

§ 8.5

Validating Authority

Interactive Study

To validate authority is to make sure the law being quoted or relied upon is still good law. Before relying on any law in a legal document, the researcher must validate that law. For decades, the standard for validating authority was a set of books in the law library called *Shepard's Citations*. Lexis has long offered *Shepard's* online as part of its subscription. Westlaw, in response, developed its own validation tool, *KeyCite*, which provides the same functions as *Shepard's*.

With law libraries seeking to reduce operating costs, and with *Shepard's* being a very expensive set of books, most law libraries have chosen to end their *Shepard's* subscriptions and offer online validation to researchers. Thus, knowing how to validate authority online is crucial. When validating authority, it is important to understand that the authority being validated is the **cited** authority, and the cases that end up validating the authority are the **citing** authorities.

QUICKVIEW – VALIDATING AUTHORITY

Westlaw

1. Navigate to the top of the case, statute, or other authority and observe whether there is a red or yellow flag next to the title
2. Locate the *KeyCite Bar* (identified with the *Powered by KeyCite* icon at the far right of the bar) and click on *Citing References* to view cases that have quoted your case
3. Within the *KeyCite Bar* options, the flags refer to the *citing* material on those pages, not to your *cited* case. So do not panic if you see red flags there.
4. Identify authority that may invalidate the cited authority by clicking on *History* and *Negative Treatment* in the *KeyCite Bar*
5. Determine whether your *cited* authority has been overturned on appeal or otherwise modified by a higher court

Lexis

1. Navigate to the top of the page of the case, statute, or other authority
2. Locate the *Shepard's Box* (on the right side of the page)
3. Look for any negative signals (red, orange, yellow)
4. Having a red or orange flag does not, by itself, assure the case is invalid, but caution should be used to make sure the issue you are using it to rely upon is still intact
5. If an authority is invalid, do not rely upon it

Law Library

Not required because most libraries no longer update hardbound volumes of *Shepard's*

ASSIGNMENT § 8.5(A) | VALIDATING AUTHORITY USING WESTLAW

In response to the powerful validation tool *Shepard's*, Westlaw created *KeyCite*, an entirely online validation system. *KeyCite* is easy to use and offers great features.

There are three potential reasons to use any validation tool.


- To validate the authority
- To obtain parallel citations
- To find additional relevant authority

KeyCite achieves all these tasks in a very efficient manner, allowing the researcher to validate any primary authority (and many secondary sources) with just a few clicks of the mouse.





To see how *KeyCite* works, locate the caption to a case, statute, or other authority. You may use an authority found during your previous research, or if you prefer, search for the following citation: 443 N.E.2d 687.


1. Using the *KeyCite* icon to the left of the caption, determine validity of the authority

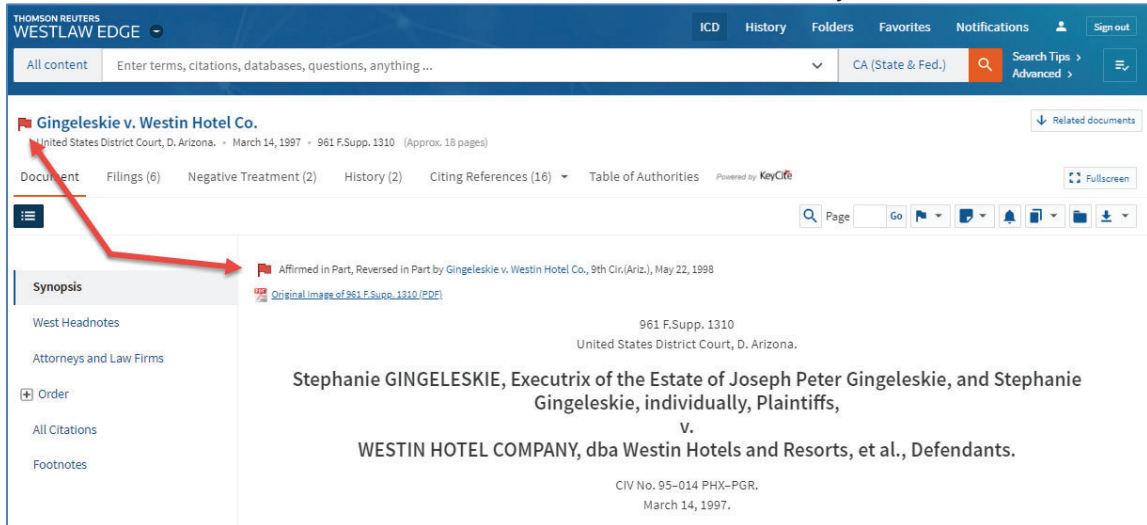
By far the most common usage of *KeyCite* is the quick determination as to whether an authority being viewed is still valid. At the top left next to the caption will be a *KeyCite* status signal. These signals instantly inform the researcher whether the authority being viewed is still valid. *KeyCite* status signals indicate:

 *Negative treatment, but still valid*
The researcher should

KeyCite®



-  • Cases & Administrative Decisions - some negative treatment, but not reversed or overruled
- Statutes & Regulations - proposed legislation or rule available, court decision has questioned validity, or prior version received negative treatment from a court
- Patents & Trademarks - not infringed, but did not rule on its validity, all or part valid and not infringed, held a trademark was not diluted, or held a trademark was not violated by unfair competition
-  • Cases & Administrative Decisions - no longer good for at least one point of law
- Statutes & Regulations - amended, repealed, superseded, or held unconstitutional or preempted in whole or in part
- Patents & Trademarks - all or part is invalid, invalid and not infringed, all or part of a patent is unenforceable due to the patentee's inequitable conduct, or a trademark is cancelled
-  A blue-striped flag indicates a document has been appealed to the U.S. Courts of Appeals or the U.S. Supreme Court (excluding appeals originating from agencies).
-  The Overruling Risk warning indicates that a document may no longer be good for at least one point of law based on its reliance on an overruled or otherwise invalid prior decision.

be concerned if a  (yellow flag) signal appears, but that signal does not necessarily mean the authority may not be used. The case is still valid, but another court may have disagreed or been critical. If the case being validated is not that crucial, the researcher may w




ant to use other authority. But if the researcher was relying on the case in a major way, he or she will need to locate the criticizing authority.

 *No longer valid*

The signal that most concerns a researcher is the  (red flag). The case is no longer valid as to at least one, and possibly all, points of law. While it is technically possible to cite a part of a case that was not affected, most attorneys, and thus paralegals, would not want to rely on an authority that had even partially been overturned. A researcher can rely on a case for a point that was not invalidated, but only if no better authority is available. A good example of this is *Roe v. Wade*, the case ensuring a woman's right to an abortion. It gets a  in KeyCite, but it is still regularly cited because the later court opinion only struck down a portion of *Roe*, leaving the most critical aspects intact.

 *Validity in question*

If a case is in the process of being appealed to either the U.S. Circuit Court of Appeals or the U.S. Supreme Court the signal  (blue-striped flag) will appear.

Most researchers use *KeyCite* for this validation step only, to quickly determine an authority's validity. This is the foundational and most crucial function of *KeyCite*. The following steps are helpful research methods, but the validation step is the one crucial element the researcher must be aware of, even if *KeyCite* is used for nothing else.

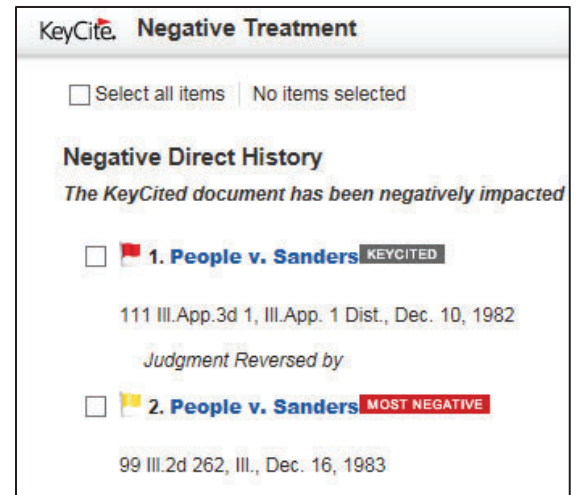
2. Use the KeyCite Bar to determine validity, and more

At the top of the page you will see the KeyCite Bar. It includes the following features:



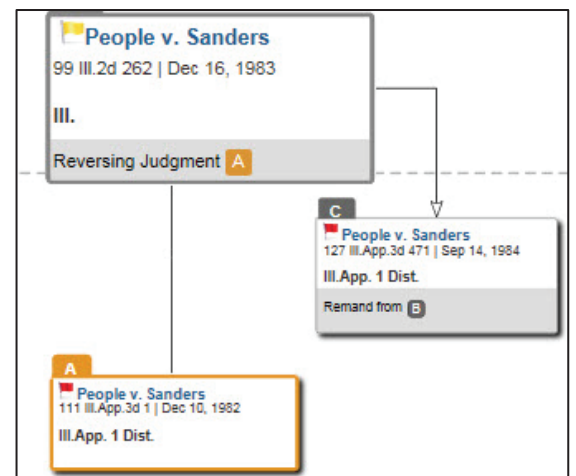
- **Negative Treatment**

Along with History, this is the most important feature of KeyCite. If any Negative Treatments are available you must review them to determine if they affect your case (which they likely do).



