



Interstate Commission for Adult Offender Supervision

Ensuring Public Safety for the 21st Century

ICAOS Bench Book for Judges

and Court Personnel

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TABLE OF CONTENTS

What's New – Latest Developments in ICAOS

Introduction

Quick Reference Guide

Chapter 1 – General Law of Interstate Compacts

- 1.1 Status of Interstate Compacts
- 1.2 Compacts Are Not Uniform Laws
- 1.3 Compacts Are Not Mere Administrative Agreements
- 1.4 Delegation of State Authority to an Interstate Commission
- 1.5 Congressional Consent Requirement
- 1.6 Considerations in Obtaining Consent
- 1.7 Interaction of Congress's Legislative Authority with the Compact Clause
- 1.8 Effect of Congressional Consent
- 1.9 Withdraw of Congressional Consent
- 1.10 Federal Enforcement of Interstate Compacts
- 1.11 Eleventh Amendment Issues for Compact Agencies
- 1.12 Judicial Interpretation of Interstate Compacts

Chapter 2 – The Interstate Compact for Adult Offender Supervision (ICAOS)

- 2.1 History of the Interstate Compact for Probation and Parole (ICPP)
- 2.2 Why the New Interstate Compact for Adult Offender Supervision?
- 2.3 General Principles Affecting Movement of Offenders
- 2.4 Historical Development of the ICAOS
- 2.5 Purpose of the ICAOS
- 2.6 Effect of ICAOS on the States
- 2.7 Adoption and Withdrawal
- 2.8 Effect of Withdrawal
- 2.9 Key Features of the ICAOS
- 2.10 Key Definitions in the ICAOS
- 2.11 Interstate Commission
 - 2.11.1 Primary Powers of the Interstate Commission
 - 2.11.2 Rulemaking Powers
- 2.12 Enforcement of the ICAOS and its Rules
 - 2.12.1 General Principles of Enforcement
 - 2.12.2 Judicial Enforcement
- 2.13 Immunity, Duty to Defend, and Indemnification

Chapter 3 – The ICAOS Implications for the Courts

- 3.1 Key Definitions in the Rules
- 3.2 Judicial Considerations
 - 3.2.1 Offender Eligibility Criteria
 - 3.2.1.1 Offenders Covered by the ICAOS

- 3.2.1.2 Eligibility of Offenders, Residency Considerations – General Overview
- 3.2.1.3 Specific Rules for Military Personnel and Their Families
- 3.2.1.4 Employment Transfers of Offenders and Their Families
- 3.2.1.5 Persons Not Covered by the ICAOS
- 3.2.1.6 Sentencing Considerations
 - 3.2.1.6.1 Deferred Sentencing
 - 3.2.1.6.2 Deferred Prosecution
 - 3.2.1.6.3 Release from “Shock” Programs
 - 3.2.1.6.4 What Constitutes Second and Subsequent Conviction of Driving While Impaired
- 3.2.2 Special Considerations
 - 3.2.2.1 Out-of-State Treatment
 - 3.2.2.2 Duration of Supervision
 - 3.2.2.3 Type of Supervision in Receiving State & Disabled Offenders
 - 3.2.2.4 Time of Transfer
 - 3.2.2.5 Expedited Transfers
 - 3.2.2.6 Temporary Travel Permits
 - 3.2.2.7 Reporting Instructions for Probationers who are Living in a Receiving State at the Time of Sentencing
 - 3.2.2.8 Transfer of Supervision of Sex Offenders
 - 3.2.2.9 Entities Covered by the ICAOS
- 3.3 Other Considerations
 - 3.3.1 Victims’ Rights
 - 3.3.2 Conditions
 - 3.3.2.1 General Considerations
 - 3.3.2.2 Authority to Impose Conditions
 - 3.3.2.3 Limitations on Conditions
 - 3.3.2.4 Sex Offender Registration and Exclusion Zones
 - 3.3.2.5 Pre-acceptance Testing
 - 3.3.2.6 Post-acceptance Testing
 - 3.3.2.7 Summary
 - 3.3.3 Restitution
 - 3.3.4 Fees
 - 3.3.5 Continuing Jurisdiction over Offender as Between the Sending & Receiving States
 - 3.3.6 Implications, Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Chapter 4 – Returning Offenders to the Sending State

- 4.1 Status of Offenders Subject to the ICAOS
- 4.2 Waiver of Formal Extradition Proceedings
 - 4.2.1 Waiver of Extradition under the ICAOS
 - 4.2.2 Uniform Extradition Act Considerations
- 4.3 Violation Reports Requiring Retaking
- 4.4 Retaking

- 4.4.1 Offenders Convicted of a Violent Crime
- 4.4.2 Arrest and Detention of Offenders in the Receiving State
- 4.4.3 Hearing Requirements
 - 4.4.3.1 General Considerations
 - 4.4.3.2 Right to Counsel
 - 4.4.3.3 Specific Considerations for Hearing under the ICAOS
 - 4.4.3.4 Probable Cause Hearings when Violations Occurred in another State
- 4.4.4 Bail Pending Return
- 4.4.5 Post Transfer Change in the Underlying Circumstances
- 4.5 Revocation or Punitive Action by the Sending State – Violation of Conditions
- 4.6 Arrest of Absconders

Chapter 5 – Liability and Immunity Considerations for Judicial Officers and Employees

- 5.1 State Sovereign Immunity – Generally
- 5.2 Liability Considerations under 42 U.S.C. § 1983
- 5.3 Liability Associated with Discretionary Acts
- 5.4 Liability Associated with Ministerial or Operational Acts
- 5.5 Immunity Waivers
- 5.6 Types of “Acts” Under the ICAOS
- 5.7 Judicial Immunity
- 5.8 Qualified Immunity
- 5.9 Negligent Supervision Claims
- 5.10 Summary of Cases Discussing Liability in the Context of Supervision
 - 5.10.1 Cases Finding that Liability May Be Imposed
 - 5.10.2 Cases Rejecting Liability

References available at www.interstatecompact.org

- Flow Charts *Training Resources*
 - Eligibility for Transfer Part I: Nature of the Offense
 - Eligibility for Transfer Part II: Sentencing/Supervision Considerations
 - Eligibility for Transfer Part III: Deferred Sentencing Considerations
 - Acceptance of Transfer by Receiving State: Felony
 - Acceptance of Transfer by Receiving State: Misdemeanor
- Model Act, Interstate Compact for Adult Offender Supervision
- Bylaws of the Interstate Commission for Adult Offender Supervision
- Rules of the Interstate Commission for Adult Offender Supervision
- Disclosures Permitted Under HIPAA (45 C.F.R. 164.512)
- Advisory Opinions of the Interstate Commission for Adult Offender Supervision

WHAT'S NEW – LATEST DEVELOPMENTS IN THE ICAOS

2017

Since the last update of the *Benchbook for Judges and Court Personnel* in 2016, the Interstate Commission considered and approved several rule amendments related to violations, sanctioning and retaking. These changes are summarized and justified as follows.

Summary of Rule Amendments:

- *Rule 1.101*
 - *Rule 3.108*
 - *Rule 4.101*
 - *Rule 4.103*
 - *Rule 4.103-1*
 - *Rule 4.106*
 - *Rule 4.109*
 - *Rule 4.109-1*
 - *Rule 5.103*
 - *Rule 5.108*
-
- Enhances community safety by holding interstate probationers and parolees accountable for their behaviors in the receiving state, consistent with the supervision of probationers and parolees in the receiving state. This establishes a single standard of supervision in the respective states for all probationers and parolees under supervision.
 - Realizes and implements the single standard of supervision described in the enabling legislation-the Crime Control Act of 1934 and the Interstate Commission Rules of 1937.
 - Enhances community supervision by eliminating the three significant violations rules and recognizes that a single act or pattern of non-compliance with the terms and conditions of supervision may now serve as the basis for filing a request for violation with the sending state, provided that similar behavior demonstrated by individuals sentenced in the receiving state would result in a violation and request for revocation in the receiving state.
 - Affirms the authority of receiving state to impose terms and conditions and supervise interstate transfers (probationers and parolees) as they would individuals sentenced in the receiving state, including the use of incentives and graduated sanctions.
 - Promotes the use of incentives and graduated sanctions in all states consistent with the principles of evidence-based-practice. The requirement for receiving states/supervising states to document the use of incentives and graduated responses in ICOTS establishes an expectation and incentivizes evidence-based-practices.

- Documentation of supervision practices in ICOTS, including the use of incentives and graduated responses, strengthens the case presented by the receiving state at the probable cause hearing, if one is conducted.
- Documentation of supervision practices supports the violation hearing and the basis for revocation in the sending state and reduces the likelihood of the sending state allowing the probationer/parolee to return immediately following the violation hearing.

INTRODUCTION

INTERSTATE COMPACT LAW -- A HISTORICAL PERSPECTIVE

Interstate compacts are rooted in the nation's colonial past where agreements similar to modern compacts were utilized to resolve inter-colonial disputes, particularly boundary disputes. The colonies and crown employed a process by which colonial disputes would be negotiated and submitted to the crown through the Privy Council for final resolution. This created a long tradition of resolving state disputes through negotiation followed by submission of the proposed resolution to a central authority for its concurrence. This "compact process" we now have as formalized in the Articles of Confederation. Article VI provided that, "No two or more states shall enter into any treaty, confederation or alliance whatever without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."

The founders were so concerned over managing interstate relations and the creation of powerful political and regional allegiances that they barred states from entering into "any treaty, confederation or alliance whatever" without the approval of Congress. The founders also constructed an elaborate scheme for resolving interstate disputes. Under Article IX of the Articles of Confederation, Congress was to "be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever[.]"

The concern over unregulated interstate cooperation resulted in the adoption of the "compact clause" in Article I, sect. 10, cl. 3 of the U.S. Constitution, which is a carry-over from the Articles of Confederation. That clause provides that "No state shall, without the consent of Congress...enter into any agreement or compact with another state, or with a foreign power[.]" In effect, the Constitution does not so much authorize states to enter into compacts as it bars states from entering into compacts absent congressional consent. However, unlike the Articles of Confederation in which interstate disputes were resolved by Congress, the Constitution vests ultimate resolution of interstate disputes in the Supreme Court either under its original jurisdiction or through the appellate process. For a thorough discussion on the history of interstate compacts from their origins to the present, *see generally*, Michael L. Buenger & Richard L. Masters, The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems, 9 ROGER WILLIAMS U. L. REV. 71 (2003), also cited in Doe v. Pennsylvania Board of Probation & Parole, 513 F.3d 95, 105, fn7 (2008). *See also*, Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution – A Study in Interstate Adjustments, 34 YALE L.J. 685 (1925); CAROLINE BROWN, MICHAEL L. BUENGER, MICHAEL H. MCCABE & RICHARD L. MASTERS, THE EVOLVING USE AND THE CHANGING NATURE OF INTERSTATE COMPACTS; A PRACTITIONER'S GUIDE (ABA Publishing 2007).

QUICK REFERENCE GUIDE

This is intended to be a quick reference guide on important Compact issues. If greater discussion or guidance would be helpful please refer to the bench book which is much more thorough.

Advisory Opinions are also available to address some frequently asked questions. Please check with the National Office for further information as needed.

MODEL INTERSTATE COMPACT FOR THE SUPERVISION OF ADULT OFFENDERS

Article XIX Binding Effect of Compact and Other Laws

Section A Other Laws

Nothing herein prevents the enforcement of any other law of a Compacting state that is not inconsistent with this Compact.

All Compacting states' laws conflicting with this Compact are superseded to the extent of the conflict.

Section B Binding Effect of the Compact

All lawful actions of the Interstate Commission, including all Rules and By-laws promulgated by the Interstate Commission, are binding upon the Compacting states.

The requisite number of states approved the Interstate Compact on Adult Offender Supervision ("ICAOS") in 2002.

- Compacts such as ICAOS have the authority of federal law and supersede any state law to the contrary. All courts and administrative bodies must give due effect to a compact.
- The ICAOS authorizes the adoption of rules by the Interstate Commission for Adult Offender Supervision. These rules carry the weight of federal law.

Judicial Enforcement (See Section 2.12.2)

All courts and executive agencies in each member state must enforce the Compact and take all necessary actions to effectuate its purposes. *See, Art. IX, § A.*

- ❖ The ICAOS allows for enforcement of the Compact on member states for noncompliance by:
 - Fines and fees;
 - Remedial training and technical assistance;
 - Legal enforcement;
 - Suspension or termination of membership in the Compact.

The Compact and its Implications for the Courts

The rules of the Commission are applicable on states by the terms of the Compact. Rules adopted by the Commission have the force and effect of statutory law and all courts and executive agencies must take all necessary actions to enforce their application. *See, Art. V.* See also *Scott vs. Virginia, infra.*; *State v. DeJesus, 953 A.2d 45 (Conn. App. 2008)* The failure of state, judicial, or executive branch officials to comply with the terms of Compact and its rules would result in the state defaulting on its contractual obligations under the Compact and can lead the Commission to take remedial or punitive action against a state, including suit in federal court for injunctive relief. *See, Art. VIX, § A.*

- ❖ ICAOS does not impact the judicial sentencing of an offender, only how the offender is supervised over state lines.

Offenders Covered by the Compact (See Section 3.2.1.1 & Referenced Flow Charts)

An adult offender does not have to be in formal probation or parole status to qualify for transfers and supervision under the ICAOS. This broad definition of “offender” was intended to correct problems under the old Compact.

To initially qualify for transfer of supervision under the ICAOS, the offender must:

- (1) be subject to some form of community supervision, including supervision by a court, paroling authority, probation authority, treatment authority or anyone or agency acting in such a capacity or under contract to provide supervision services; and
- (2) have committed a covered offense as defined by the rules.

- ❖ Eligibility for Transfer includes:
 - Sentence or release from incarceration with community-based supervision and the offender is:

- A felon, or
- misdemeanor whose sentence includes one year or more of supervision and the underlying offense includes one or more of following:
 - (1) an offense in which a person has incurred direct or threatened physical or psychological harm;
 - (2) an offense that involves the use or possession of a firearm;
 - (3) a second or subsequent misdemeanor conviction of driving while impaired by drugs or alcohol;
 - (4) a sexual offense that requires the offender to register as a sex offender in the sending state.

Eligibility of Offenders, Residency Requirements (See Section 3.2.1.2)

Transfer of offenders falls in one of two categories:

- (1) mandatory acceptance transfers and
- (2) discretionary acceptance transfers.

The authority to approve an offender for out of state placement lies exclusively within the discretion of the sending state. (Rule 3.101) An offender has no constitutional right to transfer. Rule 3.101 creates an obligation on a receiving state to accept an offender for supervision, *once the sending state has made a determination to transfer supervision*. The sending state's denial of the transfer of supervision would appear absolute and entitled to deference by the courts.

Rule 3.101

At the discretion of the sending state, an offender shall be eligible for transfer of supervision to a receiving state under the Compact, and the receiving state shall accept transfer, if the offender:

- (a) has more than 90 days or an indefinite period of supervision remaining at the time the sending state transmits the transfer request; and
- (b) has a valid plan of supervision; and
- (c) is in substantial compliance with the terms of supervision in the sending state; and
- (d) is a resident of the receiving state; or
- (e)
 - (1) has resident family in the receiving state who have indicated a willingness and ability to assist as specified in the plan of supervision; and
 - (2) can obtain employment in the receiving state or has a means of support.

- ❖ **Discretionary Acceptance** – The receiving state may accept the transfer of any other eligible offenders not covered by Rule 3.101 where acceptance in the receiving state would support successful completion of supervision, rehabilitation of the offender, promote public safety, and protect the rights of victims.

A receiving state can consent to accept supervision of an offender who does not meet the mandatory acceptance criteria. However, the acceptance of supervision under the circumstances other than those above is discretionary with the receiving state.

A discretionary transfer requires the consent of both sending and receiving states and the failure to obtain such consent prohibits the transfer of supervision.

❖ **Imposing Conditions**

- Both the sending and receiving states can impose conditions.
- Conditions must be reasonably related to the goal of offender rehabilitation and/or promotion of public/community safety. Refer to 3.3.2.
- Receiving state may impose those conditions that it would otherwise have authority to impose on in-state offenders.
- Conditions imposed by a receiving state can only be imposed after acceptance of an offender for supervision and cannot be such as to interfere with the orderly transfer of offenders subject to the Compact or act to create unreasonable barriers to the interstate movement of offenders subject to the Compact.

❖ **Acceptance of Transfer –** Of particular concern to judges may be the investigation period. Under Rule 3.104 a receiving state has up to 45 days to investigate and respond to a sending state's request to transfer.

With limited exceptions, a sending state shall not allow an offender to relocate without an explicit acceptance of the offender by the receiving state. (See, Rule 2.110.) In the absence of an exception provided in the rules, allowing the offender to relocate prior to the acceptance may trigger two events:

- (1) the sending state shall order the offender to return to the sending state; and
- (2) The receiving state can reject the placement. If the placement is rejected, the sending state would have to reinitiate the transfer request. Practically this means that no court or paroling authority may authorize an offender to relocate before acceptance by the receiving state, unless the transfer or supervision is accomplished pursuant to an expedited transfer under Rule 3.106 or under Rules 3.101-1 or 3.103.

(1) **Supervision in receiving state**

- A receiving state shall supervise offenders consistent with the supervision of other similar offenders sentenced in the receiving state, including the use of incentives, corrective actions, graduated responses and other supervision techniques.

- A receiving state shall supervise an offender transferred under the Interstate Compact for a length of time determined by the sending state.

As a precondition to transfer, the offender must agree to waive extradition from any state to which the offender may have absconded while under supervision in the receiving state. States under the Compact waive all legal requirements regarding extradition of offenders who are fugitives from justice. (Rule 3.109)

Persons Not Covered by the ICAOS (See Section 3.2.1.5)

Offenders with three months or less of supervision and offenders not subject to some form of community supervision are generally free to travel. This is because the duration of supervision does not warrant further consideration in the receiving state or because the nature of the offense is such that a court did not see continuing supervision a necessary element of the sentence.

Sentencing Considerations (See Section 3.2.1.6)

From the judiciary's perspective the relevant inquiry in determining whether ICAOS is a factor centers on two considerations: (1) what did the court do and, (2) was the end consequence of the courts action community supervision. Therefore, ICAOS has application in a broad range of cases and dispositions beyond traditional conviction followed by probation.

Deferred Sentencing (See Section 3.2.1.6.1 & Referenced Flow Charts)

In addition to traditional cases where an offender is formally adjudicated and placed on probation, the ICAOS also applies in so-called "suspended sentencing," "suspended adjudication," and deferred sentencing contexts. (Rule 2.106) The operative consideration for purposes of Rule 2.106 is whether the court has, as a condition precedent, made some finding that the offender has indeed committed the offense charged.

A sentence that essentially states "go and commit no other offense" and that does not include supervision and reporting requirements does not appear to create a "supervision" relationship between the offender and the court sufficient to trigger the ICAOS. However, to the extent that reporting requirements may be imposed on the offender, even if only to the court, that offender may be subject to the ICAOS.

Deferred Prosecution (See Section 3.2.1.6.2)

At issue in deferred prosecutions is whether the offender is covered by the ICAOS because there is no conviction. However, the Commission has interpreted its rules to apply to such offenders. See, Advisory Opinion 6-2005.

An offender in a deferred prosecution program that includes some of these conditions:

- (1) offender must make material and binding factual admissions;
- (2) if violation occurs the offender is returned to court in jeopardy of entry of conviction;
- (3) offenders as part of plea had to waive material rights to future court proceedings, would be subject to the compact. Offenders not required to meet some of the foregoing requirements is *not* covered by the compact.

Out-of-State Treatment (See Section 3.2.2.1)

Treatment in lieu of supervision or treatment as supervision.

In such cases courts may be inclined to defer sentence and place an offender on “bench probation.” Successful completion of the treatment program is generally a condition of the supervision program. The difficulties arise with these programs when an offender in one state is required to enroll in a treatment program only available in another state and whether such situations constitute circumstances that would trigger the ICAOS.

The Commission has determined that an offender who was required to participate in a treatment program in another state was subject to the Compact. (Advisory Opinion 3-2005)

Courts should be exceedingly cautious in sentencing offenders, particularly high-risk offenders, to treatment programs in other states as a means of circumventing the ICAOS. Such sentences may trigger the ICAOS putting the offender in an impossible situation of being required to complete the treatment program but not being able to transfer because the receiving state has declined the case.

Time of Transfer (See Section 3.2.2.4)

To the extent that an offender is eligible to transfer under the Compact, a court *does not* have authority to order the offender to the receiving state prior to acceptance.

Assuming the offender is eligible for transfer pursuant to Rule 3.101, several Commission rules governing transfers apply and should be of particular interest to the courts. Rule 3.102 requires that a sending state send to the receiving state an application for transfer of supervision and all pertinent information *prior to allowing the offender to leave the sending state*. Rule 3.102 also prohibits any travel other than employment travel or to attend medical appointments in a receiving state prior to the receiving state’s reply to the request for transfer unless the offender is granted reporting instructions per Rules 3.101-1, 3.103 or 3.106.

The receiving state has 45 calendar days to undertake an investigation and review the proposed transfer (Rule 3.104). Failure of the court personnel to transmit all necessary

information to their Interstate Compact Office may substantially delay the processing of the transfer request.

Expedited Transfers (See Section 3.2.2.5)

Expedited transfers are allowed on a “pending acceptance” basis. To qualify for expedited transfer the sending and receiving state *must agree* that an emergency exists justifying such a transfer. (Rule 3.106)

Reporting Instructions for Probationers Living in the Receiving State at the Time of Sentencing or after Disposition of a Violation or Revocation Proceeding (See Section 3.2.2.7)

Rule 3.103 allows an offender who is living in the receiving state at the time of initial sentencing or after disposition of a violation or revocation proceeding to receive reporting instructions pending the investigation of the transfer request.

Transfer of Supervision of Sex Offenders (See Section 3.2.2.8)

Rule 3.101-3 and the addition to the ICAOS Rule of a definition of “sex offender” (See Rule 1.101) address special considerations in transferring supervision of individuals who comprise this offender population. This rule specifically restricts travel for qualifying individuals pending a transfer request. It also promotes comprehensive information sharing to determine supervision and risk levels in a receiving state. In addition, these rules provide exceptions for probationers meeting criteria of Rule 3.103, denying travel permits without reporting instructions from a receiving state as well as allowing a receiving state to deny such a request if a proposed residence is deemed invalid due to existing state law or policy.

Entities Covered by the ICAOS (See Section 3.2.2.9)

The requirements of the ICAOS extend to courts, probation authorities, paroling authorities and other criminal justice agencies having responsibility for supervising offenders and to those operating under contract with such entities. The requirement would also extend to any entity acting on behalf of courts or corrections authorities, including private contractors. See Paull v. Park County et al., 218 P.3d 1198 (Mont. S. Ct. 2009).

General Considerations (See Section 3.3.2.1)

The receiving state can *only* impose those conditions that it would have imposed on similar in-state offenders *See*, Rule 4.103(a). A receiving state cannot impose conditions on out-of-state offenders as a means of avoiding its general obligations under the compact nor may a receiving state preemptively impose conditions prior to acceptance as a means of preventing a transfer. *See*, ICAOS v. Tennessee Bd. of Probation and Parole;

also [Munsch v. Evans, 2012 WL 528135 \(E.D. N.Y. 2012\)](#); [State v. Warner, 760 N.W.2d 209 \(Iowa Ct. App. 2008\)](#).

A sending state can impose a condition on an offender as a condition of transferring supervision. However, the receiving state must be given an opportunity to inform the sending state of its inability to meet a condition. The receiving state's inability to enforce a condition requires the sending state to either: (1) withdraw the condition and allow the offender to relocate to the receiving state, or (2) withdraw the transfer request and continue to supervise the offender in the sending state.

Limitations on Conditions (*See Section 3.3.2.3*)

Notwithstanding the authority of the sending and receiving state to impose conditions on an offender, several courts have determined that certain conditions, such as banishment from a geographical area, are not appropriate.

Sex Offender Registration and Exclusion Zones (*See Section 3.3.2.4*)

Courts have generally upheld sex offender registration requirements for offenders whose supervision is transferred under an interstate compact so long as such registration requirements are not discriminatory. Thus, a receiving state may impose sex offender registration requirements so long as they are the same as imposed on in-state offenders.

Exclusion zones are arguably legal so long as the burden imposed applies equally to in-state and out-of-state offenders.

Pre-Acceptance Testing (*See Section 3.3.2.5*)

An offender who is otherwise eligible for transfer under Rule 3.101 (mandatory transfer) may *not* be required to submit to psychological testing by the receiving state as a condition of acceptance of transfer.

Summary (*See Section 3.3.2.7*)

In sum, while both the sending state and receiving state possess authority to impose conditions as an element of probation, parole, or transfer under the ICAOS such conditions must

- (1) be reasonably related to the underlying offenses,
- (2) aid in offender rehabilitation,
- (3) not unduly interfere with fundamental liberty interests, including the right to meaningful employment, and
- (4) be designed to promote community safety.

Restitution (*See Section 3.3.3*)

ICAOS rules are silent on matters of restitution since it is a sentencing matter. Therefore, it is a matter governed entirely by the sending state. However, Rule 4.108 clearly relieves the receiving state of the obligation to collect fines, fees, and costs of restitution. The sending state retains exclusive authority – and the obligation – to manage the financial portion of an offender’s sentence. The receiving state’s only obligation is to notify the offender of a default.

Failure to meet financial obligations is a breach of the supervision agreement and can result in the sending state retaking the offender and revoking probation or parole.

Fees (See Section 3.3.4)

Rule 4.107 authorizes the collection of fees from offenders subject to the compact. Pursuant to Rule 4.107 (a), the sending state may impose a transfer application fee on an offender. Pursuant to Rule 4.107 (b), the receiving state may impose a supervision fee on an offender. See Holloway v. Cline, 154 P.3d 557 (Kan. App. 2007) (imposition of a \$25.00 per month interstate compact supervision fee without providing a hearing does not deprive a compact offender of due process of law).

A sending state is not prohibited from imposing other fees on offenders so long as those fees are not related to supervision. Collection of fees is not the responsibility of the receiving state.

Continuing Jurisdiction over Offender as Between the Sending & Receiving States (See Section 3.3.5)

The transfer of an offender’s supervision pursuant to an interstate compact does not deprive the sending state of jurisdiction over the offender, unless it is clear from the record that the sending state intended to relinquish jurisdiction.

The Compact does not give a receiving state the authority to revoke the probation or parole imposed by authorities in a sending state but may impose conditions or sanctions in lieu of revocation (with proper notification to the sending state) on an offender in violation of his or her conditions of supervisions if such action(s) would be imposed on a similar in-state offender. A receiving state may, independent of the sending state, initiate criminal proceedings against offenders who commit crimes while in the state.

HIPAA (See Section 3.3.6)

Persons subject to transfer under ICAOS may have a protected privacy interest in certain health care information. However HIPAA specifically provides a law enforcement exception to the requirement that a written release be obtained from an offender prior to disclosure of protected health care information.

Status of Offenders Subject to ICAOS (See Section 4.1)

Courts have held that because probation, parole or conditional pardon is not something an offender can demand but rather extends no further than the condition imposed, revocation of the privilege generally does not deprive an offender of any legal right. Rather, revocation merely returns the offender to the same status enjoyed before probation, parole or conditional pardon was granted.

It should also be noted that although an offender does not have a right to supervised release, when granted, certain liberty interests attach such that an offender is entitled to some minimum due process prior to revocation. *See, Morrissey v. Brewer*. 408 U.S. 471 (1972).

A person's status as an out-of-state offender does not mean that such person possesses no constitutional rights. Offenders may have some minimum rights of due process in limited circumstances.

Waiver of Extradition under the ICAOS (See Section 4.2.1)

Principal among the provisions of the ICAOS is the member states' waiver of formal extradition requirements for return of offenders who violate the terms and condition of their supervision. The ICAOS specifically provides that:

The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this Compact and By-laws and Rules promulgated hereunder.

Additionally, pursuant to Rule 3.109 an offender is *required to waive extradition* as a condition of transferring supervision. The rule provides:

- (a) An offender will execute a waiver of extradition from any state to which the offender may abscond while under supervision in the receiving state.
- (b) States that are parties to this compact waive all legal requirements to extradition of offenders who are fugitives from justice.

Violation Reports Requiring Retaking (See Section 4.3)

A receiving state is obligated to report to authorities in the sending state within 30 calendar days of the discovery or determination that an offender has engaged in behavior requiring retaking by submitting a violation report. "Behavior requiring retaking" is defined in Rule 1.101 as an act or pattern of non-compliance with conditions of supervision that could not be successfully addressed through the use of documented corrective action or graduated responses and would result in a request for revocation of supervision in the receiving state.

However, the rule indicates that “behavior requiring retaking” is determined under the laws of the receiving state. Moreover, a sending state may be required to retake an offender for non-compliant behavior that, had they occurred in the sending state, may not have constituted grounds for revocation.

