

# Using KeyCite™ in Legal Research

*INSTRUCTOR'S MATERIALS AND STUDENT EXERCISES*



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# Using KeyCite™ in Legal Research

## *Instructor's Materials and Student Exercises*

The KeyCite citation research service on Westlaw® is so new that most of the legal research textbooks do not include any information about it.

In 1997, Professor Nancy Johnson prepared *KeyCite: A Guide for Legal Research and Writing Instructors*. Many legal research and writing teachers have used her introduction to KeyCite and the exercises she prepared as a supplement to their legal research text. The 8th edition of *Discovering Westlaw: The Essential Guide* (West Group 1998) includes a chapter that will help students learn to use KeyCite. And, of course, KeyCite is taught in the Westlaw training that students receive from West Group academic account managers.

Each of these resources can help students learn how to use KeyCite and to understand its capabilities. However, none gives full consideration to why and when to use KeyCite in the legal research process. That, simply, is the goal of this set of teaching and learning materials.

These materials are intended to be integrated into the segment of your research course on citation research services. I have kept the text as concise as possible since we never have more time to cover new research tools! You can edit or change anything in this packet to suit your time frame and course pedagogy.

Before my class session on case verification, I will have asked the students to read and complete the exercises from Professor Johnson's material. Some understanding of how KeyCite operates will make the following materials more relevant.

In the following pages you will find a narrative that can be used as the basis for class lecture as well as for student reading assignments. Exercises have been included that will help your students master KeyCite tools and techniques. The description of steps to follow in using KeyCite assumes that the student is accessing Westlaw via WESTMATE®. A one-page presentation outline and several overhead transparencies have been prepared for your use in classroom presentations.

I hope these materials will help your students master the functionality of KeyCite as well as understand when to use this powerful research tool.

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## KeyCite—A Powerful New Citation Research Tool

KeyCite is a comprehensive citation research service that integrates all cases on Westlaw (including unpublished decisions) and many secondary sources such as law review articles and ALR annotations. The precursor of KeyCite is the Insta-Cite service, which helps you verify a citation and review the history of a case. While Insta-Cite provides a list of direct and negative indirect history, KeyCite does this and more. Using KeyCite, you can retrieve a comprehensive list of citations to your case, and you can customize your retrieval to the most relevant documents. For example, you might choose to view only the negative history of a case or exclude related references and minor procedural history from your KeyCite result. Moreover, KeyCite categorizes citing cases by the depth of treatment they give your case and allows you to use West's Topic and Key Number System (the West digests) to restrict the list of citing cases to those discussing particular points of law. You can also customize the list of citing cases in various other ways, such as by jurisdiction or West publication. KeyCite can be used for many purposes and at many different times in the research process. It is a powerful tool.

### When to Use KeyCite

Most researchers will use KeyCite for what is probably its primary function—case verification, that is, to check the authority of a case. Until KeyCite, there were three services that performed this function—Shepard's Citations, Auto-Cite on Lexis-Nexis, and Insta-Cite on Westlaw. In addition to case verification, KeyCite can be used to interpret the holding of your case, to find similar cases in other jurisdictions, and to expand your research into secondary literature. Each of these tasks will be discussed in turn, as it might come up in a typical research session.

#### ✓ Verify Your Case

Case verification (for many years called Shepardizing) is one of the unique features of legal research in the United States. Use of citator services permits the legal researcher to identify the history of a case as well as later case law that may have affected the holding of the case being verified.

Researchers commonly verify the authority of their case at several different points in the research process. They might verify the authority before they even read the case; they might read a case thoroughly to be sure it is relevant first; they might collect citations to several cases and verify them all at once; or they might do a final verification right before they file the brief or turn in the memorandum.

Regardless of the point in the research process at which a case is verified, at a minimum, the researcher wants to be sure she (1) has a correct citation, (2) knows the entire history of the case, and (3) knows how subsequent cases in her jurisdiction have affected the holding of her case. She may also want (4) to know how courts in other jurisdictions have treated her case.

Information related to items (1) and (2) will be found in the Direct History category of the KeyCite History of the Case result. Information related to items (3) and (4) will be found in the Negative Indirect History category and in the KeyCite Citations to the Case result.

