



Integrity and Competence in Government Relations

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05-CR-008

December 8, 2005

05-BK-003

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

05-AP-001

Dear Mr. McCabe:

I understand the Judicial Conference Advisory Committee on Criminal Rules will hold a public hearing on the proposed amendments to the rules and forms on January 9, 2006 in Phoenix, Arizona. I am writing on behalf of the National Association of Professional Background Screeners, which represents almost 500 firms nationwide who rely on court records to conduct criminal background checks for employers. As such, NAPBS has a substantial interest in these proceedings. NAPBS is particularly interested in the implications of rule 49.1 of the Criminal Rules section. **Mike Sankey**, Associate Member Director of NAPBS, would like the opportunity to present the Association's perspective by providing testimony before the advisory committee at the Jan. 9, hearing. In accordance, with the requirements put forth by the committee, I am informing you of Mr. Sankey's intention to testify 30 days in advance of the hearing. A preliminary draft copy of his testimony and the Association's recommended language for Rule 49.1 are attached to this letter. On behalf of NAPBS, I thank you for your consideration. I know the entire Association looks forward to the opportunity to aid the Committee by providing our unique insight into the filing and records system.

Sincerely,

Shay D. Stautz

On behalf of NAPBS

Vice-President for Technology Programs

Collins & Company, Inc.

stautzs@collinsandcompany.com

cc Mike Sankey Associate Member, NAPBS
Jason Morris, Co-Chairman NAPBS
Tracey Seabrook, Executive Director, NAPBS

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The Use of Date of Birth in Criminal Filings and Records
Testimony of the National Association of Professional Background Screeners
Provided by Mike Sankey, Associate Member Director of NAPBS
January 9, 2006

I appreciate the opportunity to provide testimony to you today on behalf of the National Association of Professional Background Screeners (NAPBS), an association of nearly 500 firms nationwide who provide essential background screening services for employers and landlords across the nation. On their behalf, I would like to address the provisions in the proposed rule changes that address the filing and display of key “identifiers” in court records – identifiers such as full names, social security numbers and dates of birth. NAPBS is completely aware of the sensitivity of this issue, and we applaud the Conference’s initiatives to increase the privacy protections of the nation’s citizens. However, some of these proposed changes will severely affect the ability of background screeners to conduct their essential services, and we believe a slight change to the proposed rules can maintain the increased privacy protection to citizens while maintaining background screeners’ ability to perform their services, which are so important for safety in the workplace and in the renting industry.

First, let me provide a bit of context for our industry. Background screening companies are engaged by employers and landlords to do background checks on potential employees or tenants. As such, we serve employers, job applicants, landlords and potential tenants by providing the critical information employers and landlords need to make safe, intelligent hiring and leasing decisions. This information is essential because, in the case of employers, they are compelled to investigate the backgrounds of those they hire if the would-be employee is in a position to potentially harm a third party. This covers many categories of employees. Failure to conduct adequate background checks of employees can make an employer vulnerable to a lawsuit for negligent hiring practices. Aside from mitigating employer liability, background screening protects the public, other employees, and the employer. Ensuring a dangerous person does not have the opportunity to abuse his or her employment position is in the public interest. Industry statistics indicate that 10 percent of applicants who are screened have criminal records. That statistic is particularly unsettling when viewed in the light of another, that the cost to the American economy due to workplace violence is estimated at \$55 billion each year in lost wages alone.

A key point must be made about these kinds of background searches – they are *always* conducted with the consumer’s written consent, as required by the Federal Fair Credit Reporting Act and several state fair credit reporting acts.

A major component of such background checks is a criminal history search. This criminal history component of employment screening is dependant on access to court records, as provided for under law by the Freedom of Information Act. Screeners use information provided by a consumer to verify his or her criminal history through public

documents. However, because of concern over protecting citizens from identity theft, critical identifiers are being increasingly stripped from available public court records. The removal of these identifiers, specifically social security numbers and dates of birth, makes it hard or impossible for screeners to do their jobs adequately and efficiently. The proposed rule change of 49.1, which seeks to redact information from filings in criminal proceedings, is another example of this trend.

Citizens have a right to privacy, and they have a need for employment and security. The system we operate under requires a certain balance to see that they receive all of these. Rule 49.1, in stripping the day and month of birth for adults in criminal cases, fails to maintain this balance. Without a full date of birth, numerous “false positives” are generated when individuals are screened for employment purposes. Since many people having the same or similar names are born in the same year, their records cannot be distinguished without more complete information, leaving employers to guess about the criminal history of those they intend to hire. The absence of this information requires the individual to “prove” the record in question belongs to someone else, which delays the start of their employment, and results in additional work for court employees when assisting individuals to resolve potential issues related to criminal records. This delay can cost honest applicants jobs, or, if an employer decides not to wait, can allow dishonest applicants with criminal histories to obtain sensitive jobs. In the effort to protect consumers from criminals and identity theft, the removal of identifiers could unwittingly make the public more vulnerable to criminals.

The removal of key identifiers from federal criminal court records is particularly disconcerting for two reasons: 1.) Those convicted in federal courts are often the most serious offenders. 2.) State courts often look to federal courts as a model. If federal courts fail to include adequate identifier information, state court systems are likely to follow suit.

It is also important to note that if identifiers, like date of birth, are not available in a database, employers will be required to pull every relevant court file to try to establish identification, putting a strain upon the resources of clerks’ offices. Given the number of background checks that are conducted, thousands each day, requests to access court files may be overwhelming. Employers and background screeners will need to see the public files. The courts may need to add staff to handle the requests for public records, which will have a financial impact on courts and taxpayers. In addition to adding to a significant burden to private enterprise, employers, and consumers, the stripping of necessary identifiers may create an extra burden for the courts themselves.

As the preeminent association for those who conduct employment screening, our members understand public concern for personal data security. We understand concerns about identity theft. Our screens are conducted for the expressed purpose of finding out if people are who they say they are. It is understandable for the federal courts to seek to protect the personal information of citizens. NAPBS agrees that social security numbers or financial account numbers may need to be redacted in court records to address these concerns. However, an individual’s date of birth is not as useful or relevant to identity

theft as a social security number, where a criminal endeavors to fraudulently obtain credit using someone else's identity. NAPBS is not aware that the listing of the date of birth of those convicted of crimes in public records has ever resulted in a case of identity theft or misuse of personal data. We see no evidence to suggest a rule change stripping date of birth, while well-intentioned, will serve to protect either the individuals involved or the public at large.

However, for all the reasons I mentioned, failure to include full dates of birth in the filings and records for adults charged in criminal proceedings will almost certainly harm job seekers, employers and the public. In the face of this, the Committee must consider modifying Rule 49.1 to allow for full dates of birth.

On behalf of every member of NAPBS, I thank the Committee for the opportunity to present our industry's views and comments here today. I am happy to answer any questions members of the Committee wish to pose at this time.

NAPBS-RECOMMENDED AMENDMENT TO RULE 49.1

From the Criminal Procedure portion (Pg. 150):

Rule 49.1 Privacy Protection for Filings Made with the Court**

- 1 (a) Redacted Filings. Unless the court orders otherwise,
- 2 an electronic or paper filing made with the court that
- 3 includes a social security number, or an individual's tax
- 4 identification number, a name of a person known to be a
- 5 minor, a person's birth date, a financial account
- 6 number or the home address of a person may include
- 7 only:
- 8 (1) the last four digits of the social security number
- 9 and tax identification number;
- 10 (2) the minor's initials;
- 11 (3) the year of birth for minors; and the day, month, and
- 12 year of birth for adults;
- 13 (4) the last four digits of the financial account
- 14 number; and
- 14 (5) the city and state of the home address.