- **History**

History is any previous or subsequent published opinion dealing with the same case, such as a later opinion on appeal. If there is any history, you must check to ensure the cited authority is still valid.



- **Citing References**

If another opinion mentions (cites) your “*cited*” case, it will be listed here. This is an excellent way to expand your research and find additional authority that deals with the same or similar legal issues. Also provides a green bar indicating how much in-depth your *cited* case was mentioned.

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	1. Marczak v. Storybook Square, Inc. 1999 WL 566687, *4+, Tex.App.-Hous. (1 Dist.) Mike and Julie Marczak filed suit on behalf of their daughter, Rachel, to recover damages for head injuries she sustained at the Storybook Square day care center. The trial court...	Aug. 05, 1999	Case	4	8, 10, 12 S.W.2d
Discussed by	2. Boggus obo Casey v. Texas Racquet & Spa, Inc. 2018 WL 3911090, *3+, Tex.App.-Hous. (14 Dist.) In this appeal, we hold that a fitness club failed to meet its summary judgment burden to conclusively negate at least one essential element of the plaintiff's negligence claim...	Aug. 16, 2018	Case	3	2, 5 S.W.2d
Discussed by	3. Levrie v. Department of Army 810 F.2d 1311, 1315+, 8th Cir.(Tex.) Employees of independent contractor brought action against United States and Department of Army to recover for personal injuries while cleaning up hazardous chemical solution.	Jan. 22, 1987	Case	5	8 S.W.2d

- **Table of Authorities**

Table of Authorities is a listing of the cases relied upon as authority by the document you are viewing. You can use this list to quickly verify the validity of relied upon authority. Yellow or red *KeyCite* flags associated with a reference indicate that a cautionary approach to a point of law supported by that reference is advised.

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	1. Abalos v. Oil Development Co. of Texas 544 S.W.2d 627, Tex., 1976 Independent contractor's employee brought action to recover from operator of oil lease for personal injury damages founded on doctrine of 'discovered peril.' After remand, 491...	Case	3		535
Cited	2. Anthony L. Welch, a Minor, Through His Guardian Ad Litem, Gladys a. Welch, Plaintiff and Respondent v. Dunsmuir Joint Union High School District, a P... 326 P.2d 633, Cal.App. 3 Dist., 1958 Action by student, through his guardian, for personal injuries sustained while participating in a high school football scrimmage. The Superior Court, Shasta County, Richard B...	Case	3		536
Mentioned	3. Barbarisi v. Caruso 135 A.2d 539, N.J.Super.A.D., 1957 Action by infant who was left with his grandmother under an arrangement with his mother by which the grandmother would watch for safekeeping of the infant while the mother was...	Case	3		536

- **Powered by**

A brief guide explaining how *KeyCite* works and what the signals mean.

3. *Use KeyCite to obtain parallel citations*

If you only have the unofficial citation and need the official, or vice versa, the caption in *KeyCite* will provide both cites for the researcher. (Most regular case captions provide parallel cites as well, when both an official and unofficial publication publish the case.)

4. *Use KeyCite to broaden research by finding additional authority*

It is important to remember that for a case to be listed as history or citing authority in *KeyCite*, it must either be the same case at a different point of litigation, or it must be *citing* the case being validated. Thus, any cases listed in *KeyCite* results most likely deal with similar issues.

CHECKLIST | VALIDATING AUTHORITY USING WESTLAW

- Navigate to the *caption* of the case or statute you want to validate
- Look for the controlling *KeyCite Flag* at the top left of the caption
- Use the KeyCite Bar to determine if any negative authority exists
- View any *Negative Treatment* and *History* to determine validity
- Review the *Citing References* to expand your research

REVIEW QUESTIONS § 8.5(A) | VALIDATING AUTHORITY USING WESTLAW

Using *KeyCite*, determine whether the following authorities are still valid.