The sample research problem involves the wrongful death in Missouri of an unborn viable fetus. We have found a case holding that there is no cause of action, *State ex rel. Hardin v. Sanders*, 538 S.W.2d 336 (Mo. 1976).

## Using KeyCite in Legal Research

Figure 1 shows the KeyCite display for *Hardin*. Note the red flag displayed next to the full citation. This flag appears as a solid color in Figure 1. It is important to note flag color before printing a KeyCite result, which appears in black and white. A red flag warns that a case is no longer good law for at least one of the points it contains. How do you use the information displayed to determine the authority of your case? A logical first step would be to look at the cases in your jurisdiction and at your court level that have a negative impact on your case. In the example shown in Figure 1, the *O'Grady* case is required reading since it explicitly overrules your case! The action of the *O'Grady* court is the reason that *Hardin* has a red flag. Other cases further down the list, such as *Rambo*, *Zueck* and *Connor*, should also be read for a better understanding of *Hardin*. But you have learned that your case has been overruled, and you will probably decide not to rely on this case for the crux of your argument. You will also learn by reading the Missouri Supreme Court cases listed in the Negative Indirect History result that the *O'Grady* case may be the answer. You will need to use KeyCite to verify that *O'Grady* is still good authority.

KeyCite

State ex rel. *Hardin v. Sanders*, 538 S.W.2d 336 (Mo. Jul 12, 1978) (NO. 59352)

History of the Case

Direct History

- 1 State ex rel. *Hardin v. Sanders*, 538 S.W.2d 336 (Mo. Jul 12, 1978) (NO. 59352)

Overruled by

- 2 *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. Aug 16, 1983) (NO. 64734) (Additional History) ★★★★★

Overruling Recognized by

- 3 *Rambo v. Lawson*, 799 S.W.2d 62 (Mo. Nov 20, 1990) (NO. 72803) (Additional History) ★★★★★
- 4 *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. May 03, 1991) (NO. 73226) (Additional History) ★★
- 5 *Connor (Jason) v. Monkem Company, Inc., Richter (Warren Andrew), Lindsey (Kathy J.)*, 1994 WL 493561 (Mo.App. E.D. Sep 13, 1994) (NO. 64884), cause ordered transferred to mo.s.ct (Sep 13, 1994) (Additional History) ★★★

FIGURE 1

When you research *O'Grady* using KeyCite you find that the case has a yellow "caution" flag. (See Figure 2.) This flag appears as a lighter solid color in Figure 2. A yellow flag warns that a case has some negative history (even if all the negative citing cases are from other jurisdictions) but hasn't been reversed or overruled. This is not as dangerous as it sounds. You have already read both of the cases listed here in your previous effort to understand the treatment of the *Hardin* case. (See Figure 1.) And you will remember that both cases listed as Negative Indirect History deal with a wrongful death action for a nonviable fetus. *O'Grady* looks to be good law.

KeyCite

*O'Grady v. Brown*, 654 S.W.2d 904 (Mo. Aug 16, 1983) (NO. 64734)

History of the Case

Direct History

- 1 *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. Aug 16, 1983) (NO. 64734)

Negative Indirect History

Disagreement Recognized by

- 2 *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89 (Mo. Apr 25, 1995) (NO. 77313), rehearing denied (May 30, 1995) (Additional History) ★★★

Declined to Extend by

- 3 *Rambo v. Lawson*, 799 S.W.2d 62 (Mo. Nov 20, 1990) (NO. 72803) (Additional History) ★★★★★

FIGURE 2

Your verification of *O'Grady* can stop at this point. As long as you are satisfied that you understand the holding of the case you wish to rely on, your use of KeyCite for case verification need go no further.

### ✓ Interpret Your Case

However, once you have read *O'Grady*, let us assume that you are not clear about its holding as applied to your client's problem. You can use KeyCite to find other cases that explain or interpret *O'Grady*. From the History of the Case result (Figure 2), click **Citations to the Case**. The Citations to the Case result is displayed, as shown below. (See Figure 3.) The Citations to the Case window displays all cases on Westlaw—and many secondary sources—that have cited *O'Grady*. The first portion of the result lists all negative citing cases, followed by a list of all other citing cases and a list of secondary sources. These cases are further categorized by the depth of treatment they give your case. Within each depth of treatment category, cases are ordered first by court and then by age (in reverse chronological order).