Retaking (See Section 4.4)

With limited exceptions, the decision to retake or order the return of an offender rests solely in the discretion of the sending state. However, if an offender has been charged with a subsequent felony or violent offense in the receiving state, the sending state may *not* retake the offender until the criminal charges are dismissed, sentence has been satisfied or the offender is released on supervision, unless the sending and receiving states mutually agree to the retaking or return.

The discretion of the sending state to retake an offender is limited by several factors.

- (1) A sending state must retake an offender upon request of the receiving state or subsequent receiving state and conviction for a felony offense or violent crime. See Rule 5.102. The sending state can retake only after the offender completes any term of incarceration or is placed on probation.
 - *A sending state, at its discretion, may conduct a violation hearing for an offender who is convicted and incarcerated for a new crime outside of the sending state. The sentence imposed for the violation may be satisfied or partially satisfied, with approval of appropriate authorities and the offender, while incarcerated in the other state. See Rule 5.101-2*
- (2) A sending state is required to retake an offender upon request of the receiving state and showing that the offender has engaged in behavior requiring retaking. It is important to note that the gravity of the violating act or pattern of non-compliance is measured by the standards of the receiving state. So if the violating act or pattern of non-compliance is documented showing the behavior could not be successfully addressed through the use of corrective action or graduate responses and meets the revocation standards of the receiving state, the sending state is obligated to retake.
- (3) A sending state must retake an offender who is found to be an absconder.

Once the authority of the sending state’s officers is established and due process requirements met, authorities in the receiving state may *not* prevent, interfere with or otherwise hinder the transportation of the offender back to the sending state. See, Rule 5.109.

Post Transfer Hearing Requirements (See Section 4.4.3)

General Considerations

Conditional release of offenders is a privilege not guaranteed by the Constitution; it is an act of grace. Offenders do however enjoy some due process particularly with regard to revocation, which impacts the retaking process. Several U.S. Supreme Court cases outline due process rights for offenders in a violation context. *See, Morrissey v. Brewer*, 408 U.S. 471 (1972), (parolee entitled to revocation hearing); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probationer entitled to a revocation hearing). The U.S. Supreme Court has acknowledged that while some rights are afforded, they are not entitled to the “full panoply of rights” enjoyed by defendants in a pre-trial status.

Right to Counsel

Under the rules of the Commission a state is not specifically obligated to provide counsel in circumstances of revocation or retaking. However, particularly with regard to revocation proceedings, a state should consider providing counsel to an indigent offender if he or she may have difficulty in presenting their version of their case. *Gagnon*, supra at 788.

The requirement to provide counsel would generally not be required in the context where the offender is being retaken and the sending state has no intention of revoking conditional release based on violations that occurred in the receiving state. No liberty interest is at stake because the offender has no right to be supervised in another state.

Specific Considerations for Probable Cause Hearings under ICAOS (See Section 4.4.3.3)

It is important to emphasize the distinction between retaking that may result in revocation and retaking that will not result in revocation. Where there is no danger that the sending state will revoke the offender, the offender is not entitled to a probable cause hearing. There is no right to be supervised in another state.

Where the retaking of an offender may result in revocation of conditional release by the sending state, the offender is entitled to the basic due process considerations that are the foundation of the Supreme Court’s decisions in *Morrissey* and *Gagnon* and the rules of the Commission.

An offender subject to retaking that may result in revocation *shall* be afforded the opportunity for a probable cause hearing in the receiving state consistent with due process requirements.

An offender must be afforded a probable cause hearing when subject to retaking due to non-compliant behavior, other than commission of a new criminal offense, and revocation of parole or probation by the sending state is likely. An offender may waive this hearing only if willing to admit to one or more violations of the conditions of supervision. *See* Rule 5.108(b). The purpose for the hearing is to (1) test the sufficiency of the evidence of the alleged violations and (2) to make a record for the sending state to use in subsequent revocation proceedings. One of the concerns in *Gagnon* and *Morrissey*

was geographical proximity to the location of the offender's alleged violations of supervision. The rule codifies the requirements of these cases and clearly provides that an offender shall be afforded the opportunity for a probable cause hearing before a neutral and detached hearing officer in or reasonably near the place where the alleged violation occurred.

If an offender is entitled to a probable cause hearing Rule 5.108(d) defines the basic rights of the offender. The offender is entitled at a minimum, to

- (1) written notice of the alleged violations of the conditions of supervision,
- (2) disclosure of non-privileged or non-confidential evidence,
- (3) the opportunity to be heard in person and present witnesses and documentary evidence, and
- (4) the opportunity to confront and cross-examine witnesses. As discussed earlier the offender may also be entitled to the assistance of counsel.

These Rule 5.108 requirements are consistent with the minimum due process requirements established in Morrissey.

The probable cause hearing required by Rule 5.108 need not be a full "judicial" proceeding. A variety of persons, such as a parole officer, can fulfill the requirement of a "neutral and detached" person for purposes of the probable cause hearing. Due process requires only that some person other than the one initially dealing with the case conduct the hearing. The hearing officer must be impartial and objective.

Rule 5.108(e) requires the receiving state to prepare a written report of the hearing within 10 business days and to transmit the report and any evidence or record from the hearing to the sending state. The report *must* contain

- (1) the time, date and location of the hearing,
- (2) the parties present at the hearing, and
- (3) a concise summary of the testimony and evidence relied upon.

Under Rule 5.108(e) even if the offender is exonerated after the probable cause hearing the receiving state must transmit a report to the sending state.

At the conclusion of a hearing, the presiding official must determine whether probable cause exists to believe that the offender committed the alleged violations. However, a determination made in a proceeding for mandatory retaking must be made in view of Rule 5.103(a). That rule provides in part, that officials in the receiving state must document in detail that the offender has engaged in behavior requiring retaking.

If the hearing is based on violations of a condition imposed by the receiving or sending state then two considerations arise. First, the hearing officer must determine whether the offender violated the conditions of supervision, *e.g.*, the offender indeed failed to comply with a condition. If so determined then the hearing officer must determine whether the violation is of a sufficient nature that it would typically result in revocation in the receiving state. If not, retaking is not warranted under this rule.

If the hearing officer determines that probable cause exists to believe that the offender has committed the alleged violations, the receiving state *must* detain the offender in custody pending the decision in the sending state. Within 15 business days of receipt of the probable cause hearing report the sending state *must* notify the receiving state of its intent to

- (1) retake the offender, or
- (2) take other action. *See*, Rule 5.108(f), the offender *cannot* be admitted to bail or otherwise released from custody. *See*, Rule 5.111.

In sum, offenders subject to retaking are entitled to an on-site probable cause hearing in circumstances as mandated by the Commission's rules. The right cannot be waived unless accompanied by the offender's admission of having committed one or more violation(s) of the conditions of supervision. Rule 5.108. *See Sanders v. Pennsylvania Board of Probation & Parole*, 958 A.2d 582, 585-86 (Pa. 2008)

Bail Pending Return (See Section 4.4.4)

An offender subject to retaking proceedings has *no* right to bail. Rule 5.111 specifically prohibits any court or paroling authority in any state to admit an offender to bail pending completion of the retaking process, individual state law to the contrary notwithstanding. Given that the ICAOS mandates that the roles of the Commission must be afforded standing as statutory law in every member state, the no bail provision of Rule 5.111 has the same authority as if the rule was promulgated by that state's legislature.

Arrest of Absconders (See Section 4.6)

Upon receipt of a violation report for an absconding offender, a sending state is required to issue a national arrest warrant and file a detainer with the holding facility when the offender is in custody. If the absconding offender is apprehended in the receiving state, the receiving state shall, upon request by the sending state, conduct a probable cause hearing as provided in Rule 5.108. *See* Rule 5.103-1

Under Rules 4.111 and 5.103, sending states are required to issue nationwide arrest warrants for absconders who fail to return to the sending state after being ordered to return within 10 business days. The arrest warrant requirement applies anytime an offender is expected to return to the sending state and fails to do so.

Liability and Immunity Considerations for Judicial Officers and Employees

Liability Considerations Under 42.U.S.C. § 1983 (See Section 5.2)

42 U.S.C. § 1983 creates a state and federal cause of action for damages arising out of the acts of state officials that violate an individual's civil rights.

At least two U.S. Circuit Courts of Appeal have held that neither ICAOS nor the precursor compact (IPPC) create a federally enforceable right under 42 U.S.C. § 1983. 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 Board of Probation & Parole, 513 F.3d 95, 105 \(3rd Cir. 2008\)](#)

Immunity Waiver (See Section 5.5)

A state official who violates federal law is generally stripped of official or representative character and may be personally liable for their conduct; a state cannot cloak an officer in its sovereign immunity. [Ex Parte Young, 209 U.S. 123 \(1908\)](#). Sovereign immunity does not extend to the personal actions of state officials.

Types of Acts Under ICAOS (See Section 5.6)

Rule 4.101 mandates that a receiving state must provide supervision consistent with the supervision of other similar offenders sentenced in the receiving state, including the use of incentives, corrective actions, graduated responses and other supervision techniques. This area is one in which litigation could arise claiming a failure to provide “like” supervision.

Judicial Immunity (See Section 5.7)

Virtually any decision of a judge that results from the judicial process is protected by judicial immunity. Parole boards usually have quasi-judicial immunity. However, quasi-judicial immunity does not extend to probation or parole officers who are investigating suspected parole violations, ordering an arrest, or recommending parole revocation proceedings be initiated against the offender. These actions are not entitled to immunity.

Generally, probation and parole officers possess absolute judicial immunity where their actions are integral to the judicial process. Several courts have held that actions such as supervision – distinguished from investigation – are administrative in nature and not a judicial function entitled to judicial immunity.

Qualified Immunity (See Section 5.8)

A state official may be covered by qualified immunity where they

- carry out a statutory duty,
- act according to procedures dictated by statute and superiors, and
- act reasonably.

Government officials performing discretionary functions are entitled to qualified immunity unless they violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Parole and Probation officers may enjoy qualified immunity if their actions are in furtherance of a statutory duty and in substantial compliance with relevant statutory or regulatory guidelines.

Negligent Supervision (*See Section 5.9*)

Some factors a court may consider in determining whether a state official is liable for negligent supervision are:

- (A) Misconduct by a non-policymaking employee that is the result of training or supervision “so reckless or grossly negligent” that misconduct was “almost inevitable” or “substantially certain to result.” Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987).
- (B) The existence of a special custodial or other relationship created or assumed by the state in respect of particular persons. A “right/duty” relationship may arise with the respect to persons in state’s custody or subject to its effective control and whom the state knows to be a specific risk of harm to themselves or others. Additionally, state officials may be liable to the extent that their conduct creates a danger from which they fail to adequately protect the public.
- (C) The foresee ability of an offender’s actions and the foresee ability of the harm those actions may create. Liability may exist under the “state created danger” theory, when that danger is foreseeable and direct.
- (D) Negligent hiring and supervision in cases where the employer’s direct negligence in hiring or retaining an incompetent employee when the employer knows or by the exercise of reasonable care should have known was incompetent or unfit, thereby creating an unreasonable risk of harm to others.

The obligation of state officials to fulfill ministerial acts, which are not open to discretion, generally gives rise to liability. For example, an officer can be held liable for failing to execute the arrest of a probationer or parolee when there is no question that such an act should be done.

CHAPTER 1

GENERAL LAW OF INTERSTATE COMPACTS

1.1 Status of Interstate Compacts

Interstate compacts are formal agreements between states that have the characteristics of both statutory law and contractual agreements. They are enacted by state legislatures adopting reciprocal laws that substantively mirror one another. Compacts are considered contracts because of the manner in which they are enacted. There is an offer (the presentation of a reciprocal law to state legislatures), acceptance (the actual enactment of the law) and consideration (the settlement of a dispute or creation of a regulatory scheme). At the federal level, the enforcement of compacts is controlled by the Contracts Clause of the Federal Constitution and, to a lesser extent, by the Supremacy Clause, depending on the substantive nature of the compact and its impact on the basic principles of federalism. Texas v. New Mexico, 462 U.S. 554, 564 (1987); Energy Solutions, LLC v. State of Utah et al., *infra.* at §1.8; also Doe v. Pennsylvania Board of Probation & Parole 513 F.3d 95105-106 (3rd Cir. 2008).

Although compacts historically were used to settle boundary disputes, the more modern use of compacts has been in the area of regulating interstate matters. Beginning in 1921 with the adoption of the New York-New Jersey Port Authority Compact, states have adopted a large number of compacts regulating matters as diverse as water use, land development and the environment, transportation systems, regional economic development, crime control, and child welfare. Today there are some 200 compacts in place, many of which now fall into the category of “regulatory compacts” or “administrative compacts” similar to the Interstate Compact for Adult Offender Supervision (“ICAOS”). Consequently, the ICAOS is part of a long and accelerating tradition of using interstate compacts to solve a number of multilateral state issues beyond boundary matters. Compacts are aptly described as instruments that regulate matters that are sub-federal, supra-state in nature. See Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District, 938 N.E.2d 483,(Ill 2010). (“The U.S. Constitution provides mechanisms to address ‘matters that are clearly beyond the realm of individual states’ authority but which, due to their nature, may not be within the immediate purview of the federal government or easily resolved through a purely federal response.’ quoting C. Broun, M. Buenger, M. McCabe, & R. Masters, *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner’s Guide*, n.2 2006.” An interstate compact or a federal law becomes the only mechanisms by which interstate matters are bindingly resolved. The Congress or a federal regulatory agency acts sometimes on behalf of, and not infrequently without regard for, state interests. Therefore, compacts are the only formal mechanisms by which individual states can reach beyond their borders and collectively regulate the conduct of other states and the citizens of other states. See Colorado v. Kansas, 320 U.S. 383, 392 (1943) (Interstate disputes “may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal constitution. We say . . . that such mutual accommodation and agreement should, if possible, be the medium of settlement instead of invocation of our adjudicatory power.”). See also Tarrant Regional Water District v. Herrmann, ___U.S. ___, 133 S Ct 2120 (2013).

1.2 Compacts Are Not Uniform Laws

Compacts are not uniform law as that term is typically construed and applied by the courts. Compacts, unlike laws such as the Uniform Commercial Code or the Uniform Criminal Extradition and Rendition Act, are not subject to unilateral amendment by a state. Once adopted, a state cannot unilaterally repeal the compact unless the language of the agreement authorizes such an act, and even then only as provided in the agreement. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951). States cannot unilaterally change the substance of the agreement; the terms and conditions of the states' agreement define the obligations of each member state and the effect a compact may have on individual state law. For example, in Nebraska v. Cent. Interstate Low-Level Radioactive Waste Comm'n, 207 F.3d 1021, 1026 (8th Cir. 2000), the court held that Nebraska did not have the unilateral right to exercise a veto over actions of an interstate commission created by a compact. Specifically the court held that, "Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories." Where states retain authority to unilaterally alter a reciprocal agreement, the agreement will generally not rise to the level of a compact enforceable as a contract between the states. See, Northeast Bancorp v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985). No state can act in conflict with the terms of the compact as the compact defines the members' multilateral obligations. See, U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contract clause applied to state's obligation to bondholders in connection with interstate compact); Wroblewski v. Commonwealth, 809 A.2d 247 (Pa. 2002) (terms of an interstate compact contain the substantive obligations of the parties as is the case with all contracts; Contracts Clause of the Federal Constitution protects compacts from impairment by the states; although a state cannot be bound by a compact to which it has not consented, an interstate compact supersedes prior statutes of signatory states and takes precedence over subsequent statutes of signatory states). Compacts stand as probably the only exception to the general rule that a sitting state legislature cannot irrevocably bind future state legislatures. See generally, CAROLINE N. BROUN, MICHAEL L. BUENGER, MICHAEL H. MCCABE & RICHARD L. MASTERS, THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS, A PRACTITIONER'S GUIDE § 1.2.2 (ABA Publishing, 2007).

Therefore, compacts have standing as both binding state law *and* as a contract between the member states. A state law that contradicts or conflicts with a compact is unenforceable, absent some reserve of power to the member states. See, McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991) ("Having entered into a contract, a participant state may not unilaterally change its terms. A compact also takes precedence over statutory law in member states."); also Doe v. Ward, 124 F. Supp.2d 900, 914-15 (W.D. Pa., 2000). The terms of the compact take precedence over state law even to the extent that a compact can trump a provision of a state's constitution. See, Washington Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1319 (4th Cir. 1983) (explaining that the WMATA's "quick take" condemnation powers under the compact are superior to the Maryland Constitution's prohibition on "quick take")

condemnations). By entering a compact, the member states contractually agree that the terms and conditions of the compact supersede state considerations to the extent authorized by the compact and relative to any conflicting laws or principles. In effect, compacts create collective governing tools to address multilateral issues. As such, they also govern multilaterally subject to the collective will of the member states but not under the control of any single member state.

An unusual feature of an interstate compact does not make it invalid; the combined legislative powers of Congress and of the several states permit a wide range of permutations and combinations for governmental action. *See, Seattle Master Builders v. Northwest Power Planning Council*, 786 F.2d 1359 (9th Cir.1986). The subject matter of an interstate compact is not, therefore, limited by any specific constitutional restrictions; rather as with any “contract,” the subject matter is largely left to the discretion of the parties, in this case the member states and Congress in the exercise of its consent authority. *See, Doe vs. Pennsylvania Board of Probation & Parole*, *supra*. at 110 (“Here the Interstate Compact reflects the collective wisdom not only of the Pennsylvania General Assembly and the New Jersey Legislature, but also that of the other signatory states and the United States Congress as to how best to deal with the interstate movements of adult offenders.”) *Id.* at 110.

1.3 Compacts Are Not Mere Administrative Agreements

As contracts, compacts constitute solemn “treaties” between the member states, which are acting as sovereigns within a constituent union. *See, Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838) (compacts operate with the same effect as treaties between sovereign powers). Compacts are not administrative agreements between states executed by executive branch agencies. *General Expressways, Inc. v. Iowa Reciprocity Board*, 163 N.W.2d 413, 419 (Iowa 1968) (“We conclude the uniform compact herein was more than a mere administrative agreement and did constitute a valid and binding contract of the State of Iowa.”); *See also Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d at 105 (“Interstate compacts are formal agreements between states and hence are contracts subject to principles of contract law.”). Thus, compacts are, by nature, more formal and binding than interstate administrative agreements. Administrative arrangements between states do not rise to the level of an interstate compact unless (1) the legislatures of the member states have adopted the agreement or properly delegated to an executive authority the power to enter into an agreement with other states, and (2) the agreement amounts to a contract between the member states not subject to unilateral alteration. *See, Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); also *Sullivan v. DOT, Bureau of Driver Licensing*, 708 A.2d 481 (1998) (Drivers’ License Compact called for legislature to enact reciprocal statutes; power to enact laws cannot be delegated to executive agency and thus the compact was not “enacted” in Pennsylvania under an administrative agreement executed by state Department of Transportation even though authorized by statute to do so).

1.4 Delegation of State Authority to an Interstate Commission

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 an interstate commission through an interstate compact. *See, Hess*, *supra* at 42; *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). States may validly

agree by compact with other states to delegate to interstate commissions or agencies legislative and administrative powers and duties. *See*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); 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). Obligations imposed by a duly authorized interstate commission are enforceable on the states. Scott v. Virginia, 676 S.E.2d 343, 346 (Va. App. 2009) also Johnson v. State, 957 N.E.2d 660 (Ind. App. 2011).

1.5 Congressional Consent Requirement

Although the Compacts Clause of the Constitution appears to require congressional consent in every case, the Supreme Court has determined that the compact clause is triggered only by those agreements that would alter the balance of political power between the states and federal government or intrude on a power reserved to Congress. Virginia v. Tennessee, 148 U.S. 503 (1893). *See also*, Northeast Bancorp v. Federal Reserve System, 472 U.S. 159 (1985) (statute in question neither enhances the political power of the New England states at the expense of other states or impact the federal structure of government). Thus, where an interstate agreement accomplishes nothing more than what the states are otherwise empowered to do unilaterally, the compact does not intrude on federal interests requiring congressional consent. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471, fn 24 (1978). In this circumstance, the compact continues to be a contract between the states, the meaning of which may be subject to the Supreme Court's original jurisdiction over disputes between the states. The compact is not, however, "federalized" for purposes of enforcement and interpretation. The compact is interpreted under principles of state law, not federal law.

PRACTICE NOTE: PRACTICE NOTE: A compact not requiring congressional consent does not present a federal question. It must be construed as state law. McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991). However, where congressional consent is required because the compact intrudes on federal interests, the lack of congressional consent renders the agreement void as between the states.

Where the compact does not intrude on federal interests, the agreement is not invalid for lack of congressional consent. *See*, U.S. Steel *supra*. at 471; New Hampshire v. Maine, 426 U.S. 363 (1976). Even where congressional consent is given, the mere act of consent is not dispositive of whether the compact actually required consent. *See*, U.S. Steel Corp., *supra*, 470-71 ("The mere form of the interstate agreement cannot be dispositive The relevant inquiry must be one of impact on our federal structure.")

Congressional consent is given in one of three ways:

- Consent can be implied after the fact when actions by the states and federal government indicate that Congress has granted its consent even in the absence of a specific legislative act. *See*, Virginia v. Tennessee, *supra*. *in accord* Energy Solutions, LLC v. State of Utah, et al., 625 F.3d 1261, 1272 (10th Cir. 2010)

- Consent can be explicitly given after the fact, as in the case of border compacts, by enacting legislation that specifically recognizes and consents to the compact. Energy Solutions, supra. at p. 1272
- Consent can be given in advance by Congress passing legislation encouraging states to adopt compacts to solve particular problems. Thus, the Interstate Compact on Adult Offender Supervision (“ICAOS”) is based on congressional consent granted under the Crime Control Act of 1934, 4 U.S.C.A. § 112(a), which provides, “The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.” This was the consent relied upon in the adoption of the ICAOS’s precursor, the Interstate Compact on Probation and Parole. See *Doe v. Pennsylvania Board of Probation and Parole, supra.* at 99. [“On June 19, 2002, the Interstate Compact for the Supervision of Parolees and Probationers was repealed and replaced by the Interstate Compact for the Supervision of Adult Offenders, which provides for the “controlled movement of adult parolees and probationers across state lines.” (citations omitted). Both compacts were approved by Congress. (citations omitted)”. See also M.F. v. State of New York Executive Dept. Div. of Parole, supra. Advance consent may also be given by Congress approving interstate compacts contingent upon their approval by federal executive branch officials. See, e.g., 42 U.S.C. § 675 (2004).

1.6 Considerations in Obtaining Consent

In giving consent, Congress is not required to accept a compact as presented nor is Congress constrained in imposing limitations or conditions on the member states as a condition precedent to the acceptance of a compact. Congress is fully within its authority to impose conditions on states when granting consent. The conditions can be proscriptive involving the duration of the agreement, compulsory in the sense of requiring the member states to act in a certain manner before the compact is activated, or substantive in actually changing the purposes or procedures mandated by a compact. See, e.g., 16 U.S.C § 544, et seq. (2004) (imposing certain conditions on the states participating in the Columbia River Gorge Compact including the creation of the Columbia River Gorge Commission). Although states may negotiate a compact and obtain universal assent to the instrument, Congress retains full authority to alter, amend, or set conditions on the compact as part of granting its consent. See, Columbia River Gorge United-Protecting People & Property v. Yeutter, 960 F.2d 110 (9th Cir. 1992); Seattle Master Builders v. Pacific N.W. Elec. Power, 786 F.2d 1359, 1364 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

The conditions that Congress can impose on the member states may include the waiver of Eleventh Amendment immunity for compact commissions and agencies. See, Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959). Selection of jurisdiction and venue for litigating disputes can be another condition. See, 42 U.S.C. §14616 (2004) (“Any suit arising under this Compact and initiated in a State court shall be removed to the appropriate

district court of the United States in the manner provided by section 1446 of title 28, United States Code, or other statutory authority.”). Because of the purely gratuitous nature of consent, Congress may extract as part of its consent to an interstate compact conditions that it might not otherwise extract in other contexts. Pennsylvania v. Union Gas Co., 491 U.S. 1, 43 n.1 (1988) (concession that Congress can exact with respect to entities created by compacts may be much greater than what it can exact in other contexts).

PRACTICE NOTE: States that adopt an interstate compact to which Congress has attached conditions are deemed to have accepted to those conditions as a part of the compact. *See, Petty v. Tennessee-Missouri Bridge Commission*, *supra*. (Mandated provisions regarding suability of bridge commission were binding on states because Congress was within its authority to impose conditions as part of its consent and the states accepted those conditions by enacting the compact).

Congress does not pass upon a compact in the same manner as a court decides a question of law. The requirement that Congress approve a compact is an act of political judgment about the compact’s potential impact on national interests and, if approved, to impose any conditions necessary to ensure that those interests are not harmed. *See, Waterfront Comm’n of New York Harbor v. Constr. & Marine Equip. Co.*, 928 F. Supp. 1388 (D.C.N.J. 1996). In short, the Congressional consent requirement is an exercise of political judgment as to the appropriateness of the compact vis-à-vis national concerns, not a legal judgment as to the correctness of the form and substance of the compact. There are virtually no limitations on Congress’s right to grant, withhold, or condition the granting of its consent, save perhaps a finding that the compact itself somehow violates constitutional principles.

1.7 Interaction of Congress’s Legislative Authority with the Compact Clause

While courts have been reluctant to recognize any implied constitutional power vested in Congress to amend, withdraw, or repeal its consent, there are few limitations on Congress’s *legislative* action that may impact the substance of a compact. The granting of congressional consent in no way limits Congress’s ability to exercise its legislative prerogatives, even to the extent that such an exercise significantly affects or impairs the workings of an interstate compact. *See, Arizona v. California*, 373 U.S. 546, 565 (1963) (Congress was well within its authority to create a comprehensive scheme for managing the Colorado River notwithstanding its consent to the Colorado River Compact.).

PRACTICE NOTE: While adopting an interstate compact effectively binds all future state legislatures and restricts the ability of states to act in contravention of a compact, no restrictions are imposed upon Congress. Congress can utilize its legislative power – concurrently with or subsequent to granting consent – to alter the purpose or regulatory authority of a compact by altering the landscape in which the compact operates. Compacts are not afforded a special status different than that to which the states were otherwise entitled.

The general view is that the legislative act of granting consent can result in changing the application of federal law to the states or entities subject to the compact. For example, in

McKenna v. Washington Metropolitan Area Transit Authority, 829 F.2d 186 (D.C. Cir. 1987), the U.S. Court of Appeals for the District of Columbia held that Congress’s consent to the WMATA Compact altered the application of the Federal Employers’ Liability Act (FELA) to the WMATA and exempted it from liability under that act.

1.8 Effect of Congressional Consent

Where required, the nature of the compact changes significantly once congressional consent is granted. It no longer stands solely as an agreement between the states but is transformed into the “law of the United States” under the law of the union doctrine. *See*, Cuyler v. Adams, 449 U.S. 433, 440 (1981); in accord Energy Solutions, LLC v. State of Utah et al., 625 F.3d 1261, 1271 (2010). Therefore, Congressional consent “transforms the States’ agreement into federal law under the Compact Clause.” *Id.* Although articulated in Cuyler, the rule that congressional consent transforms the states’ agreement into federal law has been recognized for some time. *See*, Delaware River Joint Toll Bridge Comm’n v. Colburn, 310 U.S. 419, 427 (1940) (“In People v. Central Railroad, 79 U.S. (12 Wall.) 455, jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted . . . and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal ‘title, right, privilege or immunity’.”). For example, the Interstate Agreement on Detainers (to which the United States is also a signatory) is considered a law of the United States whose violation is grounds for habeas corpus relief under 28 U.S.C. § 2254. *See*, Bush v. Muncy, 659 F.2d 402, 407 (4 Cir. 1981), *cert. denied*, 455 U.S. 910 (1982).

PRACTICE NOTE: One consequence of the “transformational” rationale articulated by the Supreme Court in Cuyler is that congressional consent places the interpretation and enforcement of interstate compacts in the purview of the federal courts. League to Save Lake Tahoe v. Tahoe Reg’l Planning Agency, 507 F.2d 517 (9th Cir. 1974) (“[A] congressionally sanctioned interstate compact within the Compact Clause is a federal law subject to federal construction.”). Carchman v. Nash, 473 U.S. 716, 719 (1985). *See also*, West Virginia ex rel. Dyer v. Sims, *supra* at 28 (“A state cannot be its own ultimate judge in a controversy with a sister state. To determine the nature and scope of obligations as between states, whether they arise through the legislative means of compact or the ‘federal common law’ governing interstate controversies, is the function and duty of the Supreme Court of the Nation.”)

This is not to suggest that every dispute arising under an interstate compact must be litigated in the federal courts. Under the Supremacy Clause, state courts have the same obligation to give force and effect to the provisions of a compact as do the federal courts. It is, however, ultimately the U.S. Supreme Court that retains the final word on the interpretation and application of congressionally approved compacts. *See*, Delaware River Joint Toll Bridge Comm’n v. Colburn, 310 U.S. 419, 427 (1940) (“[T]he construction of such a [bi-state] compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a

federal ‘title, right, privilege or immunity,’ which when ‘specially set up and claimed’ in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code.”).