- | | | |
|------------------------------|-----------------------------|--------------------|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 641 So. 2d 610 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 506 A.2d 428 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 40 S.W.3d 294 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 673 P.2d 1297 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 119 Haw. 467 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 91 S.E. 1070 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 520 S.W.2d 894 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 688 P.2d 749 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 722 N.Y.S.2d 3 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | 28 U.S.C.A. 1346 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | F.S.A. § 435.03 |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | N.C.G.S.A. 20-17.1 |

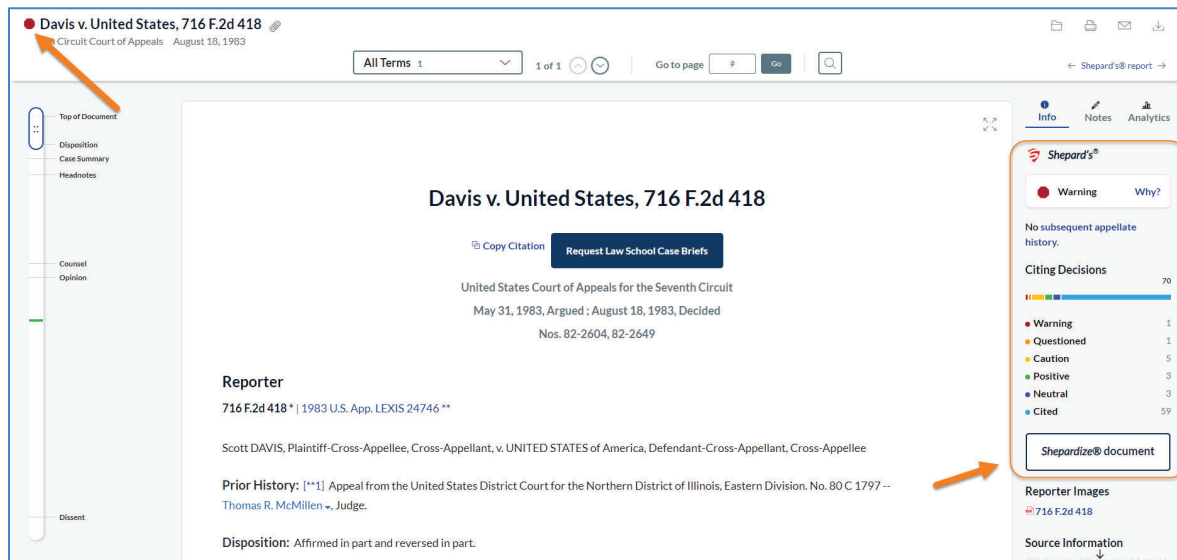
ASSIGNMENT § 8.5(B) | VALIDATING AUTHORITY USING LEXIS

As with most online legal research tasks, there are striking similarities between the validation systems used by *Lexis* and *Westlaw*. There are also a couple of differences of which the researcher needs to be aware. *Shepard's* is the classic validator. Even if an attorney uses *Westlaw*, he or she may tell a paralegal to *Shepardize* a case even though *KeyCite* will be used for *Westlaw* subscribers. In short, the term *Shepardize* has become synonymous with the term *validate*.

There are three potential reasons to use any validation tool.

- To validate the authority
- To obtain parallel citations
- To find additional relevant authority

1. Click on the *Shepardize Document* link in the *Shepard's Box* to determine whether the authority is valid. You may also click on the icon to the left of the title to open the full *Shepard's report*.



By far the most common usage of *Shepard's* is the quick determination as to whether an authority being viewed is still valid. At the top left next to the caption will be a *Shepard's* status signal. These signals instantly inform the researcher whether the authority being viewed is still valid.

The screenshot shows the Lexis+ interface for a 'Shepard's® Comprehensive Report: N.Y. Soc. Serv. Law sec. 390'. The top navigation bar includes 'Run New Search', 'Client: None', 'Folders', 'History', and 'Help'. The main header displays the report title with a green signal icon. The left sidebar contains a 'Filters' section with categories like 'Analysis' (Positive, Neutral) and 'Court' (Federal, State). The main content area shows 'Citing Decisions (43)' and 'Pending Legislation'. Two cases are listed: 'Garcia v. New York City Dept. of Health & Mental Hygiene' and 'McLean v. City of New York'. A 'Search Within Results' box is visible at the bottom left of the sidebar.

In the above image, notice the green signal after the title of the case. As we will see, this signal indicates that there is no negative treatment, and thus the authority is still valid. Had there been a different icon, such as a red stop sign signal, that would not have been the case.