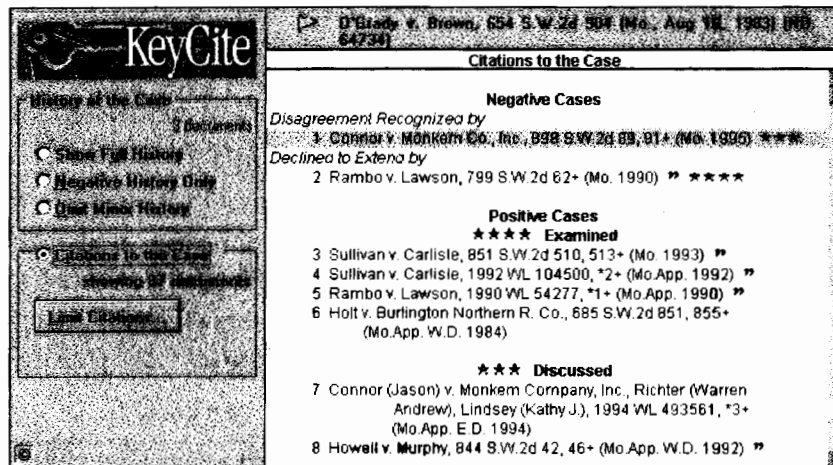


FIGURE 3

Cases categorized with four stars contain an extended discussion of your case, usually more than a printed page of text; cases categorized with three stars contain a substantial discussion of your case, usually more than a paragraph but less than a printed page; cases with two stars contain some discussion of your case, usually less than a paragraph; while cases with one star contain a brief reference to your case, usually in a string citation. Cases with three or four stars will be most likely to help you completely understand *O'Grady*. You should probably select cases from your jurisdiction first. You might also limit your list of Missouri cases by the headnotes from *O'Grady* that you think are most likely to give you the result you want.

Help in interpreting your case can also be found by looking at some of the secondary literature that cites your case. Use the scroll bar on the right side of the window to move down the list of citations to the Non-Cases portion of the result. (See Figure 4.) Note the lengthy list of secondary sources in the Citations to the Case result for *O'Grady*.

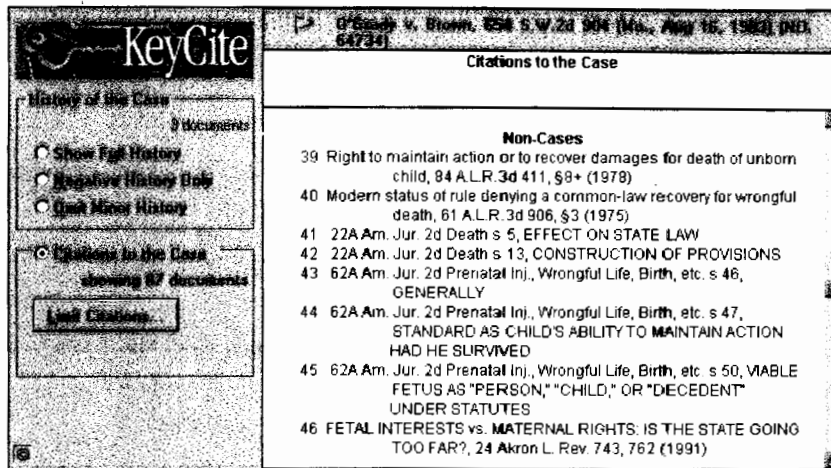


FIGURE 4

This is a lot of information to browse. You can limit the list to secondary sources published after 1995. This may help you find articles that interpret and analyze *O'Grady* in light of recent Missouri case law. Although you cannot use the Citations to the Case list to evaluate the depth of discussion of *O'Grady* in secondary sources (no KeyCite depth of treatment stars are provided), you can try to find a recent law review article that surveys this area of law. From the Citations to the Case result, click **Limit Citations**. The Limit Citations window is displayed. Click **Various Other Limits**. The Various Other Limits window is displayed. Clear the check marks in the *Cases* check boxes by clicking them. Clear the *Jurisdiction* text box, if necessary, and type **12/31/1995** in the *Document Date After* text boxes. Then click **OK**. The Citations to the Case result with the limitations you have applied is displayed, similar to that shown below in Figure 5.

