

18-CV-W
18-CR-E

July 20, 2018

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Chief Counsel
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544

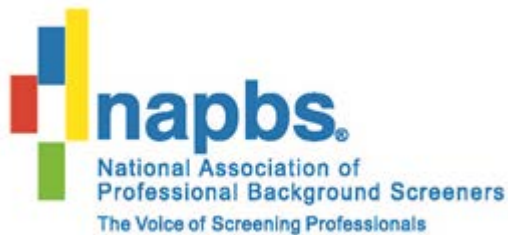
RE: Proposed Change to PACER

Dear Ms. Womeldorf:

Pursuant to 28 U.S.C. § 2072, the National Association of Professional Background Screeners (“NAPBS”) respectfully submits this proposed change to the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Public Access to Court Electronic Records (“PACER”) federal court record system. As discussed below, in order to ensure more speedy, accurate, and reliable background checks and related services, NAPBS recommends the Committee on Rules of Practice and Procedure propose two changes to Judicial Conference policy: first, to require natural persons who are parties to civil and criminal cases to file a disclosure statement in a manner similar to the disclosure statement required by Rule 1007(f) of the Federal Rules of Bankruptcy Procedure, except that instead of submitting one’s social security number (“SSN”), the party would submit his or her full name and full date of birth; and second, to make this non-sensitive personally identifying information available as a search criteria for criminal and civil cases in the PACER system in the same manner that SSNs are available in the bankruptcy system as a search criteria.

The PACER system today does not offer an effective way to ensure that the name searched in the federal criminal records system can be verified with a personal identifier such as a date of birth or Social Security Number. Without an effective identifier present in most federal criminal record cases in PACER, professional background screeners must choose between including the record in a background check report – which may not belong to the individual and will therefore be disputed, slowing the employment placement down significantly for a job candidate, or not reporting it and potentially putting other employees and employers at risk if the record does belong to the applicant. The unavailability of a key identifier in this system impedes the ability of professional background screeners to accurately associate a federal criminal record with a specific individual.

The NAPBS is an international trade association of over 850 member companies. Its members provide employment and tenant background screening and related services to virtually every industry around the globe. NAPBS members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record data. NAPBS members also include court-record retrieval services and companies that provide access to public record data to background screeners.

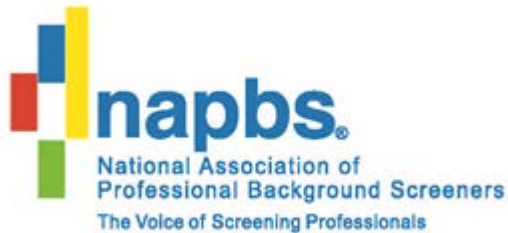


The reports prepared by NAPBS's background screening members are used by employers and landlords every day to ensure that workplaces and residential communities are safe for all who work, reside or visit there. Background reports help ensure the safety of the elderly in nursing homes, patients in hospitals, children at school, and countless others in nearly every facet of daily life. Background reports are also essential to homeland security.

NAPBS's background screening members must comply with the federal Fair Credit Reporting Act ("FCRA") in furnishing background reports to employers and landlords. See, 15 U.S.C. §§ 1681a, et seq. The FCRA imposes accuracy requirements. *Id.* § 1681e(b). Personal identifiers are key to accuracy; without them, a background screener cannot determine whether a public court record relates to the individual about whom a report is being prepared. If key identifiers like full names and full dates of birth are unavailable, employers and landlords throughout the United States will receive background reports containing "false negatives." For example, a prospective employer will not know whether an applicant was convicted of a serious crime, and the individual may be hired and placed in a position of access to vulnerable third parties or entrusted with access to money and critical assets. The inability to provide accurate and complete background reports increases the risk of harm to American citizens. And federal courts have recognized that businesses have a legitimate public policy interest in managing the risk associated with hiring or leasing to ex-offenders. See, *El v. SEPTA*, 479 F.3d 232, 245 (3rd Cir. 2007) ("If someone with a violent conviction presents a materially higher risk than someone without one, no matter which other factors an employer considers, then [an employer] is justified in not considering people with those convictions."). Indeed, many federal agencies examine public court records maintained by PACER when conducting background checks of potential federal employees, leaving the U.S. government itself vulnerable to the impact of false negatives. (A number of NAPBS members partner with these federal agencies in conducting these background checks.)

By contrast, there is no risk of harm to parties to civil and criminal cases if they are required to file a confidential statement with the court clerk disclosing their full names and full dates of birth. NAPBS members are not asking the courts to disclose this information; we already have that information. Rather, we are asking for PACER to enable users of the system to conduct searches using the name and date of birth as a search criteria. Presently, the bankruptcy-side of PACER permits conducting this type of search with SSNs. And unlike SSNs, dates of birth are not a gateway to identity theft. For many people, dates of birth are already available in the public sphere. Notable public figures will have their dates of birth posted on Wikipedia. The vast majority of state court systems make dates of birth publicly available. And forty-nine out of fifty state data breach notification laws do not treat dates of birth as sensitive personal information subject to breach notification requirements.

If the bankruptcy court system is comfortable mandating that natural persons submit their SSNs to the court clerk, and if PACER has no concerns in permitting the public to run a search of the PACER bankruptcy court system using the SSN, then we would submit the Judicial Conference should have no concerns with requiring the collection of full dates of birth and enabling dates of birth to be a search field when conducting criminal and civil case searches on PACER.



Accordingly, NAPBS respectfully recommends the Committee on Rules of Practice and Procedure consider and implement the following specific rule changes:

- Add a Rule 5.2 to the Federal Rules of Criminal Procedure requiring all defendants who are natural persons to file a confidential disclosure statement to the clerk of court disclosing their full names and dates of birth;
- Add a Rule 7.2 to the Federal Rules of Civil Procedure requiring natural persons who are parties to cases to submit a confidential disclosure statement to the clerk of court disclosing their full names and dates of birth;
- Direct the clerks of the United States District Courts to input the full names and dates of birth into the PACER system in the same manner that bankruptcy court clerks input SSNs; and
- Direct the United States Administrative Office of Courts to enable full names and full dates of birth as search criteria when users of the PACER system conduct searches of criminal and civil case records.

When Congress enacted the E-Government Act of 2002, it articulated a number of policy purposes. One of them was “to promote access to high quality Government information....” See, 44 U.S.C. § 3601 Note. Another purpose was “to provide enhanced access to Government information and services in a manner consistent with laws regarding the protection of personal privacy....” Id. What NAPBS proposes advances both purposes.

Thank you for your consideration, and please feel free to reach out with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Sorenson", is positioned below the word "Sincerely,".

Melissa Sorenson, Esq.
Executive Director

CC: The Honorable Wm. Terrell Hodges, Chair
Committee on Court Administration and Case Management

The Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure