Digital Evidence

Week 4 – Digital Evidence Case Law

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ITMS X83 – Spring 2026

Slides contain original content from Davis, S. and E-discovery: An Introduction to Digital Evidence

Last Week - Review

- Kahoot Review
  - 20 seconds for multiple choice
  - 10 seconds for true and false

Objectives

- Describe the appeals process
- Describe the commercial and free resources for researching case law
- Explain the implications of civil case law on e-discovery, including e-mail issues and litigation holds
- Explain how criminal case law applies to e-discovery
- Summarize the issues in multijurisdictional and international cases

Overview

1. Understanding the Legal Appeals Process
2. Case Study
3. Using Legal Databases
4. Examining U.S. Case Law
5. International Law and Multijurisdictional Cases
6. Using the E-discovery Database

Part I

Understanding the Legal Appeals Process

Understanding the Legal Appeals Process

- Common law countries use case law as a guide when there are no existing statues that apply specifically to a case
  - Case law determines how laws are applied and is based on previous rulings
- Smartphones, text messaging, AI, and VR/AR may introduce situations for which no existing case law applies
  - These cases must be tested in a court of law

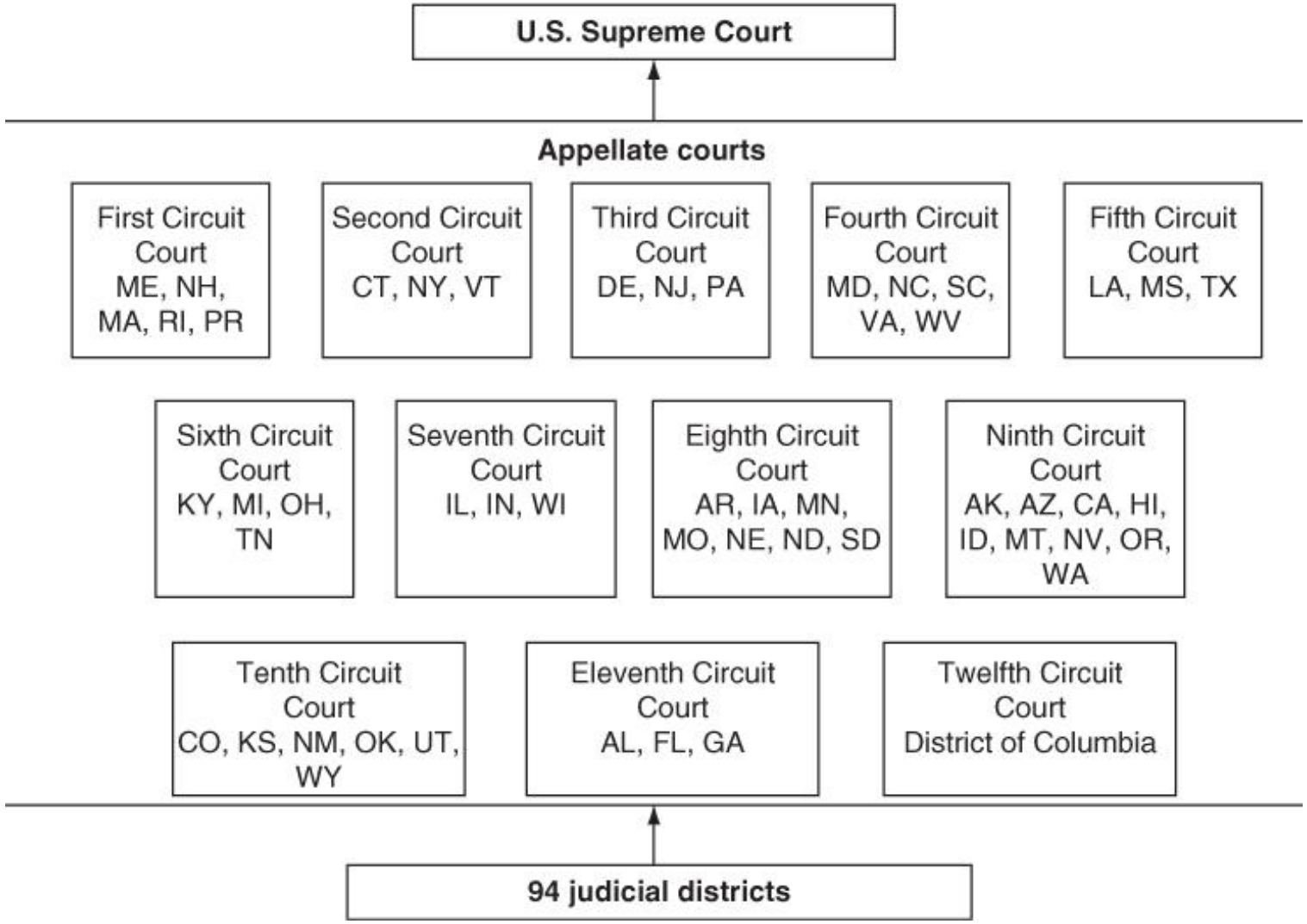
Understanding the Legal Appeals Process

- When reading case law, it helps to understand how the U.S. court system is organized
- The judicial branch of the U.S. federal government is represented in all 50 states
- Each state has its own hierarchy of courts ending in a state supreme court for appeals
- Each state also has federal courts that address issues dealing with the U.S. Constitution, bankruptcies, treaties, etc.

Understanding the Legal Appeals Process

- Ninety-four federal districts are grouped into 12 circuit courts, known as appellate courts
- Each state has at least one federal district court
  - Cases heard in district courts feed into the appellate courts if challenged
- At the top level is the U.S. Supreme Court
  - Has final say in matters of the U.S. Constitution

Appellate Courts



Understanding the Legal Appeals Process

- If plaintiffs or defendants disagree with the judge or jury's verdict
  - Can take the case to a court of appeals or a district court
- The appellant has to prove that a **legal aspect** of the case is incorrect
- When addressing e-discovery
  - The appeal might be based on an overly broad discovery order or use of cell phone data
- Appeals can be written as briefs or oral arguments

Case Example

- Take a few minutes to read about a case:
  - Go to oyez.org
  - Search for and select: Olmstead v. United States

1. What was the defendant charged with?
2. What was the trial court result (guilty or innocent?)
3. How did the Supreme Court rule?

Olmstead v. United States

- In 1924, federal agents installed wiretaps on phone in building's **basement** of a bootlegger without a warrant
  - Defendant was convicted in trial court with that evidence
- U.S. Supreme Court found that defendant's 4th and 5th amendment rights were not violated because their home or office wasn't physically intruded upon

Case Example

- Take a few minutes to read about using Oyez to search for:
  - Katz v. United States

1. What was the defendant charged with?
2. What was the trial court result (guilty or innocent?)
3. How did the Supreme Court rule?
4. How did this ruling affect Olmstead?

Katz v. United States

- In 1967, federal agents attached a wiretap to the outside of a public phone booth used by the defendant
  - Relied on established "trespass doctrine" caselaw from Olmstead v. U.S.
- Defendant was convicted for the illegal transmission of wagering information to clients in other states
- Court of Appeals agreed with trial court and said there was absence of a physical intrusion into the phone booth
- Supreme court ruled that 4th amendment **protects people and not places** and found in favor of defendant
  - This ruling also reversed Olmstead v. United States as well

Part II

Case Study

Civil Case Review

- Pull up this statute
  - http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57%20

Questions

- What are the main requirements in the BIPA statute for companies to do and not do?
- What are the damages in BIPA for each violation?

Civil Case Review

- Pull up this complaint:
  - https://www.documentcloud.org/documents/1726092-licata-v-facebook-dkt001-compl.html
- Let's go through the sections in this complaint

Questions

- What is the jurisdiction?
- Who is the plaintiff?
- Who is the defendant?
- What is the case about?
- What was the cause of action?

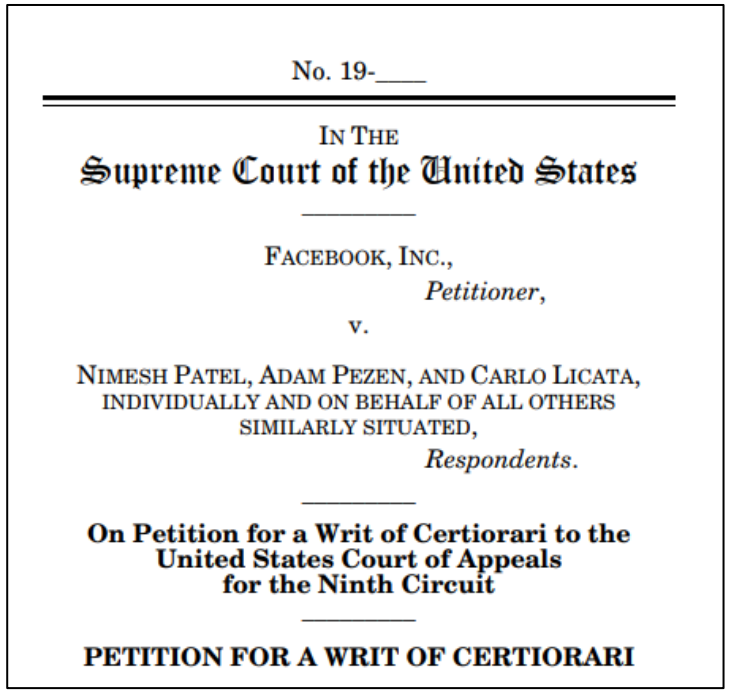
Unanimous Appellate Court Decision

- Pull up this opinion:
  - https://jnswire.s3.amazonaws.com/jns-media/c0/4a/1579273/Licata_v_Facebook_NinthCircuit.pdf

Questions

- What is the new jurisdiction?
- What issue was being appealed?
- What was the overall decision by the appellate court and why?

Writ of Certiorari Filed by Facebook



No. 19-____

IN THE
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,
v.

NIMESH PATEL, ADAM PEZEN, AND CARLO LICATA,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

- https://www.supremecourt.gov/DocketPDF/19/19-706/124149/20191202180045158_19-__%20BIPA%20Cert%20Petition%2012.2%20Final.pdf

Writ of Certiorari Filed by Facebook

QUESTIONS PRESENTED

1. Whether a court can find Article III standing based on its conclusion that a statute protects a concrete interest, without determining that the plaintiff suffered a personal, real-world injury from the alleged statutory violation.

2. Whether a court can find Article III standing based on a risk that a plaintiff's personal information could be misused in the future, without concluding that the possibility of misuse is imminent.

3. Whether a court can certify a class without deciding a question of law that is relevant to determining whether common issues predominate under Rule 23.

U.S. Supreme Court Denied Petition

DATE	PROCEEDINGS AND ORDERS
Dec 02 2019	Petition for a writ of certiorari filed. (Response due January 3, 2020) Petition Appendix Certificate of Word Count Proof of Service
Dec 10 2019	Waiver of right of respondent Nimesh Patel, et al. to respond filed. Main Document
Dec 13 2019	Brief amicus curiae of Washington Legal Foundation filed. Main Document Certificate of Word Count Proof of Service
Dec 30 2019	DISTRIBUTED for Conference of 1/17/2020.
Jan 03 2020	Brief amicus curiae of Consumer Data Industry Association filed. (Distributed) Main Document Certificate of Word Count Proof of Service
Jan 03 2020	Brief amicus curiae of TechFreedom filed.(Distributed) Main Document Certificate of Word Count Proof of Service
Jan 21 2020	Petition DENIED.

Part III

Using Legal Databases

Using Legal Databases

- Two leaders in legal databases:
  - Westlaw and LexisNexis
- LexisNexis acquired several legal archivists and publishers over the years since the 1800s
  - By early 1970s, the Ohio State Bar Association contracted Data Corp to create a text retrieval system, which was later purchased by Mead Corporation as Lexis
  - Nexis portion was created for news media around the same time
  - In 1997 it launched its first Internet search engine for legal data