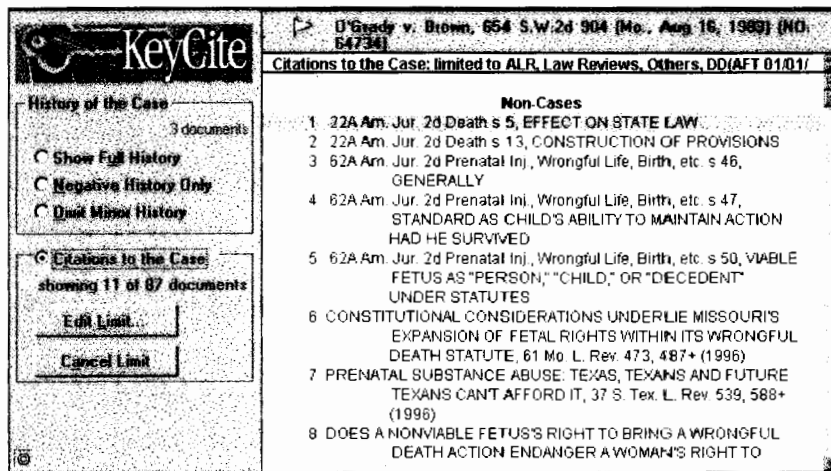


FIGURE 5

✓ Identify Cases in Other Jurisdictions

Quite often in your research you have a case from one jurisdiction but need authority in another in order to help your client. KeyCite can be used to help locate similar cases in other jurisdictions. You have found authority in Missouri that a wrongful death action can be brought for the death of a viable fetus. *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983). What is the rule in Pennsylvania?

Assuming that you found no citation to a Pennsylvania case in the *O'Grady* case itself, the logical place to look for a Pennsylvania case is in the KeyCite Citations to the Case result for *O'Grady*. You can review the list of citations by using the scroll bar in the Citations to the Case window. You can also restrict the list of citing cases to those discussing points of law summarized in specific headnotes or classified under specific topics.

You know from reading *O'Grady* that West topic 117 (Death) and key number 15 (Right of action of person injured) may help identify cases about the wrongful death of an unborn viable fetus. From the Citations to the Case result, click **Limit Citations** to display the Limit Citations window, which shows all the headnotes as they appear in *O'Grady*. Note that headnotes [5], [9], [11] and [13] are classified under topic 117 and key number 15. To restrict the result to citing cases that discuss the points of law summarized in these headnotes, click the corresponding boxes.

Because you also want to restrict the citations list by jurisdiction, click **Various Other Limits**. Click **Apply Origin** and type the two-letter postal abbreviation for Pennsylvania (**pa**) in the *Jurisdiction* text box. Clear the Non-cases check boxes by clicking them, then click **OK**. The Citations to the Case result with the limitations you have indicated is displayed, similar to that shown below in [Figure 6](#). Note that a Pennsylvania Supreme Court decision, *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985), is categorized with three depth of treatment stars, which indicates that *Amadio* contains substantial discussion of *O'Grady*. Use KeyCite to verify the authority of *Amadio*.

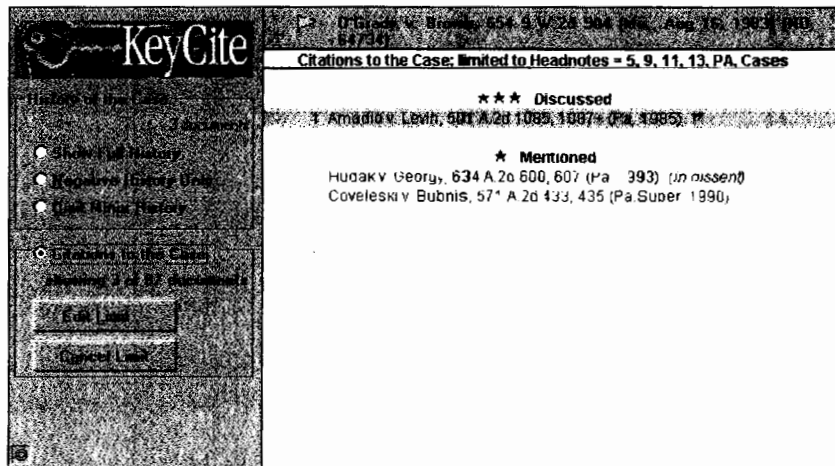


FIGURE 6

What if you had been looking for a Kansas state case? No Kansas state cases dealing with the wrongful death of an unborn viable fetus cited *O'Grady*. But we can look for a reference to such a case in a law review article or ALR annotation. Often law review articles and ALR annotations include a multijurisdictional survey of the law on a particular topic and citations to relevant cases and statutes from those jurisdictions. Recall that you used the secondary sources in the KeyCite display for *O'Grady* to locate articles that would help interpret your case. Now we can use those citations for a slightly different purpose. As you can see from Figures 4 and 5, there are many articles listed that might lead to a Kansas case.