This close-up view of the filters sidebar shows the 'Analysis' section with a list of document types and their counts: Positive (1), Followed by (1), Neutral (7), Interpreted or construed by (4), Cited in Dissenting Opinion at (2), Not applicable in (1), and 'Cited by' (40). A yellow arrow points to the 'Analysis' section header.

In the left column on the screen the researcher is able to see a summary of the types of documents listed and can even "Search within results" to further focus the research.

SIGNALS

Most researchers use *Shepard's* for this validation step only, to quickly determine an authority's validity. This is the foundational and most crucial function of *Shepard's*.

Shepard's Signal™ indicator

- Warning: Negative treatment is indicated.**

The red *Shepard's* Signal™ indicator indicates that citing references in the *Shepard's*® Citations Service contain strong negative history or treatment of your case (for example, overruled by or reversed).
- Warning**

The red *Shepard's* Signal™ indicator indicates that citing references in the *Shepard's*® Citations Service contain strong negative treatment of the section (for example, the section may have been found to be unconstitutional or void).
- Questioned: Validity questioned by citing reference.**

The orange *Shepard's* Signal™ indicator indicates that the citing references in the *Shepard's*® Citations Service contain treatment that questions the continuing validity or precedential value of your case because of intervening circumstances, including judicial or legislative overruling
- Caution: Possible negative treatment indicated**

The yellow *Shepard's* Signal™ indicator indicates that citing references in the *Shepard's*® Citations Service contain history or treatment that may have a significant negative impact on your case (for example, limited or criticized by).
- Positive treatment indicated**

The green *Shepard's* Signal™ indicator indicates that citing references in the *Shepard's*® Citations Service contain history or treatment that has a positive impact on your case (for example, affirmed or followed by).
- Citing references with analysis available. Click to Shepardize®.**

The blue "A" *Shepard's* Signal™ indicator indicates that citing references in the *Shepard's*® Citations Service contain treatment of your case that is neither positive nor negative (for example, explained).
- Citation information available**

The blue "I" *Shepard's* Signal™ indicator indicates that citing references are available in the *Shepard's*® Citations Service for your case, but the references do not have history or treatment analysis (for example, the references are law review citations).

Analysis

	Red	Warning
	Orange	Questioned
	Yellow	Caution
	Green	Positive
	Blue	Neutral
	Light Blue	No phrase exists

Depth of Discussion

	Analyzed
	Discussed
	Mentioned
	Cited

CHECKLIST | VALIDATING AUTHORITY USING LEXIS

- Navigate to the *caption* of the case you want to validate
- Click on the *Shepardize document* link in the *Shepard's Box*
- To broaden research, select a citing case from your jurisdiction, or use the headnote feature for cases dealing with the same topic

REVIEW QUESTIONS § 8.5(B) | VALIDATING AUTHORITY USING LEXIS

Using *Shepard's*, determine whether the following authorities are valid.

- | | |
|--|---|
| <input type="checkbox"/> Yes <input type="checkbox"/> No 297 P. 198 | <input type="checkbox"/> Yes <input type="checkbox"/> No 836 N.E.2d 414 |
| <input type="checkbox"/> Yes <input type="checkbox"/> No 320 N.W.2d 164 | <input type="checkbox"/> Yes <input type="checkbox"/> No 909 F. Supp. 525 |
| <input type="checkbox"/> Yes <input type="checkbox"/> No 384 A.2d 687 | <input type="checkbox"/> Yes <input type="checkbox"/> No 855 S.W.2d 116 |
| <input type="checkbox"/> Yes <input type="checkbox"/> No 178 Cal. App. 3d 1094 | <input type="checkbox"/> Yes <input type="checkbox"/> No 556 F.3d 967 |
| <input type="checkbox"/> Yes <input type="checkbox"/> No 553 F. Supp. 1298 | <input type="checkbox"/> Yes <input type="checkbox"/> No 10 USCS § 919 |

ASSIGNMENT § 8.5(C) | VALIDATING AUTHORITY USING THE LAW LIBRARY (OPTIONAL)

Most law libraries have ended subscriptions to hardcover, traditional sets of *Shepard's* due to the high cost of those books. Thus, students are not required to validate authority in the law library as a part of these assignments.

Students who wish to see how *Shepard's* is utilized in a law library may visit the website accompanying this manual for additional instruction, demonstrations, exercises, and quizzes.