

Presenting a live 90-minute webinar with interactive Q&A

ESI in Environmental Litigation: Overcoming Unique Challenges of Expert-Dependent Evidence and Multifaceted Laws

Leveraging Rule 29 Stipulations, Managing Court-Imposed Time Constraints, Minimizing Risk of Court Intervention

WEDNESDAY, JUNE 25, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Managing Electronically Stored Information In Environmental Litigation

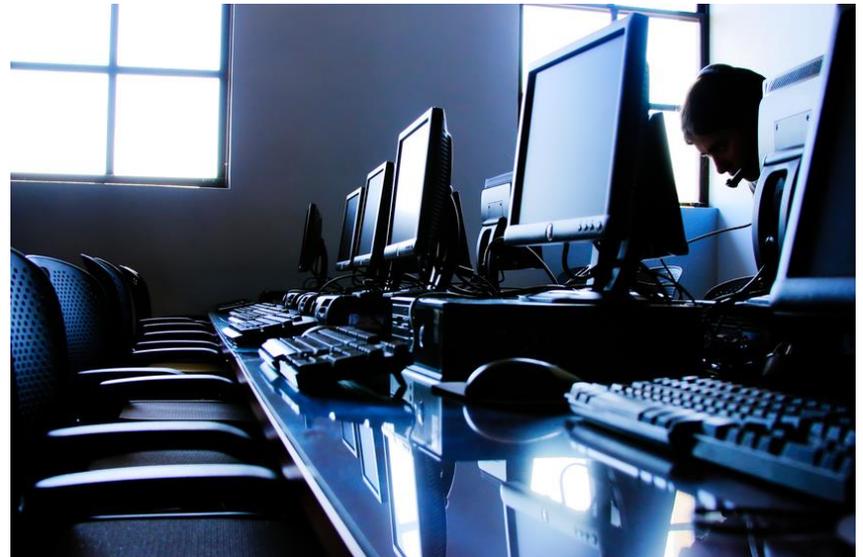
Justin A. Savage
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June 17, 2014



Overview

- Magnitude of ESI
- ESI and the Federal Rules
- Environmental Litigation & ESI
- EPA Data Collection & Reporting Initiatives
- Practitioner Tips



Magnitude of ESI

- Discovery now encompasses “electronically stored information” or “ESI”

- ✓ e-mail
- ✓ instant messages
- ✓ word processing files
- ✓ spreadsheets
- ✓ social networking content

- ✓ calendars
- ✓ voice messages
- ✓ text messages
- ✓ videos
- ✓ photographs



AND any other electronic information that may be stored on desktops, laptops, file servers, smartphones, and PDAs

Magnitude of ESI

- ESI is growing exponentially
 - We create as much digital information in two days as was created from the beginning of computing until 2003.
 - 2008–2009: ESI grew 62% from 494 billion gigabytes to 800 billion gigabytes
 - 2009–2010: ESI grew 67% to 1200 billion gigabytes
 - *Source: Wikibon Blog, Information Explosion and Cloud Storage*
- Experts predict the digital universe will grow by a factor of 300 to 40 trillion gigabytes by 2020.
 - That represents more than 5,200 gigabytes for every man, woman, and child and assumes that the digital universe will double nearly every two years between 2012 and 2020.
 - *Source: John Gantz and David Reinsel, “The Digital Universe in 2020: Big Data, Bigger Digital Shadows, and Biggest Growth in the Far East” (December 2012).*

Magnitude of ESI

- Knowing the terminology:

Unit	Size	What it means
Bit (b)	1 or 0	Short for "binary digit", after the binary code (1 or 0) computers use to store and process data
Byte (B)	8 bits	Enough information to create an English letter or number in computer code. It is the basic unit of computing
Kilobyte (KB)	1,000, or 2^{10} , bytes	From "thousand" in Greek. One page of typed text is 2KB
Megabyte (MB)	1,000KB; 2^{20} bytes	From "large" in Greek. The complete works of Shakespeare total 5MB. A typical pop song is about 4MB
Gigabyte (GB)	1,000MB; 2^{30} bytes	From "giant" in Greek. A two-hour film can be compressed into 1-2GB
Terabyte (TB)	1,000GB; 2^{40} bytes	From "monster" in Greek. All the catalogued books in America's Library of Congress total 15TB
Petabyte (PB)	1,000TB; 2^{50} bytes	All letters delivered by America's postal service this year will amount to around 5PB. Google processes around 1PB every hour
Exabyte (EB)	1,000PB; 2^{60} bytes	Equivalent to 10 billion copies of <i>The Economist</i>
Zettabyte (ZB)	1,000EB; 2^{70} bytes	The total amount of information in existence this year is forecast to be around 1.2ZB
Yottabyte (YB)	1,000ZB; 2^{80} bytes	Currently too big to imagine

The prefixes are set by an intergovernmental group, the International Bureau of Weights and Measures. Yotta and Zetta were added in 1991; terms for larger amounts have yet to be established.