### ✓ Expand Your Research

KeyCite is a powerful tool that can help you expand your research if you discover new facts or issues that suggest you need to change the direction of your research. Assume that after you find the controlling *O'Grady* case, your client gives you facts that indicate the unborn child was nonviable at the time of death. This changes the complexion of your research problem, but you possess the tools to efficiently expand the research you have already done.

You can approach this problem several different ways. One very useful approach is to use KeyCite to look at the direct and indirect history of the *O'Grady* case for clues. (See [Figure 2](#).) There you find a reference to the 1995 Missouri Supreme Court case *Connor v. Monkem Co.*, 898 S.W.2d 89. Reading this case, you find that Missouri does in fact recognize an action for wrongful death whether the unborn fetus was viable or nonviable.

If you had not been so lucky to find this case quickly, you might have used KeyCite to review the list of Missouri cases citing *O'Grady* to see if any of them deal with this new issue. Or, if you wanted a much broader view, you might have looked among the secondary citing references for an ALR annotation or law review article synthesizing relevant law from many jurisdictions. [Figure 4](#) lists some very promising candidates to help expand your research into this new area.

Efficient research often requires that you use what you already have to expand to a new or different place in your research. Leveraging the power of KeyCite with a vision of what you seek to accomplish will save time and frustration. Citation research services such as KeyCite help you discover and understand the relationships among legal authorities. Exploit them.

## Other Resources

1. *Discovering Westlaw: The Essential Guide*, 8th edition (West Group 1998)

Chapter 8 of this manual provides an overview of KeyCite and includes citation research tips. An online exercise ensures that students have looked at the capabilities of KeyCite. This concise chapter on KeyCite is especially useful when there is limited time available for instruction on citation research tools.

2. *KeyCite: A Guide for Legal Research and Writing Instructors*, by Professor Nancy Johnson (West Group 1997)

I use this guide as a tutorial for my students when we are learning how to use citation research tools. Professor Johnson's text supplements legal research texts. I have the students read through her material and do the exercises in the back of the booklet. This gives the students a quick, easy introduction to KeyCite that they can work through at home or in the law school computer lab.

3. Shapiro, Fred, "KeyCite and Shepard's—Coverage and Currency of Citations to Recent Cases: A Comparative Study," *17 Legal Information Alert* 1+ (no. 4, April 1998) and "Shepard's Response to the Shapiro Comparative Study of Shepard's and KeyCite," *17 Legal Information Alert* 4+ (no. 4, April 1998).

This comparison is for those who want to be able to give some guidance to their students about which citation research tool to use for case verification. Comprehensive knowledge of both KeyCite and Shepard's Citations will make it easier to understand Mr. Shapiro's analysis. His general conclusion is that KeyCite results contain more citing cases and other documents than Shepard's results and that citing references in KeyCite are sometimes more current than citing references in Shepard's Citations.

4. KeyCite demonstration online, provided by West Group.

For a menu-driven demonstration of KeyCite, visit  
**<http://www.westgroup.com/keycite/kcdemo.htm>**.

5. Your West Group academic account manager and your law librarian.

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## Student Exercises

*Note:* The questions marked with an asterisk (\*) are somewhat more difficult and may be better suited to those students in an advanced legal research class.

1. You need to verify the authority of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court held in this case that the Federal Rules of Evidence (specifically Rule 702) supersede the common law *Frye* test as to the admissibility of scientific evidence. The Court went on to define the scope of Rule 702. Use KeyCite to research this case. How many documents are cited in the Full History of this case? How many in the Direct History? How many in the Negative Indirect History?
2. What happens if you click **Omit Minor History**? Explain.
3. What action did the U.S. Supreme Court take on June 28, 1993?
4. Click **Negative History Only**. What result do you get? Explain.
- 5.\* Explain what the U.S. Court of Appeals for the 9th Circuit did with the *Daubert* case on remand.
6. What does the yellow flag next to the full citation of the *Daubert* case signify?

