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## **Caveat Citator (Or Why Shepardizing Your Cases Isn't Always Enough)**

By J. Paul Lomio

Legions of lawyers and law students have been told: "Shepardize your cases to make sure they are still good law."

This is a cautionary tale of one statute, three cases, and the limits of Shepardizing. (By "Shepardizing," I mean the use either of the two legal citators: Shepard's Citators on LexisNexis or KeyCite on Westlaw.) The tale was told to me by a Stanford law student doing real-world research for a clinical case he was assigned.

The statute in question is 28 U.S.C. § 1291, which grants the federal courts of appeal jurisdiction over "final decisions of district courts." One of the cases that the student found was the Ninth Circuit's 1982 opinion in *Gough v. Perkowski*, which held that "an order disqualifying counsel in a civil case **is** immediately appealable" (emphasis added). Shepardizing or KeyCiting this case shows every indication that this holding is still good law. No red flag; no red stop sign.

The other case the student found was *Koller v. Richardson Merrell, Inc.*, from the D.C. Circuit. It also held, in 1984, that an "order disqualifying counsel was immediately reviewable." If you check this case's citation in Shepard's or KeyCite, red flags abound and you are pointed to its vacation on appeal by the United States Supreme Court in *Richardson-Merrell, Inc. v. Koller* (1985).

The Supreme Court vacated the DC Circuit's opinion in *Koller*, holding that an order disqualifying counsel in a civil case is **not** subject to immediate appeal. The Court also therefore remanded with instructions that the court of appeals dismiss the appeal for want of jurisdiction.

The Supreme Court writes the supreme law of the land; its precedents bind even the Ninth Circuit. Yet there is no citator link from *Gough* to *Koller*. Why? Simply because the Supreme Court did not cite *Gough* in its opinion. The Court cites to cases from the Eleventh, Second, and Federal Circuits as allowing immediate appeal when it notes that "the Courts of Appeals [are] divided on the appealability of orders disqualifying counsel in a civil case." These three cases are all redflagged because they are cited in the Court's decision.

Both Shepard's and KeyCite do, to their credit, tell you that the briefs in the Supreme Court appeal of *Koller* cited *Gough*, but the careful researcher would have had to be extra alert to the possibilities and then to have connected all of the dots.

So what should a reasonable researcher do? Read the statute. First. Foremost. Always. And Shepardize it. If you run the federal statute through Shepard's or KeyCite, the Supreme Court decision, of course, appears.

A hurried researcher searching full-text only in the Ninth Circuit databases and then Shepardizing the results could be seriously misled. One option would be to use databases that include all precedential law – *i.e.*, the circuit PLUS the Supreme Court, but this search strategy did not occur to our student.

In my opinion, the quickest, easiest and best approach is to read the statute in an annotated code and to peruse the annotations. A reading of the annotations is especially helpful in this instance, as both the *United States Code Annotated* and the *United States Code Service* have easy-to-find case notes under the subject of “disqualification” enabling the researcher to quickly hone in on the relevant cases among the tens of thousands that have cited this statute. This annotations review is a task easily accomplished in just a few minutes either online in LexisNexis or Westlaw, or with actual search charge-free books, a medium which may be unfamiliar for today’s law students.

J. Paul Lomio is Library Director and Lecturer in Law at Stanford Law School. He is the author (with Henrik Spang-Hanssen) of the just-published *Legal Research Methods in the U.S. and Europe* (DJØF Publishing 2008).