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Fed. Appendectomy: RIP Fed.App'x (2001-2021)

From its birth, it was a redundant oddity. The real question might be “how did it last for 20 years?”



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Lawyers – especially appellate lawyers – are people of the book. We love our libraries, our treatises, and our voluminous case reporters. Without citations to precedent we cannot do our jobs. A brief that lacks citation to authorities is, at the very least, flawed. See Rules of Court, rules 8.204(a)(1)(B), 8.204(a)(1) (brief must have table of authorities). We fetishize citation format, e.g., the Cal. Style Manual. But none of that makes any sense without case reporters to cite.

One of the first things that law students learn is that cases are published in multi-volume sets of case reporters. These began at some distant point in the past and we presume they will continue on, volume after volume, series after series, into the distant future. The periodic, yet rare, start of a new series qualifies as “exciting” news in nerdy circles: “OMG Cal.5th is here!” “Have you seen the new F.4th?” What then, could be more exciting than the birth of a new reporter?

The Beginning. Many in practice today can remember the breathless ecstasy in 2001, when West began a whole new reporter, the Federal Appendix. Granted, the utility of this series was limited and even subject to ridicule. The Federal Appendix was a compilation and publication of “unpublished” (technically “non-precedential”) decisions from the Federal Courts of Appeals, colloquially known as the “Circuits.” Yes, this truly was as paradoxical and oxymoronic as it sounds. Even the name proudly espoused its arguable uselessness: The human appendix, notorious for its tendency to become inflamed or rupture, is considered – when considered at all – to be a vestigial organ with no real function. So too the Fed.App'x (or should it be Fed. Appx. or F. App'x?). It was an appendage to the Federal Reporter, which published the precedential opinions (i.e., binding authority within each Circuit). The Fed.Appx mimicked the look and feel of the Federal Reporter, sporting the same beige covers with black and red bands (often displayed on the bookshelves of TV lawyers) – undoubtedly designed to copy the gravitas of the Federal Reporter.

The cases reported in the Federal Appendix already appeared in the leading online database services, Lexis and Westlaw, and already had proprietary citations (e.g., [year] WL [citation]). Those services had been selectively, and increasingly, adding unpublished cases to their databases since the 1980s. Those citations were functional, yet as non-canonical, non-traditional citations, they appeared somewhat ugly and were often viewed with disdain or suspicion. Even at the turn of the 21st century, there was still a stigma attached to citing “online” materials that existed solely in cyberspace, as opposed to “real” citations to “real” precedent printed in tangible books that could be found on library shelves IRL. Having unnecessarily duplicative citations is not all that unusual: Citations to Cal. Rptr.

have their official Cal. and Cal.App. counterparts, and U.S. Supreme Court opinions are published in three different case reporters.

Of course in 2001, citing to “unpublished” cases was nearly universally verboten. Yet the advent of the Fed.Appx was seemingly meant to be a prescient portent. The battle lines having been drawn and the battle joined, by then, those opposing citation were gradually losing ground to vocal and persistent proponents of universal citation (if not publication). Surely you remember those heady, revolutionary days and trenchant slogans: “Stop the flood of citable precedent” versus “Stop the evils of hidden decisions.”

After many a bloody skirmish in the law reviews and library stacks, that Federal Rule of Appellate Procedure 32.1, titled Citing Judicial Dispositions, took effect on that fateful day, Jan. 1, 2007: “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been ...designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like ...”

This event established 2007 as a magical year of demarcation after which unpublished cases – now often appearing in Fed.Appx – became fair game.

It turned out that allowing citation to unpublished decisions did not cause the heavens to fall. And thus, the Fed.Appx finally came into its own as safely citable. By definition, nothing it contained was binding precedent, of course. Yet it sometimes provided some persuasive support for some argument.

The inaugural Fed.Appx citation was *Arbelaez v. Newcomb*, 1 Fed.Appx. 1 (D.C. Cir. Jan. 18, 2001). (Westlaw shows 15 citing references to *Arbelaez*, including two 2015 district court decisions, one published in *F.Supp.* and one citation in a footnote of a 2010 law review article.)

The End. In Dec. 2021, however, “West” (many lawyers still call it that, though it’s technically Thomson Reuters), did something somewhat unprecedented: After printing 861 volumes, it ended the Federal Appendix. (Failure to reach volume 999 means that there never was —and never will be —a second series.)

To many readers, this is probably still “news” even though it happened a year ago. Why is that? Well, for one, cases often didn’t get their Fed.Appx cites for many months, sometimes half a year or more. And since Fed.Appx was never an especially important reporter—and anything it contained could be cited without the “official” Fed.Appx citation anyway—its disappearance was easy to overlook. Most law firms

probably didn't subscribe to the hardbound paper copies because the citations were already online and paper books were on the decline anyway.

Further, West killed the Fed.Appx quietly. There was no fanfare, no farewell emails to the general bar, and no goodbye parties. (And since it didn't make it to 21, it would be churlish to toast it with a strong drink.) After all, dropping a product isn't really cause for attention, let alone celebration. Indeed, it's arguably a mark of failure. But who could complain or be surprised? From its birth, Fed.Appx was a redundant oddity. The real question might be "How did it last for 20 years?"

During its two-decade lifespan, California courts cited Fed.Appx only around 750 times (695 citations in California decisions, published and unpublished to "Fed.Appx," plus 20 to "Fed.App`x," 24 to "F.Appx", and 23 to "F.App`x"), with the California Supreme Court citing it just shy of 30 times. The Ninth Circuit cited it about 500 times in published opinions. Those numbers indicate that Fed.Appx was not deemed especially citation-worthy. Whatever the cost of a subscription to Fed.Appx—and considering the rent for physical space to store it—it probably wasn't worth the candle.

The Fed.Appx's last citation was *Vittetoe v. Blount County, Tennessee*, 861 Fed.Appx. 843 (6th Cir. June 17, 2021). Fittingly, perhaps, the case involved a death—the mother of a pretrial detainee sued for wrongful denial of medical care after her son died from drug and alcohol intoxication after spending the night in county jail. Yet it seems unlikely that any amount of care could have preserved the Federal Appendix.

And so we end with an obit and appreciation: We are saddened to report that the Federal Appendix passed away quietly roughly a year ago. From Arbalez to Vittetoe, this newcomer to the world of published reporters held on for 20 years. It had 861 volumes to thrill and tantalize us, including cases that could potentially sway a trial judge or appellate panel in our favor. Never the life of the party, Fed.Appx was a shy wallflower who sometimes came through with a surprising zinger. Fed.Appx is survived by the Federal Reporter, which remains healthy and binding, and also by the online services whose citations will continue in its stead. We will miss citing to the more appealing format in lieu of the bulky online database citation form. And we will miss Fed.Appx's officious sense of self-importance and passing resemblance on the shelf to the Federal Reporter. Those few libraries that were still subscribers are encouraged to use a portion of their now more-in-the-black budgets to make a donation to a charity of their choice.