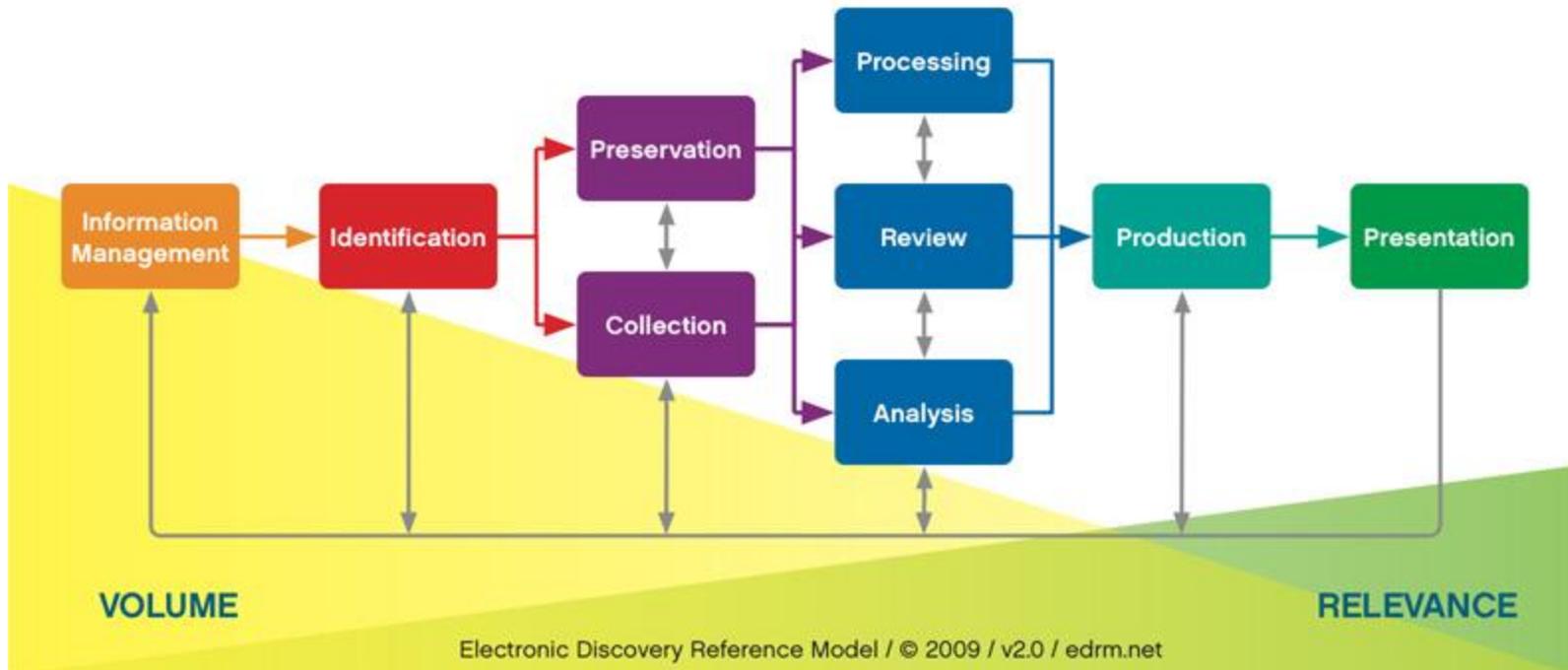
Source: *The Economist*

ESI and the Federal Rules

- Comparatively, discovery in US extremely broad and far-reaching
 - E.g., FRCP 26(b)(1)
 - "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense....if the discovery appears reasonably calculated to lead to the discovery of admissible evidence"
- The scope of discovery widens tremendously when you combine "relevant" information with the sheer volume of ESI produced on a daily basis
- Computers, Internet, and email increase costs and risks
 - E-discovery can account for over 50% of litigation costs
 - Risks of spoliation, inadvertent disclosure always present

ESI and the Federal Rules

- E-discovery is iterative, but phased in concept
 - Primary risks: preservation, collection, review
 - Cost drivers: collection, processing, review, production



ESI and the Federal Rules

- FRCP Rule 26
 - Rule 26(b)(1)
 - “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”
 - Rule 26(f)(3)(C)
 - “A discovery plan must state the parties views and proposals on:
 - any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”

ESI and the Federal Rules

- FRCP Rule 34
 - Rule 34(a)(1)(A)
 - “A party may serve on any other party a request within the scope of Rule 26(b):
 - to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control:
 - any designated documents or **electronically stored information**—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form...”

ESI and the Federal Rules

- FRCP Rule 34
 - Rule 34(b)(2)(D) & (E)
 - **“(D) Responding to a Request for Production of Electronically Stored Information.** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.
 - **(E) Producing the Documents or Electronically Stored Information.** Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
 - (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
 - (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a **reasonably usable form** or forms; and
 - (iii) A party need not produce the same electronically stored information in more than one form.”

ESI and the Federal Rules

- FRCP Rule 34

- Recent Developments

- *Anderson Living Trust v. WPX Energy Prod., LLC*, 2014 WL 930869 (D.N.M. Mar. 6, 2014):
 - The term “documents” in Rule 34(b)(2)(E)(i) does not include electronically stored information, and thus, the requirement that documents be produced either in the usual course of business or labeled to correspond to categories in the request does not apply to electronically stored information
 - Provisions (E)(i) and (E)(ii) apply to distinct, mutually exclusive categories of discoverable information: Documents—a terms that does not include ESI—are governed for production solely by (E)(i), while (E)(ii) governs electronically stored information

ESI and the Federal Rules

- E-Discovery Management Tools
 - FRCP Rule 16(b)(3)
 - The scheduling order may “provide for disclosure or discovery of electronically stored information.”
 - The rule was amended in 2006 to “alert the court to the possible need to address the handling of discovery of [ESI] early in the litigation if such discovery is expected to occur.”
 - FRCP Rule 26(a)
 - Requires a party to provide “a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses...”

ESI and the Federal Rules

- E-Discovery Management Tools Cont'd
 - FRCP 26(f) Conferences
 - Compels parties participating in federal litigation to confer “as soon as practicable—and in any event at least 21 days before a...scheduling order is due under Rule 16(b)”
 - The discovery plan must address “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”