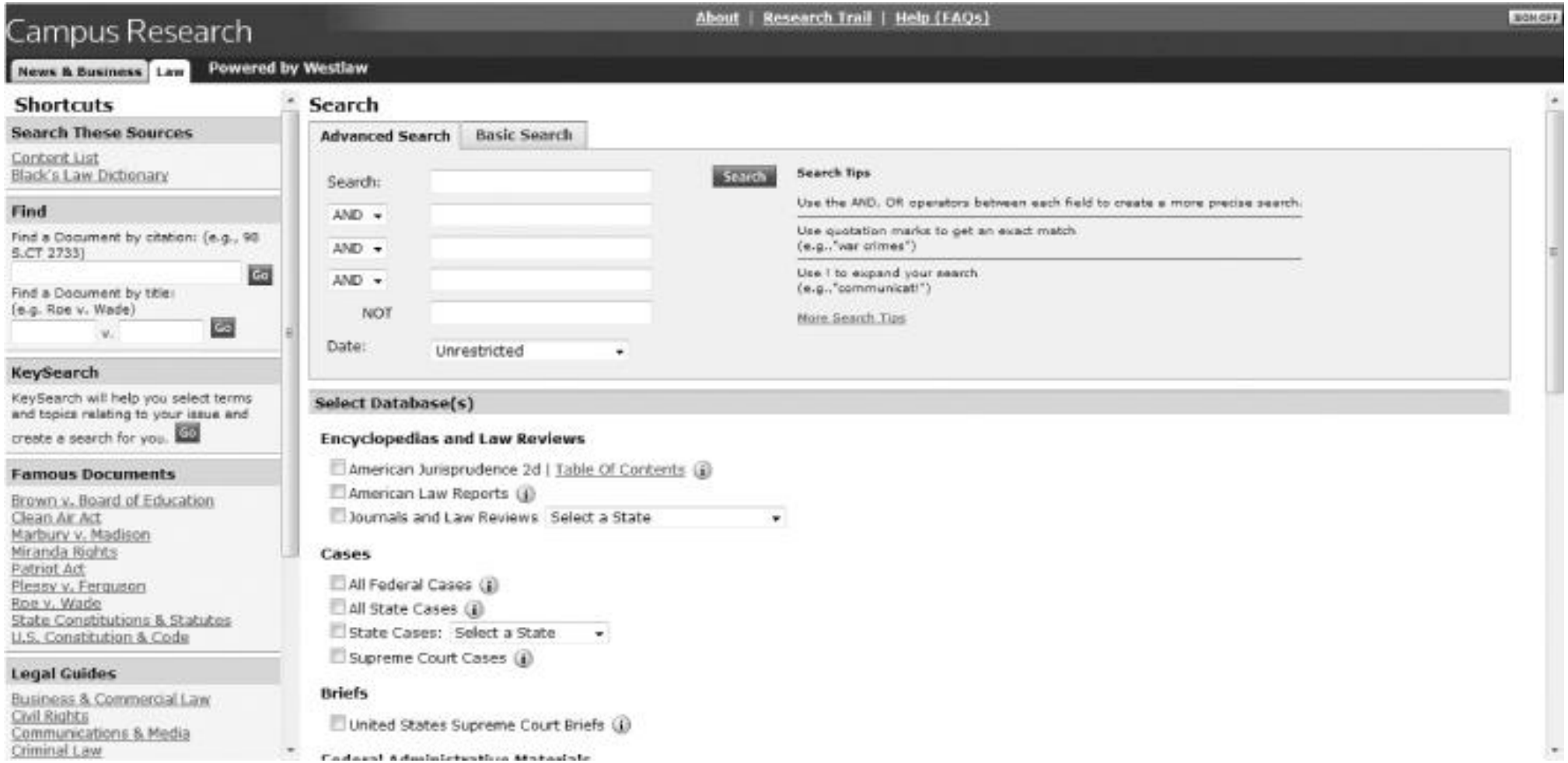
Using Legal Databases

- Westlaw grew along different lines than LexisNexis
  - John West founded a publishing company in 1872
  - His company created the American Digest System
    - Categorizes cases by topic and a key number
  - Started the *Federal Reporter* in 1880 to publish decisions of federal district and circuit courts
  - American Bar Association endorsed his method of sorting cases in 1897
  - Thomson Reuters Publishing purchased John West's company in 1996 and retained the name Westlaw

Using Legal Databases

- Most universities and community colleges have access to Westlaw or other legal search engines
- Depending on the school:
  - A subscription also enables you to search for appeals and other related cases
- Using Westlaw is straightforward
- There are two types of searches: by a specific case or by topic

Westlaw Searching



Using Legal Databases

- If you do not have access to Westlaw:
  - Free legal research Web sites are available
- FindLaw.com is an example
  - Can search for attorneys and legal advice
  - Can also find links to legal forms, blogs, and legal news
  - This site also offers information on criminal law, civil law, consumer rights, and other topics
- The Web site Electronic Discovery Law (*www.ediscoverylaw.com*) posts new cases specific to e-discovery

FindLaw.com

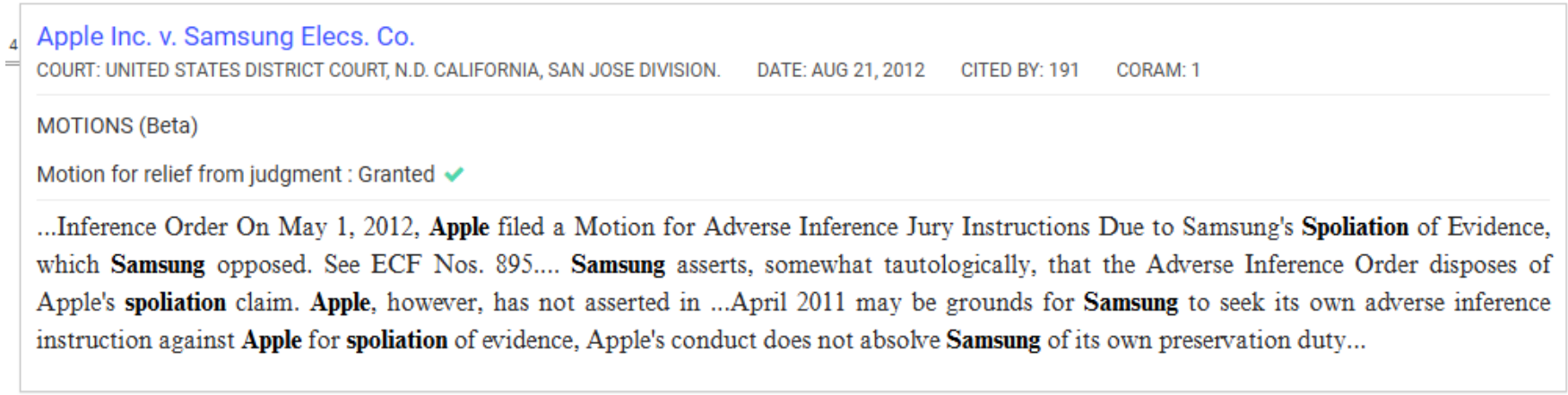
- Go to:
  - https://www.findlaw.com/state/illinois-law/illinois-consumer-laws.html
- What type of felony is identity theft in exceeding $100,000?
- What is the sentence/penalty for that type of felony?

FindLaw.com

- Go to:
  - https://www.findlaw.com/state/illinois-law.html
- What is the code section for the law relating to assisted suicide for terminally ill patients?
- Does Illinois allow assisted suicide?

