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7-1-2012

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## Teaching with Pacer: Improving Understanding by Harnessing Transparency

George W. Kuney<sup>1</sup>

*Transparency would expose and reduce corruption. It would expand the power of citizens and legislators over the courts and make the actual rules that govern society visible to the public.*

*Lynn LoPucki, Court System Transparency,  
94 Iowa L.R. 481 (2009).*

### Introduction

The adoption of the Public Access to Court Electronic Records (PACER) system by the federal courts is the most revolutionary thing to occur in the process of publishing the law since the development of electronic databases – Westlaw, LEXIS, and the like -- containing case law, statutes, regulations, and other legal authority in the 1970s.<sup>2</sup> Where databases like Lexis and Westlaw provided remote access to the contents of case reporters, among other things, PACER provides remote access to the very documents that underlie the opinions reported in the reporters. The system means that one no longer need accept at face value a court’s characterization of a party’s position or argument, one can examine the source document that contains that argument. Judicial opinions are just the tip of the iceberg that is a legal proceeding, and, while PACER does not currently allow one to see the entire iceberg, it goes a substantial way toward exposing the undersea mass and even suggests the contours that still cannot be seen.

PACER allows scholarship to proceed on a detailed level, allowing close examination from pleadings to final judgment of every step of the case except for out-of-court discovery that is not later made part of the docket’s record, at least absent a protective order. This, in turn, allows it to be used as a teaching tool in law school, bringing real, concrete examples in an almost infinite variety into the classroom or home through a student’s computer or other internet device. Further, this access promotes study, commentary, and analysis of judicial decision making on a scale previously unimagined. It promotes, in a word, “transparency” and all the

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<sup>1</sup> Lindsey Young Distinguished Professor of Law and Director of the James L. Clayton Center for Entrepreneurial Law at the University of Tennessee College of Law. Thanks are due to Wendy Patrick, UT College of Law class of 2013, for assistance with this article.

<sup>2</sup> <http://www.citypages.com/2009-04-29/news/westlaw-rises-to-legal-publishing-fame-by-selling-free-information/> (West publishing company “rolled merrily along until the mid-1970s, when advances in technology dramatically changed its business model. A nonprofit startup associated with the Ohio Bar Association commissioned West Publishing's first significant competitor: Lexis, which offered a computerized law library. In 1975, two years after Lexis's debut, West Publishing presented its own computerized system, Westlaw”); *see also* Charles P. Bourne, A History of Online Information Services 1963-1976 at 237 (listing for the “1964 milestone” that “Law Research Service was the first computer-based bibliographic search service provided on a regular basis by a commercial organization”).

social benefits that attribute brings to the operation of the third branch of government and the conduct of the lawyers that practice within it.

This article describes PACER and some of its uses in scholarship and the classroom. First, the system itself is described. Next, the article describes using PACER for scholarship, focusing on a particular project, an e-book and accompanying database by the author titled “Bamboozled.” Following that, the article discusses the use of PACER in teaching and explaining the legal process, both in an orientation or basic setting and in a more sophisticated setting. This is explored by examining three particular projects, a case study of a federal court automobile accident case prepared as a text for entering first year law students, Bamboozled, which has been used in an advance chapter 11 litigation course, and a collection of student-authored reports on particular cases, all researched and documented through PACER.

## I. PACER

Public Access to Court Electronic Records (PACER) is an internet based computer database and filing system that allows users to obtain case and docket information from federal courts.<sup>3</sup> The central system contains the full docket report on every case filed in these courts once PACER was adopted in a particular jurisdiction, with live links to most of the documents listed on the docket, so that the public can have access to the pleadings, motions, transcripts, and other documents filed with the court. The actual documents are generally stored in .pdf file format and are filed and on file with the individual courts via the federal Case Management/Electronic Case Files (CM/ECF) system; the national PACER service center in San Antonio, Texas, maintains the U.S. Party/Case Index, which features only the small amount of information necessary to allow for a national search for party or case names, and allows for a redirection of the researcher to the URL for the PACER system of the case’s home jurisdiction. This decentralized format is superior in design as, when one server goes down, only one jurisdiction is affected, rather than the whole of the federal judiciary or a circuit.