- 7.\* After looking at some of the cases cited in the Negative Indirect History, what do you conclude about the holding in *Daubert*? Is *Daubert* still good law for the holding stated in Question 1? Explain.
  
8. How many documents cite *Daubert*?
  
9. How can you possibly make use of the information you retrieved in question 8?
  
10. Explain the methodology you would use if, after reading the U.S. Supreme Court opinion in *Daubert*, you did not understand the holding of the case. Explain at least two specific ways to use KeyCite to find cases that might explain the holding of *Daubert*.
  
11. Explain how you would use KeyCite to locate a recent law review article that might help you interpret or understand *Daubert*.
  
12. Find out if the U.S. Court of Appeals for the 4th Circuit has had an opportunity to apply the *Daubert* test. Explain how you would quickly find such cases.

13. How would you limit your result to 4th Circuit cases that cite *Daubert* for the proposition summarized in *Daubert* headnote number 24? How did you get this information?
  
- 14.\* What 4th Circuit case would you cite as authority for the proposition that the 4th Circuit is applying the *Daubert*, not the *Frye*, standard for admissibility of scientific evidence?
  
15. What is the fastest way to locate law review articles that discuss the interpretation and continued validity of the *Frye* rule?

## Suggested Answers to Student Exercises

*Note:* The questions marked with an asterisk (\*) are somewhat more difficult and may be better suited to those students in an advanced legal research class.

- 
1. You need to verify the authority of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court held in this case that the Federal Rules of Evidence (specifically Rule 702) supersede the common law *Frye* test as to the admissibility of scientific evidence. The Court went on to define the scope of Rule 702. Use KeyCite to research this case. How many documents are cited in the Full History of this case? How many in the Direct History? How many in the Negative Indirect History?

Once you have accessed KeyCite, the history of the case is displayed. Click **Show Full History** to display all direct and negative indirect history, including related references. The total number of documents in the full history is displayed above the Show Full History button [54 as of 8/18/98]. The first portion of the result lists cases in the direct history [nine as of 8/18/98], followed by a list of cases in the negative indirect history [44 as of 8/18/98] and related references [one as of 8/18/98].

- 
2. What happens if you click **Omit Minor History**? Explain.

Related references (cases that involve the same parties and facts as your case, whether or not the legal issues are the same) and minor procedural history are excluded, limiting the display to seven documents as of 8/18/98. Direct history and negative indirect history that may negate the precedential value of your case is displayed.

- 
3. What action did the U.S. Supreme Court take on June 28, 1993?

The Court vacated the judgment of the 9th Circuit and remanded the decision. (*Note:* you should look at the court's opinion to find out more about the remand.)

- 
4. Click **Negative History Only**. What result do you get? Explain.

Only negative history (direct and indirect) is displayed. The total number of documents in that subset of the history of the case is displayed above the Show Full History button [47 as of 8/18/98].

- 
- 5.\* Explain what the U.S. Court of Appeals for the 9th Circuit did with the *Daubert* case on remand.

The 9th Circuit applied the Federal Rules of Evidence rather than the *Frye* test as required by the U.S. Supreme Court and found the scientific evidence was not admissible (the 9th Circuit had found the evidence inadmissible under *Frye* as well). The 9th Circuit affirmed the federal district court case.

- 
6. What does the yellow flag next to the full citation of the *Daubert* case signify?

A yellow flag warns that the case has some negative history, but that it hasn't been reversed or overruled. (A red flag indicates that the case is no longer good law for at least one of the points it contains, and a blue "H" indicates that the case has some history.)

- 7.\* After looking at some of the cases cited in the Negative Indirect History, what do you conclude about the holding in *Daubert*? Is *Daubert* still good law for the holding stated in question 1? Explain.

The holding is still good law. Most, if not all, of the cases cited in the negative indirect history are state cases that refused to apply the rule of *Daubert*, concluding that *Daubert* applies only to federal court cases and not to state courts. Many state courts clearly do not like the rule established in *Daubert*, but their refusal to follow it does not alter the *Daubert* holding.