Casemine.com

- Go to:
  - casemine.com
  - Search for: apple v. samsung nd cal spoliation
  - Open the link to the Aug 21, 2012 document



Apple Inc. v. Samsung Elecs. Co.

COURT: UNITED STATES DISTRICT COURT, N.D. CALIFORNIA, SAN JOSE DIVISION. DATE: AUG 21, 2012 CITED BY: 191 CORAM: 1

MOTIONS (Beta)

Motion for relief from judgment : Granted ✔

...Inference Order On May 1, 2012, **Apple** filed a Motion for Adverse Inference Jury Instructions Due to Samsung's **Spoliation** of Evidence, which **Samsung** opposed. See ECF Nos. 895.... **Samsung** asserts, somewhat tautologically, that the Adverse Inference Order disposes of Apple's **spoliation** claim. **Apple**, however, has not asserted in ...April 2011 may be grounds for **Samsung** to seek its own adverse inference instruction against **Apple** for **spoliation** of evidence, Apple's conduct does not absolve **Samsung** of its own preservation duty...

- What happened in this case regarding Samsung's preservation efforts?

Using Legal Databases

- American Lawyer Media (ALM) created Law.com
  - This site also added Law Technology News, with the subsection E-Discovery and Compliance
  - Can use to find cases that have been appealed or new legislation being proposed
  - Free instructional webinars are offered
- Vendors such as Kroll Ontrack have databases and documents with summaries of hundreds of cases
  - Can get full copies via Westlaw or FindLaw

Using Legal Databases

- Another good free option is:
  - https://www.courtlistener.com/opinion/
- List of additional free options:
  - https://www.law.gmu.edu/library/freelegalresearch

Part IV

Examining U.S. Case Law

Examining U.S. Case Law

- The case of *Donato Aponte-Navedo, et al, Plaintiffs v. Nalco Chemical Company, et al (2010)*
  - Involved discovery requests being unfilled, challenged, or declared too broad
  - Plaintiffs were charged with being overly broad in requests for personnel files and not complying with meet and confer requirements
  - FRCP Section 34(b)(2)(C) played a major role in the case
  - Monetary damages for failure to deliver weren't imposed because neither party was found at fault

Examining U.S. Case Law

- The case of *Landmark Legal Foundation v. Environmental Protection Agency (2003)*
  - Landmark Legal made a request for EPA information under the Freedom of Information Act
  - Judge granted an injunction and placed a litigation hold on ESI
  - EPA destroyed backup tapes, reformatted hard drives, and deleted e-mails
  - EPA was fined

E-mail and Privacy

- In the case *Peskoff v. Faber (2006*):
  - The defendant was charged with diverting company funds for his personal use
  - Plaintiff's e-mails that could have been used as evidence were missing
  - $33,000 in digital forensics costs were estimated in order to retrieve the e-mails
  - The U.S. District Court of the District of Columbia ruled that the defendant would have to pay the vendor's costs

E-mail and Privacy

- E-mail represents a large portion of electronic data presented in court
  - Establishing policies on the use of business e-mail accounts is critical
  - If employees use their business e-mail for personal correspondence, does the content belong to the employees or the employer??
- Courts have used two approaches:
  - Content approach
  - Context approach

E-mail and Privacy

- Content approach: an employer is allowed to monitor any e-mails related to the regular course of business but can't monitor personal e-mails
  - Example: a monitoring system might check for malware and perhaps scan for particular words
- Context approach: the court tries to determine whether an employer had a legitimate cause to monitor employees' e-mail
  - Example: if an internal investigation of an employee had been started, the court might decide that reading personal e-mail was warranted

E-mail and Privacy

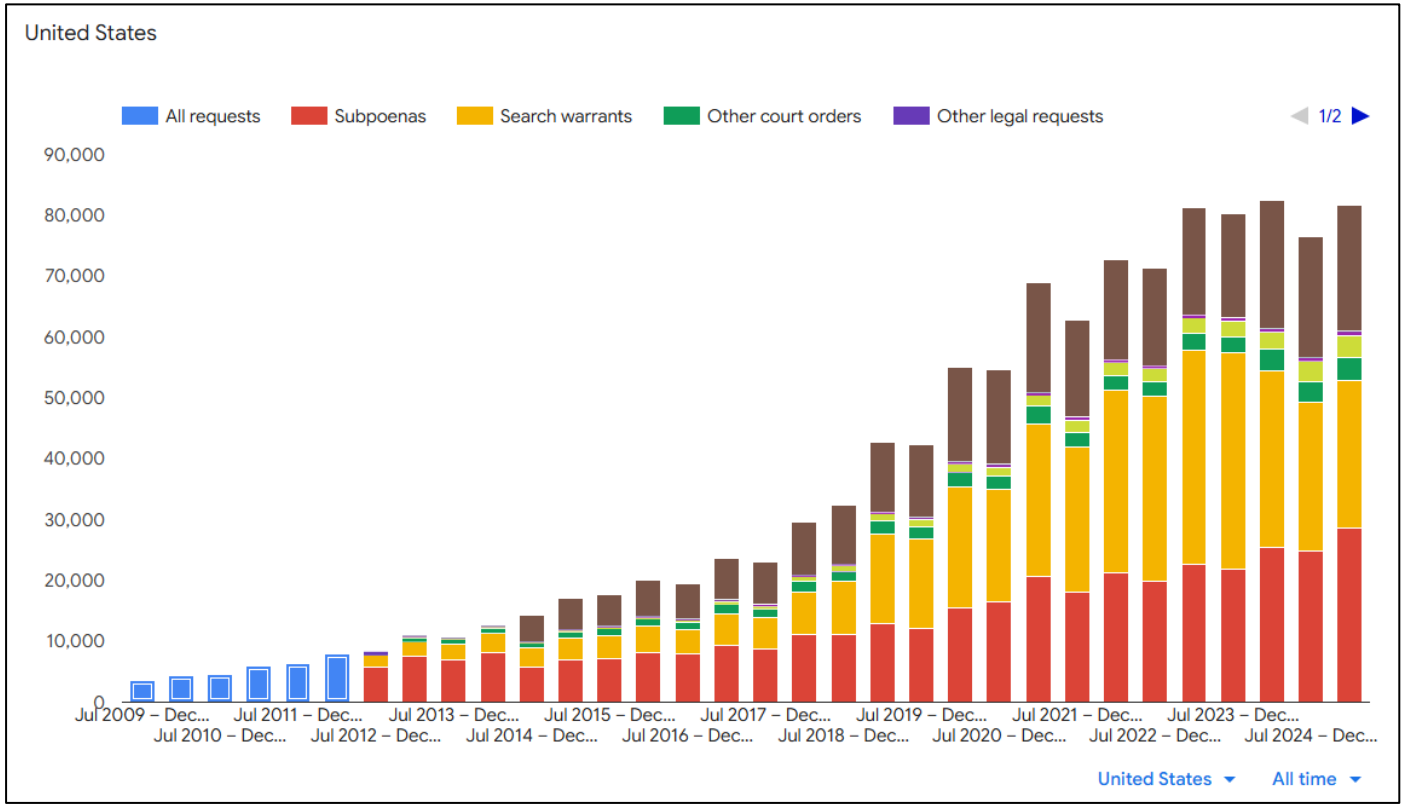
- The U.S. Electronic Communications Privacy Act (ECPA) addresses online privacy, specifically when data is in transit
  - Created in 1986
  - Changes to the ECPA have been recommended because of advances in technology since 1986

E-mail and Privacy

- In a WIRED article (Kravets, 2012), a Google Transparency Report showed how many user data requests the government makes annually
  - Warrants to see this information aren't necessary; only a subpoena is needed
- Any guesses as to how many subpoena requests for first half of 2018 and 2025?
  - 2018 – 11k
  - 2025 – 28k

E-mail and Privacy

- https://transparencyreport.google.com/user-data/overview?user_requests_report_period=authority:US



E-mail and Privacy

- Can government agents demand e-mails older than 180 days from service providers without a warrant?
  - Surprisingly, yes.

E-mail and Privacy

- E-mails older than 180 days don't require a warrant
  - E-mails more recent than 180 days do
- The ECPA and Stored Communications Act (SCA) were created when storage was costly, and space was at a premium
  - Most e-mails were deleted shortly after receipt at that time
  - With advances in storage media, e-mails are now retained for years
- Companies should train employees to be aware of these regulations to help safeguard their privacy

E-mail and Privacy

- What is the act called that was proposed to require a warrant for older emails?
  - House passed Email Privacy Act to require warrants for emails past 180 days
  - Failed in Senate
    - EFF keeps pushing for it

Litigation Holds

- The case *Einstein and Boyd v. 357 LLC and the Corcoran Group, et al*
  - Resulted in sanctions when it was proved the defendant had purposefully misled prosecutors and the plaintiff about the existence of certain e-mails
  - Intentional destruction of ESI, such as deleting e-mails, also occurred
- This case upheld a company's obligation to retain electronic evidence when a litigation hold is in place

Litigation Holds

- The case *EEOC v. JPMorgan Chase Bank, 2013*
  - JPMorgan Chase was charged with deliberately continuing scheduled purges, which included data needed in the case
  - The judge dismissed the case, so sanctions were minimal
- When a small fine is compared with a potentially high judgment:
  - Some will choose to destroy ESI
  - Until penalties adequately address the consequences, some will continue ignoring litigation holds on ESI

Effects of Criminal Case Law

- In criminal e-discovery - financial burden is on the government
  - If litigation is anticipated and ESI is destroyed, obstruction of justice charges can be filed
- In the case *United States v. Suarez* (2010)
  - FBI failed to preserve text messages from a key witness
  - Defendant used the civil e-discovery standard that text messages were critical and his case would suffer without them
  - As a result, the jury acquitted him

Effects of Criminal Case Law

- The Joint Electronic Technology Working Group (JETWG) published "Recommendations for ESI Discovery in Federal Criminal Cases"
  - Explains how to plan for criminal e-discovery procedures
  - Includes a checklist with items, such as determining whether classified information or trade secrets are involved
  - Also addresses legacy data, wiretaps, paper documents, and other matters

Part V

International Law and Multijurisdictional Cases

International Law and Multijurisdictional Cases

- Multinational companies need to be aware of the laws of each nation or jurisdiction in which they do business
- Example: a U.S.-based company was investigating an employee who lived at a company branch in the EU
  - Investigators used a VPN tunnel to examine the employee's business computer
  - When an investigator was sent to EU to retrieve the hard drive, he was arrested for violating the country's privacy laws

International Law and Multijurisdictional Cases

- UN Model Law on International Commercial Arbitration
  - Was created to address commerce/e-commerce and give standardization to international business law
  - One of its goals is to address differences in laws so that international cases aren't halted because of these legal differences
- The United Nations Economic Commission for Europe (UNECE) spells out the UN Model Law and establishes the requirements for electronic data interchange (EDI) between countries

International Law and Multijurisdictional Cases

- Many countries haven't embraced e-discovery in the same manner as in the U.S.
  - Caused party by more restrictive privacy laws and a narrower focus in discovery orders
- Many countries are looking to the U.S. for guidance in handling the complexities of dealing with electronic evidence
  - Litigation holds and the "meet and confer" are now required in Nova Scotia

International Law and Multijurisdictional Cases

- International Competition Network
  - Formed with the goal of standardizing its members' investigation procedures
- The organization published the Anti-Cartel Enforcement Manual
  - The manual describes processes for:
    - Gathering digital evidence in an organization
    - Handling privileged and private data
    - Training staff
    - Handling data stored offsite

International Law and Multijurisdictional Cases

- Anti-Cartel Enforcement Manual (cont'd):
  - One chapter focuses on:
    - Search and seizure of company premises
    - When a search warrant is needed
    - How to prepare for a search, put a team together, conduct a search, and search arrested people
  - The manual is thorough in coverage of the different countries involved and the requirements for investigating an antitrust complaint involving ESI

