



Interstate Commission for Adult Offender Supervision  

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Ensuring Public Safety for the 21st Century

## ICAOS White Papers

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**White Paper - State Liability: Why Your State Can Be Sanctioned Upon Violation of the Compact or the ICAOS Rules ..... 1**  
**White Paper - Discharge of Sentences in Lieu of Retaking is a Violation of the Compact and the ICAOS Rules ..... 6**  
**White Paper - Legal Implications of the Interstate Compact Offender Tracking System (ICOTS) ..... 11**  
**White Paper - Legal Implications of Remote Hearings in Relation to ICAOS Rules ..... 14**



## WHITE PAPER

# STATE LIABILITY: WHY YOUR STATE CAN BE SANCTIONED UPON VIOLATION OF THE COMPACT OR THE ICAOS RULES

Published September 2, 2011

At the request of the ICAOS Executive Committee resulting from several recent cases in which courts and other agencies have apparently lacked awareness or ignored the requirements of ICAOS and its rules in particular cases, the following legal analysis has been prepared in order to serve as a resource to document both the legal authority and binding nature of the compact and compact rules on the member states and to emphasize the legal consequences of non-compliance and sanctions which the Commission is authorized to impose on an offending state under the terms of the compact.

The Interstate Compact for Adult Offender Supervision (ICAOS) is a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. The Interstate Commission for Adult Offender Supervision (Commission) is charged with overseeing the day-to-day operations of the ICAOS and through its rule making powers, seeks to achieve the goals of the ICAOS.

The Commission is also empowered to monitor compliance with the interstate compact and its duly promulgated rules, and where warranted to initiate interventions to address and correct noncompliance. Common misconceptions regarding the rules and the authority of the rules have led to violations of the compact. Examples of noncompliance with interstate compact rules have included:

- The issuance of court orders allowing offenders to proceed to and remain in another state beyond the 45 day time frame to participate in a treatment program, attend school or work;
- The issuance of warrants by sending states that do not include all 53 compact member states and are limited to the sending state and/or surrounding states only;
- The dismissal or quashing of warrants for offenders prior to the execution of the warrant and the physical return of the offender to the sending state.

While judicial immunity applies to actions taken by courts and those court staff for liability which may arise in the performance of duties which are integral to the judicial function and qualified immunity provides some protection from civil liability for prosecutors and other state officials monitoring the compact; Neither judges, prosecutors nor other state officials can immunize a state from liability which results from their actions arising under the terms of an interstate compact to which the state has bound itself by legislative enactment of the compact. *See Alabama v. North Carolina*, 560 U.S. \_\_\_, 130 S.Ct. 2295, 176 L.Ed.2d 1070 (June 1, 2010), also *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)

By entering into this compact, the member states contractually agree on certain principles and rules and all state officials and courts are required to effectuate the terms of the compact and ensure compliance with the rules. Once entered, the terms of the compact as well as any rules and regulations authorized by the compact supersede substantive state laws that may be in conflict. *See West Virginia ex rel. Dyer*, supra at 29. This applies to prior law (*See Hinderlider, infra*, 304 U.S. at 106) and subsequent statutes of the signatory states. *See Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823). It is well settled that as a congressionally approved interstate compact the provisions of the

ICAOS and its duly authorized rules enjoy the status of federal law. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (“The agreement is a congressionally sanctioned interstate compact within the Compact Clause and thus is a federal law subject to federal constructions.” (Citation omitted)); see also *Alabama v. Bozeman*, 533 U.S. 146 (2001) and *Reed v. Farley*, 512 U.S. 339 (1994); and *Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d 95, 103 (3rd Cir. 2008).

The duly promulgated rules are equally binding upon the parties to the compact. One of the axioms of modern government is the ability of a state legislature to delegate to an administrative body the power to make rules and decide particular cases. This delegation of authority extends to the creation of interstate commissions through the vehicle of an interstate compact. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). It has been held that the states may validly agree by interstate compact with other states to delegate to interstate commissions or agencies legislative and administrative powers and duties. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Scott v. Virginia*, 676 S.E.2d 343, 346 (Va. App. 2009); *Dutton v. Tawes*, 171 A.2d 688 (Md. 1961); *Application of Waterfront Commission of New York Harbor*, 120 A.2d 504, 509 (N.J. Super. 1956). Thus, rules of the compact have been legally authorized and approved by the Commission and no state which is a party to the contractually binding provisions of the compact is permitted to unilaterally modify any of these requirements.

In *Dyer*, the Court also made clear that an interstate compact cannot be “... given final meaning by an organ of one of the contracting states.” Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. See *Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). See *Wash. Metro. Area Transit Auth. v. Once Parcel of Land*, 706 F.2d 1312, 1318 (4th Cir. 1983); *Kansas City Area Transp. Auth. v. Missouri*, 640 F.2d 173, 174 (8th Cir. 1981). See also *McComb v. Wambaugh*, 934 F. 2d 474, 479 (3rd Cir. 1991); *Seattle Master Builders Ass’n v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986); *Rao v. Port Authority of New York*, 122 F. Supp. 595 (S.D.N.Y. 1954), *aff’d* 222 F.2d 362 (2nd Cir. 1955); *Hellmuth & Associates, Inc. v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408, (Md. 1976).

The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with the compact’s terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment to the compact (or in this case, the administrative rules) adopted by all member states in essentially the same form.

The contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws “impairing the obligation of contracts,” including a contract adopted by state legislatures pursuant to the Compact Clause. See U.S. Const. art. I, § 10, cl. 1 (“No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts ...”); see also *West Virginia ex rel. Dyer*, *supra* at 33; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73 (1937), *rev’d* 304 U.S. 92 (1938).

In interpreting and enforcing compacts the courts are constrained to effectuate the terms of the agreement (as binding contracts) so long as those terms do not conflict with constitutional principles. Once a compact between states has been approved, it is binding on the states and its citizens. See, *New Jersey v. New York*, 523 U.S. 767 (1998). Thus, “Unless the compact . . . is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.” *New York State Dairy Foods v. Northeast Dairy Compact Comm’n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998), *aff’d*, 198 F.3d 1 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, in *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) the

Supreme Court sustained exceptions to a special master's recommendation to enlarge the Pecos River Compact Commission, ruling that one consequence of a compact becoming "a law of the United States" is that "no court may order relief inconsistent with its express terms." However, congressional consent may change the venue in which compact disputes are ultimately litigated.

Because congressional consent places the interpretation of an interstate compact in the federal courts, those same courts have the authority to enforce the terms and conditions of the compact. No court can order relief inconsistent with the purpose of the compact. See, *New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, *affirmed*, 198 F.3d 1, 1999 (1st Cir. Mass. 1999), *cert. denied* 529 U.S. 1098 (2000). However, where the compact does not articulate the terms of enforceability, courts have wide latitude to fashion remedies that are consistent with the purpose of the compact. The U.S. Supreme Court addressed this matter observing, "That there may be difficulties in enforcing judgments against States counsels caution, but does not undermine our authority to enter judgments against defendant States in cases over which the Court has undoubted jurisdiction, authority that is attested to by the fact that almost invariably the 'States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same.'" See, *Texas v. New Mexico*, 482 U.S. 124, 130, 131 (1987). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Id.* at 128.

Remedies for breach of the compact can include granting injunctive relief or awarding damages. See *e.g.*, *South Dakota v. North Carolina*, 192 U.S. 286, 320-21 (1904); *Texas v. New Mexico*, 482 U.S. at 130 ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."). The Eleventh Amendment provides no protection to states in suits brought by other states. *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (in proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a state).

In its most recent pronouncement on the subject the U.S. Supreme Court unequivocally held that obligations imposed by a duly authorized interstate commission are enforceable on the states. Moreover, such commissions may be empowered to determine when a state has breached its obligations and may, if so authorized by the compact, impose sanctions on a non-complying state. See *Alabama v. North Carolina*, 560 U.S. \_\_\_, 130 S.Ct. 2295, 176 L.Ed.2d 1070 (June 1, 2010).

In addition the Court made clear that an interstate compact commission composed of the member states may be a party to a compact lawsuit under the original jurisdiction of the U.S. Supreme Court if such claims are wholly derivative of the claims that could be asserted by the party states. *Id.* Moreover the Court held that when construing the provisions of a compact, in giving full effect to the intent of the parties, it may consult sources that might differ from those normally reviewed when an ordinary federal statute is at issue, including traditional canons of construction and the Restatement (Second) of Contracts. *Id.* at 2308-12.

In light of the above authority, and the fact that the explicit language of the compact requires that **"the courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact's purposes and intent"** makes it incumbent upon judges and other state officials to understand the requirements of the ICAOS and its rules as well as the consequences of non-compliance. Under Article I of the Compact, among the purposes of the Commission is to **"monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance."** Article V of the Compact provides that among the powers and duties of the Commission is **"to enforce compliance with the compact provisions, interstate commission rules and bylaws, using all necessary and proper means, including but not limited to, the**

**use of judicial process.” Article XIV (B.) provides that “all lawful actions of the Interstate Commission, including all rules and bylaws promulgated by the interstate commission are binding upon the compacting states.”**

Moreover Article V also provides that the interstate commission has the power and duty “to establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions. . . .” and “to perform such functions as may be necessary or appropriate to achieve the purposes of this compact.” Under Articles IX and XII of the Compact authorizes the interstate commission, in the reasonable exercise of its’ discretion, to enforce the compact either through various means set out in Article XII, Section B (which include required remedial training and technical assistance, imposition of fines, fees and costs, suspension or termination from the compact, and judicial enforcement in U.S. District Court against any compacting state in default of the compact or compact rules with the prevailing party being entitled to recover all costs of such litigation including reasonable attorney’s fees.

Under the above compact provision and pursuant to the delegated statutory authority of the compact, the Commission has also promulgated Rule 6.103 (a) under which the Interstate Commission is empowered with the authority and charged with the duty to determine whether “. . . any state has at any time defaulted (“defaulting state”) in the performance of any of its obligations or responsibilities under this Compact, the by-laws or any duly promulgated rules . . .” and in the event such a determination is made **the Commission is empowered to “impose any or all” of the penalties set forth in that rule and for which authority is expressly provided in the above referenced provisions of the compact.**

The compact’s governing structure anticipates that enforcement of the compact through judicial process will be used only in those cases where training and technical assistance, alternative dispute resolution or fines fees and costs have been unsuccessful. However, where necessary the provisions for enforcement through federal court action to secure injunctive and other appropriate relief is a powerful tool to secure compliance with the provisions of the compact and compact rules. Before the ICAOS statute was enacted by the states to replace the old Interstate Compact for Probationers and Parolees, the enforcement of the compact was generally left to either the goodwill of the member states or through an ill-defined and cumbersome process before the U.S. Supreme Court. Goodwill can only go so far, and the provisions of ICAOS clearly articulate a system of enforcement with which compliance with the compact can be obtained through an escalating series of alternatives culminating in federal litigation which can provide injunctive and monetary relief and recovery of attorney’s fees and costs.