Originally rolled out as a small pilot program available only via special terminals in select locations in 1988, the PACER system now covers all federal appellate, district and bankruptcy courts and is accessed over the World Wide Web.<sup>4</sup> The system is self-financed through user fees, which are reasonable, and yet more than cover the system’s costs; excess revenues are used

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<sup>3</sup> <http://www.pacer.gov/>

<sup>4</sup> Other than, of course, the Foreign Intelligence Surveillance Act or “FISA” court, which hears matters relating to spying both domestically and abroad brought to it by the Justice Department on behalf of the Federal Bureau of Investigation and the National Security Agency. The FISA court does not issue public orders or opinions and has no public records, making it something of a “black box” and the opposite of the now-fairly-transparent bankruptcy, district, and appellate courts of the United States.

to invest in improvements to the system and its technology.<sup>5</sup> The United States Supreme Court does not participate in the system.

## II. “Bamboozled ?”

*“Bamboozled? Anatomy of a Bankruptcy: Baystate v. Bowers and its Aftermath”* is a 275 page, 121,000 word manuscript that the author assembled, with student assistance, over a period of approximately 7 years. Currently, it has only been used in his reorganizations and workouts class at The University of Tennessee College of Law. Previously it was available on the Social Science Research Network (or SSRN); but West has now published it in robust e-book form, making it more widely available, with hyperlinks to all source documents and related websites. It tells the story of *Baystate v. Bowers*, a patent, copyright, and contract lawsuit that went to trial, to appeal to the Federal Circuit where the verdict was partially upheld, and finally ended in the Chapter 11 and later Chapter 7 melt-down of the plaintiff, Baystate, by then known as Cadkey. The story spans approximately 20 years. The manuscript project illustrates how intellectual property “bet-the-company” litigation unfolds in the real world—a story rarely told in complete detail.

The story of *Bowers v. Baystate/In re Cadkey, Corp.* has a familiar ring to anyone with substantial practice experience. Each of the twists and turns along the way are common in the real world. What is unusual is that so many of these twists and turns are contained in this single stream of litigation between these two parties, which makes for an efficient means of exposing students to the issues in a detailed, real-world fashion.

The book illustrates the litigation and the bankruptcy process differently than most instructional texts and news coverage. Most, if not all the summaries and conclusions in the manuscript’s description of the story are directly hyper-linked, via footnotes, to the primary sources that support the text: websites, pleadings, moving papers, briefs, attorney-client e-mails, correspondence, and the like. So, it is PACER that enabled this detailed examination of the litigation and allowed the manuscript, which functions as an overhead summary of the events involved, with these primary documents to be produced. The book is intended as an educational tool for students and others interested in business law disputes and their resolution. One attorney reviewer joked that he should assign the book to clients so they could understand why they may want to settle early on in a matter for less than what they believe they are entitled to receive rather than seek a “just” result in court proceedings. There are many other lessons and observations to take away, and the Questions and Discussion sections at the end of each chapter touch on only some of them.

The book has been used, as noted above, in an advanced chapter 11 seminar at The University of Tennessee while being developed. Students have reacted favorably to the

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<sup>55</sup> Michael Hiltzik, *These Crusaders Bring Transparency to Government*, LA Times, September 28, 2009.

opportunity to see the substantive and procedural law that they have learned in other courses play out in the real world. They also affirmatively like the ability to link to the source documents so that they can see for themselves. The experience of reading and discussing the book seems to increase the sophistication of what are primarily 3L students and allows them to familiarize themselves with the substance, look, and feel of legal documents and proceedings.

### III. Teaching with PACER

How can PACER be used in law teaching? There are probably a number of ways, but the primary ones are (a) to produce a *Bamboozled*-like text, a guided tour through the case file, and (b) to empower students to investigate cases themselves and produce a descriptive and analytic text of their own, a case study, supported by hyperlinked primary source documents.

It is that later approach that has been particularly successful in the author's chapter 11 seminar at The University of Tennessee College of Law. In addition to reading a text on chapter 11 law and process, and reading and discussing the story of *Bamboozled* in detail, the students, working in groups of two or three, review the full docket of a chapter 11 case of their own choosing and perform broad based research in the business and popular press regarding the case. From this, they produce a blow-by-blow account of the case, analyzing each move and countermove and assessing how the law was applied, how leverage was created and wielded, and how the negotiation/litigation of the chapter 11 case played out.<sup>6</sup>

A typical post-course comment by former students is:

PACER was very helpful because you see what happens, when it happens, who made it happen, and how it happened (smoothly or not). It's like reading someone's diary; you see all of the good stuff, all the mistakes they made, and all of the consequences. It was especially helpful to read through so many different kinds of docket filings (I haven't had that much exposure to real legal documents in any other course).