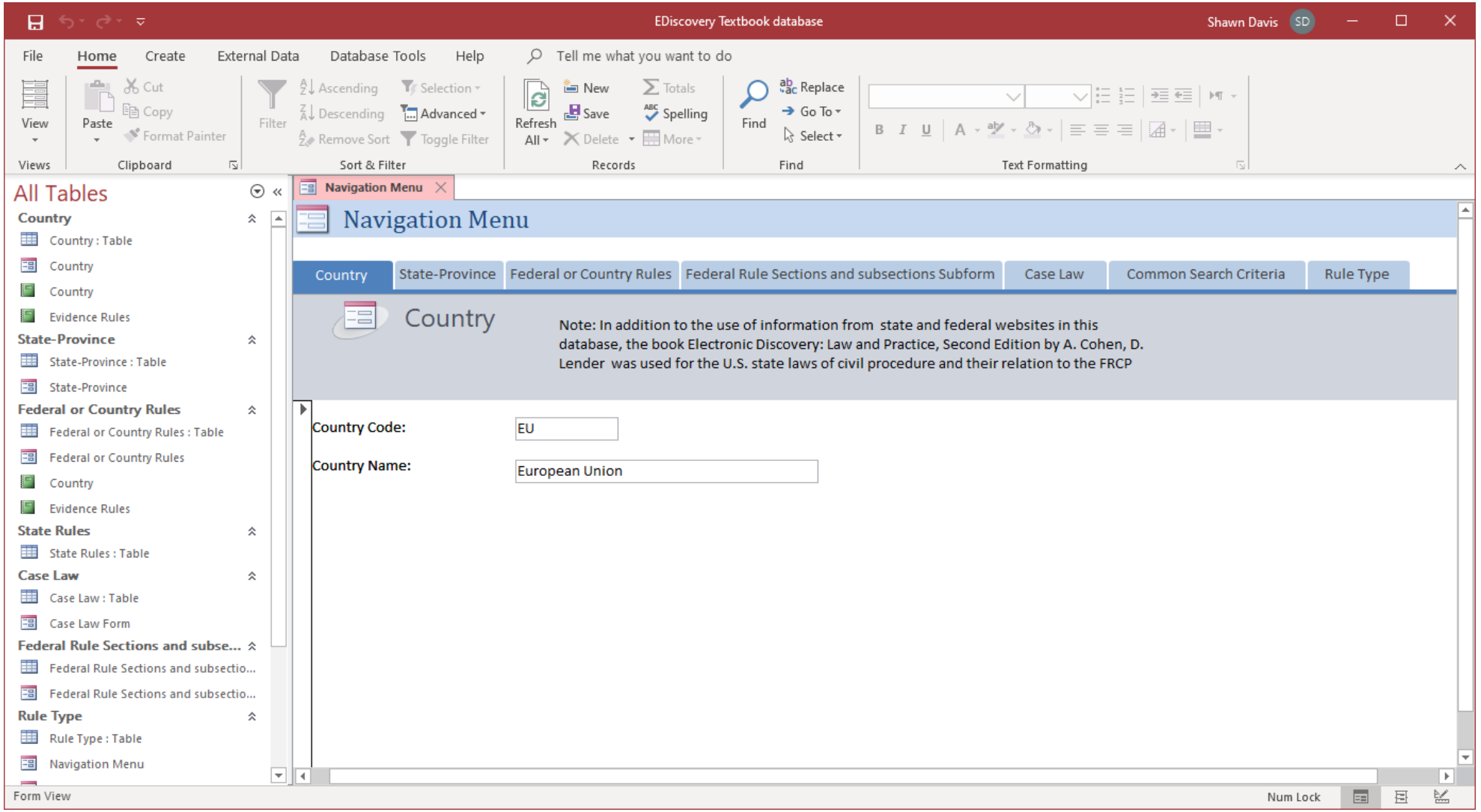
Part VI

Using the E-discovery Database

Using the E-discovery Database

- E-discovery database was created to help e-discovery students and practitioners:
  - Research state/province and country laws that might apply to a case
- Can be found on DVD that came with course text under the Chapter 8 folder
  - Ediscovery Database.accdb
  - Would need to copy to local folder to use

Using the E-discovery Database

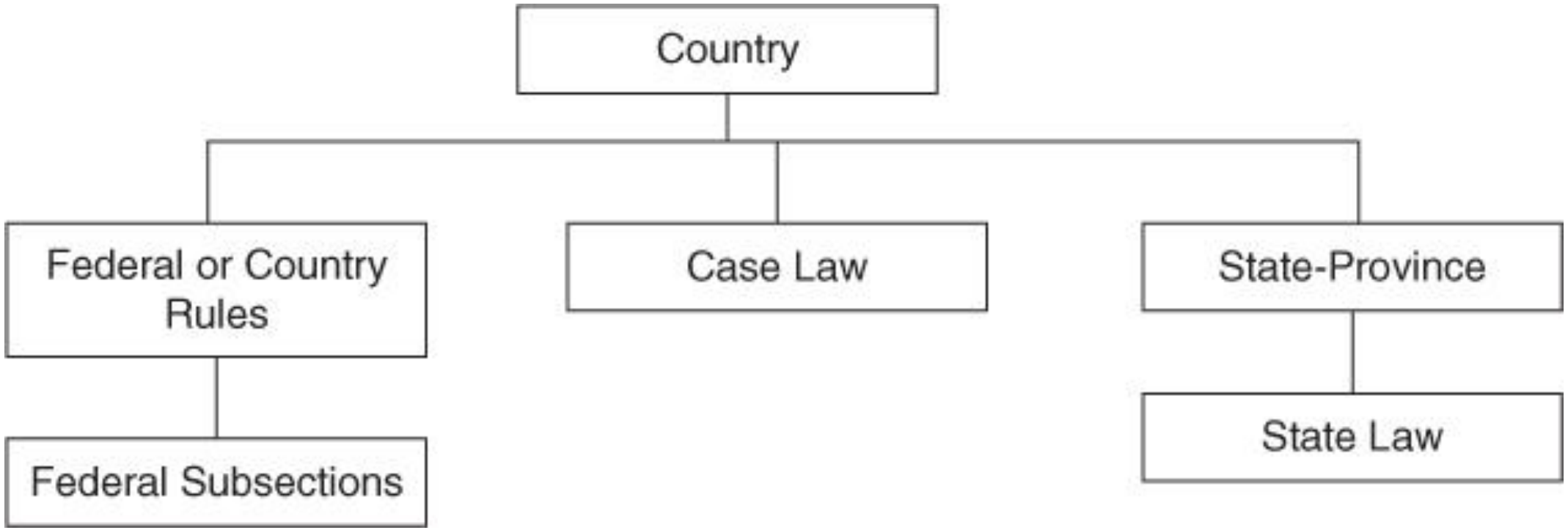


Using the E-discovery Database

- The purpose of this database is:
  - To create a resource that's detailed enough to help investigators and lawyers working on cases involving digital evidence
- The database's original table design:
  - Starts at the country level and works down to specific case law