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8. How many documents cite *Daubert*?

The total number of citing documents is displayed below the Citations to the Case button [2,501 as of 8/18/98].

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9. How can you possibly make use of the information you retrieved in question 8?

Limit citations by key number, jurisdiction, type of citing material (case, law review, etc.), date.

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10. Explain the methodology you would use if, after reading the U.S. Supreme Court opinion in *Daubert*, you did not understand the holding of the case. Explain at least two specific ways to use KeyCite to find cases that might explain the holding of *Daubert*.

- a. Locate a case citing *Daubert* that is categorized with four depth of treatment stars. Read the case, using hypertext links to move to those parts of the opinion that discuss *Daubert*.
  - b. Limit the list in the Citations to the Case result using West's Topic and Key Number System.
- 

11. Explain how you would use KeyCite to locate a recent law review article that might help you interpret or understand *Daubert*.

Retrieve the KeyCite history of the case result for *Daubert*. Then click **Citations to the Case**. A lengthy list of citations is displayed [more than 2,500 as of 8/18/98]. Click **Limit Citations**. Then click **Various Other Limits**. Clear check marks on cases and all non-cases except law reviews by clicking them. Add a date limitation. When I used date after 1/1/1997, I retrieved a list of 177 citations as of 8/18/98. The only problem with this method for this particular case is that most of the articles looked like they would not help in understanding the *Daubert* holding. Many articles also are not in academic law journals, but in commercial or bar journals. It would be very tough to find something relevant here because many articles are applying *Daubert* in other contexts. There is no other way to limit results, so you are probably better off going to the Legal Resource Index (LRI) and searching for a contemporaneous article. I suggest that finding secondary literature interpreting the case here is going to be time-consuming and you should probably take a different route.

12. Find out if the U.S. Court of Appeals for the 4th Circuit Court of Appeals has had an opportunity to apply the *Daubert* test. Explain how you would quickly find such cases.

Retrieve the KeyCite history of the case result for *Daubert*. Then click **Citations to the Case**. Click **Limit Citations**. Then click **Various Other Limits**. In the *Jurisdiction* text box type **ca4**. Clear any check marks in the non-cases boxes. Then click **OK**. A list of 4th Circuit cases that cite *Daubert* is displayed [26 as of 8/18/98].

13. How would you limit your result to 4th Circuit cases that cite *Daubert* for the proposition summarized in *Daubert* headnote number 24?

Follow the steps described in the suggested answer to question 12, with this modification: At the Various Other Limits window, limit the result by headnote as well as by jurisdiction and document type. Click the check box corresponding to headnote number 24 from the consecutive list of headnotes at the left of the page. As of 8/18/98, nine cases are displayed.

- 14.\* What 4th Circuit case would you cite as authority for the proposition that the 4th Circuit is applying the *Daubert*, not the *Frye*, standard for admissibility of scientific evidence?

*U.S. v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995), or  
*U.S. v. Powers*, 59 F.3d 1460, 1470 (4th Cir. 1995)

15. What is the fastest way to locate law review articles that discuss the interpretation and continued validity of the *Frye* rule?

This is a trick question. If you read *Daubert* carefully you'll discover that the Court cites many relevant law review articles. To discover this without reading *Daubert* carefully, display the opinion on Westlaw. From the document display, click **Locate**. Type **frye** in the Locate Editor dialog box, then click **Locate**. Use the Term arrows to move between pages containing your Locate term. Where citations to law review articles appear, there is often a hypertext link to the full text of the article on Westlaw.

## KeyCite Presentation Outline

### KeyCite— A Powerful New Citation Research Tool

- A comprehensive citation research service

### When to Use KeyCite

- ✓ **VERIFY YOUR CASE**
  - Complete, accurate citation information
  - Direct history
  - Negative treatment in your jurisdiction
  - Negative treatment in other jurisdictions
- ✓ **INTERPRET YOUR CASE**
  - Extended discussions of your case in other cases
  - Analysis of your case in secondary literature
- ✓ **IDENTIFY CASES IN OTHER JURISDICTIONS**
  - Key Number Service
  - Limit citing cases
  - Secondary material, such as law review articles and ALR annotations
- ✓ **EXPAND YOUR RESEARCH**
  - Review negative history of related case
  - Cases in your jurisdiction
  - Secondary materials citing related case