When I went back through PACER throughout the semester, working on the Lambuth [University] case, I would notice where I mislabeled docket filings or mischaracterized some filings . . . .<sup>7</sup>

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<sup>6</sup> Some examples of student work in this regard can be found at one of the links at <http://law.utk.edu/professor-george-kuney-other-materials/>. Quality varies across the sample, but it is illustrative of the sort of work that is accomplished in the seminar. Due to server-storage constraints, the hyperlinks in this work-product are not live and do not connect to the source documents as is the case with *Bamboozled*.

<sup>7</sup> E-mail from Jennifer Crake, UT College of Law Class of 2012, to author, dated May 9, 2012 (on file with author).

Interestingly, one student, who had a first year civil procedure class that featured some PACER exercises involving complaints and answers and summary judgment motions, observed that PACER might be more effective for 2L and 3L courses rather than first-year offerings:

Most of my classmates found this technique to be a less useful approach towards teaching civil procedure for several reasons. First, reading all of these documents requires a lot [of] reading and brainpower, similar to digesting an appellate opinion, except that an edited appellate opinion is shorter and you normally get more relevant law out of an appellate opinion. Second the case [we used] wasn't very interesting. . . . Third, assigning students to read a fake, simple complaint is a more effective teaching method than assigning an actual complaint.

. . . .

That being said, the case study/PACER/Paper approach is great for an upper division specialty course. From the lectures and case study, you're learning about tactics and getting a feel for what is happening in between filings. The extra-judicial material . . . in the case study helps you pick up on the nuances in the filings. Digging through a good docket is a great way to start making connections on how what you are learning in class is applicable to real life lawyering because you are seeing the actual work product in the docket entries. The paper ends up being a brief history of the events leading up to the case, a summary of the docket with the inclusion of the extra-judicial material to fill in the blanks between filings, with analysis sprinkled in here and there. In writing the paper, you are in a sense reverse engineering what the actual attorneys in the case were doing . . . you have the documents and you are trying to figure out what goal the attorney was trying to accomplish by filing the motion.<sup>8</sup>

Another student stated:

Having already taken an independent study in bankruptcy law, I understood the general principles and concepts, but the nuances did not really come together for me until I was able to study an actual, ongoing chapter 11 case through primary case documents. The case I followed was managed by a claims and balloting agent, so most of the case documents were conveniently available on a third-party website (and I used that website as my principal source for case material and documents, even though they were, of course, available on PACER). Keeping up with the filings and tracking the motions, orders, objections, and other documents helped me understand who the various players in a bankruptcy case are, what stakes and interests they each hold and seek to protect, and what objectives are important to each stakeholder. Most importantly, I was able to appreciate the differences between theoretical bankruptcy law (the kind taught by traditional law school casebook methods) and actual bankruptcy practice by following a single (albeit quite large) case from filing to

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<sup>8</sup> E-mail from Anthony Mendenhall, UT College of Law Class of 2013, to author, dated May 9, 2012.

confirmation. I learned more about the "nuts and bolts" of bankruptcy law through [the] seminar than I would have learned if I had read cases and case documents following a more traditional and abstract approach to chapter 11 bankruptcy litigation practice.<sup>9</sup>

Inspired by the success and reception that the students have shown for Bamboozled, the author has now turned to producing an e-book that can serve as an orientation reading for either a civil procedure class or for an introduction/orientation to law school, perhaps as assigned summer reading for incoming students. Essentially, it is a 21<sup>st</sup> Century version of the venerable workhorse of orientations, *Anatomy of a Lawsuit*. The e-book features descriptions of and links to all the original source documents from complaint to judgment as well as the federal rules and caselaw in a fairly vanilla car wreck case that took place in the United States District Court for the Eastern District of Tennessee.

#### IV. Conclusion

As with anything, there are pros and cons to teaching with PACER. It is another layer of technology that must be mastered for instructor and students. There are charges for accessing the documents, although at \$0.08 per page per document, with a price cap at 30 pages worth of charges, this is not very great. It appears to this author that, in upper division courses, the pros of PACER – expressed by students that have been through the process – outweigh any negatives in terms of time and expense. Possibly, if the context and perspective of first year students can be borne in mind, it even has a role at the beginning of law school or in a college legal studies class.

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<sup>9</sup> E-mail from Corrine Martin to author, UT College of Law Class of 2011.