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.” *Alabama v. North Carolina*, 560 U.S. 330 (2010); *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.” *Alabama v. North Carolina*, 560 U.S. 330, 130 S. Ct. 2295, 2313 (2010) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). However, congressional consent may change the venue in which compact disputes are ultimately litigated. *See, for example, Stanton v. Graham, et. al.*, (2008 WL 4443283 (W.D. Wis. 2008)).

PRACTICE NOTE: The ICAOS has received congressional consent and is, therefore, a federal law. *Doe v. Pennsylvania Board of Probation & Parole*, *supra.*, 513 F.3d at 105-06. The ICAOS requires that disputes concerning the Compact or its rules be brought in federal court for the District of Columbia or the federal district where the Commission has its principal offices. Currently the principal offices of the Commission are located in Lexington, Kentucky. Any challenge to the Compact or its rules brought in state court would be subject to removal to federal court.

1.9 Withdrawal of Congressional Consent

In general, once Congress grants consent to a compact, the general principle is that consent cannot be withdrawn or additional conditions added to the compact subsequent to the granting of consent. Although U.S. Supreme Court has never finally determined the matter, at least two lower courts have held that congressional consent, once given, is not subject to alteration. *See, Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962); *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939 (3rd Cir. 1985). It should be noted, however, that notwithstanding *Tobin*, in at least one instance Congress has specifically reserved to itself the authority to withdraw consent by passing a law to that effect. Legislation granting consent to low-level radioactive waste disposal compacts specifically provides that, “Each compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent.” *See, 42 U.S.C. § 2021d (d) (2004)*. Because of the time-limited nature of these compacts, the specific reserve of authority, and the prior notice to the states, subsequent withdrawal of consent may be appropriate and legally defensible in this limited context. Moreover, the specific reservation of authority provides ample notice to the member states that one condition of the compact is the reservation of Congress’s authority to withdraw its

consent to the agreement. Thus, the concern expressed in Tobin that withdrawal of consent could lead to unknown problems may be obviated when the states accept a compact containing a condition that empowers Congress to withdraw consent. Nevertheless, whether a court would recognize withdrawal of consent given the important legal standing of compacts, even under circumstances where Congress has specifically authorized such withdrawal in granting consent, has yet to be litigated and finally resolved.

1.10 Federal Enforcement of Interstate Compacts

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). However, a state may not act as a surrogate for its citizens but must have a direct interest in the original action brought against a sister state. *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981); *see also New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (Eleventh Amendment applies and acts to bar jurisdiction where the State and the attorney-general are only nominal actors in the proceeding).

1.11 Eleventh Amendment Issues for Compact Agencies

In general, the delegation of state authority to an interstate commission does not mean that such commissions presumptively have the status of a “state agency” for purposes of Eleventh Amendment immunity from suit in federal court. Compact agencies are usually under the control of “special interests” or “gubernatorially appointed” representatives and are, therefore, considered two or more steps removed from popular control or even of control by a

local government. Bi-state entities created by compact are not subject to the unilateral control of any one of the states that compose the federal system. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) (Port Authority is financially self-sufficient; it generates its own revenues, and it pays its own debts. Requiring the Port Authority to answer in a federal court to injured railroad workers who assert a federal statutory right, under the Federal Employers' Liability Act to recover damages does not touch the concerns, the states' solvency and dignity, that underpin the Eleventh Amendment.)

The Eleventh Amendment may protect an interstate compact commission or agency *if the compact evidences an explicit and unequivocal intent* by the states and Congress (if consent is required) to do so. The Supreme Court has noted that as long as the compact provisions reveal the intent of the states to have direct financial and legal responsibility for the operation and administration of a compact-created interstate commission, immunity is generally not waived. Thus, Eleventh Amendment immunity is generally available to an interstate commission if: (1) the states have direct (as distinguished from indirect) financial responsibility for funding the operations of the agency, and (2) the states assume legal responsibility for the administration of the compact. See, Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979). Compact commissions that are self-funding and whose operations are generally independent of direct state oversight do not enjoy Eleventh Amendment immunity. See, Hess, supra. However, a compact that is silent on Eleventh Amendment immunity does not confer such immunity, the presumption running against conferring immunity on "non-state" entities. See, Watters v. Wash. Metro. Area Transit Auth., 295 F.3d 36 (2002) (The three signatories conferred their respective sovereign immunities, including the Eleventh Amendment immunity of the two states, upon WMATA; there was nothing to indicate a waiver of WMATA's immunity against a suit for breach of duty to enforce an attorney's lien). The Supreme Court has been cautious in extending Eleventh Amendment immunity to entities that are not "states." See, Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency, supra at 410 ("It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"). Therefore, whether Eleventh Amendment immunity has been waived can only be determined by examining the compact language and the intent of the states as revealed by that language.

Although the "sue and be sued" provision in Article V of the Interstate Compact for Adult Offender Supervision may constitute a state waiver of immunity from suits against the state in state courts, it does not necessarily constitute a waiver of Eleventh Amendment immunity against suits in federal courts. Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assoc., 450 U.S. 147, 150, 67 L. Ed. 2d 132, 101 S. Ct. 1032 (1981); accord Trotman v. Palisades Interstate Park Comm'n, 557 F.2d 35, 39-40 (2d Cir. 1977). Arguably, the compact evidences intent by the states to be financially and administratively responsible for the actions of the Commission, which may provide Eleventh Amendment immunity under the test articulated in Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994). This has not, however, been judicially determined. Even if the Eleventh Amendment does not offer protection, the Commission may be immune from suit under the laws of the states that created

the Commission. Such immunity is governed by state sovereign immunity considerations not Eleventh Amendment considerations. While the courts have not yet determined whether the “sue and be sued” provision of the compact constitutes a waiver of state sovereign immunity in this context; some courts have interpreted “sue and be sued” provisions of other statutes as a waiver of immunity depending on the language of the provision. *See, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (New York and New Jersey consented to suit against PATH in federal court.). But see, *Tooke v. City of Mexia*, 197 S.W.3d 325 (Texas Supreme Ct. 2006) (Use of provisions in various statutes, including one creating an interstate compact agency, stating that such agencies may “sue and be sued” did not, “merely by using such phrases, clearly waive governmental immunity from suit and instead merely addressed such governmental entity’s capacity to engage in the activities encompassed in those phrases.”) also, *Watters v. Wash. Metro. Area Transit Auth.*, *supra* at 40 (“We may find a waiver of sovereign immunity ‘only where stated by the most express language or by such overwhelming implications from the text [of the compact] as will leave no room for any other reasonable construction.’” (Citations omitted). See also *Moroney v. Waterfront Commission of New York Harbor*, 276 N.Y.S.2d 362 (Sup 1966).

1.12 Judicial Interpretation of Interstate Compacts

Because a compact is a contract it must be enforced according to the terms and conditions of the compact. No court has authority to provide relief that is inconsistent with the compact. *Texas v. New Mexico*, 462 U.S. 554 (1983). However, in interpreting a compact courts have latitude in discerning the intent and purpose of an agreement. In interpreting a “federalized” interstate compact, federal courts must address disputes just as if a court were addressing a federal statute. The first and last order of business of a court addressing an interstate compact “is interpreting the compact.” *Id.* at 567-68. Absent a federal statute making state statutory or decisional law applicable, the controlling law is federal law; and, absent federal statutory guidance, the governing rule of the decision would be fashioned by the federal court in the mode of the common law. See *Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d at 106 (“When interpreting an interstate compact, we must address disputes under the compact just as if we were addressing a federal statute or a federal contract.”); *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674-679 (1974).

Although courts have acknowledged that interstate compacts are contracts to the extent that they are binding agreements between the member states, courts have also recognized the unique features and functions of compacts. Though a contract, an interstate compact represents a political compromise between “constituent elements of the Union,” as opposed to a commercial transaction. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). Such an agreement is made to “address interests and problems that do not coincide nicely either with the national boundaries or with State lines – interests that may be badly served or not served at all by the ordinary channels of National or State political action.” *Id.* Consequently, with regards to congressionally approved compacts, the right to sue for breach of the compact differs from a right created by a commercial contract; it does not arise from state common law but from federal law.

While contract principles may inform the interpretation of a compact and the remedies available in the event of a breach, the underlying action is not like a contract action at common law as heard in the English law courts of the late Eighteenth Century. Courts may look to extrinsic evidence, when appropriate, to determine the intent of the parties and to effect the desired result of the compact. Extrinsic evidence such as a compact's legislative history or the negotiation history may be examined in interpreting an ambiguous provision of a compact. Arizona v. California, 292 U.S. 341 (1934); Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989); Pierce v. Underwood, 487 U.S. 552, (1988); Blum v. Stenson, 465 U.S. 886 (1984). Thus, unlike standard contract disputes where principles such as the parole evidence rule may restrict the influence of outside evidence in interpreting a contract provision, resorting to extrinsic evidence such as the history of negotiations is entirely appropriate in a compact dispute. See, Oklahoma v. New Mexico, 501 U.S. 221 (1991). The use of extrinsic evidence to interpret and enforce a compact arises from the dual nature of such agreements as both statutory and contractual in nature. However, the express terms of the compact must be respected and in the absence of an ambiguity consideration of extrinsic evidence is not permissible. See Tarrant Regional Water Dist. v. Herrmann, supra. at 2130; Alabama v. North Carolina, supra. at 2309-13.

CHAPTER 2

INTERSTATE COMPACT ON ADULT OFFENDER SUPERVISION (ICAOS)

2.1 History of the Interstate Compact for Probation and Parole (ICPP)

In 1934 Congress authorized the creation of interstate compacts on crime control which led to the 1937 Interstate Compact for the Supervision of Parolees and Probationers, sometimes referred to as the Interstate Compact for Probation and Parole or the Uniform Law on the Supervision of Probationers and Parolees (hereafter “ICPP”). Pursuant to 4 U.S.C. 112 (2004), Congress granted the following consent:

(a) The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.

(b) For the purpose of this section, the term “States” means the several States and Alaska, Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and the District of Columbia.

This consent, given to the states in advance of any compact actually being in place, was the basis of not only the ICPP but also serves as consent to other agreements such as the Interstate Juvenile Compact and the Interstate Compact for Adult Offender Supervision. See Doe v. Pennsylvania Board of Probation and Parole, 513 F.3d 95, 99, 103 (3rd Cir. 2008); See also M.F. v. State of New York Executive Dept. Div. of Parole, supra. Prior to the adoption of the ICPP there was no formal means for controlling the interstate movement of probationers and parolees. In many circumstances, whether an offender was permitted to engage in interstate travel or relocation was largely discretionary with courts and paroling authorities, often with little or no notice to a receiving state that an offender was relocating. The ICPP served as the primary means for controlling the interstate movement of offenders until its replacement by ICAOS.

2.1 Why the New Interstate Compact for Adult Offender Supervision?

Stephanie Peyton Tuthill is the face of the ICAOS. Stephanie, a twenty-four year old graduate student and a resident of Florida, was attending college in Colorado at the time she was murdered by Dante Terrous Paige. In college, she was the president of her sorority, an environmentalist, and a volunteer for the American Cancer Society and Habitat for Humanity. She volunteered at a shelter for abused women. Dante Terrous Paige had served 22 months of a 20-year sentence in Maryland for violent crime, assault and armed robbery at the time he was released and transferred to Colorado. Paige had no family or other contacts in Colorado, but

Maryland transferred him there to participate in a halfway house program. The transfer occurred without any notice to Colorado authorities or any consent by Colorado authorities. Paige walked away from his program. Stephanie died after returning to her apartment following a job interview to find Paige burglarizing it. Paige proceeded to rape and murder Stephanie. The state of Maryland settled a civil suit brought by the Tuthill family for \$700,000.

The intent of the ICAOS is not to dictate judicial sentencing or place restrictions on judicial discretion relative to sentencing. See Scott v. Virginia, 676 S.E.2d 343, 348 (Va. App. 2009) The ICAOS contains no provisions telling judges what sentences to hand out in particular cases. The ICAOS does not alter individual state sentencing laws, although the ICAOS may alter how those laws impact transfer decisions under the compact. See, e.g., Advisory Opinion 6-2005 (deferred sentencing) & Advisory Opinion 7-2006 (second offense DUI). The ICAOS is only activated when supervision of an offender will be transferred to another state that is also a member of the Compact. Thus, if part of complying with a judge's sentence would permit or require travel to or relocation in another state, the rules of the ICAOS may apply and would be binding on state officials both in the sending and receiving state. Likewise, the ICAOS does not control the underlying decisions of a parole board except to the extent that the decision to parole requires or permits travel to or relocation in another state. If the parole board is permitting such travel or relocation, the rules of the ICAOS would apply and be controlling upon state officials in both states. The transfer of incarcerated offenders to serve their term of incarceration in another state is not controlled by the ICAOS but may be controlled by the Interstate Corrections Compact.

PRACTICE NOTE: The ICAOS is not an instrument imposing restrictions upon the discretion of courts or parole authorities in the sending state as to the nature of the sentence or conditions to impose on an offender. Limits on sentencing or parole conditions are generally a function of state law. The ICAOS becomes relevant to courts and parole authorities when an offender may be traveling to or relocating in a state other than the state that imposed the sentence or conditions.

2.3 General Principles Affecting Interstate Movement of Offenders

As a general proposition, convicted persons enjoy no right to interstate travel or a constitutionally protected interest in serving time or being supervised in another state. See, Jones v. Helms, 452 U.S. 412 (1981); Griffin v. Wisconsin, 483 U.S. 868, 874 (1987); U.S. v. Knights, 534 U.S. 112, 119 (2001) (“Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.”); See Virgin Islands v. Miller, (2010 WL 1790213 (V.I. Super., May 4, 2010)) (“This language (of the compact) clearly reflects that the determination of whether to allow a probationer to reside in another jurisdiction and be supervised under the authority of the receiving state is an exercise of discretion and not a matter of right.”), also O’Neal v. Coleman, 2006 U.S. Dist. LEXIS 40702 (W.D. Wis., June 16, 2006) (offender has no “right” to have supervision transferred pursuant to ICAOS). See also United States v. Warren, 186 F.3d 358, 366 (3d Cir. 1999), Bagley v. Harvey, 718 F.2d 921, 924 (9th Cir. 1988); Alonzo v. Rozanski, 808 F.2d 637 (7th Cir. 1986) and, Wilkinson v. Austin, 125 S.

Ct. 2384 (2005) (inmates may have protected due process interests, but state's interests in public safety and management of scarce resources are dominant considerations owed great deference). A parolee cannot be regarded as "free" as they have already lost their freedom by due process of law. While paroled, the parolee is a convicted person who has tentatively assumed progress towards rehabilitation is being "field tested." One cannot, therefore, compare the parolee's rights in this posture with rights before conviction. Hyser v. Reed, 318 F.2d 225, 239 (D.C. Cir.) (en banc), *cert denied*, 375 U.S. 957 (1963). A parolee's right to travel is substantially the same as an inmate's and, thus, not in need of any specific constitutional protection. *See*, Paulus v. Fenton, 443 F. Supp. 473 (M.D. Pa. 1977), also Berrigan v. Sigler, 499 F.2d 514, 522 (D.C. Cir. 1974). Likewise, restricting the movement of individuals on probation is appropriate in some cases to facilitate proper supervision and to punish the probationer for his or her unlawful conduct. United States v. Scheer, 30 F.Supp. 2d 351, 353 (E.D.N.Y. 1998); O'Neal v. Coleman, Case No. 06-C-243-C (W.D. Wis. June 16, 2006). A categorical denial of the right to travel applicable to offenders does not presumptively violate due process rights as such rights were extinguished or greatly diminished by a conviction. *See e.g.*, Pelland v. Rhode Island, 317 F. Supp. 2d 86 (R.I. 2004) (for probationers, the right of interstate travel necessarily exists, if at all, in a restricted and weakened condition; thus, a higher degree of deference (or a lower degree of scrutiny) is necessary with respect to the government's restrictions if the distinction between the convicted and the law-abiding is to mean anything). Convicted persons have no right to control where they live in the United States; the right to travel is extinguished for the entire balance of their sentences. *See, e.g.*, Williams v. Wisconsin, 336 F.3d 576 (7th Cir. 2003). *See also*, Jones v. Helms, 452 U.S. 412, 419-20 (1981) (a person who has committed an offense punishable by imprisonment does not have an unqualified right to leave the jurisdiction prior to arrest or conviction). *See also* United States v. Pugliese, 960 F.2d 913, 916-16 (10th Cir. 1992). ('No due process challenge may be made unless the challenger has been or is threatened with being deprived of life, liberty, or property.') *See*, Cevilla v. Gonzales, 446 F.3d 658, 662 (7th Cir. 2006).

As will be discussed within the context of retaking, the lack of a specific right to interstate travel for those convicted of offenses has important implications regarding the return of offenders. Because offenders possess no presumptive right to travel, and given that public safety considerations and the management of scarce corrections resources are dominant concerns, states have great leeway in managing both the sending and return of offenders. The Interstate Compact for Adult Offender Supervision is the primary tool for managing the interstate movement of offenders subject to conditional release and/or community supervision. The Compact, therefore, controls such movement as well as the return of offenders. The level of process owed offenders in transferring supervision to another state would appear purely discretionary and involves little if any due process considerations by a sending state. However, the ICAOS may implicate due process considerations in one of two circumstances. First, in some circumstances the ICAOS imposes an obligation on a receiving state to accept certain offenders for supervision. The improper refusal by the receiving state to accept transfer of an otherwise eligible offender may present due process issues. Second, due process considerations may also arise by actions in the receiving state that may lead the sending state to revoke conditional release. *See*, discussion *infra* at § 4.4.2.3. There are no due process implications *per se* to the decision to transfer supervision or retake an offender unless one of these two circumstances is present. The Compact imposes no obligation on sending states to transfer supervision and therefore would appear to

present no due process concerns in this context. An offender does not have a right to transfer and a sending state has no affirmative obligation to grant transfer.

PRACTICE NOTE: Offenders have no constitutional right to relocate. Sending states have no obligation to allow an offender to travel to or relocate in another state. Except as provided in the ICAOS and its rules, member states do not have an obligation to assume jurisdiction and supervision over offenders from other states. The ability of an individual offender to relocate and the obligations of states to either approve relocation or accept relocation are defined by federal law or interstate agreements such as ICAOS.

2.4 Historical Development of the ICAOS

In 1998, the National Institute of Corrections (NIC) Advisory Board, following several public hearings, directed its staff to begin pursuing a revision of the ICPP. Through the development of an Advisory Group, NIC facilitated a discussion among state officials and corrections policy experts, arriving at a list of recommendations for improvement and overhaul to the existing interstate compact. Through a partnership with The Council of State Governments (CSG), NIC and CSG developed and facilitated a Drafting Team of state officials to design a revised interstate compact – one that would create a modern administrative structure, provide for rule-making and rule-changing over time, require the development of a modern data collection and information sharing system among the states, and was adequately funded to carry out its tasks.

Beginning in January 2000, the new Interstate Compact for Adult Offender Supervision saw acceptance in the states and by June 2002, had reached its threshold of thirty-five states, thereby becoming active in just thirty months. Activation of the Compact also activated its governing body, the Interstate Commission on Adult Offender Supervision (hereinafter “Commission”). The first meeting of the new Commission took place November 18-20, 2002 in Scottsdale, Arizona. More than forty-five states attended the inaugural meeting at which the newly formed Commission conducted preliminary business.

The ICAOS was written to address problems and complaints with the ICPP. Chief among the problems and complaints were:

- Lack of state compliance with the terms and conditions of the ICPP.
- Enforceability of its rules given there was no enforcement mechanism provided in the ICPP and, thus, the enforcement tools provided for in the rules of the Parole and Probation Compact Administrators’ Association (PPCAA) were suspect.
- Questions as to whether the PPCAA could legitimately be construed as “like officials” conferring authority to promulgate rules under the terms of the ICPP.
- The increasing tendency of state legislatures to adopt statutes that conflicted with the terms, conditions, and purposes of the ICPP due to notorious failures in compact management. For example, Colorado adopted legislation prohibiting “the travel of a

supervised person who is a nonresident of this state . . . without written notification from the administrator of the interstate compact of acceptance of the supervised person into a private treatment program.” Colo. Rev. Stat. § 17-27.1-101(3) (b) (2002). The Colorado legislature specifically found that “The general assembly further finds that although Colorado is a signatory to the interstate compact for parolee supervision, more information concerning out-of-state offenders is necessary for the protection of the citizens of Colorado, and it may be necessary to further regulate programs that provide treatment and services to such persons.” *See, Doe v. Ward*, 124 F. Supp. 2d 900, (W.D. Pa. 2000) (Pennsylvania’s attempt to impose higher restrictions on out-of-state sex offenders than it imposed on in-state sex offenders violated the terms of the ICPP and rules adopted pursuant to that compact).

- Questions regarding what offenders were covered by the Compact, particularly given the increasing use of alternative sentencing practices such as suspended imposition of sentence and diversion programs that did not readily fit the terms and definitions of the ICPP.

2.5 Purpose of the ICAOS

Against this backdrop a new compact was proposed to the states. The purpose of the compact is defined in Article I, which provides:

It is the purpose of this Compact and the Interstate Commission created hereunder, through means of joint and cooperative action among the compacting states: to provide the framework for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving state; and to equitably distribute the costs, benefits, and obligations of the Compact among the compacting states.

2.6 Effect of the ICAOS on the States

As previously discussed, the ICAOS received advanced congressional consent pursuant to 4 U.S.C. § 112 (2004). The agreement is, therefore, a compact that must be construed as federal law enforceable on member states through the Supremacy Clause and the Contracts Clause of the U.S. Constitution. Given the contractual nature of compacts, member states may not act unilaterally to alter the terms and conditions of the agreement. Any state law that would conflict with or attempt to supersede the ICAOS would be unenforceable to the extent of any conflict. Additionally, state executive bodies and courts are required to give full force and effect to the agreement by the explicit terms of the ICAOS and its standing as (1) a valid compact, (2) which is contractual in nature, and (3) must be construed as federal law. A state parole board may not, for example, impose terms and conditions on parolees from other states that exceed or attempt to override the requirements imposed by the Commission.

PRACTICE NOTE: An additional feature of the ICAOS that is unique among compacts is the effect rules adopted by the Interstate Commission have on state law. The ICAOS specifically vests in the Interstate Commission the authority to adopt rules to effectuate the purpose of the agreement. By the terms of the compact, rules adopted by the Interstate Commission have standing as statutory law and are binding on the compacting states. Scott v. Virginia, 676 S.E.2d 343, 346 (Va. App. 2009). A state law, court rule, or regulation that contradicts or attempts to contravene the rules of the Interstate Commission may be invalid to the extent of the conflict. Art. V, Powers & Duties of the Interstate Commission.

2.7 Adoption and Withdrawal

Like any other interstate compact, the ICAOS is adopted when state legislatures pass like statutes enacting the provisions of the agreement. In the case of the ICAOS, the threshold requirement for activation of the Compact was adoption of the Compact by thirty-five states. It should be noted that unlike some compacts that are adopted through Executive Order or by delegation of authority to a state official, ICAOS is adopted by enacting a statute that is substantially similar to and contains all pertinent provisions of the draft compact. The following states have adopted the ICAOS:

Alabama	Ala. Code § 15-22-1-1 (2004)
Alaska	ALASKA STAT. §33-36-3 (2004)
Arizona	ARIZ. REV. STAT. § 31-467 (2004)
Arkansas	ARK. CODE ANN. § 12-15-101 (2004)
California	CAL. PENAL CODE § 11180 (2004)
Colorado	COLO. REV. STAT. §§ 24-60-2802 (2004)
Connecticut	CONN. GEN. STAT. § 54-133 (2004)
Delaware	DEL. CODE ANN. tit. 11, §§ 4358 & 4359 (2004)
Florida	FLA. STAT. ANN. 949-07 (2004)
Georgia	GA. CODE ANN. § 42-9-81 (2004)
Hawaii	HAW. REV. STAT. § 353B-1 (2004)
Idaho	IDAHO CODE § 20-301 (2004)
Illinois	45 ILL. COMP. STAT. 170 (2004)
Indiana	IND. CODE 11-13-4.5 (2004)
Iowa	IOWA CODE § 907B-2 (2004)
Kansas	KAN. STAT. ANN. § 22-4110 (2004)
Kentucky	KY. REV. STAT. ANN. § 439-561 (2004)
Louisiana	LA. REV. STAT. ANN. § 15-574-31 (2004)
Maine	ME. REV. STAT. ANN. tit. 34-A, § 9871, et seq. (2004)
Maryland	MD. CODE ANN. CORRECT. SERV. § 6-201, et seq. (2004)
Massachusetts	2005 MASS. ANN. LAWS 121 (2005)
Michigan	MICH. CONS. LAWS. § 3-1012 (2004)
Minnesota	MINN. STAT. ANN. § 243.1605 (2004)
Mississippi	MISS. CODE ANN. § 47-7-81 (2004)
Missouri	MO. REV. STAT. § 589.500 (2004)
Montana	MONT. CODE ANN. § 46-23-1115 (2004)
Nebraska	NEB. REV. STAT. § 29-2254 (2004)

Nevada	NEV. REV. STAT. § 213-215 (2004)
New Hampshire	N.H. REV. STAT. ANN. § 651-A:29 (2004)
New Jersey	N.J. STAT. ANN. § 2A:168-26 (2004)
New Mexico	N.M. STAT. ANN. § 31-5-20 (2004)
New York	N.Y. EXEC. LAW § 259-mm (2004)
North Carolina	N.C. GEN. STAT. § 148-4B (2004)
North Dakota	N.D. CENT. CODE § 12-65-01 (2004)
Ohio	OHIO REV. CODE §5149-21 (2004)
Oklahoma	OKLA. STAT. tit. 22 § 1091, et seq. (2004).
Oregon	OR. REV. STAT. §144-600 (2004)
Pennsylvania	61 PA. CONS. STAT. § 324.1 (2004)
Puerto Rico	(P. del S. 2141), 2004, ley 208
Rhode Island	R.I. GEN. LAWS § 13-9.1-1 (2004)
South Carolina	S.C. CODE ANN. § 24-21-1100 (2003)
South Dakota	S.D. CODIFIED LAWS § 24-24-16A (2004)
Tennessee	TENN. CODE ANN. § 40-28-41 (2004)
Texas	TEXAS GOV'T CODE ANN. § 510.00, et seq. (2004)
Utah	UTAH CODE ANN. § 77-28C-103 (2004)
Vermont	VT. STAT. ANN. tit. 22 § 1351 (2004)
Virginia	VA. CODE ANN. §§ 53.1-172 & 53.1-174 (2004)
Virgin Islands	Act No. 6730, Bill No. 26-0003
Washington	WASH. REV. CODE § 9-94A-745 (2004)
West Virginia	W. VA. CODE § 28-7-1, et seq. (2004)
Wisconsin	WIS. STAT. § 304-16 (2004)
Wyoming	WYO. STAT. ANN. § 7-13-423 (2004)
District of Columbia	D.C. CODE § 24-133 (2004)
United States	Pub. L. No. 73-293, 48 Stat. 909, 4 U.S.C. § 112(A) (2004)

Withdrawal from the Compact is permitted pursuant to Article XII, § A of the agreement. A state may withdraw by enacting a statute specifically repealing the agreement. The effective date of withdrawal is the effective date of the repeal, provided however that repealing the agreement does not relieve a state of any pending financial obligations it may have to the Commission. Therefore, a state could not avoid paying assessments, obligations or other liabilities, including any financial penalties imposed by the Commission or a court simply by repealing the agreement. Such obligations would extend beyond the date of any repeal and would be subject to judicial enforcement even after a state has withdrawn from the ICAOS.

2.8 Effect of Withdrawal

As briefly discussed, offenders have no constitutional right to travel and states have no constitutional obligations to open their doors to offenders from other states. The ICAOS, therefore, is currently the only mechanism by which states can regulate the interstate movement of adult offenders subject to community supervision. A state that repeals the ICAOS forfeits being a part of a formal mechanism by which the movement of offenders to and from other states can be regulated. Therefore, at least theoretically, any state could order an offender to relocate to a non-member state without abiding by the most basic considerations, such as prior notice of

relocation, the opportunity to review a proposed supervision plan, and the opportunity to investigate whether resources are available to meet the goals of the supervision plan. In short, non-member states place themselves in serious jeopardy of both “dumping” as well as being a “dumping ground” for all other states’ offenders. Additionally, offenders of states that are not members of the ICAOS may be subject to a wide array of state laws and regulations that may actually seek to prohibit relocation. *See, e.g., COLO. REV. STAT. § 17-27.1-101(3) (b) (2002)*. For example, a state statute requiring only that all out-of-state felony offenders submit to psychological testing and registration may not be enforceable against felons from states that are members of the ICAOS, *cf., Doe v. Ward*, 124 F. Supp.2d 900 (W.D. Pa. 2000), but may be enforceable against felons from states that are not members of the Compact. Stated differently, participation in the ICAOS ensures not only the controlled movement of offenders under community supervision, but also that out-of-state offenders will be given the same resources and supervision provided to similar in-state offenders including the use of incentives, corrective actions, graduated responses and other supervision techniques. Non-participation or withdrawal from the Compact could allow out-of-state offenders to be treated differently, within the bounds of due process and equal protection, than their in-state counterparts. The differences could, conceivably, include requirements imposed on non-member state offenders that effectively prevent transfers to the state.

2.9 Key Features of the ICAOS

The following are key features of the ICAOS:

- The creation of a formal Interstate Commission comprised of Commissioners representing each of the member states and vested with full voting rights, the exercise of which is binding on the respective state. The Commission may also include a number of ex-officio members representing various interest groups such as the Conference of Chief Justices, crime victim advocates, and others who would be non-voting members.
- Broad rulemaking authority is given to the Commission.
- Extensive enforcement authority is given to the Commission including the authority to require remedial training, impose fines, and suspend non-compliant member states.
- A mandate that each member state create a “State Council” with representatives from all three branches of government to assist in managing intrastate compact affairs and intervene as necessary to prevent disputes between the states. The State Council was intended to provide a forum where intrastate management issues could be resolved short of intervention by the Commission.

2.10 Key Definitions in the ICAOS (Art. II)

The following definitions should be of particular interest to judicial authorities:

- **Adult** – means both individuals legally classified as adults and juveniles treated as adults by court order, statute, or operation of law.
- **Compact Administrator** – means the individual in each compacting state appointed pursuant to the terms of this Compact who is responsible for the administration and management of the state’s supervision and transfer of offenders subject to the terms of this Compact, the rules adopted by the Interstate Commission and the policies adopted by the State Council.
- **Commissioner** – means the voting representative of each compacting state appointed pursuant to Article II of this Compact.
- **Offender** – means an adult placed under, or subject to, supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.
- **Rules** – means acts of the Interstate Commission, duly promulgated pursuant to Article VIII of this Compact, and substantially affecting interested parties in addition to the Interstate Commission, which shall have the force and effect of law in the compacting states.

2.11 Interstate Commission

The ICAOS creates an Interstate Commission to oversee the operations of the Compact nationally, enforce its provisions on the member states, and resolve any disputes that may arise between the states. The Commission is comprised of one voting representative of each member state to the Compact. In addition, the Compact allows for ex officio members representing national organizations of governors, legislatures, state chief justices, attorneys general and crime victims. The Commission is a corporate public body of the states that is engaged in public policy making on behalf of the member states. This characterization as a “corporate public body” of the member states may have important liability consideration regarding the actions of the Commission.

2.11.1 Primary powers of the Commission

The powers of the Commission are laid out in Article V of the ICAOS. Among the primary powers of the Commission are to:

- Promulgate rules which are binding on the state and have the force and effect of law within each member state.

- Oversee, supervise, and coordinate the interstate movement of offenders subject to the Compact.
- Enforce compliance with all rules and terms of the Compact.
- Create dispute resolution mechanisms to resolve differences between the states.
- Coordinate education, training, and awareness of the Commission relative to coordinating the interstate movement of offenders.
- Establish uniform standards for the reporting, collecting, and exchange of data.
- To perform such other functions as may be necessary to achieve the purposes of the Compact.

2.11.2 Rulemaking Powers

Of the powers of the Commission, none is more unique and all encompassing than its rulemaking authority. Rules promulgated by the Commission have the force and effect of statutory law within member states and all state agencies and courts must give full effect to the rules. See Art. IX § A. See Scott v. Commonwealth of Virginia, 676 S.E.2d 343, 346 (Va. App. 2009) (“The Interstate Commission for Supervision of Adult Offenders, ‘the Commission or ‘ICAOS’ was established by the Compact and has promulgated rules governing the transfer of supervision from a sending state to a receiving state as well as the return to or retaking by a sending state. The ICAOS Rules are binding in the compacting states and thus have the force and effect of law in Virginia and Ohio.”) *Id.* at 346. See also Johnson v. State, 957 N.E.2d 660 (Ind. App. 2011); State v. DeJesus, 953 A.2d 45 (Conn. 2008). As the ICAOS has congressional consent, both the Compact and its rules have the force and effect of federal law and are arguably binding on the states under both a Supremacy Clause analysis and a Contract Clause analysis, no state being able to impair the obligations of contracts including those entered into by the state itself. See Doe v. Pennsylvania Board of Probation and Parole, 513 F.3d 95 (2008) (“[A]pplying the factors set forth in Cuyler v. Adams, 449 U.S. 433, 442 (1981)” the Court held that the Compact, “as a congressionally-sanctioned interstate compact is federal law.”) *Id.* at 103; See also M.F. v. State of New York Executive Dept. Div. of Parole, supra; ICAOS v. Tennessee Bd. of Probation and Parole, No. 04-526 KSF (E.D. Ky. 2005). In adopting rules, the Commission is required to substantially comply with the “Government in Sunshine Act,” 5 U.S.C. § 552(b). However, the Commission’s rulemaking process must only *substantially comply* with the noted provision and is not bound by the specific terms and conditions of 5 U.S.C. § 552(b), *et seq.* The Commission’s rulemaking authority is also limited by Article VIII, which provides that if a *majority* of state legislatures rejects a Commission rule by enacting a statute to that effect, the rule has no force or effect in *any* member state. A single state may not unilaterally reject a rule even if it adopts legislation to that effect. Moreover, to the extent that a provision of the Compact (not the rules promulgated by the Commission) exceeds the constitutional limits imposed on a state legislature, the obligations, duties, powers, or jurisdiction sought to be

conferred on the Commission shall be ineffective and such obligations, duties, powers, or jurisdiction shall remain in the compacting state.

The ICAOS specifically provides a mechanism by which a rule adopted by the Commission can be challenged. Under Article VIII, not later than sixty days after the promulgation of a rule any interested party may file a petition in the United States District Court for the District of Columbia or the United States District Court in which the Commission has its principal offices (currently the United States District Court for the Eastern District of Kentucky) challenging the rule. The court can set aside a Commission rule if it is not supported by substantial evidence in the rulemaking record as defined by the Administrative Procedures Act, 5 U.S.C. § 551, et seq. (2004).

PRACTICE NOTE: It must be noted that in promulgating a rule the Interstate Commission is only required to substantially comply with the requirements of the Administrative Procedures Act and therefore the setting aside of a rule would only occur upon a showing of failing to substantially comply with the Act. A failure to absolutely comply with all aspects of the Administrative Procedures Act is not grounds for setting aside a duly promulgated rule of the Interstate Commission.

2.12 Enforcement of the Compact and its Rules (Art. IX & Art. XII)

One key feature of the ICAOS is the enforcement tools given to the Commission to promote state compliance with the Compact. It should be noted that the tools provided to the Commission are not directed at compelling offender compliance. Offender compliance is a matter that rests with the member states' courts, paroling authorities and corrections officials. Rather, the tools provided for in the ICAOS are directed exclusively at compelling the member states to meet their contractual obligations by complying with the terms and conditions of the Compact and any rules promulgated by the Commission.

2.12.1 General Principles of Enforcement

The Commission possesses significant enforcement authority against states that are deemed in default of their obligations under the Compact. The decision to impose a penalty for non-compliance may rest with the Commission as a whole or one of its committees depending on the nature of the infraction and the penalty imposed. The enforcement tools available to the Commission include:

- Requiring remedial training;
- Mandating mediation or binding arbitration;
- Providing technical assistance;
- Imposing financial penalties on a non-compliant state;

- Suspending a non-compliant state;
- Termination from the Compact; and
- Initiating litigation to enforce the terms of the Compact, monetary penalties ordered by the Commission, or obtaining injunctive relief.

Grounds for default include but are not limited to a state’s failure to perform such obligations as are imposed by the terms of the Compact, the by-laws of the Commission, or any duly promulgated rule of the Commission.

2.12.2 Judicial Enforcement

The Commission can initiate judicial enforcement by filing a complaint or petition in the appropriate U.S. district court. A member state that loses in any such litigation is required to reimburse the Commission for the expenses it incurred in prosecuting or defending a suit, including reasonable attorney fees. *See*, Art. XII § C; Rule 6.104 (prevailing party shall be awarded all costs associated with the enforcement action, including reasonable attorneys’ fees).

PRACTICE NOTE: A state seeking to sue the Commission to challenge a rule or enforce a provision of the Compact would have to initiate an action in one of two venues, the U.S. District Court for the District of Columbia or federal district where the Commission has its principal office, currently the U.S. District Court for the Eastern District of Kentucky. Art. XIII. The Commission is entitled to reasonable attorney’s fees and costs that result from having to bring an enforcement action against a state found to be in default of its obligations. Art. XII § C.

All courts and executive agencies in each member state must enforce the Compact and take all necessary actions to effectuate its purposes. *See*, Art. IX, § A. *See* Scott v. Virginia, 676 S.E.2d 343, 346 (Va. App. 2009); Johnson v. State, 957 N.E.2d 660, 663 (Ind. App. 2011) (“All of the rules and bylaws adopted by the commission established by the interstate compact are binding upon the compacting states”) For a discussion of the application of a similar provision in Interstate Compact on Juveniles, *see*, In re O.M., 565 A.2d 573 (D.C.C.A 1989) holding that provisions in the Compact requiring rendition of a juvenile to another member state is required by the terms of the Compact which the courts and executive agencies of the District of Columbia must enforce. The Court of Appeals concluded that, “The courts of the District of Columbia have no power to consider whether rendition of a juvenile under the Interstate Compact on Juveniles is in the juvenile’s best interests.” Id. at 581. In the context of a compact, courts cannot ignore the use of the word “shall,” which creates a duty, not an option. Id. *See also*, A Juvenile, 484 N.E.2d 995, 997-998 (Mass. 1985).

The Commission is entitled to all service of process in any judicial or administrative proceeding in a member state pertaining to the subject of the Compact where the proceedings may impact the powers, responsibilities or actions of the Commission. *See*, Art. IX, § A. It is not clear what impact the failure to provide service to the Commission would have on the

enforceability of a judgment vis-à-vis the Commission. However, it is reasonable to assume that because the ICAOS mandates service of process whenever litigation affects a power, responsibility or action of the Commission, the Commission may be an indispensable party. The failure to join an indispensable party justifies dismissal of the suit. *See, e.g., Teitelbaum v. Wagner*, 99 Fed. Appx. 272 (2nd Cir. 2004).

2.13 Immunity, Duty to Defend, and Indemnification

The ICAOS specifically provides qualified immunity to “The Members, officers, executive director and employees of the Interstate Commission [.]” This immunity extends to such persons in either their official or personal capacity. The ICAOS provides that the Commission “shall defend the Commissioner of a Compacting State, or his or her representatives or employees, or the Commission’s representatives or employees, in any civil action seeking to impose liability, arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities[.]” The ICAOS requires the Commission to indemnify and hold harmless a Commissioner, appointed designee or employees, or the Commission’s representatives or employees in the amount of any settlement or judgment arising out of actual or alleged errors, acts or omissions that are within the scope of the Commission’s duties or responsibilities.

Although the “sue and be sued” provision in Article V may constitute a state waiver of immunity for suits against the state in state courts, it does not necessarily constitute a waiver of Eleventh Amendment immunity against suits in federal courts. Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Assoc., 450 U.S. 147, 150, 67 L. Ed. 2d 132, 101 S. Ct. 1032 (1981); *accord* Trotman v. Palisades Interstate Park Comm’n, 557 F.2d 35, 39-40 (2d Cir. 1977). In general, courts presume that an entity created pursuant to the Compact Clause does not qualify for Eleventh Amendment immunity unless there is good reason to believe that the states structured the entity to arm it with the states’ own immunity, and that, if applicable, Congress concurred in that purpose. *See, Lake Country Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391 (1979). *See, also, Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36 (D.C. Cir. 2002), *cert. denied* 538 U.S. 922 (2003). Arguably the ICAOS evidences intent by the states to be financially and administratively responsible for the actions of the Commission, which may provide Eleventh Amendment immunity under the test articulated in Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994). This has not, however, been judicially determined.

Even where the Eleventh Amendment does not offer protection, the Commission may be immune from suit under the laws of the states that created the Commission. Such immunity is governed by state sovereign immunity considerations. Whether the “sue and be sued” provision of the ICAOS constitutes a waiver of state sovereign immunity in this context has not been judicially determined; some courts have interpreted “sue and be sued” provisions as a waiver of immunity depending on the language of the provision. *See, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (New York and New Jersey consented to suit against PATH in federal court.). But *see, Tooke v. City of Mexia*, 197 S.W.3d 325 (Texas Supreme Ct. 2006) (Use of provisions in various statutes, including one creating an interstate compact agency,

stating that such agencies may “sue and be sued” did not, “merely by using such phrases, clearly waive governmental immunity from suit and instead merely addressed such governmental entity’s capacity to engage in the activities encompassed in those phrases.”) also, Watters v. Wash. Metro. Area Transit Auth., *supra* at 40 (“We may find a waiver of sovereign immunity ‘only where stated by the most express language or by such overwhelming implications from the text [of the compact] as will leave no room for any other reasonable construction.’” (Citations omitted). See Moroney v. Waterfront Commission of New York Harbor, *supra*.

CHAPTER 3

THE ICAOS IMPLICATIONS FOR THE COURTS

The rules of the Commission are applicable on the states by the terms of the Compact. Rules adopted by the Commission have the force and effect of statutory law and all courts and executive agencies must take all necessary actions to enforce their application. *See, Art. V.* See also *Scott v. Virginia*, 676 S.E.2d 343, 346 (Va. App. 2009). The failure of state judicial or executive branch officials to comply with the terms of the compact and its rules would result in the state defaulting on its contractual obligations under the Compact and can lead the Commission to take remedial or punitive action against a state, including suit in federal court for injunctive relief. *See, Art. XII § C.* All state laws that conflict with the Compact are superseded to the extent of any such conflict. *See, Art. VIX § A.* Given the broad definitions in the Compact, the Commission is not limited to certain classifications of offenders, unless it decides to be so limited. See Commission Rules. As a congressional approved interstate compact, the Compact has the force and effect of federal law pursuant to the Supremacy Clause.

PRACTICE NOTE: No court can order relief that is inconsistent with the terms and conditions of the Compact; a principle that extends also to the rules of the Commission. This principle would extend to state court enforcement of the Compact as federal law under the Supremacy Clause.

3.1 Key Definitions in the Rules

The following key terms and their definitions supplement terms defined in the Compact. They should be of special interests to judicial authorities:

- **Abscond** means to be absent from the offender's approved place of residence or employment and avoiding supervision.
- **Arrival** means to report to the location and officials designated in reporting instructions given to an offender at the time of the offender's departure from a sending state under an interstate compact transfer of supervision.
- **Behavior Requiring Retaking** means an act or pattern of non-compliance with conditions of supervision that could not be successfully addressed through the use of documented corrective action or graduated responses and would result in a request for revocation of supervision in the receiving state
- **Compliance** means that an offender is abiding by all terms and conditions of supervision, including payment of restitution, family support, fines, court costs or other financial obligations imposed by the sending state.

- **Deferred Sentence** means a sentence the imposition of which is postponed pending the successful completion by the offender of the terms and conditions of supervision ordered by the court.
- **Plan of Supervision** means the terms under which an offender will be supervised, including proposed residence, proposed employment or viable means of support and the terms and conditions of supervision.
- **Probable Cause Hearing** means a hearing in compliance with the decisions of the U.S. Supreme Court, conducted on behalf of an offender accused of violating the terms or conditions of the offender's parole or probation.
- **Relocate** means to remain in another state for more than 45 consecutive days in any 12-month period.
- **Sex Offender** means an adult placed under, or made subject to, supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies, and who is required to register as a sex offender either in the sending or receiving state and who is required to request transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision.
- **Substantial Compliance** means that an offender is sufficiently in compliance with the terms and conditions of his or her supervision so as not to result in initiation of revocation of supervision proceedings by the sending state.
- **Violent Crime** means any crime involving the unlawful exertion of physical force with the intent to cause injury or physical harm to a person; or an offense in which a person has incurred direct or threatened physical or psychological harm as defined by the criminal code in which the crime occurred; or the use of a deadly weapon in the commission of a crime; or any sex offense requiring registration.
- **Waiver** means the voluntary relinquishment, in writing, of a known constitutional right or other right, claim or privilege by an offender.
- **Warrant** means a written order of the court or authorities of a sending or receiving state or other body of competent jurisdiction which is made on behalf of the state, or United States, issued pursuant to statute and/or rule and which commands law enforcement to arrest an offender. The warrant shall be entered in the National Crime Information Center (NCIC) Wanted Person File with a nationwide pick-up radius with no bond amount set.

3.2 Judicial Considerations

3.2.1 Offender Eligibility Criteria

Determining offender eligibility under the Compact requires a multi-prong analysis beginning with the broad definition of an offender. An “offender” means “an adult placed under, or made subject to, supervision as a result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies, and who is required to request transfer of supervision under the terms and conditions of supervision.” *See, Art. II; Rules § 1.101.* If an offender is an “offender” for purposes of the Compact, the inquiry must then determine whether the nature of the offense and the nature of the supervision disqualify an offender for transfer of supervision.

The definition of offender contained in the compact is generally mimicked in the Commission’s rules. In interpreting the definition of “offender,” the Commission has observed that the type of supervision to be undertaken in a receiving state is not a factor in determining whether an offender is eligible for transfer. *See, Advisory Opinion 9-2004* (sex offender sentenced to community supervision for life pursuant to state statute is eligible for transfer under the compact provided all other conditions for transfer have been met). Thus, the nature of the supervision to be provided is generally not a criterion for determining whether an offender is eligible for transfer under the compact, so long as the offender is subject to some type of community supervision. Additionally, because of the broad definition of offender the compact covers those under supervision of probation and parole officials, departments of corrections, courts, related agencies, and private firms acting on behalf of courts and corrections authorities. *See, Advisory Opinion 8-2004.*

PRACTICE NOTE: Several factors may disqualify an offender from transfer of supervision under the ICAOS. Those factors may include not meeting the definition of an offender, not having committed an offense covered by the compact, or not being subject to some form of community supervision. If an offender fails to meet any of the status criteria, the offender is not subject to the ICAOS. Offenders not subject to the ICAOS may, depending on the terms and conditions of their adjudication, be free to move across state lines without prior approval from the receiving state.

3.2.1.1 Offenders Covered by the ICAOS

The Compact itself defines an offender as “an adult placed under, or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.” *See, Art. I.* By this definition, the Commission can regulate the full breadth of adult offenders. An adult offender does not have to be in a formal “probation” or “parole” status as those terms are traditionally applied to qualify for transfer and supervision under the ICAOS. The broad definition of “offender” was intended to correct perceived problems with the ICPP,

which encouraged states to claim that certain individuals were exempt from coverage of the agreement by use of the explicit language of “probationers” and “parolees,” terms that were given a narrow definition and application. As a general statement, to *initially* qualify for transfer of supervision under the ICAOS, the offender must (1) be subject to some form of community supervision, including supervision by a court, paroling authority, probation authority, treatment authority or anyone person or agency acting in such a capacity or under contract to provide supervision services, and (2) have committed a covered offense as defined by the rules.

PRACTICE NOTE: An undocumented immigrant who meets the definition of “offender” and seeks to transfer under the Compact is subject to the jurisdiction of the Compact and the immigrant’s status as “undocumented” would not be a *per se* disqualification as long as the immigrant establishes that the prerequisites of Rule 3.101 have been satisfied. This includes the requirement that the immigrant be in ‘substantial compliance’ with the terms and conditions of supervision in the sending state. *See, Advisory Opinion 13-2006.*

Offenders *ELIGIBLE FOR TRANSFER* of supervision under the ICAOS and its rules include:

- Those subject to traditional parole or probation, *e.g.*, offenders found guilty and sentenced;
- Those subject to deferred sentencing such as suspended imposition of sentences if some form of community supervision and/or reporting is a condition of the court’s order;
- Those subject to deferred execution of sentence if some form of community supervision and/or reporting is a condition of the court’s order;
- Those subject to other “non-standard” forms of disposition as determined by the Commission if some form of community supervision and/or reporting is a condition of the court’s order;
- A juvenile offender treated as an adult by court order, statute, or operation of law;
- A misdemeanor provided they are subject to one year or more supervision and were convicted of one of the following offenses:
 - An offense resulting in direct physical or psychological harm to another person (*See, ICAOS Advisory Opinion 16-2006 for clarification*);
 - An offense involving the possession or use of a firearm; (*See, ICAOS Advisory Opinion 1-2011 for clarification*);

- A second or subsequent conviction of driving while impaired by drugs or alcohol; or (*See*, ICAOS [Advisory Opinion 7-2006](#) for clarification);
- A sex offense requiring the offender to register as a sex offender under the laws of the sending state. (Rule 2.105)
- Those subject to deferred prosecution programs to the extent that participation in such programs requires the offender to make material admissions of fact and waive all or some of their constitutional rights. *See*, ICAOS [Advisory Opinion 6-2005](#)

PRACTICE NOTE: Pursuant to Rule 2.110, with limited exception, no state is permitted to allow a person covered by the Compact to relocate to another state except as provided in the Compact and its rules. Therefore, a court cannot order or otherwise direct an otherwise covered offender to leave a state and relocate to another state unless such relocation is done in accordance with the Compact and its rules.

Those *NOT ELIGIBLE FOR TRANSFER* of supervision under the ICAOS and its rules include:

- Offenders on furlough or work release (Rule 2.107);
- Misdemeanants not subject to the qualifications contained in Rule 2.105;
- Non-criminals such as those convicted of infractions or subject to a civil penalty system, *See Com. of Virginia v. Amerson*, 706 S.E.2d 879 (2011) (offenders convicted under Sexually Violent Predators Act (SVPA) ineligible for transfer under ICAOS because the act is civil not criminal); and
- Juvenile offenders who are not deemed “adults” for purposes of prosecution.

3.2.1.2 Eligibility of Offenders, Residency Requirements – General Overview

Transfer of offenders falls in one of two categories, (1) mandatory acceptance transfers and (2) discretionary acceptance transfers. The authority to approve an offender for out-of-state placement lies exclusively within the discretion of the sending state. (Rule 3.101) The offender has no constitutional right to transfer their supervision to another state, even if the offender is otherwise qualified. Rule 3.101, therefore, should not be interpreted as creating on behalf of an offender any constitutionally protected interest to relocate. Rather, Rule 3.101 creates an obligation on a receiving state to accept an offender for supervision *once the sending state has made a determination to transfer supervision*. The sending state’s denial of the transfer of supervision would appear absolute and is entitled to deference by courts. *See Com. v. Mowry*, 921 N.E.2d 565 (Mass. App. 2010); also *Virgin Islands v. Miller*, 2010 WL 1790213 (V.I. Super. Ct. St. Thomas Division 2010); *Strong v. Kansas Parole Bd.*, 115 P.3d 794 (Kan. Ct. App. 2005)

If a sending state decides to transfer supervision and the offender has three months or more or an indefinite period of supervision remaining, the receiving state *must* accept the transfer if the offender:

- Is in substantial compliance with a valid plan of supervision, and
- Is a resident of the receiving state, or
- Has resident family in the receiving state who has indicated (1) a willingness to assist in satisfying the plan of supervision, *and* (2) the offender can obtain employment or has a means of support.

If a valid plan of supervision includes an obligation on the offender to demonstrate that they have a means of economic support, the offender's failure to meet that obligation may result in denial of transfer even if the offender meets the residency requirements. *See, Advisory Opinion 8-2005 and Rule 1.101 definition of Resident.*

PRACTICE NOTE: The decision to transfer supervision of an offender is purely within the discretion of authorities in the sending state. Rule 3.101 neither creates nor grants to an offender a constitutionally protected right to relocate.

After a sending state grants permission to an offender meeting the mandatory acceptance criteria to relocate, the receiving state *must* assume supervision over the offender and treat the offender in the same manner as in-state offenders. This principle applies to both the quality and quantity of supervision as well as access to rehabilitative programs. *See Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d 95, 108 (3rd Cir. 2008) (“By signing the Interstate Compact, Pennsylvania has agreed that, when accepting out-of-state probationers who transfer their parole and their residence to the Commonwealth, it will approximate the same procedure and standards it applies to its own probationers.”). A receiving state may impose conditions on an out-of-state offender if they assist in offender rehabilitation and promote community safety. *See, discussion, infra*, at § 3.3.2. It would be a violation of the Compact for a receiving state to create barriers to transfer or to impose conditions on out-of-state offenders that it would not otherwise impose on in-state offenders. *See e.g., ICAOS v. Tennessee Bd. of Probation and Parole*, No. 04-526 KSF (E.D. Ky. 2005). Rule 3.101 affirms the sole discretion of the sending state and prevents the receiving state from attempting to unilaterally add conditions in order to stifle the transfer of offenders it deems undesirable or for whom it is attempting to “shift” to the sending state some financial obligation related to the offender’s supervision. *See, Doe v. Ward*, 124 F. Supp.2d 900 (W.D. Pa. 2000) (interpreting a similar provision in the old ICPP to negate certain provisions of Pennsylvania’s “Megan’s Law” which treated out-of-state offenders differently from in-state offenders). *See also, ICAOS Advisory Opinion 9-2004* (Dec. 2, 2004) (“[I]t is our opinion that CSL offenders are subject to supervision under the Interstate Compact for Adult Offender Supervision and upon proper application and documentation of a valid plan of supervision and verification of residency and employment criteria as required under those rules should be permitted to transfer to other states for supervision under the Compact.”).

PRACTICE NOTE: Rule 4.101 requires a receiving state to supervise transferred offenders as in-state offenders. Receiving states shall subject the offender to any and all supervision techniques and responses to behavior it imposes on in-state offenders with the exception of modifying the supervision term or revoking conditional release.

A *receiving* state can consent to accept supervision of an offender who does not meet the mandatory acceptance criteria. However, the acceptance of supervision under circumstances other than those above is discretionary with the receiving state. For example, the Commission has opined in ICAOS Advisory Opinion 4-2005 that an offender who is ineligible for mandatory transfer due to the nature of the offense or the offender's failure to meet residency and employment requirements may be transferred under the discretionary provisions of the rules. Under such circumstances transfer may be warranted when *in the opinion of both the sending and receiving states* such a transfer is in the interests of justice and rehabilitation. It must be emphasized, however, that a discretionary transfer requires the consent of both sending and receiving states and the failure to obtain such consent prohibits the transfer of supervision.

PRACTICE NOTE: Acceptance of offenders on grounds other than those mandated in Rule 3.101 lies within the discretion of the receiving state under Rule 3.101-2.

The sending state must submit to the receiving state a request to transfer supervision along with all relevant information necessary for the receiving state to investigate and accept the transfer. Rule 3.107 sets out the information that must be provided to a receiving state prior to transfer of the offender.

With limited exceptions, a sending state *shall not allow* an offender to relocate without an explicit acceptance of the offender by the receiving state. *See* Rule 2.110. In the absence of an exception provided in the rules, allowing the offender to relocate prior to acceptance may trigger two events: (1) the sending state shall order the offender to return to the sending state, and (2) the receiving state can reject the placement. *See, ICAOS Advisory Opinion 9-2006*. At least one court has interpreted this rule, with deference to the advisory opinion, and concluded that while a receiving state 'can properly' reject the application for transfer of supervision under the compact it is not required "to deny the application on that basis." *See In the Matter of Terrill Paul*, (2010 WL 4028588 (N.J. Super. A.D.)) If the placement is rejected, the sending state would have to reinitiate the transfer request. *Id.* Practically this means that no court or paroling authority may authorize an offender to relocate *before* acceptance by the receiving state, unless the transfer of supervision is accomplished pursuant to expedited reporting instructions under Rule 3.106 or Rules 3.101-1 and 3.103. *See discussion, infra* § 3.2.2.5.

Of particular concern to judges may be the investigation period. Under Rule 3.104 a receiving state has up to 45 days to investigate and respond to a sending state's request to transfer. There are provisions for emergency transfers (Rule 3.106) to expedite reporting instructions. As noted, Rule 3.103 provides a limited probation exception to restrictions on transfer prior to acceptance. In general, however, a probationer or parolee is not allowed to travel to a receiving state (unless for employment or medical purposes previously established

prior to the transfer request *See* Rule 3.102 (c)) until the receiving state has investigated, accepted transfer of the offender, and has issued reporting instructions.

In addition, within one business day of receiving reporting instructions or acceptance of transfer by a receiving state, the sending state must notify crime victims pursuant to applicable state law that a transfer will occur. (Rule 3.108). The rules also set out guidelines by which victims can request the opportunity to be heard on the offender's transfer or return request. (Rule 3.108-1).

As a precondition to transfer, the offender must agree to waive extradition from any state to which the offender may have absconded while under supervision in the receiving state. States to the Compact waive all legal requirements regarding extradition of offenders who are fugitives from justice. (Rule 3.109)

3.2.1.3 Special Rules for Military Personnel and Their Families

Rule 3.101-1 addresses three categories of military individuals: (1) military personnel, (2) family members living with military personnel; and (5) veterans for medical or mental health services.

Military Personnel are eligible for reporting instructions and transfer through the ICAOS when they are being deployed by the military to another state.

If an offender lives with a family member who is in the military, that offender's supervision is subject to transfer through the ICAOS if they:

- (1) have three months or more supervision remaining;
- (2) are in substantial compliance with the terms and conditions of their supervision;
- (3) have a valid plan of supervision;
- (4) can obtain employment in the receiving state or have a means of support;
- (5) are moving to another state as a result of the military deployment of a family member;
and
- (6) will be living with the family member who is subject to the military deployment.