The judicial enforcement provisions of the compact have been utilized three (3) times since the enactment of ICAOS and activation of the Commission in 2002. Two of these cases were settled and the remaining case was submitted to the Court for a final decision resulting in the entry of a permanent injunction by the U.S. District Court and an award of attorneys fees and costs. See ICAOS v. Tennessee Bd. of Probation and Parole, No. 04-526 (E.D. Ky. 2005).

Citing several of the U.S. Supreme Court decisions referenced in this paper, the Court determined that jurisdiction was conferred to decide the case **“because the Compact, as a congressionally sanctioned interstate compact is federal as well as state law. See Doe v. Ward, 124 F. Supp. 2d 900, 911-12 (W.D. PA, 2000); Cuyler v. Adams, 449 U.S. 433, 440 (1981)”** and further held that, **“The administrative rules adopted by the Commission function as a law of the United States applicable to the member states under the terms of the Compact and through the operation of the Supremacy Clause. Carchman v. Nash, 473 U.S. 716, 719 (1985). Thus obligations imposed by a congressionally sanctioned compact and a duly authorized interstate commission are enforceable on the States. See West Virginia ex rel Dyer v. Sims, 341 U.S. 22, 30 (1951). Moreover, the terms of compacts and any rules and regulations authorized by compacts supersede substantive state laws that are conflicting. Id at p. 29.”**

## WHITE PAPER

# DISCHARGE OF SENTENCES IN LIEU OF RETAKING IS A VIOLATION OF THE COMPACT AND THE ICAOS RULES

Published November 1, 2013

The ICAOS Executive Committee has requested this ‘white paper’ resulting from several recent cases in which courts, prosecuting attorneys, and probation and parole officers have apparently lacked awareness or ignored the requirements of ICAOS and its rules in cases where retaking of a compact offender was mandated but instead the balance of the offender’s sentence was discharged. The following legal analysis has been prepared in order to serve as a resource to document both the requirements of the retaking rules and the obligations of the compact states to do so because of the legal authority and binding nature of the compact and compact rules on the member states. This document was also prepared to emphasize that discharging a sentence of a compact offender instead of retaking and returning the offender to the sending state is a violation of ICAOS rules and as a reminder of the legal consequences of non-compliance and sanctions which the Commission is authorized to impose on an offending state under the terms of the compact for violation of **any** of the ICAOS rules, including those pertaining to retaking.

The Interstate Compact for Adult Offender Supervision (ICAOS) is a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. The Interstate Commission for Adult Offender Supervision (Commission) is charged with overseeing the day-to-day operations of the ICAOS and through its rule making powers, seeks to achieve the goals of the ICAOS.

The Commission is also empowered to monitor compliance with the interstate compact and its duly promulgated rules, and where warranted to initiate interventions to address and correct noncompliance.

In several recent cases while compact offenders were awaiting retaking in the receiving state, the sending state terminated supervision and discharged the offender from probation in lieu of retaking. In one such case a receiving state submitted a violation report and case closure for an offender under ICAOS supervision from a sending state who failed to complete jail time, failed to provide urinalysis, failed to attend group drug treatment sessions, made an unauthorized change of residence, and failed to perform community service. In response to these actions the sending state accepted the ICOTS notice of violation and file closure from the receiving state informing the receiving state that a motion to revoke was being prepared and that a warrant would be issued. The offender was subsequently taken into custody in the receiving state on a nationwide, no bail warrant issued by the sending state. However, instead of retaking the offender, the sending state notified the receiving state that it was terminating supervision of the offender and quashing the warrant.

ICAOS Rule 5.103-1(a) requires that, *“Upon receipt of an absconder violation report and case closure, the sending state shall issue a warrant and, upon apprehension of the offender, file a detainer with the holding facility where the offender is in custody.”* Under subsections (b) and (c) provision is made for a probable cause hearing, if requested by the sending state, and upon such finding, *“the sending state shall retake the offender from the receiving state.”*

Despite the above rule, during the period in which the offender was awaiting retaking in the receiving state, the sending state terminated supervision and discharged the offender from probation



in lieu of retaking. While the sending state acknowledged the course of events it asserted that this did not constitute ‘dumping’ or ‘abandoning’ the offender in the receiving state because the offender had completed three-quarters of her probation (18 months of a 24 month sentence); and that even if the offender had been retaken and returned to the sending state as required by the above rule, that the sentencing Court would still have terminated her probation as having been performed “unsatisfactorily” and the offender would have been discharged and still free to return to the receiving state where she resides and has family connections including a mother and two children. Notwithstanding this defense, retaking was not optional in this case and the failure to do so was in violation of ICAOS Rules and the Compact.