The Use of Date of Birth in Criminal Filings and Records

Testimony of the National Association of Professional Background Screeners

Provided by Mike Sankey, Associate Member Director of NAPBS

Hermosa Inn, Scottsdale, AZ, January 6th, 2006

I appreciate the opportunity to testify before you today on behalf of the National Association of Professional Background Screeners (NAPBS), an association of nearly 500 firms that provide background screening services to over 500,000 employers and landlords across America. On behalf of our members and the people we serve, I would like to speak about the provisions in the proposed rule changes that address the filing and display of key "identifiers" in court records – identifiers such as full names, social security numbers, and dates of birth. NAPBS is completely aware of the sensitivity of this issue, and we applaud the Committee's initiatives to increase the privacy protections of the nation's citizens.

However, we would direct the Committee's attention to one aspect of the proposed changes that is problematic. Removing, or encouraging the removal of, the dates of birth for adults in criminal filings will impact the hiring procedures of nearly every employer in this country, and it will likely make citizens more vulnerable to crime. We believe a slight change to the proposed rules can maintain increased privacy protection to citizens without disrupting the employee or tenant screening procedures that are so important for safety in the workplace and in the renting industry. As I will elaborate on, NAPBS strongly urges the Committee to consider a slight modification of the proposed changes to Rule 49.1 to retain full dates of birth in criminal court record filings. To this end, we have submitted modifying language for your consideration with this written testimony.

First, let me provide a bit of context for our industry. Background screening companies are engaged by employers and landlords to do background checks on potential employees and tenants. As such, we serve employers, job applicants, landlords and potential tenants by providing the critical information employers and landlords need to make safe, intelligent hiring and leasing decisions. This information is essential because, in the case of employers, our customers are compelled to investigate the backgrounds of those they would hire if the would-be employee is in a position to potentially harm a third party. This covers many categories of employees. Failure to conduct adequate background checks of employees can make an employer vulnerable to a lawsuit for negligent hiring practices. Aside from mitigating employer liability, background screening protects the public, other employees, and the employer. Ensuring a dangerous person does not have the opportunity to abuse his or her employment position is in the public interest. Industry statistics indicate that 10 percent of all applicants fail to disclose their criminal histories when asked on applications. This statistic is particularly unsettling when viewed in the light of another -- that the cost to the American economy due to workplace violence is estimated at \$55 billion each year in lost wages alone.

A key point must be made about the kinds of background searches we do – they are *always* conducted with the consumer's written consent, as required by the Federal Fair Credit Reporting Act and several state fair credit reporting acts.

A major component of background checks is a criminal history search. This criminal history component of employment screening is dependant on access to court records, as provided for under law by the Freedom of Information Act. Screeners use information provided by a consumer to verify his or her criminal history through public documents. However, because of concern over protecting citizens from identity theft, critical identifiers are increasingly being stripped from available public court records. The removal of these identifiers, specifically social security numbers and dates of birth, makes it hard or impossible for screeners to do their jobs adequately and efficiently. The proposed change to Rule 49.1, which seeks to redact information from filings in criminal proceedings, is another example of this trend.

Citizens have a right to privacy, and they have a need for employment and security. The system we operate under requires a certain balance to see that they receive all of these. The proposed Rule 49.1, in stripping the day and month of birth for adults in criminal cases, fails to maintain this balance. Without a *full* date of birth, numerous “false positives” are generated when individuals are screened for employment purposes. Since many people having the same or similar names are born in the same year, their records cannot be distinguished without more complete information, leaving employers to guess about the criminal history of those they intend to hire. The absence of this information requires the individual to “prove” the record in question belongs to someone else, which delays the start of their employment, and results in additional work for court employees when assisting individuals to resolve potential issues related to criminal records. This delay can cost honest applicants jobs, or, if an employer decides not to wait, can allow dishonest applicants with criminal histories to obtain sensitive jobs. In the effort to protect consumers from criminals and identity theft, the removal of identifiers could unintentionally make the public more vulnerable to criminals.

Six percent of criminal convictions are federal crimes. Some of these are arguably the most serious crimes - crimes like those that involve terrorism. Taking date of birth out of federal court records *blinds* screeners to that six percent. We would not feel comfortable if we failed to check the passports of six percent of foreign visitors. Our standards should not be more lax for those we take into our homes and businesses. Without access to identifiers in records, screeners lose the ability to keep applicants honest. If date of birth is not readily available in federal court records, how many applicants with federal criminal histories will lie to gain employment?

Significantly, the rule changes implemented by this Committee and the Judicial Conference will have consequences reaching beyond the *federal* courts. State courts look to federal courts as a model. If federal courts fail to include adequate identifier information, state court systems will likely follow suit. This will make criminal background checks on those who commit the remaining 94% of crimes (at the state and local level) also difficult or impossible to conduct.

Another potential impact of the rule change is a substantial increase on the burden of court clerks. If identifiers, like date of birth, are not available in a database, employers

will be required to pull every relevant court file to try to establish identification, putting a strain upon the resources of clerks' offices. Given the number of background checks that are conducted, thousands each day, requests to access court files may be overwhelming. Employers and background screeners will need to see the public files. The courts may need to add staff to handle the requests for public records, which will have a financial impact on courts and taxpayers. In addition to adding to a significant burden to private enterprise, employers, and consumers, the stripping of necessary identifiers may create an extra burden for the courts themselves.

As the preeminent association for those who conduct employment screening, our members understand public concern for personal data security. We understand concerns about identity theft. Our screens are conducted for the expressed purpose of finding out if people are who they say they are. It is understandable for the federal courts to seek to protect the personal information of citizens. NAPBS agrees that social security numbers or financial account numbers may need to be redacted in court records to address these concerns. However, an individual's date of birth is not as useful or relevant to identity theft as a social security number, where a criminal endeavors to fraudulently obtain credit using someone else's identity. NAPBS is not aware that the listing of the date of birth of those convicted of crimes in public records has ever resulted in a case of identity theft or misuse of personal data. While well-intentioned, we see no evidence to suggest that a rule change stripping date of birth will serve to protect either the individuals involved or the public at large.

While we cannot be sure of the benefits of removing dates of birth, we can be sure of the consequences. For all the reasons I have mentioned here, failure to include full dates of birth in the records for adults charged in criminal proceedings will almost certainly harm job seekers, employers, and the public. Every screen conducted by every employer or landlord on every applicant will be affected by a failure to include this information. The removal of identifiers will create increased strain on the resources of court clerks. It will make it hard or impossible for screeners to identify the six percent of criminals convicted of a federal crime. The sure result of this failure will be that average citizens will be less safe, at their workplaces and in their homes. In the face of all this, NAPBS strongly urges the Committee to consider a slight modification of the proposed changes to Rule 49.1 to retain full dates of birth in the criminal court record filings. To this end, we have submitted modifying language for your consideration with this written testimony.

On behalf of the nearly 500 member of NAPBS who serve the nation's employers and public, I thank the Committee for the opportunity to present our industry's views and comments here today. I am happy to answer any questions members of the Committee wish to pose at this time.

NAPBS-RECOMMENDED AMENDMENT TO RULE 49.1

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2 an electronic or paper filing made with the court that
3 includes a social security number, or an individual's tax
4 identification number, a name of a person known to be a
5 minor, a person's birth date, a financial account
6 number or the home address of a person may include
7 only:
8 (1) the last four digits of the social security number
9 and tax identification number;
10 (2) the minor's initials;
11 (3) the year of birth for minors; and the day, month, and
12 year of birth for adults;
13 (4) the last four digits of the financial account
14 number; and
 (5) the city and state of the home address.