



**SEARCH 2019**



# **2019 SEARCH Symposium on Justice Information Technology, Policy & Research**

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**Panel:**

**“Official CCH Records vs. Commercial Background Checks:  
What Do We Know?”**

**Comments by Panel Member Attorney Lester S. Rosen,  
Founder and CEO of Employment Screening Resources® (ESR)**

# About the Speaker

## Attorney Lester Rosen, Founder & CEO Employment Screening Resources® (ESR)



**Attorney Lester Rosen, J.D.**  
**Founder and CEO of Employment**  
**Screening Resources® (ESR)**

### About Attorney Lester Rosen:

- ✓ Lester Rosen is an Attorney at Law and CEO of Employment Screening Resources® (ESR), a global background check firm accredited by the National Association of Professional Background Screeners (NAPBS).
- ✓ He is a frequent speaker on due diligence and background screening issues.
- ✓ He is the author of “The Safe Hiring Manual,” the first comprehensive book about background screening.
- ✓ He has qualified and testified as an expert in court cases and has testified before the California Legislature.
- ✓ He was the chair of the steering committee that founded the NAPBS ([www.napbs.com](http://www.napbs.com)) and served as first co-chair.



## Employment Screening Resources® (ESR)



EMPLOYMENT SCREENING RESOURCES®

Employment Screening Resources® (ESR)

[www.esrcheck.com](http://www.esrcheck.com)

888-999-4474

### About Employment Screening Resources® (ESR):

- ✓ Founded in 1997 in the San Francisco area with the mission to ensure safe workplaces for employers, employees, and the public.
- ✓ Wrote the book on background checks with “The Safe Hiring Manual” by Founder & CEO Lester Rosen.
- ✓ Accredited by the National Association of Professional Background Screeners (NAPBS®) Background Screening Credentialing Council (BSCC) for successfully proving compliance with the Background Screening Agency Accreditation Program (BSAAP)
- ✓ Undergoes annual SOC 2® (SSAE 18) audits to protect the privacy, security, and confidentiality of consumer information used for background checks.



## Current Situation – Putting Commercial Checks into Perspective

- **There is a large private industry that provides pre-employment background checks to employers.**
- **Employers generally do background checks to document due diligence.**
- **For the most part, the employers getting these commercial checks are NOT eligible for Federal Bureau of Investigation (FBI) fingerprint checks.**
- **There are a small number of employers such as banks that may do both FBI checks and private checks but for the most part it is a separate process.**
- **The employers served by the private screening industry simply do not have authorization to obtain fingerprint checks.**

# Employers Want Applicants to Pass Background Checks

- **Background checks are done as part of the last step in the hiring process to demonstrate due diligence.**
- **Normally done after job offer (required in some states).**
- **Employers go through a progressive hiring process that may include resume reviews, phone interviews, assessment tools, and an interview to arrive at a finalist.**
- **Employers only submit a name to a screening firm of someone they want to hire and where time and money has been invested to recruit and identify the right applicant.**
- **Employers want the applicants to pass – Why waste time and money otherwise?**
- **Employers do NOT use criminal checks as a way of trying to eliminate people, but as a tool to ensure quality of hire.**

# A Background Check Firm is NOT a Data Aggregator – One Time Use

- **A Consumer Reporting Agency (CRA) – the technical term for a background check firm – is much different than data brokers, data aggregators or online data sites.**
- **Under the federal Fair Credit Reporting Act (FCRA), a CRA does not resell criminal data over and over.**
- **A CRA generally has a one-time use.**
- **Information can only go to an employer who has a permissible purpose (employment) under the FCRA and has certified it will follow the FCRA.**
- **A CRA has accuracy requirements and must ensure data is complete and up to date when reported.**

# A Background Check Firm Does Other Checks As Well

- **Background screeners provide a host of other services besides criminal checks including:**
  - Past employment.
  - Education and credentials.
  - Sex offender lists.
  - A Social security trace.
  - Credit reports.
  - Drug testing.
  - International screening.
  - Disbarment lists.
  - A host of other searches.

# Employers and Screeners Highly Regulated

- **Under the FCRA, a background check firm is a CRA.**
- **Numerous obligations placed on a CRA such as:**
  - A CRA must use reasonable procedures for maximum possible accuracy.
  - If a public record is reported, CRA must either notify the applicant or use procedures to ensure accuracy.
  - A CRA must re-investigate if requested in a limited time period.
  - Numerous limitations on what a CRA can report.
  - Limitations on who can get information.



- **An employer has numerous obligations under the FCRA when using a private background screening firm:**
  - Must certify the information is for employment purposes and will not be used to discriminate.
  - Will only be requested after the applicant has given a written authorization and received a clear and conspicuous standalone disclosure.
  - Must have a permissible purpose.
  - If the employer used the report in whole or in part to deny an opportunity, must provide pre-adverse and post-adverse action notices and a statement of rights under the FCRA so that the applicant can ask for a re-investigation.

# Other Obligations for Employers

- **Private searches for employers are heavily regulated by numerous state laws, the U.S. Equal Employment Opportunity Commission (EEOC), “Ban the Box,” and Fair Chance hiring laws:**
  - Under the EEOC, the automatic use of a criminal record can create a discriminatory disparate impact.
  - Employers need to use a targeted screen (nature and gravity of crime, nature of the job, and age of the crime)
  - If employment denied, employers must offer an “Individualized Assessment.”
- **Numerous privacy obligations.**
- **Explosion in FCRA class action lawsuits and other claims against employers.**

# Employers Can Only View “Public Records”

- **Part of problem with use of criminal data for employment is that it is a secondary use not intended by those who gather the data.**
- **Data is gathered for criminal justice reasons.**
- **Employer can only access “public records,” which does NOT include police reports, witness statements, search warrant affidavits, probation reports, etc.**
- **Employer only can see limited part of “criminal record”:**
  - The charging document (complaint, indictment, etc.).
  - Minute orders or clerk summaries of public appearance.
  - Sentencing summary.
- **From a very limited picture, employers need to try to make hiring decisions.**

- **Private criminal record check issues:**
  - Where to search.
  - How to search.
  - How to provide accurate, complete, and actionable information.
  - Time is off the essence and less expensive.

# Where to Search

- **Private background check firms cannot search every court.**
- **There are approximately 3,200 county jurisdictions the U.S. with records on the county level.**
- **Various ways to identify which courts to search:**
  - Ask applicant for address history
  - Social security trace to locate past counties associated with subject.
  - An Address Information Manger (AIM) goes deeper.
  - Can add in past employment and education locations.
  - Add in multi-state/multi jurisdictional search as a lead indicator.
  - Add in state specific repositories (but not states like New York that charge a significant AOC fee).
  - Search adjacent counties.

# Multi-State/Multi-Jurisdictional Tool

- **Multi-state/multi-jurisdictional tool is essentially a large data dump with millions of records.**
- **Data taken from every source publicly available for access.**
- **Not anything close to FBI data.**
- **Has potential for both false negatives and false positives.**
  - A “false positive” can be a sealed or expunged record not indicated, a name that is similar to but not the subject of report, or consumer who is a victim of identity theft.
  - A “false negative” misses a criminal record that is a potential “red flag.”
- **The problem is that some online sites sell this data directly to the public, but do not update their data with after occurring information, such as an expungement or other judicial set-asides.**
- **Under FCRA, employers cannot legally use online data sites to perform “do it yourself” criminal background checks for employment.**

# What if There is a Potential Criminal Record “Hit” From Commercial Criminal Database?

- **Multi-state/multi-jurisdictional used by CRA’s only as a lead indicator or “secondary source” only to determine where else to search.**
- **Gives CRA a broader scope of places that may be potentially relevant.**
- **If there is a potential criminal record “hit” when using the multi-state/multi-jurisdictional tool, a CRA must review the file to determine if it belongs to the applicant and the information is complete, up to date, and reportable (i.e. there had been no sealing, expungement or judicial set aside).**
- **Cannot be reported directly to employer until verified as accurate and reportable.**

- **Screening firms also access available state-maintained criminal repositories.**
  - 15 states with a unified court system and complete records – Equivalent of courthouse search but statewide.
  - 15 states that are a good supplement but still need counties where the subject has lived and worked.
  - 7 states that screeners consider unreliable but used as a supplement or if part of a client requirement.
  - 14 states where statewide information is unavailable, although some of the data may be in a multi-state/multi-jurisdictional databases if county data is available.



# Artificial Intelligence (AI) and “Big Data” will Expand Search

- **Not long before Artificial Intelligence (AI), unique blockchain identification and Big Data will add significant more data points in terms of a personal dossier and where to search.**
- **New private sector biometric solutions:**
  - Software that allows candidates to photograph themselves, and then photograph a form of ID such as a passport, driver’s license, or some sort of ID card.
  - Software designed to validate the validity of the ID and to compare to the person’s photo.
  - Has built-in precautions to prevent fraud.
  - Not a fingerprint biometric but confirms that a name is associated with a particular person and helps to boost confidence in name ID.