While judicial immunity applies to actions taken by courts and those court staff for liability which may arise in the performance of duties which are integral to the judicial function and qualified immunity provides some protection from civil liability for prosecutors and other state officials monitoring the compact; neither judges, prosecutors nor other state officials can immunize a state from liability which results from their actions arising under the terms of an interstate compact to which the state has bound itself by legislative enactment of the compact. See *Alabama v. North Carolina*, 560 U.S. 330 (2010), also *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

By entering into this compact, the member states contractually agree on certain principles and rules and all state officials and courts are required to effectuate the terms of the compact and ensure compliance with the rules. Once entered, the terms of the compact as well as any rules and regulations authorized by the compact supersede substantive state laws that may be in conflict. See *West Virginia ex rel. Dyer*, *supra* at 29. This applies to prior law (See *Hinderlider*, *infra*, 304 U.S. at 106) and subsequent statutes of the signatory states. See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823). It is well settled that as a congressionally approved interstate compact the provisions of the ICAOS and its duly authorized rules enjoy the status of federal law. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (“The agreement is a congressionally sanctioned interstate compact within the Compact Clause and thus is a federal law subject to federal constructions.” (Citation omitted)); see also *Alabama v. Bozeman*, 533 U.S. 146 (2001) and *Reed v. Farley*, 512 U.S. 339 (1994); *M.F. v. State of N.Y. Exec. Dept. Div. of Parole*, 640 F.3d 491, 494 (2nd Cir. 2011); and *Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d 95, 103 (3rd Cir. 2008).

All of the duly promulgated rules, including those pertaining to retaking, are equally binding upon the parties to the compact. One of the axioms of modern government is the ability of a state legislature to delegate to an administrative body the power to make rules and decide particular cases. This delegation of authority extends to the creation of interstate commissions through the vehicle of an interstate compact. *Alabama v. North Carolina*, 560 U.S. 330 (2010); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). It has been held that the states may validly agree by interstate compact with other states to delegate to interstate commissions or agencies legislative and administrative powers and duties. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Scott v. Virginia*, 676 S.E.2d 343, 346 (Va. App. 2009); *Dutton v. Tawes*, 171 A.2d 688 (Md. 1961); *Application of Waterfront Commission of New York Harbor*, 120 A.2d 504, 509 (N.J. Super. 1956). Thus, rules of the compact have been legally authorized and approved by the Commission and no state that is a party to the contractually binding provisions of the compact is permitted to unilaterally modify any of these requirements.

In *Dyer*, the Court also made clear that an interstate compact cannot be “... given final meaning by an organ of one of the contracting states.” Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. See *Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). See *Wash. Metro. Area Transit Auth. v. Once Parcel of Land*, 706 F.2d 1312, 1318 (4th Cir. 1983); *Kansas City Area Transp. Auth. v. Missouri*, 640 F.2d 173, 174 (8th Cir. 1981). See also *McComb v. Wambaugh*, 934 F. 2d 474, 479 (3rd Cir. 1991); *Seattle Master Builders Ass’n v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir.

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The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with the compact's terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment to the compact (or in this case, the administrative rules) adopted by all member states in essentially the same form.

The contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legislatures pursuant to the Compact Clause. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts ..."); *see also* *West Virginia ex rel. Dyer, supra* at 33; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73 (1937), *rev'd* 304 U.S. 92 (1938).

In interpreting and enforcing compacts the courts are constrained to effectuate the terms of the agreement (as binding contracts) so long as those terms do not conflict with constitutional principles. Once a compact between states has been approved, it is binding on the states and its citizens. *See, New Jersey v. New York*, 523 U.S. 767 (1998). Thus, "Unless the compact . . . is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." *New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998), *aff'd*, 198 F.3d 1 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, in *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) the Supreme Court sustained exceptions to a special master's recommendation to enlarge the Pecos River Compact Commission, ruling that one consequence of a compact becoming "a law of the United States" is that "no court may order relief inconsistent with its express terms." However, congressional consent may change the venue in which compact disputes are ultimately litigated.

Because congressional consent places the interpretation of an interstate compact in the federal courts, those same courts have the authority to enforce the terms and conditions of the compact. No court can order relief inconsistent with the purpose of the compact. *See, New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, *affirmed*, 198 F.3d 1, 1999 (1st Cir. Mass. 1999), *cert. denied* 529 U.S. 1098 (2000). However, where the compact does not articulate the terms of enforceability, courts have wide latitude to fashion remedies that are consistent with the purpose of the compact. The U.S. Supreme Court addressed this matter observing, "That there may be difficulties in enforcing judgments against States counsels caution, but does not undermine our authority to enter judgments against defendant States in cases over which the Court has undoubted jurisdiction, authority that is attested to by the fact that almost invariably the 'States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same.'" *See, Texas v. New Mexico*, 482 U.S. 124,130, 131 (1987). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Id.* at 128.

Remedies for breach of the compact can include granting injunctive relief or awarding damages. *See e.g., South Dakota v. North Carolina*, 192 U.S. 286, 320-21 (1904); *Texas v. New Mexico*, 482 U.S. at 130 ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."). The Eleventh Amendment provides no protection to states in suits brought by other states. *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (in proper original actions, the Eleventh Amendment is no barrier, for

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In its most recent pronouncement on the subject the U.S. Supreme Court unequivocally held that obligations imposed by a duly authorized interstate commission are enforceable on the states. Moreover, such commissions may be empowered to determine when a state has breached its obligations and may, if so authorized by the compact, impose sanctions on a non-complying state. See *Alabama v. North Carolina*, 560 U.S. 330 (2010).