Navigation Menu in the Database Interface

Database Table Design



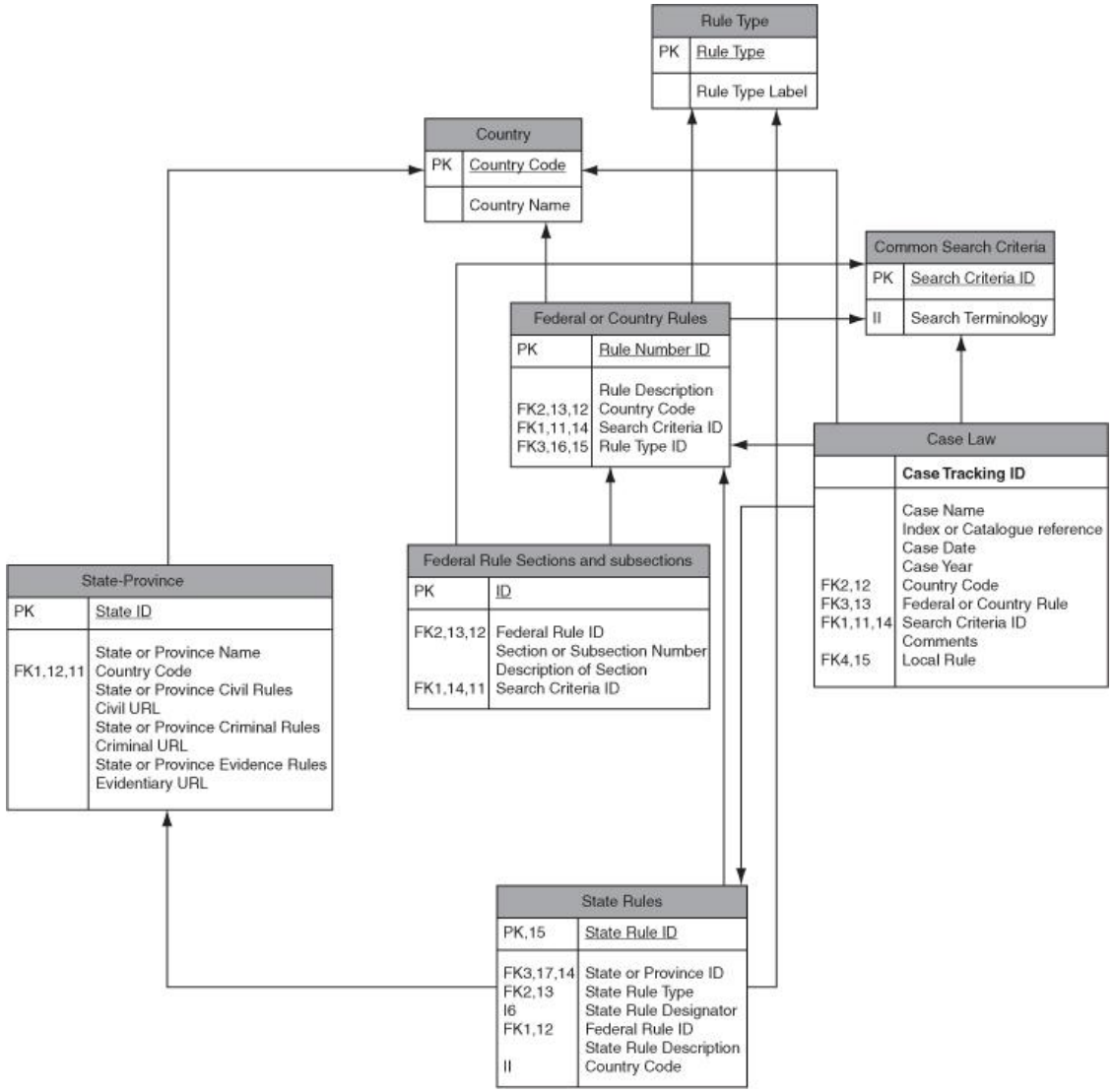
Using the E-discovery Database

- The database is designed to compare state/province and country laws
  - It begins at the country level, where you enter a country name and code
  - Then you can browse each country's laws
- Countries might have multiple jurisdictions or states/provinces that might have different civil laws
- After entering provinces/states and their related laws:
  - You can look up or enter applicable case law

Tables in the Database

- The entity-relationship diagram for the database is shown in Figure 8-7 on the following slide
- "PK" = a table's primary key (a unique value)
- "FK" = a table's foreign key (indicates that the field is a primary key in a linked table)
- The Country table consists of two fields for country names and codes
- A State ID is typically made up of the country code and the state abbreviation
  - Example: California is represented by US-CA