Veterans referred for medical and/or mental health services in a receiving state by the Veterans Health Administration are eligible transfer supervision if they:

- (1) have three months or more supervision remaining;
- (2) are in substantial compliance with the terms and conditions of their supervision;

- (3) have a valid plan of supervision; *and*
- (4) the sending state provides referral documentation and is approved for care at the receiving state Veterans Health Administration.

See, Rule 3.101-1.

3.2.1.4 Employment Transfers of Offenders and Their Families

The other circumstances in which a receiving state is mandated to accept supervision involves the employment transfer of an offender and the employment transfer of a family member with whom the offender resides with to another state. Rule 3.101-1(a)(3) and (a)(4) covers such instances. An offender is eligible to have supervision transferred to another state if they:

- (1) have three months or more of supervision remaining;
- (2) are in substantial compliance with the terms and conditions of their supervision;
- (3) have a valid plan of supervision; *and*
- (3) are directed to transfer by either the offender's or offender's family member's full-time employer as a condition of maintaining employment.

3.2.1.5 Persons Not Covered by the ICAOS

An offender not subject to the ICAOS is not eligible to have their supervision transferred to another state but neither are they restricted in their travels except as otherwise ordered by the sentencing court. *See, Sanchez v. N.J. State Parole Bd.*, 845 A.2d 687, 692 (N.J. Super. Ct. App. Div. 2004) (“New York cannot have it both ways. If CSL defendants do not fall within the purview of ICAOS, then New Jersey has no obligation to prevent them from moving to New York. If New York is willing to permit the change of residency, assuming the other criteria of ICAOS are met, we expect that New Jersey will cooperate fully to the extent and in the manner allowed by the laws of this state and the rules of ICAOS.”) Offenders with three months or less of supervision and offenders not subject to some form of community supervision are generally free to travel. This is in large measure because the duration of supervision does not warrant further consideration in the receiving state or because the nature of the offense is such that a court did not see continuing supervision a necessary element of the sentence. Thus, for example, individuals convicted of low-level misdemeanor offenses and subject only to “bench probation” with no reporting requirements or no conditions other than monetary conditions whose only requirement is to “go and commit no further offense” are not covered by the Compact. However, a court should not attempt to circumvent the Compact by placing offenders in “unsupervised”

status, particularly offenders who pose a public safety risk to others. Such an action would not comport with the purpose and spirit of the Compact, and may act to encourage other states to take similar actions thereby compromising the underlying purposes of the Compact. Placing an offender on “bench probation” as a means of circumventing the ICAOS carries with it the high probability of additional harm to the community if the offender is high risk.

An offender who *is not* in substantial compliance with the terms and conditions of their supervision and who has nevertheless committed an eligible offense cannot be transferred through the Compact because of their improvident behavior. In such cases, the offender is not permitted to travel or relocate to another state; the ICAOS and its rules acting as a bar to such action. If an offender is subject to the ICAOS, the Compact offers the only means for transfer of supervision as the ICAOS contains no provision authorizing “side agreements” between member states. *Compare*, INTERSTATE COMPACT FOR THE PLACEMENT OF CHILDREN, ART. VIII(b) (compact shall not apply where another agreement “between said states * * * has the force of law.”).

3.2.1.6 Sentencing Considerations

In general the ICAOS applies to all offenders meeting the eligibility requirements and who are subject to some form of community supervision or corrections. Unlike the ICPP, which could be interpreted as applying expressly to “probationers” and “parolees,” the use of the term “offender” in the ICAOS was intended to provide reach that is more sweeping and flexibility in managing the offender population as current and future sentencing practices change. Therefore, whether an offender is “sentenced” and subject to formal “probation” or “parole” is a largely irrelevant inquiry. From the judiciary’s perspective the relevant inquiry in determining whether ICAOS is a factor centers on two considerations: (1) what did the court do, and (2) was the end consequence of the court’s action community supervision. Therefore, the ICAOS has application in a broad range of cases and dispositions beyond traditional conviction followed by probation.

3.2.1.6.1 Deferred Sentencing

In addition to traditional cases where an offender is formally adjudicated and placed on probation, the ICAOS also applies in so-called “suspended sentencing,” “suspended adjudication,” and “deferred sentencing” contexts. Rule 2.106 provides that “Offenders subject to deferred sentences are eligible for transfer of supervision under the same eligibility requirements, terms and conditions applicable to all offenders under this Compact. Persons subject to supervision pursuant to a pre-trial intervention program, bail, or similar program are not eligible for transfer under the terms and conditions of this Compact.” In interpreting this rule, the Commission has issued an opinion advising as follows:

In the case of a “deferred sentence” under Rule 2.106, the rule would apply if the court has lawfully entered a conviction on its records even if it has suspended the imposition of a final sentence and has subjected the offender to a program of conditional release. The rule would also apply where the defendant has entered a plea of guilt or no contest to the charge(s) and the court has accepted the plea but suspended entry of a final judgment of conviction in lieu of placing

the offender in a program of conditional release, the successful completion of which may result in the sealing or expungement of any criminal record. Finally, the rule would apply where the court has entered a conviction on the record and sentenced the offender but has suspended execution of the sentence in lieu of a program of conditional release.

The operative consideration for purposes of Rule 2.106 is whether the court has, as a condition precedent, made some finding that the offender has indeed committed the offense charged. This finding, by a court of competent jurisdiction, whether technically classified as a “conviction” under the terms of an individual state’s law, makes an individual an offender for purposes of the Compact. The offender is no longer in a pretrial, presumed-innocent status, but has been found to have committed the charged offense notwithstanding the decision of the court to withhold punitive sentencing in favor of an alternative program of corrections, such as deferment, probation in lieu of sentencing, suspended imposition of sentence, or suspended execution of sentence. (Emphasis added).

It must be emphasized, given the overall purposes of the Compact and the status of the compact as federal law that an individual state’s statutory scheme that can vary remarkably from state to state is of limited benefit in determining whether an offender is subject to the Compact. Individual states can use terms remarkably different from other states’ to describe what is, in essence, the same legal action. In determining the eligibility of an offender and the application of the ICAOS, one must look not at the legal definitions but rather the legal action taken by a court of competent jurisdiction or paroling authorities. To find otherwise would lead to disruptions in the smooth movement of offenders, the equitable application of the ICAOS to the states, and the uniform application of the rules.

See, ICAOS Advisory Opinion, June 30, 2004.

In addition to the nature of the adjudication, eligibility also turns on the nature of the supervision ordered. The Commission defines the term “supervision” as follows:

“Supervision” means the oversight exercised by authorities of a sending or receiving state over an offender for a period of time determined by a court or releasing authority, during which time the offender is required to report to or be monitored by supervising authorities, and to comply with regulations and conditions, other than monetary conditions, imposed on the offender at the time of the offender’s release to the community or during the period of supervision in the community. (Rule 1.101 definitions).

The Commission does not deem dispositions such as “bench” probation as eligible for transfer under the ICAOS because such dispositions are more along the lines of “go and commit no further offenses.” The supervision contemplated by the Commission appears to be more

formal, having elements akin to traditional notions of regular reporting and supervision requirements. A sentence that essentially states “go and commit no other offense” and that does not include supervision and reporting requirements does not appear to create a “supervision” relationship between the offender and the court sufficient to trigger the ICAOS. However, to the extent that reporting requirements may be imposed on an offender, even if only to the court, that offender may be subject to the ICAOS all other eligibility requirements having been met. This is a particularly important consideration when courts sentence offenders to probation with only a treatment element and reporting requirements. Such offenders may be subject to the ICAOS. *See, discussion, infra at 3.2.2.1.*

3.2.1.6.2 Deferred Prosecution

Some states may employ a “sentencing” option referred to as deferred prosecution. Such sentences, generally authorized by a state’s statutes, allow for an offender to admit under oath or stipulate to the facts of the criminal conduct but defer prosecution conditioned upon the offender completing some type of treatment program or meeting other conditions. Generally, if the offender successfully complies with the court’s order, the case is dismissed and no criminal judgment is entered. If the offender fails to comply with the court’s order, the court may enter a judgment of conviction and proceed to criminal sentencing.

At issue in deferred prosecutions is whether the offender is covered by the ICAOS because there is no conviction, the offender arguably being in a “pretrial” status. However, the Commission has interpreted its rules to apply to such offenders. *See, Advisory Opinion 6-2005.* In reaching its conclusion that the Compact covers such offenders, the Commission has opined that there is little functional difference between a “deferred prosecution” and a “deferred sentence.” In both cases, the offender is generally required to stipulate to the facts of the underlying criminal conduct. While in the deferred prosecution context the court does not enter a judgment of conviction and then suspend sentencing (as is the case in deferred sentencing), the court nevertheless accepts the offender’s admission to certain facts and places the offender on a probationary-type status. Unlike a pretrial offender whose guilt has not been established by trial or admissions, the deferred prosecution offender has admitted to the essential facts of their conduct and no longer enjoys the status of “innocent until proven guilty.” As the Commission has noted, “In determining that Rule 2.106 applies here [to deferred prosecutions], we are considering the action actually taken by the offender and the court rather than the label used by the legislature.” Considerations in determining whether the Compact would cover an offender subject to a deferred prosecution program include, but are not limited to:

- Is the offender required to make material and binding factual admissions before a court concerning the circumstances of the case such that practically there is no question that an offense has been committed?
- Upon violation of the terms and condition of the deferred prosecution program, is the offender returned to court and in jeopardy of having a conviction entered without trial?

- Is the offender, as a condition of participation in a deferred prosecution program, required to waive material rights concerning future court proceedings, such as the right to contest the facts, confront witnesses and offer exculpatory evidence?

An offender in a deferred prosecution program that includes some of these elements, particularly those regarding admissions of material fact and waiver of rights, would be subject to the Compact. By contrast, an offender in a deferred prosecution program that is run exclusively as a prosecutorial diversion program and that does not involve the courts or require an offender to waive fundamental rights in future proceedings *is like not* covered by the Compact.

3.2.1.6.3 Release from “Shock” Programs

Generally, those subject to programs such as “shock incarceration,” “shock parole” or “shock probation” are eligible for transfer under the ICAOS so long as all other requirements are met. These programs may also fall within the category of “judicial call-back” or “judicial release” programs. A sending state seeking to transfer supervision of offenders within its corrections systems generally has advanced knowledge of the release date and therefore sufficient time to arrange for the transfer of supervision. However, the creation of “shock” programs has in some cases blurred the distinction between traditional probation and parole. It is increasingly common for states to place offenders on probation after a short period of incarceration. Nevertheless, the Commission has held that offenders released from prison (as distinguished from local jails) even under a “shock” program are ineligible to relocate to another state until after acceptance by the receiving state, amendments to Rule 3.103 notwithstanding. *See, ICAOS Advisory Opinion 1-2006.*

3.2.1.6.4 What Constitutes Second and Subsequent Conviction of Driving While Impaired?

Special attention should be noted to offenders convicted of a second or subsequent offense of driving while impaired (DUI and DWI offenses). Because various states’ laws differ widely on what constitutes a second or subsequent conviction, the Commission has issued ICAOS Advisory Opinions to clarify the application of the ICAOS to such offenders. In the advisory opinion, the Commission observed that even if the sentencing court deems a second or subsequent conviction a “first conviction” for sentencing purposes, the Commission considers the actual number of convictions not the manner in which the conviction may be treated for sentencing purposes by individual state laws. An offender convicted of a second or subsequent offense but sentenced as a first-time offender is nevertheless an offender subject to the ICAOS. *See, ICAOS Advisory Opinion 7-2006.*

3.2.2 Special Considerations

3.2.2.1 Out-of-state Treatment

One area for potential confusion centers on the issue of treatment in lieu of supervision or treatment as supervision. In such cases, courts may be inclined to defer sentence and place an offender on “bench probation,” an element of which is enrollment in a community-based or in-house treatment program in another state. Successful completion of the treatment program is

generally a condition of the supervision program. Such treatment programs may include drug treatment, mental health treatment, or sex offender treatment, to name a few. The difficulties with these programs arise when an offender in one state is required to enroll in a treatment program only available in another state and whether such situations constitute circumstances that would trigger the ICAOS.

The Commission has opined that placement of an offender in an out-of-state treatment program may trigger the requirements of the Compact even if the offender is not subject to supervision by corrections officials. In ICAOS Advisory Opinions 3-2005 & 2-2015, the Commission determined that an offender who was required to participate in a treatment program in another state was subject to the Compact. The Commission noted that even in the absence of direct supervision by corrections officials, a provision in a court order requiring the treatment provider to provide progress reports or to report violations of the treatment regime to the court constituted “supervision” for purposes of triggering the Compact. The imposition of a treatment component as a condition of release with the corresponding requirements of progress reporting to the court and the probability of probation revocation upon failure to comply was sufficient to require the sending state to comply with the Compact and its rules.

Moreover, if covered by the ICAOS, enrollment in out-of-state treatment programs would appear to fall exclusively within the definition of “discretionary” acceptance, unless the conditions of Rule 3.101 concerning residency or family ties with a means of support are met. Consequently, courts should be exceedingly cautious in sentencing offenders, and particularly high-risk offenders, to treatment programs in other states as a means of circumventing the ICAOS. Such sentences may trigger the ICAOS and where they do trigger the ICAOS may place an offender in the impossible situation of being required to participate in a treatment program but unable to transfer to that program because the receiving state has declined to accept the case.

3.2.2.2 Duration of Supervision

Rule 4.102 provides that, “A receiving state shall supervise an offender transferred under the interstate compact for a length of time *determined by the sending state.*” (Emphasis added) Therefore, the duration of supervision is a matter that rests exclusively within the authority of the sending state and over which officials in the receiving state have little to no discretion. A receiving state would be required under the rules to supervise an out-of-state offender even if the duration of that supervision would supersede the duration of supervision normally afforded an in-state offender.

Several states in an effort to monitor high-risk offenders, such as sex offenders, have created supervision programs designated as “CSL” programs, or “Community Supervision for Life.” These programs generally require that high-risk offenders be subject to continuing community-based supervision for very long periods including the natural life of the offender. The conflict that such programs create centers on the obligation of the receiving state to provide a level of supervision that its own state laws may not recognize. Additionally, CSL programs can be a significant resource drain adding to the pressure on receiving states to either reject such cases or prematurely terminate supervision of an offender. This is precisely the issue that arose

between New York and New Jersey, and that led to ICAOS Advisory Opinion 9-2004 (Dec. 2, 2004).

In interpreting the ICAOS and its rules, the Commission opined that duration of supervision (as distinguished from the amount of supervision remaining under Rule 3.101) is not a consideration for eligibility under the ICAOS. Eligibility to transfer supervision is controlled by the nature of the offense, the nature of the sentence and the status of the offender. Thus, an offender who is subject to CSL or an exceedingly long period of supervision and who meets the criteria of Rule 3.101 is eligible to transfer supervision notwithstanding the duration of the supervision imposed by the sending state. *See, ICAOS Advisory Opinion 9-2004* (Dec. 2, 2004). It should be noted also that the receiving state is obligated by Rule 4.101 (discussed immediately below) to supervise the offender in a manner determined by the receiving state that is consistent with the supervision it provides other like offenders. Rule 4.101 is, however, directed more at the quality of supervision than the length of supervision and does not appear to supersede or change the receiving state's obligations regarding the duration of supervision; the latter being a matter, as noted, that is determined by the sending state as part of its judicial or parole proceedings.

A receiving state may close supervision for the reasons stated in Rule 4.112. These reasons include (1) the offender has been discharged, (2) the offender has absconded, (3) notification of death, (4) notification to the sending state that the offender has been sentenced to a term of incarceration of 180 days or more and the sending state has failed to provide a warrant, detainer or other acknowledgement with 90 days of notification, or (5) the offender has been returned to the sending state. A receiving state's decision to close supervision for the reasons contained in Rule 4.112 does not preclude the offender from being subject to the Compact. *See, Advisory Opinion 11-2006*.

3.2.2.3 Type of Supervision in Receiving State & Disabled Offenders

Rule 4.101 mandates that the receiving state supervise the offender consistent with the supervision it provides similar offenders in the state, including the use of incentives, corrective actions, graduated responses and other supervision techniques. While the sending state has sole authority to determine the duration of supervision either by way of the court's sentence or by paroling authorities (*see, Rule 4.102*), the receiving state retains discretion as to the type of supervision it will provide. *See Warner v. McVey*, (2010 WL 3239385 (W.D. Pa. 2010), also *State v. Warner*, 760 N.W.2d 209, 2008 WL 5009279 (Iowa App., 2008). Consequently, there can be qualitative differences between the intensity of services that a sending state would have provided an offender and the services a receiving state will provide the offender under its own rules and laws. Additionally, a receiving state is obligated to continue to supervise offenders "who become mentally ill or exhibit signs of mental illness or who develop a physical disability while supervised in the receiving state." (Rule 2.108) It would, therefore, be impermissible for a receiving state to seek to terminate supervision or to demand that a sending state retake an offender purely because the offender has become mentally or physically disabled.

3.2.2.4 Time of Transfer

Commission rules can have a great bearing on the time between final disposition of a case and when the offender can actually move to another state. To the extent that an offender is eligible for transfer under the Compact, a court *does not* have authority to order the offender to the receiving state prior to acceptance. Therefore, it is possible that the offender – even if a resident of the receiving state – will have to remain within the custody of the sending state until such time that the transfer is approved and reporting instructions are issued by the receiving state. See *In the Matter of Terrill Paul supra.* at 3.2.1.2

Assuming the offender is eligible for transfer pursuant to Rule 3.101, several Commission rules governing transfers apply and should be of particular interest to courts. Rule 3.102 requires that a sending state send to the receiving state an application for transfer of supervision and all pertinent information *prior to allowing the offender to relocate*. The receiving state has 45 calendar days to undertake an investigation and review the proposed transfer. (Rule 3.104) In the event the sending state fails to provide all needed information as required by Rule 3.107, the receiving state shall reject the request and provide specific reason(s) for rejection. (Rule 3.104(b)) Therefore, failure of court personnel to transmit all necessary information to their interstate compact office may substantially delay the processing of the transfer request. Incomplete requests are not sufficient and the receiving state is within its prerogative to deny transfer. *See e.g., ICAOS Advisory Opinion 5-2005.*

With regard to incarcerated offenders, under Rule 3.105 a sending state is required to submit a completed request for transfer of supervision no earlier than 120 days prior to the offender's planned release from a correctional facility. This rule has been interpreted to mean that "the process for transferring parole to a sister state cannot be commenced until the inmate is given a release date." *In re James A. Sauers, (2010 WL 290584 (Cal. App. 6 Dist., Feb. 11, 2010); also ICAOS Advisory Opinion 5-2005.*

3.2.2.5 Expedited Transfers

The Commission has provided through rule the option of "expedited reporting instructions," which effectively allows the offender to transfer supervision on a "pending acceptance" basis. To qualify for expedited reporting instructions, the sending and receiving state must agree that an emergency exists justifying such transfer of an offender. *See Rule 3.106.* The receiving state must provide a response to a request for expedited reporting instructions no more than two (2) business days after receipt of the request from the sending state after which the sending state, upon obtaining the offender's signature on all necessary forms, must issue a departure notice at the time the offender leaves the state. The granting of expedited instructions does not limit the authority of the receiving state to eventually reject the transfer of supervision upon full investigation. In such event, the offender is required to return to the sending state. If the offender fails to return to the sending state, that state *must* initiate retaking procedures to obtain custody and return the offender. The provisions of Rule 3.101-3 applicable to sex offenders provides for certain exceptions to these procedures. Retaking in this context would not appear to trigger the probable cause hearing requirements in Rule 5.108 unless revocation of

conditional release is contemplated by the sending state based on violations committed in the receiving state while the transfer is pending.

3.2.2.6 Temporary Travel Permits

Offenders may be granted travel permits and temporary travel permits. The distinction between the two types of permits is not exactly clear, except that a “temporary travel permit” appears to contemplate shorter stays while a “travel permit” appears to contemplate longer out-of-state stays. A temporary travel permit is defined as “written permission granted to an offender, whose supervision has been designated a ‘victim sensitive’ matter, to travel outside the supervising state for more than 24 hours but no more than 31 days.” *See* Rule 1.101. One important consideration in issuing travel permits, and particularly temporary travel permits, is the victim notification requirements of Rule 3.108(b).

3.2.2.7 Reporting Instructions for Probationers Living in the Receiving State at the Time of Sentencing or After Disposition of a Violation or Revocation Proceeding

The Commission has addressed the issue of transferring an offender’s supervision within the context of probation. Because offenders subject to probation may find themselves relocating to a state prior to acceptance and receiving instructions, the Commission has adopted Rule 3.103. This rule allows an offender who is living in the receiving state at the time of initial sentencing or after disposition of a violation or revocation proceeding to receive reporting instructions giving permission to the offender to reside in the receiving state pending the reply for transfer of supervision. The rule only applies to offenders who are living in the receiving state *at the time of initial sentencing or after disposition of a violation or revocation proceeding*. The rule, therefore, would not apply to every probationer. The sending state may grant a seven-day travel permit to an offender subject to Rule 3.103 and the receiving state must issue reporting instructions no later than two days after receiving the sending state’s request. *See* Rule 3.103. While such an offender inhabiting the receiving state would satisfy the requirement for eligibility for reporting instructions under Rule 3.103, upon completion of the investigation of the transfer request, the receiving state may deny the transfer based on failure to satisfy prerequisites of Rule 3.101, including not meeting the definition of resident as defined by the compact rules. In the event of such a denial, the provisions of Rule 3.103(e) clearly require the offender to return to the sending state or be retaken upon issuance of a warrant. *See ICAOS Advisory Opinion 3-2007*

3.2.2.8 Transfer of Supervision of Sex Offenders

The Commission recognizes that the transfer of sex offenders has become increasingly complex and difficult due to individual state laws regarding sex offender registries and various residency and employment restrictions. Rule 3.101-3 was adopted by the Commission to address these challenges in promoting offender accountability, public safety, and sharing comprehensive information regarding these offenders and their offenses and effectively regulating the process of transferring supervision of this high-risk population in a uniform manner.

This rule specifically provides exceptions to the procedures for issuing reporting instructions for sex offenders who meet criteria of Rules 3.101-1, 3.103 and 3.106 as addressed in the previous section. In cases of sex offenders transferring, travel permits are not allowed, meaning a sex offender must remain in the sending state until reporting instructions are issued, and a receiving state has five (5) business days to review an offender's proposed residence and respond to such request for reporting instructions which may result in a denial if the residency is invalid based on existing state law or policy.

In addition to providing these exclusions, this rule also prohibits a sex offender from *any* travel outside of a sending state pending a request for transfer and requires a sending state to provide additional information at the time of a request for transfer of supervision, if available, to assist a receiving state in determining risk and appropriate supervision levels for sex offenders. *See* Rule 3.101-3. To further implement special considerations and processes for sex offenders, a definition was added to the administrative rules of the Commission.

'Sex offender' has been defined by the Commission as "an adult placed under, or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies and *who is required to register as a sex offender either in the sending or receiving state* and who is required to request transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision." *See* Rule 1.101.

PRACTICE NOTE: The definition of sex offender was adopted to provide guidance in the administration of the rules regarding the movement of sex offenders. The Commission recognizes that state laws may differ with regard to the criteria under which an offender is classified as a sex offender. Therefore, the definition of sex offender provided in the compact rules does not impinge on individual state definitions and only addresses registration requirements of the sending and receiving states.

3.2.2.9 Entities Covered by the ICAOS

The requirements of the ICAOS extend to courts, probation authorities, paroling authorities and other criminal justice agencies having responsibility for supervising offenders and to those operating under contract with such entities. The requirement would also extend to any entity acting on behalf of courts or corrections authorities, including private contractors. Paull v. Park County, et al, 218 P.3d 1198 (Mont. S.Ct. 2009). To the extent that offenders both by offense and the fact that they are subject to some form of supervision are subject to the Compact, neither courts nor other supervising authorities may permit the offender to move interstate without complying with the ICAOS and its rules. Even where courts act as the "supervising authority," the Compact may still apply if terms and conditions have been attached to the sentence of the court. Supervision of offenders has two distinct criteria: (1) oversight exercised by a supervising authority regardless of its status or designation; and (2) such oversight is to monitor the offender's compliance with regulations and conditions, other than monetary conditions imposed on the offender at the time of release to the community or during the period of supervision. *See, ICAOS Advisory Opinion 8-2004 (Dec. 20, 2004)*. Assuming all other conditions are met, as long as the offender is under supervision and required to comply with

specific conditions (with the exception of cases in which the only condition is a monetary obligation) or other requirements to remain free, the transfer of the offender and his or her supervision must be done in compliance with the ICAOS and its rules. Thus, considerations of convenience and expediency are superseded by the goals of the ICAOS, which is first and foremost to ensure community safety in both the sending state, receiving state and any state to which the offender may subsequently relocate.

PRACTICE NOTE: If otherwise qualified under the Rules, an offender subject to court supervision to which non-monetary conditions have been attached (beyond “go and do not re-offend”) is an offender whose relocation to another state can only be achieved through the provisions of the ICAOS and its rules.

3.3 Other Considerations

3.3.1 Victims’ Rights

The ICAOS specifically creates certain rights for victims of crime and certain obligations on courts and supervising authorities with respect to those rights. While the Compact statute itself is vague and general on the rights, the Commission’s rules spell out specific rights and obligations that must be respected. Under Rule 3.108, victims of crime have a right to notice of an offender’s transfer. The notification requirement is triggered one business day after reporting instructions have been issued by the receiving state. The notification requirement applies to victims who reside in both the sending and receiving states, with each state having the obligation to follow state law regarding notification of victims that might be located within the respective states. Additionally, once an offender relocates, the receiving state is required by Rule 3.108(b) to notify the sending state when the offender (1) commits a subsequent offense or engages in behavior requiring retaking, (2) changes addresses, (3) returns to the sending state where a victim may be located, (4) departs the receiving state pursuant to an approved transfer of supervision to another receiving state, or (5) has been issued a travel permit where supervision of the offender is considered victim-sensitive.

In addition to the right to various notifications, victims also have a right to appear and be heard and to express their concerns with any proposal to transfer supervision to another state. *See* Rule 3.108-1. The obligation to notify the victim of the right to be heard rests with victim notification authority in the sending state. However, it would seem only logical that courts and paroling authorities must apprise state victim notification authorities of a pending hearing for this right to have any meaning.

Finally, depending on various factors, supervision may be classified as “victim-sensitive,” which has the effect of providing additional safeguards and procedures that must be followed. Victim sensitive supervision is defined as “a designation made by the sending state in accordance with its definition of ‘crime victim’ under the statutes governing the rights of crime victims in the sending state.” *See* Rule 1.101. Such a designation can affect the notification requirements imposed on a receiving state under Rule 3.108 and temporary travel permits.

The responsibility for administering the rights given by the ICAOS to victims appears to fall more on a state's interstate compact office rather than judicial officers and courts. However, courts should be aware of the various victim protections contained in the ICAOS and the Commission's rules to ensure full compliance by all parties involved with the matter.

3.3.2 Conditions

3.3.2.1 General Considerations

Although a state may be required to accept supervision given the eligibility status of an offender, the receiving state may at the time of acceptance determine that conditions are needed. The receiving state can only impose those conditions that it would have imposed on similar in-state offenders. *See* Rule 4.103(a). A receiving state cannot impose conditions on out-of-state offenders as a means of avoiding its general obligations under the Compact nor may a receiving state preemptively impose conditions prior to acceptance as a means of preventing a transfer. *See ICAOS v. Tennessee Bd. of Probation and Parole*, No. 04-526 KSF (E.D. Ky. 2005). To do so, either in a particular case or as a matter of routine practice, violates the ICAOS rules. A receiving state would not violate the ICAOS rule, for example, by requiring an out-of-state offender to submit to registration and testing requirements (*e.g.*, DNA testing, sex offender registration, etc.) if mandated by the laws of the receiving state and imposed on in-state offenders. *See* Rule 4.104(a). However, it cannot be emphasized enough that the timing of imposing conditions is critical to their validity. Under Rule 4.103 a condition can only be imposed by the receiving state *after* acceptance. Thus, prior practices, such as those challenged in *ICAOS v. Tennessee Bd. of Probation & Parole* that imposed conditions during the investigative stage, are not valid under the ICAOS rules.

Rule 4.103 requires the receiving state to notify the sending state of its intent to impose a condition. A receiving state can place conditions on an offender as a result of any allowable investigation *once transfer is accepted*. An offender accepts any conditions by accepting the transfer; that is, by applying for transfer and being accepted by a receiving state the offender accepts the condition or risks forfeiting the ability to transfer supervision. *See State v. Warner*, 760 N.W.2d 209 (Iowa Ct. App. 2008) In effect, a receiving state can impose a condition after acceptance of the offender but prior to the offender's actual physical relocation to the receiving state. *See Warner v. McVey*, (2010 WL 3239385 (W.D. Pa., July 9, 2010). An offender who has been accepted for transfer may refuse to comply with a receiving state's conditions, which then operates to deprive the offender of the ability to physically relocate supervision.