In addition the Court made clear that an interstate compact commission composed of the member states may be a party to a compact lawsuit under the original jurisdiction of the U.S. Supreme Court if such claims are wholly derivative of the claims that could be asserted by the party states. *Id.* Moreover the Court held that when construing the provisions of a compact, in giving full effect to the intent of the parties, it may consult sources that might differ from those normally reviewed when an ordinary federal statute is at issue, including traditional canons of construction and the Restatement (Second) of Contracts. *Alabama v. North Carolina*, *supra*.

In light of the above authority, and the fact that the explicit language of the compact requires that **“the courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact’s purposes and intent”** makes it incumbent upon judges and other state officials to understand the requirements of the ICAOS and its rules as well as the consequences of non-compliance. Under Article I of the Compact, among the purposes of the Commission is to **“monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance.”** Article V of the Compact provides that among the powers and duties of the Commission is **“to enforce compliance with the compact provisions, interstate commission rules and bylaws, using all necessary and proper means, including but not limited to, the use of judicial process.”** Article XIV (B.) provides that **“all lawful actions of the Interstate Commission, including all rules and bylaws promulgated by the interstate commission are binding upon the compacting states.”**

Moreover Article V also provides that the interstate commission has the power and duty “to establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions . . .” and “to perform such functions as may be necessary or appropriate to achieve the purposes of this compact.” Under Articles IX and XII the Compact authorizes the interstate commission, in the reasonable exercise of its’ discretion, to enforce the compact either through various means set out in Article XII, Section B which include required remedial training and technical assistance, imposition of fines, fees and costs, suspension or termination from the compact, and judicial enforcement in U.S. District Court against any compacting state in default of the compact or compact rules with the prevailing party being entitled to recover all costs of such litigation including reasonable attorney’s fees.

Under the above compact provision and pursuant to the delegated statutory authority of the compact, the Commission has also promulgated Rule 6.103 (a) under which the Interstate Commission is empowered with the authority and charged with the duty to determine whether “ . . . any state has at any time defaulted (“defaulting state”) in the performance of any of its obligations or responsibilities under this Compact, the by-laws or any duly promulgated rules . . .” and in the event such a determination is made **the Commission is empowered to “impose any or all” of the penalties set forth in that rule and for which authority is expressly provided in the above referenced provisions of the compact.**

The compact’s governing structure anticipates that enforcement of the compact through judicial process will be used only in those cases where training and technical assistance, alternative dispute resolution or fines fees and costs have been unsuccessful. However, where necessary the provisions for enforcement through federal court action to secure injunctive and other appropriate relief is a

powerful tool to secure compliance with the provisions of the compact and compact rules. Before the ICAOS statute was enacted by the states to replace the old Interstate Compact for Probationers and Parolees, the enforcement of the compact was generally left to either the goodwill of the member states or through an ill-defined and cumbersome process before the U.S. Supreme Court. Goodwill can only go so far, and the provisions of ICAOS clearly articulate a system of enforcement in which compliance with the compact can be obtained through an escalating series of alternatives culminating in federal litigation that can provide injunctive and monetary relief and recovery of attorney's fees and costs.

The judicial enforcement provisions of the compact have been utilized three (3) times since the enactment of ICAOS and activation of the Commission in 2002. Two of these cases were settled and in the remaining case, the U.S. District Court awarded attorneys' fees and costs after submission to the Court for a final decision resulting in the entry of a permanent injunction. See *ICAOS v. Tennessee Bd. of Probation and Parole*, No. 04-526 (E.D. Ky. 2005).

Citing several of the U.S. Supreme Court decisions referenced in this paper, the Court determined that jurisdiction was conferred to decide the **case "because the Compact, as a congressionally sanctioned interstate compact is federal as well as state law.** See *M.F. v. State of New York Executive Dept. Div. of Parole*, 640 F.3d 491, 75 A.L.R.6th 691 (2d Cir. 2011); *Doe v. Pennsylvania Bd. of Probation and Parole*, 513 F. 3d 95, 103 (3d Cir. 2008); *Doe v. Ward*, 124 F. Supp. 2d 900, 911-12 (W.D. PA, 2000); *Cuylar v. Adams*, 449 U.S. 433, 440 (1981)" and further held that, **"The administrative rules adopted by the Commission function as a law of the United States applicable to the member states under the terms of the Compact and through the operation of the Supremacy Clause.** *Carchman v. Nash*, 473 U.S. 716, 719 (1985). **Thus obligations imposed by a congressionally sanctioned compact and a duly authorized interstate commission are enforceable on the States.** See *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22, 30 (1951). **Moreover, the terms of compacts and any rules and regulations authorized by compacts supersede substantive state laws that are conflicting.** *Id* at p. 29."

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## WHITE PAPER

# LEGAL IMPLICATIONS OF THE INTERSTATE COMPACT OFFENDER TRACKING SYSTEM (ICOTS)

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At the request of the Interstate Commission for Adult Offender Supervision's (ICAOS) Executive Committee, the following legal analysis has been prepared in order to serve as a resource documenting the legal implications of the Interstate Compact Offender Management System (ICOTS). This is in response to questions raised by member states regarding the use of ICOTS records as official court documents. One of the ways in which states seek to use this information is as an exception to the hearsay rule under the federal rules of evidence or similar provisions of the state court rules of civil procedure. However, business records are a recognized exception to the hearsay rule.