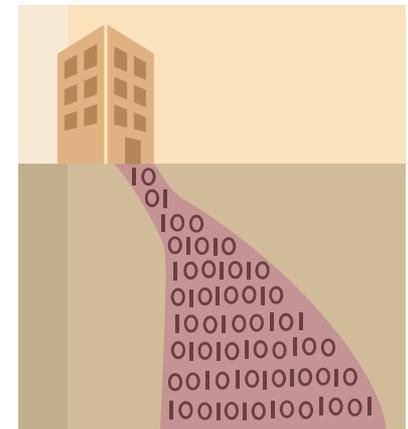
ESI and the Federal Rules

- Sanctions & FRCP Rule 37
 - Duty to Preserve
 - Obligation on counsel and client to identify & preserve relevant information (created pre-/post-trigger) in possession, custody, and control
 - Triggered when litigation is “known or reasonably anticipated”
 - Disclosure in of ESI in a “reasonably usable form” is required by FRCP 34(b)
 - Burden is on the responding party, but standard is subject to considerable interpretation
 - *Adams v. AllianceOne*, 2011 WL 2066617 (S.D.Cal. May 25, 2011)
 - Sanctions not applied when defendant produced database of millions of discoverable phone numbers as PDFs instead of original CSV format
 - *S2 Automation LLC v. Micron Technology Inc.* 2012 WL 3656454 (D. NM. Aug. 9, 2012)
 - Sanctions applied when defendant produced emails as PDFs instead of their native format, as plaintiff requested

Environmental Litigation & ESI

- ESI poses unique challenge to environmental litigators given the characteristic complexities of environmental litigation:
 - Heavy reliance on intricate statutes and regulations
 - Armies of acronyms
 - Complex factual and technical facts
 - Expert testimony is the norm.

- Two Key Trends:
 - Limits on productions in discovery
 - Time limits at trial



Environmental Litigation & ESI

Case Study 1: Limits on Discovery

- *United States v. DTE Energy Co.*, No. 10-cv-13101-BAF-RSW, 2011 WL 3706585 (E.D. Mich. 2011)
- DOJ brought an enforcement action on behalf of EPA against DTE Energy, an electric utility, alleging violations of the Clean Air Act's New Source Review permitting provisions.

Environmental Litigation & ESI

Case Study 1: Limits on Discovery Cont'd

- DTE Energy served numerous requests for production that required EPA to search through past and present rulemaking, permitting, and enforcement files for responsive documents.
- In addition to providing past productions, EPA agreed to produce information from agency headquarters and the regional EPA office overseeing the case.
 - EPA identified over 100 personnel in ten EPA offices as having potentially responsive documents.
 - ESI collection required EPA IT personnel to expend over 240 hours to manage the technical aspects of the discovery production.
 - Federal employees spent over 3,000 hours of time searching for, collecting, reviewing, and producing documents in response to defendants' requests.

Environmental Litigation & ESI

Case Study 1: Limits on Discovery Cont'd

- EPA moved for a protective order arguing that the request was unreasonably burdensome
 - EPA would need to search for and review over 1.946 million e-mails, over 1,434 gigabytes of loose e-documents, and over 5,119 linear feet (nearly a mile) of paper documents
- The court granted the protective order against DTE Energy's request for nationwide discovery,
 - Magnitude of the request may have played a role in the decision.
 - EPA argued that a nationwide production would have been duplicative because it agreed to produce information from EPA headquarters, which oversees the other regions.

Environmental Litigation & ESI

Case Study 1: Limits on Discovery Cont'd

- Question: How big is too big of an ESI production?
- Answer: It depends on the circumstances
 - Judges will continue to rely on familiar discovery factors such as burden, cost, fairness, reasonableness, and proportionality.
- Key takeaway: No large institutional litigant, including the government, can simply refuse to produce a significant amount of ESI.

Environmental Litigation & ESI

Case Study 2: Time Limits at Trial

- *In re Oil Spill by the Oil Rig Deepwater Horizon*, 10-md-2179 (E.D. La. filed Aug. 10, 2010)
- Consolidated litigation brought against companies due to the 2010 oil spill in the Gulf of Mexico, including claims brought by EPA under the Clean Water Act.



Environmental Litigation & ESI

Case Study 2: Time Limits at Trial Cont'd

- The parties produced a vast amount of ESI, amounting to millions of pages were it all ever printed out.
- The presiding judge, the Honorable Carl Barbier, imposed time limits, including an order specifying the exact number of minutes each party would be allowed for opening statements.
- See Amended Pre-Trial Order No. 54, In re Oil Spill by the Oil Rig Deepwater Horizon, 10-md-2179 (E.D. La. Jan 4, 2013).