A sending state can also impose a condition on an offender as a condition of transferring supervision. However, in this context the receiving state must be given an opportunity to inform the sending state of its inability to meet a condition. *This should be of particular concern to judges*. Although a court may as a condition of probation impose a condition and require that the condition be met in the receiving state, the receiving state can refuse to enforce the condition if the receiving state is unable to do so. *See, ICAOS Advisory Opinion 1-2008* The receiving state's inability to enforce a condition requires the sending state to either: (1) withdraw the

condition and allow the offender to relocate to the receiving state, or (2) withdraw the transfer request and continue to supervise the offender in the sending state.

3.3.2.2 Authority to Impose Conditions

Courts and paroling authorities have wide latitude in imposing conditions. The standard of review on appeal challenging a condition is the abuse of discretion standard. *See, United States v. Torres-Aguilar*, 352 F.3d 934, 935 (5th Cir. 2003); *Critelli v. Florida*, 962 So.2d 341 (Fl. Dist. Ct. App. 2007); *Williams v. State*, 879 So. 2d 49 (Fla. Dist. Ct. App. 2004), *review denied*, *Williams v. State*, 2005 Fla. LEXIS 144 (Fla., Jan. 14, 2005). *State v. Baca*, 90 P.3d 509 (N.M. Ct. App. 2004). However, when an offender fails to challenge at sentencing the imposition of a condition, the court of appeals will generally review the validity of the condition under a “plain error” standard. *See, United States v. Brandenburg*, No. 05-1261 (6th Cir. Dec. 14, 2005).

Generally, a condition imposed as a part of probation or parole must be reasonably related to the underlying offense, promote offender rehabilitation, not unreasonably impinge on recognized liberty interests, protect the community and not be so vague as to make compliance difficult. If a condition is statutorily authorized and/or does not violate any constitutional protections, habeas corpus relief is unavailable to an offender contesting the condition. *See, People of the State of New York ex rel. William Stevenson v. Warden*, 806 N.Y.S.2d 185 (N.Y. App. Div. 2005). Conditions found to be appropriate include:

- Pursuant to a North Carolina statute applicable to offenders sentenced in North Carolina, it is reasonable to conclude that the imposition of this limited period of incarceration, in lieu of revocation of probation (‘Quick Dip’), would ‘qualify’ as a condition under Rule 4.103. Such condition would require the State of North Carolina to notify the sending state of such condition of supervision ‘at the time of acceptance or during the term of supervision’ as required under this rule. *See, ICAOS Advisory Opinion 1-2015*.
- Condition imposed on an offender convicted of trading child pornography over the internet that required him to provide the U.S. Probation Office advance notification of any computers, automated services, or connected devices that he would use during the term of supervision, and allowed the U.S. Probation office to randomly monitor the inmate’s computers, connected devices, and/or storage media. *See, United States v. Balon*, 384 F.3d 38 (2nd Cir. 2004).
- Condition imposed on an offender convicted of weapons charges that included a ban on operation of a motor vehicle and permitted warrantless searches was reasonable given the underlying offense, the need to protect the public, and the goal of reducing the likelihood of recidivism in view of an extensive criminal activity. *United States v. Kingsley*, 241 F.3d 828 (6th Cir. 2001), *cert. denied* 534 U.S. 859 (2001).
- Lower court did not abuse its discretion by imposing on an offender convicted of theft of goods in interstate commerce a special condition that he not work in the transportation of goods. *United States v. Vaughn*, 1997 U.S. App. LEXIS 30397 (6th Cir. 1997).

- Condition that required an offender convicted of operating a “chop shop” to obtain a GED and prohibited him from engaging in any motor-vehicle-related employment such as sales, service, mechanics, parts distribution or repair work was reasonable. Sanchez v. State, 1999 Alas. App. LEXIS 52 (Alaska Ct App. 1999).
- Social contact notification imposed on offender with history of domestic violence. United States v. Brandenburg, No. 05-1261 (6th Cir. Dec. 14, 2005).
- Supervised release which requires the defendant to remain current on restitution payments from previous criminal convictions is not subject to the limitation that restitution be related to the underlying offense. United States v. Mitchell, 429 F.3d 952 (10th Cir. 2005).
- Participation in sex offender treatment program and prohibition against contact with minor children. United States v. Heidebur, 417 F.3d 1002 (8th Cir. 2005).
- Prohibiting offender who pled guilty to possessing child pornography from having contact with his girlfriend and her minor children because the condition of supervised release served a permitted goal of protecting the children from harm and reasonably allowed for contact upon prior approval. United States v. Roy, No. 05-2145 (1st Cir., March 1, 2006).
- A ban on Internet use was not an unconstitutional condition of offender convicted of possessing child pornography because offender used his computer to send images; threatened to pursue violent revenge against the prosecutor, which could have been facilitated through Internet research; and blatantly violated the ban. People v. Harrison, 134 Cal. App. 4th 637 (Cal. App. 3d Dist. 2005). *See also*, Harris v. State, 836 N.E.2d 267 (Ind. Ct. App. 2005) (parole board was within its power in requiring convicted child molester, as a condition of parole, to refrain from using Internet except for work and not to seek employment that would bring him into contact with children).
- Restitution scheme requiring offender convicted of mail fraud to set up a trust fund for those whom he defrauded was in keeping with the purposes of probation because aggrieved parties would be established in civil litigation. United States v. Barringer, 712 F.2d 60 (4th Cir. 1983)
- Mandatory statutory condition prohibiting offender convicted of sexual misconduct with a minor from living with a child and which did not permit exceptions for offender's own children was a valid probation condition, and did not violate due process. State v. Strickland, 609 S.E.2d 253 (N.C. Ct. App. 2005).

3.3.2.3 Limitations on Conditions

Notwithstanding the authority of the sending and receiving state to impose conditions on an offender, several courts have determined that certain conditions – such as banishment from a

geographical area – are not appropriate because they interfere with the purpose of probation and parole, which is essentially rehabilitative in nature. For example, it is an invalid condition to order an offender deported from the United States, as it is beyond the jurisdiction of a court to order anyone deported without due process of the law. State v. Ahmed, 924 P.2d 679 (Mont. 1996), *cert. denied*, 519 U.S. 1082 (1997). Similarly, a majority of the jurisdictions examining the issue of banishment from a geographical area have generally held that such a condition cannot be broader than necessary to accomplish the goals of rehabilitation and the protection of society. *See*, Jones v. State, 727 P.2d 6 (Alaska Ct. App. 1986) (vacating condition prohibiting the defendant from being within a 45-block area since the condition is “unnecessarily severe and restrictive,” unlike a condition which prohibits the frequenting of certain types of establishments such as bars where prohibited activity will occur); State v. Franklin, 604 N.W.2d 79 (Minn. 2000) (vacating condition excluding defendant from Minneapolis, Minnesota); State v. Ferre, 734 P.2d 888 (Or. Ct. App. 1987) (determining condition restricting the defendant from the county where the victim lived was broader than necessary, but indicating condition limiting banishment to the town, instead of the county, where the victim resides would be reasonable); Johnson v. State, 672 S.W.2d 621 (Tex. Ct. App. 1984) (determining banishment from county where defendant resides is unreasonable).

Some jurisdictions have invalidated banishment conditions as being against public policy. *See*, People v. Baum, 231 N.W. 95, 96 (Mich. 1930). *See also*, Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) (power to banish, if it exists at all, is vested in the legislature; where such methods of punishment are not authorized by statute, it is impliedly prohibited by public policy); State v. Charlton, 846 P.2d 341, 344 (N.M. Ct. App. 1992) (endorsing the public policy rationale stated in Baum and Rutherford). By contrast, a limited number of jurisdictions have held that probation conditions restricting a defendant from geographic areas encompassing a county or areas within a city or town can be reasonably related to the goals of rehabilitation and the protection of society. *See*, Oyoghok v. Municipality of Anchorage, 641 P.2d 1267 (Alaska Ct. App. 1982) (approving condition restricting offender convicted of soliciting prostitution from being within a two block radius where street prostitution occurs); People v. Brockelman, 933 P.2d 1315 (Colo. 1997) (affirming condition restricting offender convicted of assault from the two towns where the victim lived and worked); State v. Nolan, 759 A.2d 721 (Maine 2000) (trial court's special probation condition which prohibited offender from entering towns of Sanford or Wells during five-year probationary term was reasonable as applied and was not an abuse of discretion).

Courts have held other types of conditions invalid because they bore no reasonable relationship to offender rehabilitation, public safety or the underlying offense. For example, a condition requiring sex offender registration is invalid where the trial court imposed the condition not because of the underlying offense (armed bank robbery), nor because of the conduct that led to revocation, but because of an unrelated 1986 sex-offense conviction. *See*, United States v. Scott, 270 F.3d 632 (8th Cir. 2001). The court found the condition had no reasonable relationship to the nature of the underlying offense and the record did not show that the condition was reasonably necessary to deter the offender from repeating a sex crime that had occurred 15 years earlier. Likewise, a condition restricting computer use was not reasonably related to present or prior offenses. *See*, United States v. Peterson, 248 F.3d 79 (2nd Cir. 2001). *But see*, United States v. Granger, 2004 U.S. App. LEXIS 25222 (4th Cir. 2004) (condition of

supervised release that defendant not possess or use any computer which was or could be connected to a network would not have prevented defendant from seeking employment where defendant's work history involved manual labor). Other conditions that have been held invalid include:

- Condition that prohibited an offender from employment as an over-the-road truck driver was vacated because it was not reasonably related to the offender's crime and imposed an overly harsh financial hardship. *See, United States v. Cooper*, 171 F.3d 582 (8th Cir. 1999).
- Condition requiring an accountant convicted of tax fraud to notify potential clients of the conviction was vacated as an unreasonable occupational restriction not related to protecting the public. *United States v. Doe*, 79 F.3d 1309 (2nd Cir. 1996).
- Condition that offender not use or possess alcohol during probation invalid because there was no relationship between offender's weapons convictions and use of alcohol. *Biller v. State*, 618 So.2d 734 (Fla. 1983).
- Condition barring unsupervised contact with offender's minor son was invalid where the record did not enable the court to determine whether the condition impermissibly impinged on a protected parent-child relationship. *United States v. Myers*, 426 F.3d 117 (2nd Cir. 2005); *See also Goings v. Court Services and Offender Supervision Agency of Dist. of Columbia*, 786 F.Supp.2d 48 (D. D.C. 2011)
- Condition imposed on offender convicted of child pornography that barred access to computers and the internet was not narrowly tailored to serve the dual purpose of promoting offender rehabilitation and protecting the community. *United States v. Crume*, 422 F.3d 728 (8th Cir, 2005).
- Condition barring use of alcohol and controlled substances held invalid as to the alcohol prohibition as there was no reasonable relationship between a firearms offense and alcohol consumption. *People v. Arenivas*, C043961 (Cal. App. 3d Dist., April 16, 2004).
- Conditions imposed on a parolee with respect to employment restrictions were overly broad and confusing, they were void for vagueness. *Pazden v. N.J. State Parole Bd.*, 864 A.2d 1136 (N.J. Super. Ct. App. Div. 2005).

Therefore, a condition that is overly broad, not related to the goals of rehabilitation, and not reasonably related to the protection of a victim or a community is generally unlawful. *State v. Muhammad*, 43 P.3d 318 (Mont. 2002); *Harrell v. State*, 559 S.E.2d 155 (Ga. Ct. App. 2002).

In addition to finding some conditions invalid, some courts have upheld the condition but found their execution invalid as the offender failed to receive sufficient notice that certain conduct was proscribed. Thus, in *State v. Boseman*, 863 A.2d 704 (Conn. Ct. App. 2005), the court held that revocation of an offender's probation for violating a no-contact order violated due process because the offender had no prior knowledge that being outside of his girlfriend's house

to drop off a child to an intermediary was contemplated within no contact condition. *See also, Jackson v. State*, 902 So.2d 193 (Fla. 5th Dist. Ct. App. 2005) (condition of probation of paying for drug treatment was not statutorily authorized and was struck since it was not orally pronounced; conditions requiring drug treatment and submission to warrantless searches were authorized). Likewise, a condition requiring an offender to reimburse attorney's fees was not valid where the trial court failed to determine the offender's ability to pay. *State v. Drew*, No. 83563 (Ohio Ct. App. 8th Dist., July 8, 2004)

3.3.2.4 Sex Offender Registration and Exclusion Zones

Courts have generally upheld sex offender registration requirements for offenders whose supervision is transferred under an interstate compact so long as such registration requirements are not discriminatory. Thus, a receiving state may impose sex offender registration requirements on transferees so long as the requirements are the same as imposed on in-state offenders. In *Doe v. McVey*, 381 F. Supp. 2d 443 (E.D. Penn. 2005), the court struck down the application of Pennsylvania's "Megan's Law" to an out-of-state offender. The court determined that under the law as applied, an in-state offender was entitled to a civil hearing to determine whether they were a "sexually violent predator" before registration was required. An out-of-state offender seeking transfer of supervision was subject to the requirement of automatic registration without the corresponding hearing available to an in-state offender. The court found that although protecting citizens from sex offenses was, without doubt, a legitimate state interest, subjecting one group of sex offenders to community notification without the same procedural safeguards accorded to other sex offenders, based solely on where the predicate offense was committed, was not rationally related to that goal and, thus, Pennsylvania's Megan's Law violated the Equal Protection Clause.

The Commission has addressed the issue of establishing a sex offender's risk levels and notification obligations in the receiving state prior to transfer. In *Advisory Opinion 5-2006* the Commission advised that a receiving state cannot impose a pre-transfer condition of establishing a sex offender's risk level or community notification requirement if it does not apply the same practice to in-state offenders. Applying the rule of *ICAOS v. Tennessee. Bd. of Probation & Parole*, Case No. 04-526-KSF (E.D. Ky. 2005), the Commission noted that "[Rule 4.101] does not permit a receiving state to impose the establishment of sex offender risk level or community notification on offenders transferred under the Compact if it does not impose these same requirements on offenders sentenced in the receiving state." *Advisory Opinion 5-2006*. *See generally discussion at § 3.3.2.1.*

Another area of concern for convicted sex offenders who may be transferred out-of-state concerns so-called "exclusion zones." Such zones, frequently created by statute, provide that sex offenders may not reside within certain distances from schools, day care centers and the like. Such zones are generally permissible. In the context of the interstate movement of offenders, such zones will not be constitutionally void merely because they interfere with interstate relocation. In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) the court of appeals upheld an Iowa law finding that (1) the U.S. Constitution did not prevent a state from regulating the residency of sex offenders in order to protect the health and safety of the citizens of Iowa, (2) the residency restriction was not unconstitutional on its face, and (3) the law in question did not amount to

unconstitutional *ex post facto* punishment of persons who committed offenses prior to July 1, 2002 because the sex offenders did not establish by the “clearest proof” that the punitive effect of the law overrode the state legislature’s legitimate intent to enact a non-punitive, civil regulatory measure that protected health and safety. However, an exclusion zone would not be permissible if by operation of law or practice it was directed to out-of-state offenders and not applied equally to in-state offenders. *Cf.*, Doe v. Ward, 124 F. Supp. 2d 900, (W.D. Pa. 2000).

The impact of sex offender registration requirements and exclusion zones has not been litigated within the context of the ICAOS and its rules. However, the requirement for sex offender registration would appear a legitimate exercise of state power and fall within the category of permissible conditions the transferee must meet so long as the burden applies equally to in-state and out-of-state offenders. See Commonwealth of Kentucky v. McBride, 281 S.W.3d 799 (Ky. 2009). Additionally, although a law creating exclusion zones may burden interstate transfers, such laws are not presumptively unconstitutional. Such laws may be challenged to the extent that they are intended to discriminate against out-of-state offenders.

3.3.2.5 Pre-Acceptance Testing

An offender who is otherwise eligible for transfer under Rule 3.101 (mandatory transfer) may not be required to submit to psychological testing by the receiving state as a condition of acceptance of the transfer. Such “pre-acceptance” requirements imposed on otherwise eligible offenders constitute additional requirements not authorized by the Compact or Commission rules. See, ICAOS v. Tennessee Bd. of Probation and Parole, No. 04-526 KSF (E.D. Ky. 2005). Imposing additional requirements on offenders not contemplated by the Compact or its rules constitutes an impermissible and unilateral attempt to amend the Compact. *Id.* Although certain testing requirements may be applied equally to in-state and out-of-state offenders, such requirements cannot operate to foreclose offenders from transferring their supervision. See also, Advisory Opinion 5-2006 (requiring sending state to establish sex offender risk level is inappropriate where similar requirement is not imposed on offenders in receiving state).

3.3.2.6 Post-Acceptance Testing

Although receiving states may not impose pre-acceptance requirements on offenders that would violated a state’s obligations under the Compact, the Compact and its rules would not foreclose the receiving state from imposing post-acceptance testing requirements on an offender. An offender otherwise eligible for transfer under Rule 3.101 must be accepted by the receiving state without obstacle. Once accepted the receiving state may impose additional rationale requirements on the offender provided that the additional requirements apply equally to in-state and out-of-state offenders. An offender’s failure to meet the additional requirements, *e.g.* sex offender registration or psychological testing, could be grounds for retaking. The same rule would apply to discretionary transfers under Rule 3.101-2. See, Critelli v. Florida, 962 So.2d 341 (Fl. Dist. Ct. App. 2007) (discussion *infra*. Sec. 3.3.2.7; also Advisory Opinion 8-2006).

3.3.2.7 Summary

In sum, while both the sending state and receiving state possess authority to impose conditions as an element of probation, parole, or transfer under the ICAOS, such conditions must (1) be reasonably related to the underlying offense, (2) aid in offender rehabilitation, (3) not unduly interfere with fundamental liberty interests, including the right to meaningful employment, and (4) be designed to promote community safety. The issue of imposing conditions pursuant to a transfer under ICAOS was considered in Critelli v. Florida, 962 So.2d 341 (Fl. Dist. Ct. App. 2007) which upheld the revocation of a compact sex offender’s probation for failure to comply with conditions imposed by the receiving state to “submit . . . to any program of psychological or physiological assessment and monitoring at the direction of the probation officer or treatment provider. This includes the polygraph, plethysmograph [“PPG”] and/or the Abel Screen to assist in treatment, planning and case monitoring.” The Court held that the offender “should not be able to accept the benefits of his transfer to Colorado, and then fail to carry out the required conditions.” Id. at 342-44. Additionally, within the context of offender transfers pursuant to the ICAOS, any special conditions imposed by a receiving state as a preemptive or *de facto* prohibition on transfers – particularly when such transfers are mandated by Rule 3.101 – would violate the spirit and intent of the ICAOS, which is fundamentally to allow for the expedient and effective transfer of offender supervision to other states as a necessarily element of offender rehabilitation and community safety.

3.3.3 Restitution

As ICAOS governs the movement of offenders and not the terms and conditions of sentencing, the ICAOS rules are silent on the imposition of restitution. This, therefore, is a matter governed exclusively by the laws of the sending state and the court imposing sentence. However, Rule 4.108 clearly relieves the receiving state of the obligation to collect fines, fees, costs or restitution. A sending state retains exclusive authority – and the obligation – to manage the financial portion of an offender’s sentence. The only obligation imposed on the receiving state is to inform the offender of a default and that the offender is out of compliance with the conditions of supervision upon notification from the sending state of the offender’s failure to maintain payments. See, Rule 4.108(b). The actual collection and enforcement of the financial obligation rests with the sending state. Failure to meet financial obligations is a breach of the supervision agreement and can result in the sending state retaking the offender and revoking probation or parole. See, e.g., Gelatt v. County of Broome, 811 F.Supp. 61 (N.D.N.Y. 1993) (decided on other grounds).

3.3.4 Fees

Rule 4.107 authorizes the collection of fees from offenders subject to the Compact. Pursuant to Rule 4.107(a), the sending state may impose a transfer application fee on an offender. Pursuant to Rule 4.107(b), the receiving state may impose a supervision fee on an offender. Generally, such fees have been previously authorized by state statutory or state administrative rule. See Holloway v. Cline, 154 P.3d 557 (Kan. App. 2007) (Imposition of a \$25.00 per month interstate compact supervision fee without providing a hearing before assessing such fee does not violate an offender’s Constitutional rights to due process of law). It is important to note that once an offender transfers supervision to a receiving state, the authority of

a sending state to collect any type of supervision fee ceases, to the extent such fees are truly supervision fees. Thus, while a sending state may impose a supervision fee for that period of time that the offender is actually in that state, the sending state may not continue to impose such a fee on the offender under the guise of continuing to “supervise” the offender’s progress in the receiving state. *See e.g.*, ICAOS [Advisory Opinion 2-2006](#).

A sending state is not prohibited from imposing other fees on offenders so long as those fees are not related to supervision. For example, in ICAOS [Advisory Opinion 14-2006](#), the Commission advised that a sending state could impose an annual fee on sex offenders so long as that fee had “no direct relationship to the supervision of such offenders.” *See*, ICAOS [Advisory Opinion 14-2006](#). In that particular case, state statute authorized an annual fee to be collected from sex offenders for purposes of maintaining the state’s sex offender registry and victim notification systems. The fee was an annual assessment as distinguished from an on-going fee related to the actual supervision of an offender. However, the Commission also concluded that while a sending state could impose such a fee the sending state alone was responsible for collecting the fee and could not transfer collection responsibilities to the receiving state. *Id.* *See also* [Wem v. Department of Corrections, 2011 WL 2651858 \(Mich. Ct. App. 2011\)](#)

3.3.5 Continuing Jurisdiction over Offender as Between the Sending & Receiving States

The transfer of an offender’s supervision pursuant to an interstate compact does not deprive the sending state of jurisdiction over the offender, unless it is clear from the record that the sending state intended to relinquish jurisdiction. *See, e.g.*, *Scott v. Virginia*, 676 S.E.2d 343, 347 (Va. App. 2009); *State v. Lemoine*, 831 P.2d 1345 (Kan. Ct. App. 1992). While the receiving state exercises jurisdiction over the offender for purposes of supervision, the sending state retains jurisdiction over the offender for purposes of probation or parole revocation. *See*, ICAOS [Advisory Opinion 3-2008](#) *Id.* (sending state retains jurisdiction to revoke probation; transfer of the duties of visitation and supervision over probationers does not explicitly mean a complete transfer of jurisdiction). One court, interpreting the ICPP, precursor to the ICAOS, held that:

Under the Interstate Parole and Probation Compact, * * * [a] receiving state assumed the duties of visitation and supervision over defendant. Florida Administrative Code Rule 23-4.001 provides an effective, businesslike method for permitting persons under supervision to leave one state and take up residence in another state with assurance that they will be supervised in the receiving state and can be returned to the sending state in case of sufficient violation. One of the functions of the receiving state is to properly report all violators to the original sending state, with appropriate recommendations. (Citations omitted)

Kolovrat v. State, 574 So. 2d 294, 296 (Fla. Dist. Ct. App. 1991). The Compact does not give a receiving state the authority to revoke the probation or parole imposed by authorities in a sending state. *Scott v. Virginia* supra. at 347; *See also* *Peppers v. State*, 696 So. 2d 444 (Fla. Dist. Ct. App. 1997). A receiving state may, independent of the sending state, initiate criminal proceedings against offenders who commit crimes while in the state. *See, e.g.*, Rule 5.101-1. A receiving state may not, however, as part of the offender’s conviction for such crimes revoke the

probation or parole imposed on the offender in the sending state or decide to provide no supervision once an offender is transferred in accordance with the ICAOS rules, *See ICAOS Advisory Opinion 1-2007*. Moreover, whether a sending state continues to exercise jurisdiction over an offender or has relinquished or forfeited that jurisdiction is generally a matter that can only be determined by the sending state. *See, Crady v. Cranfill*, 371 S.W.2d 640 (Ky. Ct. App. 1963) (under ICPP a sending state retains authority over offender through the retaking provisions; it is inappropriate for the courts of a receiving state to arrogate to themselves the determination of whether a sending state has forfeited its right to retake offenders under parole from that state).

3.3.6 Implications, Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The Health Insurance Portability and Accountability Act of 1996 and rules promulgated pursuant thereto are intended to protect certain health care information from disclosure to authorized persons or entities. Generally, prior to disclosure of health care information, the holder of that information is required to get a release from the patient. HIPAA covers the disclosure of both physical and mental health care information. Thus, persons subject to transfer under ICAOS may have a protected privacy interest in certain health care information.

There is a law enforcement exception to the requirement that a written release be obtained from an offender prior to disclosure of protected health care information. *See* 45 C.F.R. 164.512(f)(1). Protected health care information may also be released pursuant to a court order. *See*, 45 C.F.R. 164.512(f)(1)(ii). However, release of protected health care information pursuant to court order is limited to the explicit terms of the orders. *See*, 45 C.F.R. 164.512(e)(1)(i). Additionally, providers may release protected health care information when such release is consistent with law and applicable ethical standards, including disclosure to law enforcement authorities when necessary to protect the public or an individual from serious imminent threat or to aid in the apprehension of an individual who has escaped from lawful custody. *See*, 45 C.F.R. 164.512(j)(1)(i) & (j)(1)(ii)(B). *See also*, 45 C.F.R. 164.512(k)(5). It is, however, important to emphasize that the release of protected health care information must be genuinely for law enforcement purposes. Thus, it should not be presumed that offenders enjoy no rights of privacy in their health care information. To the extent that the disclosure of protected information is a legitimately necessary element in the supervision of an offender, such a release of information would not violate HIPAA. To the extent that the disclosure of such information is more general in nature and not directly tied to a legitimately necessary element of supervision, the release of such information may violate HIPAA. Therefore, in deciding whether to release protected health care information to the authorities of another state it is important to determine whether the release of such information is critical to the offender's supervision or maintaining public safety. An unlawful disclosure of protected information carries with it criminal and civil penalties, including fines up to \$250,000 and 10 years imprisonment. For a list of disclosures permitted by HIPAA, *see*, Advisory Opinion August 25, 2005.

Although HIPAA may arise in the context of an interstate transfer, several courts have concluded that HIPAA does not provide either an explicit or implicit private right of action. One court having addressed HIPAA within the context of transferring medical records in the ICAOS context concluded that "I need not determine whether petitioner's allegations state a possible

claim under this statute because the text of the statute does not provide a private right of action and two federal courts have concluded after thorough and persuasive analyses that no implied right of action exists.” O’Neal v. Coleman, 2006 U.S. Dist. LEXIS 40702 (W.D. Wis. June 16, 2006) *citing* Johnson v. Quander, 370 F. Supp. 2d 79, 99-100 (D.D.C. 2005); Univ. of Colorado Hospital v. Denver Publishing Co., 340 F. Supp. 2d 1142, 1144-46 (D. Colo. 2004).

CHAPTER 4

RETURNING OFFENDERS TO THE SENDING STATE

4.1 Status of Offenders Subject to ICAOS

One of the principal purposes for the ICAOS is to provide for the effective transfer of offenders to other states and to also obtain the return of an offender to the sending state through means other than formal extradition. To this end, the status of an offender as a convicted person substantially affects the process to which they are entitled under the ICAOS and constitutional principles of due process. Although the ICAOS and its administrative rules are relatively new and, therefore, have not been the subject of robust judicial construction, general principles governing the status of probationers and parolees under the federal Constitution, prior compacts, court decisions and state law are instructive and most likely controlling on offenders subject to the ICAOS.

The U.S. Supreme Court has held that the granting of probation or parole is a privilege, not a right guaranteed by the Constitution. It comes as an “act of grace” to one convicted of a crime and may be coupled with conditions that a state deems appropriate under the circumstances of a given case. Escoe v. Zerbst, 295 U.S. 490 (1935); Burns v. United States, 287 U.S. 216 (1932). *See also*, United States ex rel. Harris v. Ragen, 177 F.2d 303 (7th Cir. 1949). Many state courts have similarly found that probation or parole is a “revocable privilege,” an act of discretion. *See*, Wray v. State, 472 So. 2d 1119 (Ala. 1985); People v. Reyes, 968 P.2d 445 (Calif. 1998); People v. Ickler, 877 P.2d 863 (Colo. 1994); Carradine v. United States, 420 A.2d 1385 (D.C. 1980); Haiflich v. State, 285 So. 2d 57 (Fla. Ct. App. 1973); State v. Edelblute, 424 P.2d 739 (Idaho 1967); People v. Johns, 795 N.E.2d 433 (Ill. Ct. App. 2003); Johnson v. State, 659 N.E.2d 194 (Ind. Ct. App. 1995); State v. Billings, 39 P.3d 682 (Kan. Ct. App. 2002); State v. Malone, 403 So. 2d 1234 (La. 1981); Wink v. State, 563 A.2d 414 (Md. 1989); People v. Moon, 337 N.W.2d 293 (Mich. Ct. App. 1983); Smith v. State, 580 So.2d 1221 (Miss. 1991); State v. Brantley, 353 S.W.2d 793 (Mo. 1962); State v. Mendoza, 579 P.2d 1255 (N.M. 1978). Probation or parole is a statutory privilege that is controlled by the legislature and rests within the sound discretion of a sentencing court or paroling authority. *See, e.g.* People v. Main, 152 Cal. App. 3d 686 (Cal. Ct. App. 1984). An offender has no constitutional right to conditional release or early release. *See*, Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 7 (1979). Because there is no constitutional right, federal courts “recognize due process rights in an inmate only where the state has created a ‘legitimate claim of entitlement’ to some aspect of parole.” Vann v. Angelone, 73 F.3d 519, 522 (4th Cir. 1996). *See also* Furtick v. South Carolina Dept. of Probation, Parole & Pardon Services, 576 S.E.2d 146, 149 (2002). A state will only be held to “create” a constitutional liberty interest if its laws affirmatively create an interest that, if taken, would impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995).