# How to Search

- **Screening firms utilize networks of court researchers so they can access every county court in U.S. often in the same day.**
- **Turnaround can be longer if copies of documents requested, files must be obtained by court clerk, identifiers removed from public access terminals, or files in storage.**
- **Enhanced by screening firms are using screen scraping or automated processes that can access records remotely.**
  - Issue is whether electronic search is the functional equivalent of going to courthouse.
  - Information can be inaccurate if online data is incomplete or not updated.

# Supplemental Sources

- **In addition, supplemental sources are being used to give broader searches:**
  - State repositories/state wide resources.
  - Multi-state/multi-jurisdictional.

# How to Provide Accurate, Complete, and Actionable Information

- **A CRA goes deep:**
  - CRA gets actual current disposition from the courthouse.
  - CRAs also get whatever identifiers are in the file such as full name, date of birth (DOB), Social Security number (SSN), address, etc.
  - To demonstrate maximum possible accuracy or strict scrutiny, will get the disposition as of the day its reported.
  - CRA needs to know what happened to a case so that decisions can be made if reportable.
  - CRA in position to note if there is a barrier to reporting, such as a judicial set-aside like expungement or diversion.
  - All of this is part of what a CRA must do.

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# Criminal Record Just One Tool

- **Unless by law a specific criminal record prohibits a person from having the position or license, a criminal record is just one tool.**
- **Employers normally use progressive screening.**
  - Person with criminal history may not become finalist if knowledge, skills, and abilities (KSA) do not align.
- **Also keep in mind that employers have additional tools to access the candidate such as interviews, past employment references, assessment tests, and looking for unexplained resume gaps.**
- **School of thought that a verified employment history without significant gaps is more important to employers than a criminal history.**

# Time is Of the Essence and Less Expensive

- **Because an employer needs to make a decision quickly, and due to complete pressures, time, and cost are essential.**
- **Assuming a case is available at Courthouse and has not gone into storage, criminal turnaround can be as quick as the same day.**
- **If common name, file in storage or the clerk does the search, can take longer.**
- **Can do instant clears in many situations if no record:**
  - i.e. if no public record, then it can be assumed the applicant is “cleared” in county.
- **Cost is very cheap.**
- **Applicant has no need to go anywhere for fingerprints.**

# Employers Wonder if Name Checks are Better than Fingerprints

- **Name Check**
  - Faster and cheaper.
  - No need to incur time and effort of getting printed
  - Complete data from courthouse with current dispositions.
  - Subject to accuracy requirements under FCRA.
  - Getting better and more complete as supplemented by databases, AI, Big Data, and private sector ID solutions.
- **Fingerprints**
  - Biometric data.
  - Better Identification.
  - Better coverage nationwide if not perfect.



# Solutions are Fundamentally Different – Risk Management Decision

- **Not an issue of which solution is better – Fingerprints or name checks – The solutions are different.**
- **Choice of solution is a risk management decision based upon a number of factors unique to each organization.**
- **Organizations with access to fingerprints may want name checks. For example, large scale volunteer programs with other protections in place may have a willingness to rely on name checks for cost, speed, and efficiency reasons.**
- **For other organizations, the biometric and ID aspects provided by fingerprints may be much more critical.**
- **Organizations need to decide appropriate level of risk given totality of circumstances including cost and administration.**

# A Warning about Private Screening Firms

- **Not all private screening firms are created equal.**
- **Over 100 screening firms have gone through accreditation by the National Association of Professional Background Screeners (NAPBS).**
- **But even NAPBS accredited screening firms have been hit hard by litigation and government sanctions.**
- **An employer needs to conduct careful due diligence in selecting a screening firm.**

In 2010, the National Association of Professional Background Screeners (NAPBS®) instituted an intensive Background Screening Agency Accreditation Program (BSAAP).

Rigorous third-party audit related to six critical areas:

1 Consumer Protection

2 Legal Compliance

3 Client Education

4 Product Standards

5 Service Standards

6 General Business Practices



NAPBS accreditation is the only practical means of third party verification of professionalism and competency of a screening firm.

# Numerous Ways to Cut Corners with Criminal Record Searches

- **Using incomplete statewide system.**
  - Most states have disclaimer that statewide database has errors – Only 13 states have statewide system that is equivalent of courthouse searches.
- **Screen scrapping and B2B automaton when data is not complete and up to date.**
- **Claiming seven-year search and ignoring convictions older than seven years that are reportable.**
- **Using database in counties that are known to be incomplete.**
- **Ignoring highly related ALIAS names.**
- **Using substandard past address information.**
- **Using workers in foreign countries to make decisions.**

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