To fully grasp the business records exception, you must first understand the **hearsay rule**, which generally forbids out-of-court statements that are offered for the truth of the matters asserted. Many jurisdictions model their hearsay rules and business records exception (partially or fully) on **Rules 801-807 of the Federal Rules of Evidence (FRE)**. Under the FRE, a document is inadmissible hearsay unless it qualifies as an exclusion or exception to the hearsay rule. For that reason (and others), understanding the business records exception is **critical** for anyone considering taking a case to trial. However, each jurisdiction may have its own version of the hearsay rule and business records exception. Therefore, proper use of the records exception requires that compact administrators are familiar with rules particular to their jurisdiction regarding how to properly introduce an exhibit into evidence as an exception to the hearsay rule.

Under the Federal Rules of Evidence, a party must show that:

- The record was **made by a person with knowledge** of the information contained in it;
- The record was **made at or near the time of the event**;
- It was the business' **regular practice to make these types of records**; and
- The record was **kept in the course of a regularly conducted activity**.

Thus, it is essential that compact administrators and others responsible for managing and using information from ICOTS understand the nature of the information and the state who is determined to be the custodian. In addition, the above-referenced criteria require a determination of which state is the custodian of the ICOTS records concerning a particular offender. Moreover, it may be advisable for the custodian to prepare a business records affidavit as the custodian of ICOTS records that are maintained in a database established under the authority of the provisions of the Interstate Compact for Adult Offender Supervision.

As an example, such an affidavit could include a brief description of the ICOTS data system and that the information concerning the offender in question is a product of criminal justice case history provided by both the sending state from which the offender transfers and the receiving state of current residence. In addition, the affiant may also document that production of the relevant record

occurred at or near the time of processing of the compact transfer request.

It is also essential to understand that data pulled on a compact activity PDF(s) is updated and current when created. The compact activity PDF(s) generate when the user clicks on them within the ICOTS application. While subsequent 'users' may make additional entries or assume responsibility for an ICOTS record, authorization of an ICOTS user account occurs in advance and may be used to identify user entries or changes. Additionally, best practices conveyed through training may involve additional notation of sufficient identifying information including the time and date of the entry to establish a 'chain of custody' or more accurately a 'chain of data entries.' Additions or changes to records received typically add information such as new aliases, new SSNs, new state IDs or even a different name if a state compact administrator makes a clerical edit to correct an error. Because an assigned officer modifying the PDF(s) may be different from the officer that created the initial compact case record, edits should include contemporaneous identifying information so that a business records affidavit may trace the 'chain of edits to data entries.' Creation of the edit chain is critical to court proceedings where the reliability of information and changes to a record is in question.

It is important for compact offices to establish that it is the regular practice of ICAOS compact administrators to produce these types of records and that the preparation of these records occurs in the "regular course of business" based upon compact rules and policies. In addition to the records and processes outlined above, compact offices may describe the ICOTS system as follows:

*ICOTS is the nationwide electronic information system of the ICAOS. The system is used by all states to track offenders who are authorized to travel or relocate across state lines. The system is also used to share information regarding offender movement under the rules of the interstate compact. In addition to serving as the main communication tool for processing compact transfer requests, ICOTS serves as a clearinghouse for compact offender information. ICOTS data is accessible as either active case information or as an historical record.*

The Compact provides that:

*The Interstate Commission shall collect standardized data concerning the interstate movement of offenders as directed through its bylaws and rules, which shall specify the data to be collected, the means of collection and data exchange and reporting requirements. See ICAOS, Article VII.*

However, nothing in the foregoing text expresses or implies that any such data collected is the property of the Interstate Commission. In fact, it is clear from the language of Article I, in which the Purpose of the Compact is set forth, that it is "the compacting states to this Interstate Compact" that have responsibility for the supervision of the adult offenders subject to the compact; and, that responsibility derives from "joint and cooperative action" including the creation of ". . . a system of uniform data collection, access to information on active cases by authorized criminal justice officials. . ." See Article I.

Consistent with the above compact provisions, Section I of the ICAOS Administrative Policy (02-2009) Record Retention and Destruction Policy provides:

*All offender records and case information entered in ICOTS by member states **is the property of the member states and is maintained according to the laws and policies of the member states.** ICOTS entries and attachment will not be disposed of without the express written permission of the member state that provided the information. [Emphasis Added]*

The Commission acts consistently with this policy and the above compact provisions. It has not made use of the ICOTS data, except as directed by the compact member states, that continue to own the information furnished in ICOTS. Moreover, since the compact states are the 'owners' of the information that is submitted to ICOTS, the compact states are responsible for the accuracy of the data and are best able to vouch for its reliability.

Accordingly, for the purpose of furnishing a 'business records affidavit' or testimony concerning the reliability of such information that it is customarily reported, retained, and exchanged with other compact state concerning offenders transferred under the compact, it is the state that furnished the ICOTS information about the offender in question that should be considered the 'custodian' of such records. The furnishing state should provide the required affidavit.