Courts have held that because probation, parole or conditional pardon is not something an offender can demand but rather extends no further than the conditions imposed, revocation of the privilege generally does not deprive an offender of any legal right. Rather, revocation merely returns the offender to the same status enjoyed before probation, parole or conditional pardon was granted. *See, Woodward v. Murdock*, 24 N.E. 1047 (Ind. 1890); *Commonwealth ex rel. Meredith v. Hall*, 126 S.W.2d 1056 (Ky. 1939); *Guy v. Utecht*, 12 NW2d 753 (Minn. 1943). Other courts have held that probation, parole or conditional pardon is in the nature of a contract between the offender and the state and which the offender is free to accept with conditions or to reject and serve the sentence. Having elected to accept probation, parole or conditional pardon, the offender is bound by its terms. *See, Gulley v. Apple*, 210 S.W.2d 514 (Ark 1948); *Ex parte Tenner*, 128 P.2d 338 (Calif. 1942); *State ex rel. Rowe v. Connors*, 61 S.W.2d 471 (Tenn. 1933); *Ex parte Calloway*, 238 S.W.2d 765 (Tex. 1951); *Re Paquette*, 27 A.2d 129 (Vt. 1942); *Pierce v. Smith*, 195 P.2d 112 (Wash. 1948), *cert denied* 335 U.S. 834. Still other courts have held that probation, parole or conditional pardon is an act of grace controlled by the terms and conditions placed on an offender as if under contract. *See, State ex rel. Bush v. Whittier*, 32 N.W.2d 856 (Minn. 1948). Regardless of the underlying theory – grace, contract, or both – the general proposition is that probation is a privilege such that if an offender refuses to abide by the conditions a state can deny or revoke it. *People v. Eiland*, 576 N.E.2d 1185 (Ill. Ct. App. 1991). The rights of a person who is actually or constructively in the custody of state corrections officials due to the conviction of a criminal offense differs markedly from citizens in general, or for that matter citizens under suspicion of criminal conduct. *People v. Gordon*, 672 N.Y.S.2d 631 (N.Y. Sup. Ct. 1998). It should be noted however that although an offender does not have a right to supervised release, as discussed below, when granted certain liberty interests attach such that an offender is entitled to some minimum due process prior to revocation. *See, Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

It is not a violation of Fourteenth Amendment equal protection when the procedures prescribed and followed under a uniform interstate compact are applied. *See, People ex rel. Rankin v Ruthazer*, 107 N.E.2d 458 (N.Y. 1952). Similarly, in *Ex parte Tenner*, 128 P.2d 338 (Cal. 1942), the court upheld the validity of a uniform statute for out-of-state parolee supervision (ICPP) finding that since the statute applied uniformly to all parolees from states that were members of the Compact, the statute did deprive parolees of the equal protection of the laws. In *People v Mikula*, 192 N.E. 546 (Ill. 1934), the court held that no violation of the constitution occurred where an out-of-state offender might be eligible for transfer of parole to another state while an in-state offender was not able to obtain such a parole. The court found that it was within the authority of the legislature to make reasonable classification of prisoners in order to effectuate the purposes of the statute. Pointing out that if the convict was a nonresident and the law would not permit him to be paroled outside of the state, those reasons would become impotent as to him. The court concluded that there was no deprivation of advantage to anyone because of the statutory distinction between resident and nonresident convicts. *Cf., Williams v. Wisconsin*, 336 F.3d 576 (7th Cir. 2003) (while offenders have a right to marry, state can impose reasonable travel restrictions which have the effect of incidental interference with the right to marry; such restrictions do not give rise to a constitutional claim if there is justification for the interference).

Similarly, even warrantless searches of parolees have been held to be permissible, particularly where such searches have been agreed to as a condition of parole. See Samson v. California, 547 U.S. 843 (2006) [“Under our general Fourth Amendment approach we examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment. . . *Id.* At 848 (citations omitted)]. In Samson, the Court found that, on the continuum of state-imposed punishments, “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” *Id.* At 850. See also United States v. Stewart, 213 Fed. Appx. 898, 899 (11th Cir. 2007). Relying on Samson and Stewart at least one federal court has upheld a warrantless search of a parolee whose supervision was transferred from Georgia to Alabama under the provisions of ICAOS noting that under the terms of his Georgia parole agreement the offender “consented to search by his parole officer or any other parole officer or ‘any other parole officer,’ with no limitation as to the state of residence of the parole officer conducting the search. . . The search provision to which defendant agreed as a condition of his Georgia parole was not vitiated by the transfer of his supervision to Alabama.” See U.S. v. Brown, (2009 WL 112574 (M.D. Ala., January 15, 2009).

A person’s status as an out-of-state offender does not mean that such person possesses no constitutional rights. Offenders may have some minimum rights of due process in limited circumstances. For example, in Browning v Michigan Dept. of Corrections, 188 N.W.2d 552 (Mich. 1971), the court held that equal protection rights would be violated if a “dead time” statute were construed so that a person paroled out-of-state was not given credit on his original sentence for time served after his parole and while in prison in other states based on subsequent convictions in those other states. In that case, a parolee, as a result of the imprisonment in Georgia and in Illinois, had accumulated “dead time” totaling nearly 8 years, which was not credited to his Michigan sentence. Noting that the legislature intended that a parole violator should serve sentences concurrently, the court held that in the event of a parole violation, the time from the date of the parolee’s delinquency to the date of his arrest should not be counted as any part of the time to be served. However, the court also concluded that a prisoner who is paroled out of state and who subsequently violates parole by committing an offense in another state, does not have his dead time end until declared available by the other state for return to Michigan. The court declared that if construed to operate in this manner, the “dead time” statute not only violated the requirement that consecutive sentences be based upon express statutory provisions, but also invidiously sub-classified an out-of-state parolee solely upon the basis of geography and constituted a violation of equal protection guaranties.

In State v. Eldert, 125 A.3d 139, (Vt. 2015) the sending state’s court found that even though the Vermont probation officer received documents related to the commission of a new crime in the receiving state through the Interstate Compact Offender Tracking System from the Delaware probation officer, they did not have sufficient indicia of reliability to establish “good cause” to justify denying defendant his right to confront his Delaware probation officer. The documents were unsigned, unsworn and undated and did not contain adequate information or detail regarding the circumstances of defendant’s admissions to violations specifically to whom and when they were made, and when the offending behavior took place.

4.2 Waiver of Formal Extradition Proceedings

4.2.1 Waiver of Extradition under the ICAOS

Principal among the provisions of the ICAOS is the member states' waiver of formal extradition requirements for return of offenders who violate the terms and condition of their supervision. The ICAOS specifically provides that:

The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this Compact and By-laws and Rules promulgated hereunder.

See Purposes, Art. I. Additionally, pursuant to Rule 3.109, an offender *is required to waive extradition* as a condition of transferring supervision. That rule provides:

- (a) An offender applying for interstate supervision shall execute, at the time of application for transfer, a waiver of extradition from any state to which the offender may abscond while under supervision in the receiving state.
- (b) States that are parties to this Compact waive all legal requirements to extradition of offenders who are fugitives from justice.

See, Rule 3.109(a) & (b). The execution of an extradition waiver at the time of transfer is valid. *See Evans v. Thurmer*, 278 Fed. Appx. 679, 2008 WL 2149840 (7th Cir. 2008), *O'Neal v. Coleman*, 2006 U.S. Dist. LEXIS 40702 (W.D. Wis. June 16, 2006); see also *Johnson v. State*, 957 N.E.2d 660 (Ind. App. 2011). It is important to note that, subject to certain requirements, a sending state has authority at all times to enter a receiving state and retake an offender. *See discussion, infra, at §4.4.2* concerning hearing requirements. The waiver of extradition outlined in Rule 3.109 applies to any member state where the offender might be located. Under Rule 3.109, authorities are not limited in their pursuit of fugitives or in returning a fugitive to the sending state. However, authorities may be required to present evidence that the fugitive is the person being sought and that they are acting with lawful authority, *e.g.*, they are lawful agent of the state enforcing a properly issued warrant. *See, Ogden v. Klundt*, 550 P.2d 36, 39 (Wash. Ct. App. 1976).

Although neither Article I of the ICAOS or Rule 3.109 have been the subject of judicial interpretation, challenges to the constitutionality of similar waiver provisions contained in past Compacts have not been successful. Courts have held that an interstate compact authorized by Congress relating to interstate apprehension and retaking of offenders without formalities and without compliance with extradition laws does not violate due process of law. *See, Gulley v. Apple*, 210 S.W.2d 514 (Ark. 1948); *Woods v. State*, 87 So.2d 633 (Ala. 1956); *Ex parte Tenner*, 128 P.2d 338 (Cal. 1942); *Louisiana v. Aronson*, 252 A.2d 733 (N.J. Super. Ct. App. Div. 1969); *People ex rel. Rankin v. Ruthazer*, 107 N.E.2d 458 (N.Y.1952); *Pierce v. Smith*, 195 P.2d 112

(Wash. 1948), *cert. denied*, 335 U.S. 834. Extradition is not available even in the absence of a written waiver by the offender as the interstate compact operates to waive any extradition rights. *See, People v. Bynul*, 524 N.Y.S.2d 321 (N.Y. Crim. Ct.1987). Habeas corpus is generally unavailable to offenders being held pending return to the sending state under an interstate compact. *See, Stone v. Robinson*, 69 So. 2d 206 (Miss. 1954) (prisoner not in Mississippi as a matter of right but as a matter of grace under the clemency extended by the Louisiana parole board; prisoner subject to being retaken on further action by the parole board); *State ex rel. Niederer v. Cady*, 240 N.W.2d 626 (Wis. 1974) (constitutional rights of offender whose supervision was transferred under compact not violated by denial of an extradition hearing as offender was not an absconder but was in another state by permission and therefore subject to the retaking provisions of the compact); *Cook v. Kern*, 330 F.2d 1003 (5th Cir. 1964) (whatever benefits offender enjoyed under the Texas Extradition Statute, he has not been deprived of a federally protected right and therefore a writ of habeas corpus was properly denied; even assuming that a constitutional right was involved, the parole agreement constitutes a sufficient waiver.) However, a person seeking relief from incarceration imposed as the result of allegedly invalid proceedings under the ICPP may utilize the remedy of habeas corpus to challenge that incarceration. *People v. Velarde*, 739 P.2d 845 (Colo. 1987). Other jurisdictions have also recognized the availability of this remedy, albeit for limited issues, to offenders seeking to challenge the nature and result of proceedings conducted pursuant to provisions equivalent to those of the ICPP. *See, e.g., United States ex rel. Simmons v. Lohman*, 228 F.2d 824 (7th Cir. 1955); *Petition of Mathews*, 247 N.E.2d 791 (Ohio Ct. App. 1969); *Ex Parte Cantrell*, 362 S.W.2d 115 (Tex. 1962). The availability of habeas corpus to a detained offender may also be affected by recent changes to the ICAOS rules imposing time limits on probable cause determinations. *See, Rule 5.108€ & (f)*.

4.2.2 Uniform Extradition Act Considerations

An offender who absconds from a receiving state is deemed a fugitive from justice. The procedures for returning a fugitive to a demanding state can be affected by the Uniform Criminal Extradition and Rendition Act (UCERA). Under that act, a fugitive may waive all procedural rights incidental to the extradition, for example the issuance of a Governor's warrant, and consent to return to the state demanding the fugitive. To be valid, the waiver must be in writing, in the presence of a judge, and after the judge has informed the fugitive of his rights under the statute. Nothing in the UCERA prevents a person from voluntarily returning to a state. Several courts have recognized that an interstate compact governing supervision of out-of-state offenders provides an *alternative procedure* by which a person can be returned to the demanding state without complying with the formalities of the UCERA. *See, In re Klock*, 133 Cal App 3d 726 (Cal. Ct. App. 1982); *People v. Bynul*, 524 N.Y.S.2d 321 (N.Y. Crim. Ct. 1987). *See also Todd v. Florida Parole and Probation Commission*, 410 So.2d 584 (Fla. 1st DCA 1982) (“[W]hen a person is paroled to another state pursuant to an interstate compact, all requirements to obtain extradition are waived.”) An interstate compact has been held to displace the UCERA as to certain offenders and requires only minimal formalities as to the return of those offenders. *Id.* Furthermore, the offender's agreement to waive extradition as a condition of relocating waives the need for formal extradition proceedings upon demand by the sending state that an offender be returned. *Cf., Wymore v. Green*, 245 Fed. Appx. 780, 2007 WL 2340795 (10th Cir. 2007)

(plaintiff's waiver of extradition renders any formal request or permission from the requesting and sending state governors unnecessary.)

PRACTICE NOTE: The purpose of the ICAOS is to benefit an offender by permitting them to reside and be supervised in a state where the offender has familial and community ties. In consideration of this privilege, an offender is bound by the terms of the ICAOS, including Rule 3.109 regarding waiver of extradition in certain circumstances. Therefore, an offender subject to ICAOS is subject to the “alternative procedures” provided in the Compact and its rules, not the provisions of the UCERA.

4.3 Violation Reports Requiring Retaking

A receiving state is obligated to report to authorities in the sending state within 30 calendar days of the discovery or determination that an offender has engaged in behavior requiring retaking by submitting a violation report. “Behavior requiring retaking” is defined in Rule 1.101 as an act or pattern of non-compliance with conditions of supervision that could not be successfully addressed through the use of documented corrective action or graduated responses and would result in a request for revocation of supervision in the receiving state. The definition of “behavior requiring retaking” has not been judicially construed. However, the language of the rule indicates that “behavior requiring retaking” is determined under the facts and laws of the receiving state. Therefore, it is conceivable that revocable acts or patterns of non-compliant behavior and retaking will differ from state-to-state. Moreover, a sending state may be required to retake an offender for violating acts or non-compliant behavior that, had they occurred in the sending state, may not have constituted grounds for revocation.

4.4 Retaking

As previously noted, Article I of ICAOS authorizes officers of a sending state to enter a receiving state or a state to which an offender has absconded for purposes of retaking an offender. With limited exceptions, the decision to retake an offender rests solely in the discretion of the sending state. *See* Rule 5.101(a). However, if an offender has been charged with a subsequent offense in the receiving state, the sending state may not retake the offender without prior consent from authorities in the receiving state, until the criminal charges are dismissed, sentence has been satisfied or the offender released on supervision. *See* Rule 5.101-1, also Reece v. Owens, 2011 WL 3239958 (E.D. TX, 2011) (State of Arkansas could not retake an offender from Texas after being charged with a subsequent criminal offense in Texas unless Texas consents under ICAOS Rule 5.101)

The discretion of the sending state to retake an offender is limited by several factors. First, a sending state must retake an offender upon request of the receiving state or subsequent receiving state and conviction for a felony offense or violent crime. *See* Rule 1.101 and Rule 5.102. The sending state can retake only after charges have been dismissed, sentence has been satisfied, or the offender has been released to supervision for the subsequent offense, unless the sending and receiving states mutually agree to the retaking. *Id.* Second, a sending state is required to retake an offender upon request of the receiving state and a showing that the offender

has engaged in behavior requiring retaking. *See* Rule 1.101 and Rule 5.103. Furthermore, Rule 5.103 can only be invoked by the receiving state and the applicability of this rule assumes that the violating behavior must all have occurred in the receiving state. *See ICAOS Advisory Opinion 4-2007*. It is important to note that the gravity of the violating act or pattern of non-compliance is measured by the standards of the receiving state. Therefore, a sending state is required to retake an offender even if the violating act or pattern of non-compliant behavior would not have resulted in revocation under the standards of the sending state. So long as the violation is documented showing the behavior could not be successfully addressed through the use of corrective action or graduated responses and meets the revocation standards of the receiving state, the sending state is obligated to retake. This may have significant implications for the need to conduct a retaking hearing in the receiving state.

PRACTICE NOTE: The gravity of a violating act or pattern of non-compliance is measured by the standards of the receiving state. A sending state may be required to retake an offender even if the violation would not have been given the same weight by that state.

Under the Compact, officers of the sending state are permitted to enter the receiving state or any other state to which the offender has absconded in order to retake the offender. As the Compact and Rule 3.109 waive formal extradition proceedings, officers need only establish their authority and the identity of the offender. *See* Rule 5.107(a) & (b). Due process requirements, such as the requirement for a probable cause hearing, may also apply if the violations are to form the basis for revocation proceedings in the sending state. *See* Rule 5.108(a). Once the authority of sending state's officers is established and due process requirement met, authorities in a receiving state may not prevent, interfere with or otherwise hinder the transportation of the offender back to the sending state. *See* Rule 5.109. Interference by court officials would constitute a violation of the ICAOS and its Rules.

4.4.1 Offenders Convicted of a Violent Crime

Rule 5.102 as described in the previous section, requires at the request of a receiving state, that the sending state retake an offender convicted of a violent crime. A violent crime is qualified by one of the following four criteria: (1) any crime involving the unlawful exertion of physical force with the intent to cause injury or physical harm to a person; (2) or an offense in which a person has incurred direct or threatened physical or psychological harm as defined by the criminal code of the state in which the crime occurred; (3) or the use of a deadly weapon in the commission of a crime; (4) or any sex offense requiring registration.

4.4.2 Arrest and Detention of Offenders in the Receiving State

The relationship between officials in a sending state and officials in a receiving state has been defined by courts as an agency relationship. Courts recognize that in supervising out-of-state offenders the receiving state is acting on behalf of and as an agent of the sending state. *See, State v. Hill*, 334 N.W.2d 746 (Iowa 1983) (trial court committed error in admitting out-of-state offender to bail as status of the offender was not controlled by the domestic law of Iowa but rather by the Interstate Compact for Probation and Parole and the determinations of sending state authorities); *State ex rel. Ohio Adult Parole Authority v. Coniglio*, 610 N.E.2d 1196, 1198 (Ohio

Ct. App. 1993) (“For purposes of determining appellee’s status in the present case, we believe that the Ohio authorities should be considered as agents of Pennsylvania, the sending state. As such, the Ohio authorities are bound by the decision of Pennsylvania with respect to whether the apprehended probationer should be considered for release on bond and the courts of Ohio should recognize that fact.”); also New York v. Orsino, 27 Misc.3d 1218(A), 2010 WL 1797026 (N.Y.Sup., April 26, 2010)(“In several cases both appellate and lower courts have held that the power of the receiving state, in this case Connecticut, to conduct a hearing is delegated to it pursuant to the Compact for Adult Supervision.”); People ex rel Ortiz v. Johnson, 122 Misc.2d 816, Sup. Ct.1984).

In supervising out-of-state offenders, authorities in a receiving state are not acting exclusively as authorities of that state under the domestic law of that state, but are also acting as agents of the sending state and to a certain degree are controlled by the lawful decisions of sending state officials. “Under the terms of the compact, the receiving state “will assume the duties of visitation and supervision over probationers or parolees of any sending state. Transfer of supervision under this statute is not a transfer of jurisdiction. Although the day-to-day monitoring of probationers becomes the duty of the receiving state, the sending state does not abdicate its responsibility.” See Johnson v. State, 957 N.E.2d 660 (Ind. App. 2011); Keeney v. Caruthers, 861 N.E.2d 25 (Ind. App. 2007); Scott v. Virginia, 676 S.E.2d 343, 348 (Va. App. 2009).

The arrest of an out-of-state offender may occur under one of three broad categories. First, an out-of-state offender is clearly subject to arrest and detention for committing a new offense in the receiving state. Rules 5.101 and 5.102 recognize that an offender may be held in a receiving state for the commission of crime and *is not* subject to retaking unless the receiving state consents, the term of incarceration on the new crime was completed, or the offender has been placed on probation. The authority to actually incarcerate an offender necessarily carries with it the implied power that an offender is subject to arrest for committing an offense.

Second, an out-of-state offender is subject to arrest and detention upon request of the sending state based on its intent to retake the offender. Such a retaking can occur based on a demand by the receiving state or because the sending state intends to revoke probation. Under this circumstance and notification to retake an offender, the sending state must issue a warrant, and file a detainer with the holding facility when the offender is in custody. Courts have routinely recognized the right of a receiving state to arrest and detain an offender based on such a request from a sending state. See *e.g.*, State ex rel. Ohio Adult Parole Authority v. Coniglio, 610 N.E.2d 1196 (Ohio Ct. App. 1993) (offender cannot be admitted to bail pending retaking); Crady v. Cranfill, 371 S.W.2d 640 (Ky. Ct. App. 1963) (detention of offenders proper as only courts in the sending state can determine the status of their jurisdiction over the offender).

PRACTICE NOTE: An offender arrested and detained for violating the conditions of supervision may have certain due process rights. If the sending state intends to use offender’s violations in the receiving state as the basis for possibly revoking the offender’s conditioned release, both U.S. Supreme Court decisions and rules of the Commission require that the sending and receiving states comply with various hearing requirements. See *discussion*, beginning at Section 4.4.3

The third circumstance under which officials in a receiving state may arrest an out-of-state offender is for violations that physically occur in the receiving state. This third circumstance may prove the most confusing and difficult because the offender may or may not have been charged with committing a new offense in the receiving state and the sending state may or may not initiate retaking proceedings. Nevertheless, courts have recognized that out-of-state offenders are subject to arrest for violations that occur in the receiving state. *See, e.g., Kaczmarek v. Longworth*, 107 F.3d 870 (Table), 1997 WL 76190 (6th Cir. 1997) (out-of-state probationer could not show that he was entitled to be released from detention under the standards set by Ohio *for its own probationers and parolees*) (Emphasis added); in accord *Perry v. Pennsylvania*, 2008 WL 2543119 (W.D. Pa. 2008)

The ICAOS rules clarify the arrest powers of state officials supervising an out-of-state offender. Rule 4.109-1 provides that, “An offender in violation of the conditions of supervision may be taken into custody or continued in custody in the receiving state.” This rule acts as statutory authorization in the receiving state notwithstanding domestic laws to the contrary. *See, Art. V* (Commission to adopt rules that “shall have the effect of statutory law” and are binding on the states). Rule 4.109-1 effectively adopts and codifies the Commission’s prior stance on arrest powers as set out in ICAOS Advisory Opinion 2-2005. *See also Perry v. Pennsylvania, supra.* (giving ‘deference’ to this advisory opinion and holding that the term “supervision” as defined by ICAOS “as a matter of statutory construction . . . included the ability to arrest and to detain Plaintiff.”)

PRACTICE NOTE: Notwithstanding the adoption of Rule 4.109-1, state officials should determine whether the laws of their state authorize the arrest of a compact offender not already in custody including the need for a warrant. Rule 4.109-1 extends to receiving state officials the right to arrest out-of-state offenders to the extent permitted by the laws of the receiving state. *See Advisory Opinion 17-2006.*

In addition to specific rule authorization, public policy justifies the arrest of an out-of-state offender notwithstanding the domestic law of the receiving state. The purpose of the ICAOS is not to regulate the movement of adult offenders simply for the sake of regulation. Rather, regulating the movement of adult offenders fulfills the critical purposes of promoting public safety and protecting the rights of crime victims. *See INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, ART. I.* All activities of the Commission and the member states are directed at promoting these two overriding purposes. Member states, their courts and criminal justice agencies are required to take all necessary action to “effectuate the Compact’s purposes and intent.” *See INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, art. IX, § A.*

4.4.2.1 Discretionary Disposition of Violation

Rule 5.102, as previously discussed, requires the sending state to retake an offender for a new felony or violent crime conviction *after* the offender has been released from incarceration for the new crime. This may result in a considerable amount of time between when the crime is committed, when the term of incarceration concludes and when the sending state retakes the

offender and has opportunity to impose its sanction for the violation for a new crime conviction occurring in another state.

Rule 5.101-2 provides a discretionary process for a sending state to timely dispose of a violation for a new crime conviction occurring outside the sending state. This process is limited to offenders incarcerated for the new crime conviction and the sentence for the new crime may satisfy or partially satisfy the sentence imposed for the violation committed. This requires the approval of the sentencing authority or releasing authority and consent of the offender. At its own expense, the sending state is required to establish procedures for conducting the violation hearing electronically or in-person and provide hearing results to the receiving state. If the sentence for the new crime fully satisfies the sentence for the violation imposed, the sending state is no longer required to retake if Rules 5.102 and 5.103 apply. *See* Rule 5.101-2

4.4.3 Post-Transfer Hearing Requirements

4.4.3.1 General Considerations

Offenders, including those subject to supervision under the ICAOS, have limited rights. Conditional release is a privilege not guaranteed by the Constitution; it is an act of grace, a matter of pure discretion on the part of sentencing or corrections authorities. *See* Escoe v. Zerbst, 295 U.S. 490 (1935); Burns v. United States, 287 U.S. 216 (1932); United States ex rel. Harris v. Ragen, 177 F.2d 303 (7th Cir. 1949); Wray v. State, 472 So. 2d 1119 (Ala. 1985); People v. Reyes, 968 P.2d 445 (Calif. 1998); People v. Ickler, 877 P.2d 863 (Colo. 1994); Carradine v. United States, 420 A.2d 1385 (D.C. 1980); Haiflich v. State, 285 So. 2d 57 (Fla. Ct. App. 1973); State v. Edelblute, 424 P.2d 739 (Idaho 1967); People v. Johns, 795 N.E.2d 433 (Ill. Ct. App. 2003); Johnson v. State, 659 N.E.2d 194 (Ind. Ct. App. 1995); State v. Billings, 39 P.3d 682 (Kan. Ct. App. 2002); State v. Malone, 403 So. 2d 1234 (La. 1981); Wink v. State, 563 A.2d 414 (Md. 1989); People v. Moon, 337 N.W.2d 293 (Mich. Ct. App. 1983); Smith v. State, 580 So.2d 1221 (Miss. 1991); State v. Brantley, 353 S.W.2d 793 (Mo. 1962); State v. Mendoza, 579 P.2d 1255 (N.M. 1978). Some courts have held that revoking probation or parole merely returns the offender to the same status enjoyed before being granted probation, parole or conditional pardon. *See* Woodward v. Murdock, 24 N.E. 1047 (Ind. 1890); Commonwealth ex rel. Meredith v. Hall, 126 S.W.2d 1056 (Ky. 1939); Guy v. Utecht, 12 NW2d 753 (Minn. 1943).

More recently, courts have generally held that because conditional release is not a right an offender can demand but extends no further than the conditions imposed, revoking the privilege triggers only very limited rights. Offenders enjoy some modicum of due process, particularly with regards to revocation, which impacts the retaking process. Beside the rules of the Commission, several U.S. Supreme Court cases may the process for return of offenders for violating the condition of their supervision. *See e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee entitled to revocation hearing); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probationer entitled to revocation hearing); Carchman v. Nash, 473 U.S. 716 (1985) (probation-violation charge results in a probation-revocation hearing to determine if the conditions of probation should be modified or the probationer should be resentenced; probationer entitled to less than the full panoply of due process rights accorded at a criminal trial). The U.S. Supreme Court has recognized that offenders subject to probation or parole have some liberty interests, but that they need not be accorded the “full panoply of rights” enjoyed by defendants in a pretrial status

because the presumption of innocence has evaporated. Due process requirements apply equally to parole and probation revocation. *See generally, Gagnon, supra.*

4.4.3.2 Right to Counsel

Under the rules of the Commission, a state is not specifically obligated to provide counsel in circumstances of revocation or retaking. However, particularly with regard to revocation proceedings, a state should provide counsel to an indigent offender if she or he may have difficulty in presenting their version of disputed facts, cross-examining witnesses, or presenting complicated documentary evidence. *Gagnon, supra* at 788. Presumptively, counsel should be provided where, after being informed of his right, the indigent probationer or parolee requests counsel based on a timely and colorable claim that he or she has not committed the alleged violation or, if the violation is a matter of public record or uncontested, there are substantial reasons in justification or mitigation that make revocation inappropriate. *See generally, Gagnon, supra.* Providing counsel for proceedings in the receiving state may be warranted where the sending state intends to use the offender's violations as a basis for revoking conditional release. In the revocation context officials in the receiving state are not only evaluating any alleged violations but are also creating a record for possible use in subsequent proceedings in the sending state. *See Rule 5.108.* The requirement to provide counsel would generally not be required in the context where the offender is being retaken and the sending state does not intend to revoke conditional release based on violations that occurred in the receiving state. In this latter context, no liberty interest is at stake because the offender has no right to be supervised in another state.