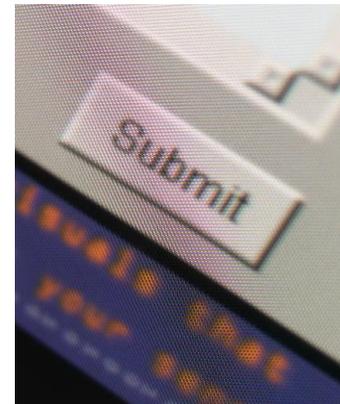
Environmental Litigation & ESI

Case Study 2: Time Limits at Trial Cont'd

- Key Takeaway: streamline the presentation of their evidence and present it in the most compelling and least cumulative manner possible.
- If confronted with time limits at trial, consider:
 - Technical capabilities of the court hearing the matter
 - Time investment needed to present the ESI
 - Whether huge volumes of ESI can be reduced to a more manageable form.
 - Example: consider preparing a summary of the ESI under FRE 1006, if faced with numerous e-mails or spreadsheets

EPA Data Collection & Reporting Initiatives

- EPA is embracing online reporting & new monitoring technology
- EPA is turning to technology to solve a number of problems:
 - Benefits initially envisioned have not been achieved
 - High level of noncompliance
 - Lack of resources for implementation & enforcement
 - Burdensome data submission requirements
 - Tough on EPA and on the regulated community
 - Public access to information



EPA Data Collection & Reporting Initiatives

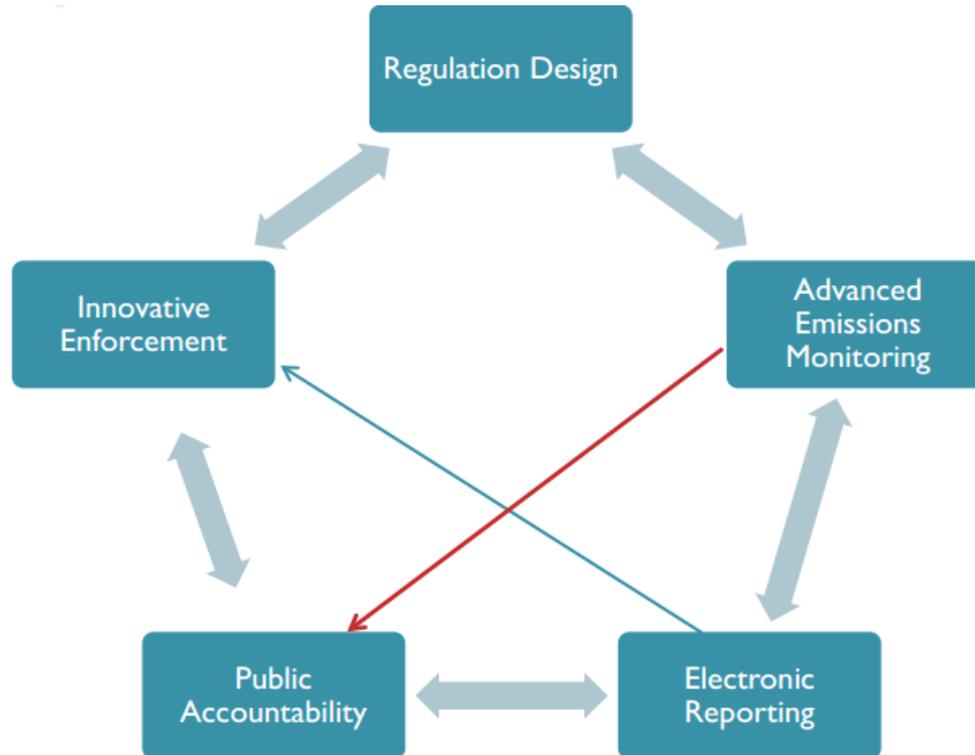
“[W]e need to move EPA’s information technology into the 21st century. We need to transform EPA to be not only a collector and disseminator of information but an analytical resource that can present information in a form that is easily understood and useable by the public.”