# WHITE PAPER

## LEGAL IMPLICATIONS OF REMOTE HEARINGS IN RELATION TO ICAOS

### RULES

At the request of the Interstate Compact for Adult Offender Supervision's ("ICAOS") Executive Committee, and following a roundtable discussion with various ICAOS stakeholders, the following legal analysis has been prepared to serve as a resource documenting the interaction of remote sentencing with ICAOS Rules. This is not necessarily a new concern, but the COVID-19 pandemic and the corresponding rise of video conferencing platforms in legal proceedings sparked further questions from member states concerning the use of remote hearings and their impact on the specific offender movement requirements contemplated in the Rules. These questions most frequently relate to whether remote hearings disrupt traditional practices for receiving states returning offenders to sending states and can present themselves in several different forms. Due to the increasing likelihood that some form of remote legal proceedings will become permanent fixtures in at least some jurisdictions, this resource is intended to assist member states in faithfully carrying out ICAOS Rules in this emerging platform.

In considering these issues, it is important to first remain mindful of the nature of the Compact and the way ICAOS Rules interact with state law and policy. As a general matter, congressionally approved interstate compacts (like ICAOS) enjoy the force of federal law. *Culyer v. Adams*, 449 U.S. 453, 440 (1981). By entering into the Compact, member states accordingly contractually agree to effectuate the terms of the Compact and to follow its Rules, essentially agreeing to abrogate its own laws on matters relating to the Compact. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). As a result, ICAOS Rules are binding on the member states and control over any conflict in state law or policy. See also ICAOS WHITE PAPER, Sept. 2, 2011. Member states are accordingly required to prioritize compliance with ICAOS Rules over their internal preferences and procedures to the extent any true conflict exists.

Concerning remote hearings, member states and stakeholder questions largely arise in two contexts: (1) procedures concerning the movement of sex offenders; and (2) procedures concerning absconders. Both contexts highlight the challenges member states face in implementing ICAOS Rules in the face of emerging technologies and ultimately ask when offenders must physically move across state lines. The following paragraphs address each of these instances.

#### Sex Offenders

One glaring way this issue presents itself is in the context of sex offenders who are already residents of a receiving state—that is, an offender commits an offense in the sending state, but is already physically residing in the receiving state. If the offender is not in custody and the sending state uses remote sentencing hearings, the question becomes whether ICAOS Rules permit the offender to remain in the receiving state, or if he or she must nonetheless physically travel to the sending state. Fortunately, the Rules offer some guidance for member states to consider in this analysis.

Rule 3.101-3(f), fortunately, expressly contemplates the possibility that some sex offenders may currently reside in the receiving state at the time of sentencing. This provision specifically makes consideration for "[r]eporting instructions for sex offenders living in the receiving state at the time of sentencing," and cross-references Rule 3.101-1 and Rule 3.103 [1]. In this sense, sex offenders are to be treated similarly to the other classifications of offenders enumerated within Rule 3.101-1. There



are, of course, added considerations applicable specific to sex offenders—i.e., registration, suitability of the residence, etc.—but the Rules essentially treat sex offenders in this scenario the same as other offenders who, for one reason or another, are already physically present in the receiving state at the time of sentencing.

One other consideration is the default rule that sex offenders may not be in the receiving state until after sentencing. And to be sure, Rule 3.101-3(a) somewhat definitively declares that “[a] sex offender shall not be allowed to leave the sending state until the sending state’s request for transfer of supervision has been approved, or reporting instructions have been issued, by the receiving state.” Viewed in isolation, this passage might suggest that a sex offender’s continued residence in a receiving state and the sending state’s use of a remote sentencing hearing conflicts with Rule 3.101-3(a)’s otherwise clear statement. The Rule applies, however, only to offenders who leave the sending state. If we hypothetically assume a sex offender resides and remains in the receiving state throughout the legal process with proceedings conducted remotely, then he or she will never leave the sending state, and Rule 3.101-3(a) is inapplicable in this context [2]. In that case, the offender should be evaluated under Rule 3.101-3(f).

Altogether, ICAOS Rules do envision scenarios in which sex offenders are already residing in the receiving state. By cross-referencing the Rules’ treatment of other qualified individuals who either currently reside in a receiving state or require an expedited transfer, the Compact does provide some guidance for this situation. The question then becomes whether the offender must travel to the sending state when he or she has not been arrested and the sending state intends to conduct the offender’s sentencing remotely, and in this sense, this becomes less of an issue specific to sex offenders, but more broadly applicable to any offender facing charges in a sending state but currently residing elsewhere. Here, it is again important to remain mindful of the purposes of the Compact and the twin goals of public safety and cooperation between sending and receiving states. Member states should encourage open dialogue between state court systems to ensure that, in this context, the states are clear as to who possesses supervisory jurisdiction over the offender.

### **Absconders**

Similar questions arise for offenders transferred to a receiving state that subsequently abscond. Most member state questions assume probable cause for a violation of the offender’s terms of supervision is established and that the sending state intends to adjudicate the issue through a remote hearing. In such situations, receiving states are bound under the Rules to return the offender to the sending state regardless of how the sending state intends to handle the situation.

