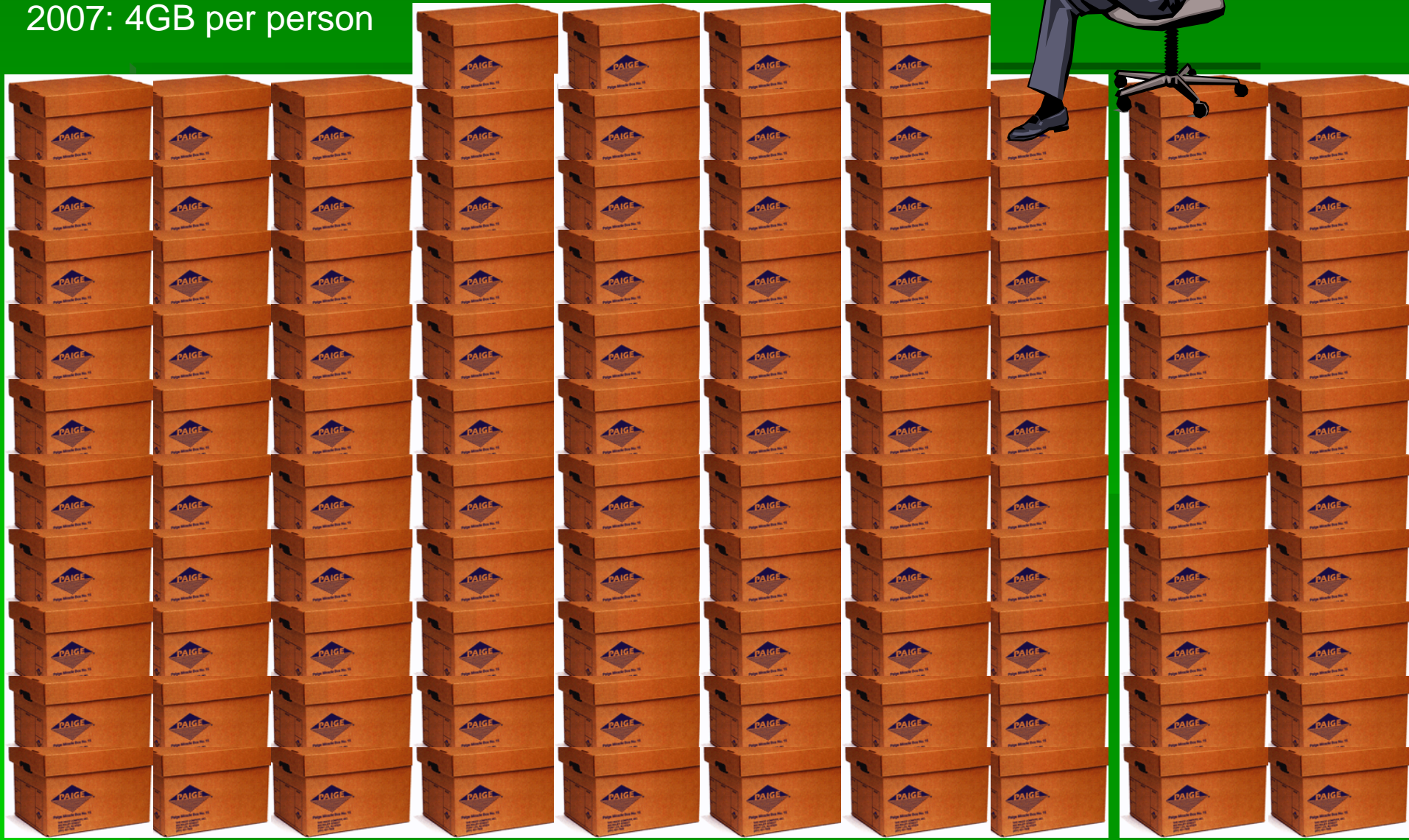




# eMail volume:

This is ONE person's email!!!

2007: 4GB per person



# **6. Be Careful What You Ask For!**

Too Little? (one form of production)

Right Format?

- Native
- Image
- Text
- Spreadsheet
- Video/Audio

# ***7. Check Before You Speak.***

- Before you commit to a production deadline, make sure it is feasible.
- Talk to your experts, consultants and IT people ahead of time.
- Don't come to a CMC (Rule16) or Discovery Conference unsure of your ESI issues.

# ***8. Better To Ask For Permission Than Forgiveness***

---

- Discovery Cutoff's
- Discovery Due Dates
- Other Discovery Compliance Problems
- Discovery Disputes
- Remember Rule 29
- Great Way to Avoid Sanctions
- Ask for a discovery conference sooner than later but after a 26 (c) meet & confer

# ***9. See The Forest For The Trees.***

---

- Discovery is not the end game.
- Meet & Confer with that in mind.
- Focus on what you really need.
- Don't leave your common sense at the door.
- Consider sampling as an option to “all or none” debates.
- Realize that sometimes “no” is a good answer!

# 10. Don't Use Sound Bites

- not “reasonably accessible” because of undue burden or cost.
  - Court will want to know cost, timing and relevance factors (how much, how long & what's the point?).
- information lost as a result of the routine “good-faith” operation of an electronic information system
  - Have details of operation and litigation hold plan and particulars.

The End