- Lisa Jackson, Former EPA Administrator



EPA Data Collection & Reporting Initiatives

- Next Generation Compliance
 - New initiative announced in fiscal year 2012
 - Five Components of Next Generation Compliance:



Source: <http://www.epa.gov/compliance/data/systems/icis/vmeeting/vmeeting6a-panel.pdf>

EPA Data Collection & Reporting Initiatives

Examples of EPA's move to electronic reporting:

- Toxic Release Inventory
 - Online reporting required for all non-trade secret TRI data using **TRI Made Easy (TRI-MEweb)**
 - Reasons given:
 - Improves quality and accuracy of TRI data
 - Allows EPA to get data to the public faster
 - Majority of TRI facilities already submit online
- Mercury and AirToxics Standards
 - Online reporting required through EPA's **Compliance & Emissions Data Reporting Interface (CEDRI)**
 - Reasons given:
 - Online reporting already widely used
 - Reduces the work burden associated with environmental reporting
 - Allows for data standardization and more efficient validation
 - Better public access

EPA Data Collection & Reporting Initiatives

- Toxic Substances Control Act
 - Online reporting required for most submissions under TSCA using EPA's **Central Data Exchange (CDX)**
 - Reasons given:
 - Reduce information collection burdens on the public
 - Increase program efficiency and effectiveness
 - Improve integrity, quality, and utility of information collected
- Clean Water Act – NPDES Program
 - 2013 EPA **proposed rule** would require facilities regulated under the NPDES program to make all data submissions and reports electronically

Practitioner Tips

- Strategic use of FRCP 26(f) conference
 - Shape entire discovery process, if not entire case
 - Required ESI provisions in the discovery plan
 - Whether to phase discovery where a substantial amount of ESI is anticipated
 - The form or forms in which ESI will be produced
 - Special discovery limitation agreements
 - In addition to required topics of discussion and contents of proposed discovery plan, consider addressing:
 - Limiting preservation and/or collection based on custodians, date ranges, keyword search terms, concept search
 - Agreement on who each party will make its productions, including review platform compatibility and parameters, document fields, metadata
 - Claw-back agreement to be entered into court order pursuant to FRE 502

Practitioner Tips

- Production
 - Use FRCP 34(b)(1)(c) to your advantage
 - Permits requesting party to identify form of ESI production
 - Native files; exported (e.g., for use in MS Access, Excel); searchable image (e.g., TIF, PDF); hard copy
 - Each form has positives & negatives
 - Consider which form is best under circumstances
 - Do not ask for/agree to produce metadata unless relevant
 - Get agreements up front
 - Not just form of production, also form of media in which ESI produced (i.e., platform type, parameters)
 - Motions practice on this issue can be expensive, time consuming; can result in having to re-do a production

Environmental Litigation and ESI

- Authenticating Computer Records
 - Many courts allow authentication for computer records by a showing that:
 - The business successfully used the computer in question, and
 - The witness recognizes the record as output from the computer
 - Some courts require more in-depth foundation regarding the reliability of the particular computer and of the business' use of the computer



Environmental Litigation and ESI

- Some questions to consider when authenticating computer records:
 - Is the computer reliable and serviced or updated regularly?
 - Does the computer have security systems in place?
 - Where is the computer located and who has access to it?
 - What software was used to create the record?
 - How is the record stored on the computer?
 - Is the computer part of a network?



Environmental Litigation and ESI

Authenticating E-mail

- **Reply letter doctrine** – show that the e-mail was sent to a user and that user in due course replied with a responsive message
- **Content** – show that only the purported author had reason to or was likely to know the information contained in the message
- **Acting upon the message** – show that the purported author took action in response to the message consistent with its content
- **Cryptography** – present testimony about the key used to encrypt or scramble the message



Environmental Litigation and ESI

Authenticating E-mail (cont'd)

- **Digital signature** – show that a digital signature was used on an unencrypted message (private key used to encrypt digital signature only)
- **Chain of custody** – use the business records of systems that transmitted the message to trace it to the source computer

When all else fails, authenticate using chain of custody:

- ✓ Print out routing of the message
- ✓ Introduce routing records of all servers that transmitted the e-mail
- ✓ Show that the purported author had primary or exclusive access to the source computer



Questions?

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