Rule 5.103-1(c) unambiguously provides that “upon a finding of probable cause, the sending state shall retake the offender from the receiving state.” The use of “shall,” removes the sending state’s discretion, and retaking becomes mandatory under ICAOS Rules. See *Maine Comm. Health Options v. United States*, --- U.S. ---, 134 S.Ct. 1308 (2020) (Unlike the word “may,” which implies discretion, the word “shall” usually connotes a requirement). Rule 5.103-1(c) seemingly applies to any situation in which a sending state issues a warrant and probable cause is established, without consideration of the offender’s alleged violation or the sending state’s intended resolution of the issue. Of course, if any of these preconditions are not present, retaking is no longer mandatory, and the receiving state is permitted “to resume supervision upon request of the sending state.” Rule 5.103-1(d).

This understandably results in difficulties and potential inconvenience for both sending and receiving states, as well as the offenders themselves. On one hand, Rule 5.103-1 promotes the sending state’s accountability for offenders convicted and sentenced under its laws by respecting the sending state’s jurisdiction and not overwhelming a receiving state that is supervising the offender as a result of its participation in the Compact. On the other hand, the Rule seemingly makes no distinction between the severity of an offender’s violation or whether the sending state is likely to simply resume supervision in the receiving state. In many respects, these competing interests have long persisted

before the rise of remote hearings, which have only exacerbated those concerns. Short of amending the Rules, however, Rule 5.103-1(c) requires physical retaking of an absconding offender when probable cause of a violation is established.

### **Conclusion**

Remote hearings and legal proceedings are relatively new phenomena. Increased use of remote options presents difficult and unanticipated concerns in member state relations and interpretation of ICAOS Rules. Fortunately, the Rules were carefully crafted to conform to the Compact's dual goals of encouraging cooperation among the member states while promoting public safety. As these technological changes become permanent fixtures to the criminal justice system (in at least some jurisdictions), further clarity from ICAOS to member states or adjustments to existing protocols may be warranted, but the Rules do generally provide some guidance to states in navigating the post-COVID legal environment.

### **Q & A**

Q: Does remote sentencing of a sex offender violate Rule 3.101-3 if the offender is in the receiving state when sentenced?

A: No this would not be a violation of Rule 3.101-3, the offender is not 'leaving the sending state' as assumed by the rule.

Q: In consideration of the above question and answer, does remote sentencing of a sex offender provide a loophole in the rules or allow states to circumvent the compact rules for sex offenders, specifically Rule 3.101-3?

A: No, the answer provided only addresses whether the offender's presence in a receiving state at sentencing violates the rules, addressing 3.101-3 (a) only. Prior to sentencing, the rules do not apply. Therefore, the rules cannot dictate procedures for sentencing, including whether remote or in-person sentencing occurs.

Q: If a sex offender is sentenced remotely while physically in the receiving state and the sex offender's current residence violates local laws (e.g. too close to a school, park, etc..) do reporting instructions have to be approved?

A: A revision to Rule 3.101-3, effective April 1, 2020, clarifies the protocol for issuing reporting instructions for sex offenders 'living in the receiving state at the time of sentencing.' Having established that remote hearings are allowable in this circumstance, it is important states remain mindful of the purposes of the Compact and the twin goals of public safety and cooperation between sending and receiving states. When issuing reporting instructions for sex offenders, the rule makes it incumbent on receiving states to evaluate how they handle similar sex offenders sentenced in their jurisdiction to ensure consistent treatment and procedures are applied. For example, immediate denial of reporting instructions would not be appropriate in such instances where a similar sex offender convicted in the receiving state may be afforded time to secure a new residence that is not in violation of sex offender laws. Cooperation/communication between sending and receiving states should be of utmost importance in these matters as to ensure the sex offender is not displaced or subjected to unnecessary movement/return.

Q: Does the sending state have discretion to adjudicate a violation of an offender's supervision through a remote hearing if the sending state is likely to resume supervision in the receiving state?

A: While ICAOS rules do allow for remote hearings to adjudicate a violation, it is important for states to cooperate, involving key stakeholders and decision makers when navigating these situations. As a

receiving state may require physical retake of an offender under the rules in certain violation situations, knowing the sending state's intent in disposing of a violation is an important consideration. For example, if it is unlikely the sending state will pursue revocation for the violation and a plan of supervision exists in a receiving state, retaking the offender just to simply re-transfer back to a receiving state may not conform to the Compact's goals. For analysis on offenders transferring from your state after being retaken, see the '[Offenders Retaken Then Re-transferred](#)' dashboard.

Q: In what ways could states engage their courts or prosecutors to better navigate remote hearings?

A: States can proactively engage their state court administrators to establish procedures for remote hearings and develop clear lines of communication. This allows for the sharing of information and documentation when remote hearings occur. State may also consider inviting a representative from the district attorney's office to sit on their state council. This provides states with an advocate that can assist in issues that may arise from the use of remote hearings and help keep compact members informed of court procedures.

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[1] Rule 3.101-3(f) limits application of Rules 3.101-1 and 3.103 to sex offenders by requiring the receiving state to issue reporting instructions within 5 business days, rather than the longer timeframes otherwise presented in those Rules. See Rule 3.101-3(f)(1).

[2] Outside of a remote adjudication, this rules analysis might be different. If the sending state compels the offender to be physically present for his or her sentencing, then the offender submits to the sending state's jurisdiction and would necessarily be "leaving" the sending state to return to his or her residence. In this situation, Rule 3.101-3(a) would again apply. This may be something of a pedantic distinction fit for a future evaluation of ICAOS Rules and their interplay with emerging technologies. Nevertheless, this appears to be the consequence of the current iteration of Compact Rules.