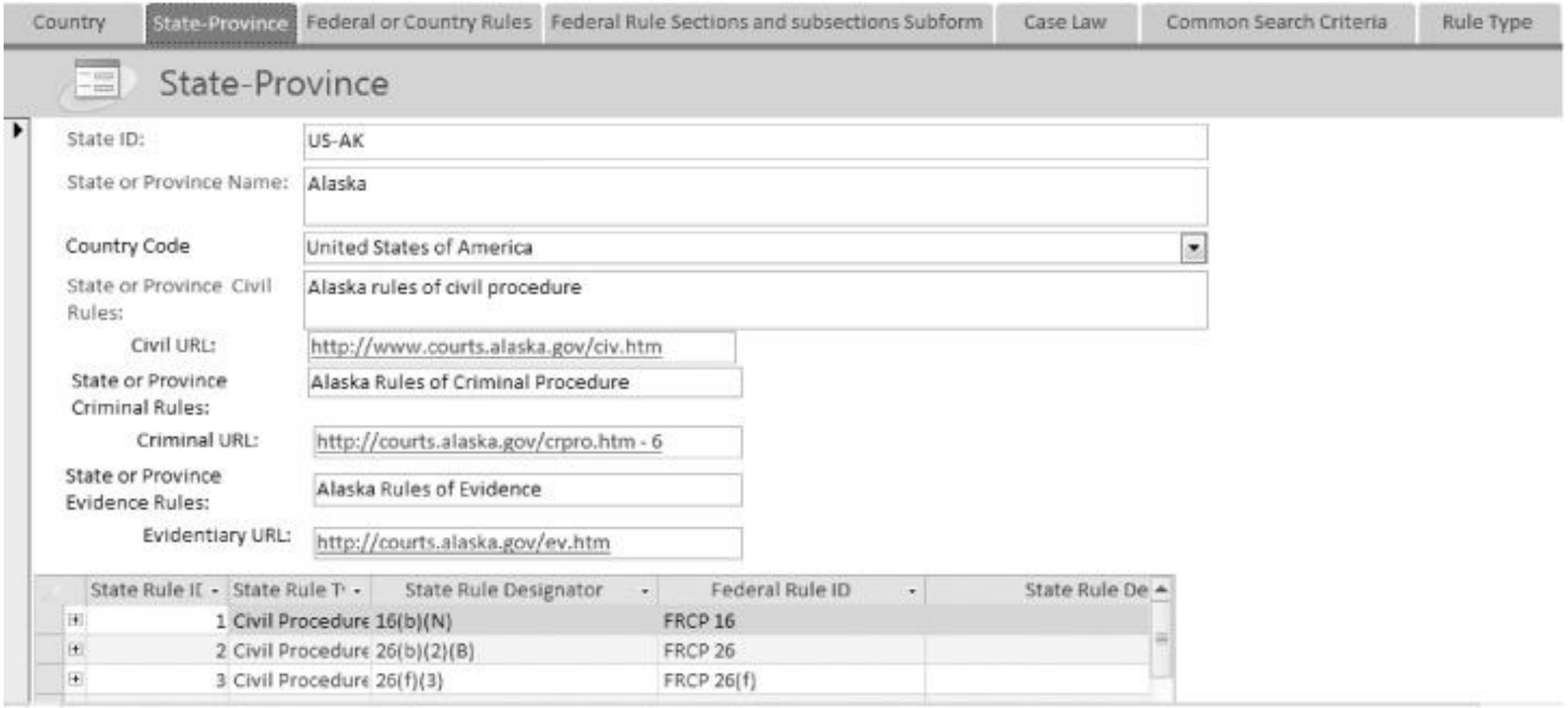
Database Entity-Relationship Diagram



Tables in the Database

- The State-Province table reflects how laws can vary between states or provinces in a country
  - You can enter related civil and criminal laws, and the state or province laws can be mapped to federal laws
- The Case Law table shows how cases are linked to a particular country, related laws, and key search terms
  - Use this table to look up cases that might be similar to the one you're investigating

Using the State-Province Table



The Case Law Form Windows

Tables in the Database

- To make database searching easier, two tables were created:
  - Common Search Criteria and Rule Type
- Use the Rule Type table to look up rules based on specific categories
  - Such as constitutional

Rule Type

Rule Type ID	Rule Type Label	Click to Add
1	Civil Procedure	
2	Criminal	
3	Evidence	
4	Privacy	
5	Constitutional	
6	Computer Crime & Abuse	

Tables in a Database

- The Common Search Criteria table has two fields:
  - Search Criteria ID
  - Search Terminology
    - Lists search terms that are common to different laws

Key Terms

Key Term ID	Key Terminology
1	Scope and Definition of Search and Seizure Law
2	Who can issue a warrant
3	When a warrant can be issued
4	When items can be seized without a warrant
5	Search of an arrested person
6	Authority to enter premises in interest of national security
7	Resisting arrest or search
8	Warrant must be issued who has authority to execute
9	Motion to return property/wrongful search/compensation
10	Wiretaps
11	Privacy - communications
12	warrantless search
13	Expectation of Privacy
14	Meets the Katz requirements
15	Definitions
16	Privacy - other

Tables in the Database

- After these two supporting tables were populated, the Federal or Country Rules table was populated

Federal or Country Rules

Rule Number ID	Rule Description	Coun	Rule Type ID	Search Criteria ID
4th Amendment	regarding unreasonable search and seizure	US	Constitutional	Scope and Definition
5th Amendment	self incrimination	US	Constitutional	Self Incrimination
CFAA	Computer Fraud and Abuse Act	US	Computer Crime &	
ECPA	Electronic Communications Privacy Act	US	Privacy	Privacy - communicat
FRCP 16	Pretrial Conference - ESI may be in contents	US	Civil Procedure	
FRCP 26		US	Civil Procedure	
FRCP 26(f)	Meet and Confer	US	Civil Procedure	
FRCP 33	Interrogatories - option to produce business re	US	Civil Procedure	
FRCP 34	May specify form of ESI	US	Civil Procedure	
FRCP 37 (e)	Safe Harbor for routine good faith operation o	US	Civil Procedure	
FRCrP 41	Search and Seizure Rules	US	Criminal	
FRE 1002	Contents of Writings, Recordings and Photogra	US	Evidence	
FRE 1003	Contents of Writings, Recordings and Photogra	US	Evidence	
FRE 103	Rulings on Evidence	US	Evidence	
FRE 104	Preliminary questions such as whether or not a	US	Evidence	
FRE 105	Limited Admissibility	US	Evidence	

Tables in the Database

- Another table was added for states with their own specific civil, criminal, and evidence rules
  - The table is called State Rules
- Many states have similar rule numbers
  - State Rule ID - An auto number used as the key field
  - A one-to-many relationship to the State or Province table could be set up
- The State Rule field is used to describe a rule's function

Tables in the Database

- After several cases had been entered, it was clear that more detail was needed
  - A table for sections and subsections of federal or country laws was created

Federal Rule Sections and subsections

ID	Federal Rule ID	Section or Si	Description of Section	Search Criteria ID
1	FRCrP 41	41(a)	Scope and definitions	Scope and Definition of Search anc
2	FRCrP 41	41(b)	Who has the authority to issue a warrant	Who can issue a warrant
3	FRCrP 41	41 (c)	When a warrant may be issued	When a warrant can be issued
4	FRCrP 41	41(d)	The warrant must be issued to someone with author	Warrant must be issued who has a
5	FRCrP 41	41(g)	Motion to return property	Motion to return property/wrongfi

Summary

- The judicial branch of the U.S. federal government is represented in all 50 states and each state has its own hierarchy of courts ending in a state supreme court for appeals
- The number of online resources for e-discovery is growing
- The biggest challenge of e-discovery is litigation holds because they're often ignored, and as a result, ESI is deleted

Summary

- The issue of privacy in e-mail continues to be a concern when creating company policies in the United States and other countries
- When civil cases become criminal cases, the rights of the individual and Rule 41 of the FRCrP (related to search and seizure) apply
- The Electronic Communications Privacy Act (ECPA) doesn't adequately address issues related to the age of the e-mail, data stored remotely, and other matters introduced as a result of cloud storage

Text References

- Phillips, A., Godfrey, R., Steuart, C., & Brown, C. (2014). E-discovery: An Introduction to Digital Evidence. Boston, MA: Cengage Learning.

Homework

- Review and understand this slide deck on Canvas and read chapter 2 before next class on 2/19

- Research paper **outline** due in 2 weeks on 2/16 before midnight
  - Your topics assignment grades were posted yesterday and your assigned topic can be found in the grading comments
  - Please read the outline assignment instructions and rubric carefully

Questions???