The provision of the *Morrissey* and *Gagnon* decisions governing revocation hearings and appointment of counsel have been read by some courts to apply only after the defendant is incarcerated. *See, State v Ellefson*, 334 N.W.2d 56 (SD 1983). However, the law in this area is unsettled. At least one case provides insight into the Supreme Court's evolving jurisprudence with regard to the right to counsel in non-traditional criminal sentencing proceedings. *See, e.g., Alabama v. Shelton*, 535 U.S. 654 (2002) (Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the state did not provide counsel during the prosecution of the offense for which he is imprisoned). In *Shelton*, the Court reasoned that once a prison term is triggered the defendant is incarcerated not for the probation violation but for the underlying offense. The uncounseled conviction at that point results in imprisonment and ends up in the actual deprivation of a person's liberty. The Court also noted that *Gagnon* *does not* stand for the broad proposition that sequential proceedings must be analyzed separately for Sixth Amendment purposes, with the right to state-appointed counsel triggered only in circumstances where proceedings result in *immediate* actual imprisonment. The dispositive factor in *Gagnon* and *Nichols v. United States*, 511 U.S. 738 (1994), was not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony for which he was imprisoned. Revocation of probation would trigger a prison term imposed for a misdemeanor of which *Shelton* was found guilty without the aid of counsel, not for a felony conviction for which the right to counsel is questioned. Similarly, returning a defendant to a sending state on allegations that he or she violated the terms of their probation and thus are now subject to incarceration *may* give rise to due process concerns. Because *Shelton* was limited to actual trial proceedings – distinguished from post-trial

proceedings – its direct application to retaking proceedings may be of limited value. However, the decision does provide insight into the gravity the Supreme Court attaches to the opportunity to be heard and the assistance of counsel if liberty interests are at stake.

4.4.3.3 Specific Considerations for Probable Cause Hearings under ICAOS

It is important to emphasize the distinction between *retaking that may result in revocation* and *retaking that will not result in revocation*. Where there is no danger that the sending state will revoke the offender’s probation or parole supervision, the offender is not entitled to a probable cause proceeding. As previously discussed, an offender has no right to be supervised in another state and the sending state retains the right under the ICAOS to retake an offender for any or no reason. See Paull v. Park County, 218 P.3d 1198 (S. Ct. Mt. 2009) For example, a sending state may retake an offender because the offender has failed to comply with a condition that in and of itself does not constitute a new felony offense nor can be construed as a “behavior requiring retaking.” The failure to meet a condition may cause officials in the sending and receiving states to conclude that the offender would be better supervised the sending state. The broad language of the ICAOS and its rules would allow a sending state to retake an offender even though the status of the offender’s conditional release is not in jeopardy.

Where the retaking of an offender may result in revocation of conditional release by the sending state, the offender is entitled to the basic due process considerations that are the foundation of the Supreme Court’s decisions in Morrissey and Gagnon, and the rules of the Commission. Rule 5.108(a) provides, in part, that:

An offender subject to retaking *that may result in revocation* shall be afforded the opportunity for a probable cause hearing before a neutral and detached hearing officer in or reasonably near the place where the alleged violation occurred.
(Emphasis added)

Rule 5.108 creates a two-tier system for addressing probable cause hearing requirements. First, an offender convicted of a new criminal offense in the receiving state *is not* entitled to further hearings, the judgment of conviction being conclusive as to the status of the offender’s violations of supervision and the right of the sending state to retake. In this circumstance, there is no need to conduct a probable cause hearing subsequent to the court proceedings simply to make a new (and virtually identical) record for transmission to the sending state. See Morse v. Nelson, (2010 WL 466157 (D. Conn., Feb. 9, 2010), also D’Amato v. U.S. Parole Com’n, 837 F.2d 72, 79 (2d Cir. 1988)

PRACTICE NOTE: An offender convicted of committing a new criminal offense in the receiving state is not entitled to a probable cause hearing, the official judgment of the court sufficient to trigger retaking by the sending state and subsequent revocation of release.

Second, an offender must be afforded a probable cause hearing where retaking is for *other than* the commission of a new criminal offense *and* revocation of conditional release by the sending state is likely. The offender may waive this hearing only if she or he admits to one or

more violations of their supervision. *See*, Rule 5.108(b), also Sanders v. Pennsylvania Board of Probation and Parole, 958 A.2d 582 (2008). The purpose of the hearing is twofold: (1) to test the sufficiency and evidence of the alleged violations, and (2) to make a record for the sending state to use in subsequent revocation proceedings. One of the immediate concerns in Gagnon and Morrissey was geographical proximity to the location of the offender's alleged violations of supervision. Presumably, hearings on violations that occurred in a receiving state that was geographically proximate to the sending state could be handled in the sending state if witnesses and evidence were readily available to the offender. *See*, Fisher v. Crist, 594 P.2d 1140 (Mont. 1979); State v. Maglio, 459 A.2d 1209 (N.J. Super. Ct. 1979) (when sentencing state is a great distance from supervising state, an offender can request a hearing to determine if a *prima facie* case of probation violation has been made out; hearing will save defendant the inconvenience of returning to that state if there is absolutely no merit to the claim that a violation of probation occurred). Consistent with Gagnon and Morrissey Rule 5.108 (a) provides that an offender shall be afforded the opportunity for a probable cause hearing before a neutral and detached hearing officer in or reasonably near the place where the alleged violation occurred. While a judge is not required to preside at such hearings, care should be taken to conduct these proceedings in a fair manner consistent with the due process requirements set forth in these U.S. Supreme Court cases. An offender's due process rights are violated where a witness against an offender is allowed to testify via another person without proper identification, verification, and confrontation, *e.g.*, with a complete lack of demonstrating good cause for not calling the real witness. *See*, State v. Phillips, 126 P.3d 546 (N.M. 2005).

PRACTICE NOTE: If there is any question regarding the intent of the sending state to revoke an offender's conditional release based on violations in the receiving state, the offender should be given a probable cause hearing as provided in Rule 5.108. Failure to do so may act to bar consideration of those violations in subsequent revocation proceedings in the sending state.

If an offender is entitled to a probable cause hearing, Rule 5.108(d) defines the basic rights of the offender. The offender is entitled, at a minimum, to (1) written notice of the alleged violations of the terms and conditions of supervision, (2) disclosure of non-privileged or non-confidential evidence, (3) the opportunity to be heard in person and present witnesses and documentary evidence, and (4) the opportunity to confront and cross examine witnesses. As previously discussed, the offender may also be entitled to the assistance of counsel. The requirements in Rule 5.108 are consistent with the minimum due process requirements established in Morrissey (offender entitled to (a) written notice of the violations; (b) disclosure of evidence against probationer or parolee; (c) opportunity to be heard and to present witnesses and documentary evidence; (d) the right to confront and cross-examine witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the fact finder as to the evidence relied upon). Rule 5.108 does not define the specific type of hearing required only that it be a probable cause "type" hearing. At least one court has acknowledged that the language of Rule 5.108 simply contemplates some type of due process hearing that is a generally consistent with the due process requirements of Gagnon and Morrissey. *See*, Smith v. Snodgrass, 112 Fed. Appx. 695 (10th Cir. 2004) (petitioner's claim that the state violated procedures specified in the interstate compact authorizing her transfer to Arizona are merit less; relevant sections of the Compact simply acknowledge the due process requirement of a preliminary revocation hearing

recognized in Morrissey and Gagnon and, given the interstate-transfer context, provide for it in the receiving state).

The probable cause hearing required by Rule 5.108 need not be a full “judicial proceeding.” A variety of persons can fulfill the requirement of a “neutral and detached” person for purposes of the probable cause hearing. For example, in the context of revocation, it has been held that a parole officer not recommending revocation can act as a hearing officer without raising constitutional concerns. *See, Armstrong v. State* 312 So. 2d 620 (Ala. 1975). *See also, In re Hayes*, 468 N.E.2d 1083 (Mass. Ct. App. 1984) *citing Gerstein v. Pugh*, 420 U.S. 103 (1975) (while offender entitled to hearing prior to rendition, reviewing officer need not be a judicial officer; due process requires only that the hearing be conducted by some person other than one initially dealing with the case such as a parole officer other than the one who has made the violations report). However, the requirement of neutrality is not satisfied when the hearing officer has predetermined the outcome of the hearing. *See, Baker v. Wainwright*, 527 F.2d 372 (5th Cir. 1976) (determination of probable cause at commencement of hearing violated the requirement of neutrality). This does not prohibit a judicial proceeding on the underlying violations, but merely provides states some latitude in determining the nature of the hearing, so long as it is consistent with basic due process standards. Presumably if officials other than judicial officers are qualified to handle revocation proceedings, these same officials can preside over a probable cause hearing in the receiving state.

Rule 5.108(e) requires the receiving state to prepare a written report of the hearing within 10 business days and to transmit the report and any evidence or record from the hearing to the sending state. The report must contain (1) the time, date and location of the hearing, (2) the parties present at the hearing, and (3) a concise summary of the testimony and evidence relied upon. Under Rule 5.108(e), even if the offender is exonerated after the probable cause hearing the receiving state must transmit a report to the sending state.

PRACTICE NOTE: Rule 5.108 requires the receiving state to prepare and transmit a report on the probable cause hearing to the sending state notwithstanding a finding that the offender did not commit the alleged violations of supervision.

It is important that Rule 5.108 be read in conjunction with other rules regarding retaking and conditions as this may affect the outcome of the proceedings and the impact of subsequent proceedings in the sending state. At the conclusion of a hearing, the presiding official must determine whether probable cause exists to believe that the offender committed the alleged violations of the conditions of their supervision. However, a determination made in a proceeding for mandatory retaking must be made in view of Rule 5.103(a). That rule provides, in part, that officials in the receiving state must show through documentation that the offender has engaged in behavior requiring retaking.]” *See, Rule 5.103(a)*. In order to support the request for mandatory retaking by the receiving state as well as to provide a basis for subsequent proceedings in the sending state which could result in revocation, it is advisable that the hearing officer in the receiving state determine whether sufficient cause exists to conclude that the act or pattern of non-compliant behavior committed by the offender is appropriately documented and deemed revocable. Behavior requiring retaking “means an act or pattern of non-compliance with conditions of supervision that could not be successfully addressed through the use of

documented corrective action or graduated responses and would result in a request for revocation of supervision in the receiving state” See Rule 1.101.

If a hearing is conducted which is based on violations of a condition imposed by the receiving or sending state, two considerations arise. First, the hearing officer must determine whether the offender violated the conditions of supervision, *e.g.*, the offender indeed failed to comply with a condition. If the hearing officer so concludes, a second determination may need to be made. If the receiving state is notified by the sending state of its intention to revoke probation or parole based upon the violation of a condition and requests a hearing, or if the receiving state intends to provide the sending state with a sufficient basis for revocation and voluntarily conducts such a hearing, under Gagnon and Morrissey, the hearing officer must determine whether the violation is of a sufficient nature that it would typically result in revocation in the receiving state. Conceivably, a hearing officer could find that the violation occurred but that because it would not rise to the level of revocation in the receiving state, retaking is not warranted. Two important points must be emphasized. First, the determination “of likelihood of revocation” would not be conclusively binding on the sending state as only the state granting conditional release has jurisdiction to make a final determination on revocation. See, Scott v. Virginia, 676 S.E.2d 343, 347 (Va. App. 2009); Bills v. Shulsen, 700 P.2d 317 (Utah 1985); State ex rel. Reddin v. Meekma, 306 N.W.2d 664 (Wis. 1981). There is, nevertheless, a potential for conflicting conclusions between officials in the sending and receiving states regarding the severity of a violation and its implication.

Second, notwithstanding the fact that the determination of “likelihood of revocation” is made with reference to the receiving state’s standards, a sending state could conceivably obviate the need for a probable cause hearing by asserting that it has no intention of revoking the offender’s conditional release. Such an assertion by the sending state would foreclose it from using the violation as a predicate for revocation, notwithstanding the jurisdiction to do so. This reading of Rule 5.108(a) is consistent with the general principles of Gagnon and Morrissey. The purpose of the probable cause hearing in the receiving state *is not* to test the sufficiency of a sending state’s decision to retake but to determine the merits of alleged violations that occurred in the receiving state *and* to secure a record for subsequent proceedings in the sending state. Under the due process principles articulated in Gagnon and Morrissey, an assertion by the sending state that it has no intention to revoke conditional release (thus negating the need for a probable cause hearing in the receiving state) would act to bar consideration of the violations in any subsequent revocation proceedings. Any other reading would allow a sending state to bypass the minimum due process requirements established in Gagnon, Morrissey and Rule 5.108 simply by asserting it has no intention to revoke and then subsequently not honor that position. See *e.g.*, Fisher v. Crist, 594 P.2d 1140 (Mont. 1979) (a writ of habeas corpus will be granted when revocation of parole is based on violations that occurred in the receiving state and offender was not granted an on-site probable cause hearing prior to retaking; waiver of hearing will not be inferred by offender’s failure to demand hearing).

If the hearing officer determines that probable cause exists to believe that the offender has committed the alleged violations, the receiving state must detain the offender in custody pending the outcome of decisions in the sending state. Within 15 business days of receipt of the probable cause hearing report the sending state must notify the receiving state of its intent to (1)

retake the offender, or (2) take other action. *See* Rule 5.108(f). The sending state must retake an offender within 30 calendar days of the decision to retake. It is conceivable, therefore, that a receiving state would have to hold an offender for up to 45 days *after* the hearing officer issues a report. The offender cannot be admitted to bail or otherwise released from custody. *See* Rule 5.111. *See also* discussion at § 4.4.3. The cost of incarceration is the responsibility of the receiving state. (Rule 5.106.)

The rules do not impose on the receiving state any timeframe for *initiating* the probable cause hearing. There are no time periods specified for holding a probable cause hearing or for providing notice and, therefore, no due process violation *per se*. *See, People ex rel. Jamel Bell v. Santor*, 801 N.Y.S.2d 101 (App. Div. N.Y. 2005). However, recent changes to Rule 5.108 impose certain mandatory timeframes on the sending state *after* issuance of the hearing officer's report. The failure to comply with these timeframes presumably could give rise to challenges to the incarceration in either the sending or receiving states. *See, Williams v. Miller-Stout*, 2006 U.S. Dist. LEXIS 80443 (M.D. Ala. November 2, 2006) (person named as custodian in a habeas action and the place of a petitioner's custody are not always subject to a literal interpretation; jurisdiction under § 2241 lies not only in the district of actual physical confinement but also in the district where a custodian responsible for the confinement is present).

PRACTICE NOTE: A sending state's failure to comply with post-hearing report timeframes could give rise to habeas corpus relief in either the sending or receiving states.

If the hearing officer fails to find probable cause to believe the offender has committed the alleged violations, the receiving state must continue supervision per the plan. *See, Rule* 5.108(g). The offender must be released if in custody. *See, Rule* 5.108(g) (2) & (3). Additionally, the receiving state must notify the sending state of its determination at which point the sending state must vacate any warrant it has issued. Likewise, the receiving state must vacate any warrant it has issued.

In sum, offenders subject to retaking are entitled to a probable cause hearing only in the circumstances mandated under Gagnon and Morrissey and codified by the Commission's rules. This right cannot be waived unless accompanied by the offender's admission of having committed one or more significant violation(s). *See* Rule 5.108. This rule requires that an offender shall be afforded the opportunity for a probable cause hearing before a neutral and detached hearing officer (in many states a judicial officer but not necessarily so) in or reasonably near the place where the alleged violation occurred. This hearing shall have the basic elements of due process and fundamental fairness, yet does not have to rise to the level of a full adversarial hearing. Offenders *may be* entitled to appointment of counsel where warranted by the particular facts and circumstances of the case. A determination by a sending state that an offender violated the terms of probation or parole supervision is conclusive in proceedings in the receiving or asylum state so long as fundamental principles of due process were afforded by the sending state. If at the conclusion of a hearing in the receiving state the critical determinations are met and the offender is not subject to further criminal proceedings in that state (or an asylum state), the offender may be "retaken" by sending state authorities, who are permitted to return the offender free from interference by authorities of any states that are members of the ICAOS.

4.4.3.4 Probable Cause Hearings when Violations Occurred in another State

It is important to maintain the distinction between a *probable cause hearing* and a *retaking hearing*. Under the Compact, any sending state has the right to enter any other member state and retake an offender. Therefore, Rule 5.108 applies only in circumstances where the sending state intends to use violations in another state as a predicate for revocation of the offender's conditional release. Neither Rule 5.108 nor the Gagnon and Morrissey decisions require a probable cause type hearing in all circumstances of retaking. See Johnson v. State, 957 N.E.2d 660 (Ind. App. 2011).

For example, in Ogden v. Klundt, 550 P.2d 36, 39 (Wash. Ct. App. 1976), the court held that the scope of review in the receiving state in a retaking proceeding was limited to determining (1) the scope of the authority of the demanding officers, and (2) the identity of the person to be retaken. This principle applies in circumstances where the violations forming the basis of retaking occurred in a state other than the state where the offender is incarcerated, *e.g.* a determination of probable cause by a sending state. It is sufficient in this context that officials conducting the hearing in the state where the offender is physically located be satisfied on the face of any documents presented that an independent decision maker in another state has made a determination that there is probable cause to believe the offender committed a violation. *Cf.*, In re Hayes, 468 N.E.2d 1083 (Mass. Ct. App. 1984). Such a determination is entitled to full faith and credit in the asylum state and can, therefore, form the basis of retaking by the sending state without additional hearings. Id. The offender is entitled to notice. The hearing may be non-adversarial. The offender, while entitled to a hearing, need not be physically present given the limited scope of the proceeding. Id. *Cf.*, Quinones v. Commonwealth, 671 N.E.2d 1225 (Mass. 1996) (juveniles transferred under interstate compact not entitled to a probable cause hearing in Massachusetts before being transferred to another state to answer pending delinquency proceedings when the demanding state had already found probable cause); In re Doucette, 676 N.E.2d 1169 (Mass. Ct. App. 1997) (once governor of the asylum state has acted on a request for extradition based on a demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state; a court considering release on habeas corpus can do no more than decide (a) whether documents are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive).

4.4.4 Bail Pending Return

An offender subject to retaking proceedings has no right to bail. Rule 5.111 specifically prohibits any court or paroling authority in *any state* to admit an offender to bail pending completion of the retaking process, individual state law to the contrary notwithstanding. Given that the ICAOS mandates that the rules of the commission must be afforded standing as statutory law in every member state, the "no bail" provision of Rule 5.111 has the same standing as if the rule was a statutory law promulgated by that state's legislature. See, Article V. Detention in a receiving state or asylum state based on probable cause determination that the offender committed a serious violation of the terms of probation does not give rise to a 42 U.S.C. § 1983 violation. See, Kaczmarek v. Longworth, 1997 U.S. App. LEXIS 3406 (6th Cir. 1997).

The “no bail” provision in Rule 5.111 is not novel; states have previously recognized that under the ICPP officials in a receiving state were bound by no bail determinations made by officials in a sending state. *See, e.g., State ex rel. Ohio Adult Parole Authority v. Coniglio*, 610 N.E.2d 1196 (Ohio Ct. App. 1993) (probationer transferred from Pennsylvania could not be released on personal recognizance as Ohio authorities were bound under the ICPP by Pennsylvania decision as to consideration of probationer for release). States have recognized the propriety of the “no bail” requirements associated with ICPP, even where there was no expressed prohibition. In *State v. Hill*, 334 N.W.2d 746 (Iowa 1981), the state supreme court held that Iowa authorities were agents of Nevada, the sending state, and that they could hold the parolee in their custody pending his return to Nevada. The trial court’s decision to admit the offender to bail notwithstanding a prohibition against such action was reversed. In *Ex parte Womack*, 455 S.W.2d 288 (Tex. Crim. App. 1970), the court found no error in denying bail to an offender subject to retaking as the Compact made no provision for bail. And in *Ogden v. Klundt*, 550 P.2d 36, 39 (Wash. Ct. App. 1976), the court held that:

Absent express statutory authorization, the courts of Washington are without power to release on bail or bond a parolee arrested and held in custody for violating his parole. The Uniform Act for Out-of-State Supervision provides that a parole violator shall be held, and makes no provision for bail or bond. The person on parole remains in constructive custody until his sentence expires. Restated, his liberty is an extension of his confinement under final judgment and sentence. Whether the convicted person is in actual custody within the prison walls or in constructive custody within the prison of his parole, the rule is unchanging; there is simply no right to release on bail or bond from prison.

See also, Aguilera v. California Department of Corrections, 247 Cal.App.2d 150 (1966); *People ex rel. Tucker v. Kotsos*, 368 N.E.2d 903 (Ill. 1977); *People ex rel. Calloway v. Skinner*, 300 N.E.2d 716 (N.Y. 1973); *Hardy v. Warden of Queens House of Detention for Men*, 288 N.Y.S.2d 541 (N.Y. Sup. 1968); *January v. Porter*, 453 P.2d 876 (Wash. 1969); *Gaertner v. State*, 150 N.W.2d 370 (Wis. 1967). However, an offender cannot be held indefinitely. *See, Windsor v. Turner*, 428 P.2d 740 (Okla. Crim. App. 1967) (offender on parole from New Mexico who committed new offenses in Oklahoma could not be held indefinitely under compact and was therefore entitled to writ of habeas corpus when trial in Oklahoma would not take place for a year and New Mexico authorities failed to issue a warrant for his return).

PRACTICE NOTE: The ICAOS and its rules impose upon the member states (including courts of a member state) an absolute prohibition against admitting an offender to bail pending retaking.

4.4.5 Post-Transfer Change in the Underlying Circumstances

As discussed, the transfer of supervision of an offender is mandatory in some circumstances and receiving states are required to accept transfer if the offender is eligible under Rules 3.101 and 3.101-1. Under the rules governing retaking, the sending state has sole discretion to retake unless the offender is convicted of a new felony or violent crime or commits three significant violations. *See Rule 5.102 and 5.103*. This presents a question: What happens

if the offender neither commits a new felony, is convicted of a violent crime nor demonstrates a pattern of noncompliance but the original circumstances leading to the transfer have significantly changed?

The Commission has addressed this matter in Advisory Opinion 15-2006. The facts underlying the opinion are as follows. A receiving state requested that a sending state retake an offender because they had lost their means of support and their sponsor family rescinded its commitment to maintain the offender. As a result, the offender became homeless, unemployed and without a means of support. Although the Commission recognized that post placement changes in circumstances were not unusual, the Commission advised:

[U]nder the current rules there is no such requirement [retaking by the sending state] which is provided either explicitly or by implication or reasonable inference. In fact under Rules 5.101, 5.102, and 5.103 retaking by a sending state is “at its sole discretion” except for situations in which the offender has been charged with a subsequent criminal offense and completion of a term of incarceration for that conviction, or placement on probation; or upon a showing that the offender has engaged in behavior requiring retaking, which can be either an act or pattern of non-compliance that could not be successfully addressed through the use of documented corrective action or graduated responses and would result in a request for revocation of supervision in the receiving state. ”

Under current rules and as a general principle, a change in the underlying circumstances that mandated the transfer of an offender is not, in itself, grounds to require the sending state to retake that offender *if the transfer was the result of a mandatory acceptance under Rule 3.101 or Rule 3.101-1*. However, a different rule *may* apply in the context of a discretionary transfer under Rule 3.102. In this latter circumstance, the transfer is purely a voluntary arrangement and conceivably the receiving state could demand retaking of an offender based on a change of circumstances if such a condition was placed on the offender. For example, Rule 4.103 allows the receiving state to impose conditions post-transfer. Conceivably this could include a condition that the offender demonstrate *and* maintain a means of support, the failure to do so being cause to demand retaking by the sending state. *See, Advisory Opinion 15-2006; Advisory Opinion 8-2006*. However, any conditions imposed on an offender either at the time of acceptance or during the term of supervision must be reasonably related to the overall purposes of the Compact, which is to promote offender rehabilitation and public safety. Advisory Opinion 8-2006. The rule of “reasonableness” applies to mandatory and discretionary transfers without distinction.

4.5 Revocation or Punitive Action by the Sending State – Conditions

For purposes of revocation or other punitive action, a sending state is required to give the same force and effect to the violation of a condition imposed by the receiving state as if the condition had been imposed by the sending state. Furthermore, the violation of a condition imposed by the receiving state can be the basis of punitive action even though it was not part of the original plan of supervision established by the sending state. Conditions may be imposed by the receiving state at the time of acceptance of supervision or during the term of supervision, *See*

Rule 4.103. Thus by way of example, if at the time of acceptance, a receiving state imposed a condition of drug treatment and the offender violated that condition, the sending state would be required to give effect to that violation even though the condition was not a part of the original plan of supervision.

PRACTICE NOTE: A sending state must give effect to the violation of a condition or other requirement imposed by the receiving state even if the condition or requirement was not contained in the original plan of supervision.

4.6 Arrest of Absconders

Upon receipt of a violation report for an absconding offender, a sending state is required to issue a national arrest warrant upon notification that the offender has absconded. If the absconding offender is apprehended in the receiving state, the receiving state shall, upon request by the sending state, conduct a probable cause hearing as provided in Rule 5.108. *See* Rule 5.103-1.

ICAOS Rules 4.111 and 5.103 also require sending states to issue nationwide arrest warrants for absconders who fail to return to the sending state no later than 10 business days. The arrest warrant requirement applies to the failure of an offender to return to the sending state when ordered to do so anytime the offender returns from the receiving state while subject to supervision *See*, Rules 4.111 & 5.103(c). The failure of the offender to comply and return to a sending state as instructed results in the issuance of a nationwide arrest warrant “effective in all compact member states, without limitation as to the specific geographical area.” *Id.* An absconder is subject to arrest in all compact member states, not only in the receiving state and in the sending state. When read in conjunction with Rule 5.111 (Denial of bail to certain offenders), any compact member state is obligated to arrest and detain in custody an absconded offender. Based upon the provisions of Rule 5.101 (b), with deference to ICAOS Advisory Opinion 12-2006, it has been held that a compact offender who absconds and is subsequently arrested, detained and returned to the sending state has no federal due process right to compel a state authority to issue a parole violation warrant, file or hear a petition to revoke, or reach a disposition of his parole at a given time. *See Voerding v. Mahoney*, (2010 WL 1416104 (D. Mont., Feb. 22, 2010)).

PRACTICE NOTE: Admission to bail or other release of an absconding offender who is the subject of an arrest warrant issued by the sending state is strictly prohibited *in any state that is a member of the Compact* regardless of whether that state was the original sending or receiving state. Warrants issued pursuant to any ICAOS rule are effective in all member states without regard or limitation to a specific geographical area.

CHAPTER 5

LIABILITY AND IMMUNITY CONSIDERATIONS FOR JUDICIAL OFFICERS AND EMPLOYEES

5.1 State Sovereign Immunity – Generally

State sovereign immunity is a fundamental aspect of the sovereignty that the states enjoyed before the ratification of the U.S. Constitution and the Eleventh Amendment. The concept of state sovereign immunity involves two aspects: (1) each state is a sovereign entity in the federal system; and (2) inherent in state sovereign immunity is the principle that a state is not subject to suit by an individual without its consent. However, the term “state sovereign immunity” is used imprecisely by courts to refer to both parts, i.e., the immunity from suit, and the entity itself, including all of its powers, rights and privileges.

Because the Eleventh Amendment recognizes a state's sovereign immunity from suits brought by individuals in *federal court*, the U.S. Supreme Court has often referred to this as Eleventh Amendment immunity. “Eleventh Amendment immunity” is a misnomer, however, because that immunity is really an aspect of the Supreme Court's concept of state sovereign immunity and is neither derived from nor limited by the Eleventh Amendment. Nevertheless, the term has been used loosely and interchangeably with “state sovereign immunity” to refer to a state's immunity from suit without its consent in federal courts. Notwithstanding the imprecise and interchangeable nature of the concept, state sovereign immunity has both an individual aspect and a federal aspect.

In the federal context, a state's immunity from suit is not absolute. The U.S. Supreme Court has recognized two circumstances in which an individual may sue a state in federal court. First, Congress may abrogate the states' immunity by authorizing such a suit in the exercise of its power to enforce the Fourteenth Amendment. Second, a State may at its pleasure waive its sovereign immunity by consenting to suit. *See, Meyers v. Texas*, 410 F.3d 236 (5th Cir. 2005). Voluntary consent to waiving the immunity may be explicit in state statute or a state's constitution. Waiver may also be made by affirmative action. Generally, the Court will find a waiver either if (1) the state voluntarily invokes federal court jurisdiction; or (2) the state makes a clear declaration that it intends to submit itself to federal court jurisdiction. A waiver of Eleventh Amendment immunity by state officials must be permitted by the state constitution, or state statutes, and applicable court decisions must explicitly authorize such a waiver by the state officials since they cannot waive immunity unless authorized to do so. *See, Lapidés v. Bd. of Regents*, 251 F.3d 1372 (11th Cir. 2001). Unless waived, Eleventh Amendment immunity also bars a §1983 lawsuit against a state agency or state officials in their official capacities even if the entity is the moving force behind the alleged deprivation of the federal right. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985); also *Larsen v. Kempker*, 414 F.3d 936, 939 n.3 (8th Cir. 2005).

5.2 Liability Considerations under 42 U.S.C. § 1983

42 U.S.C. § 1983 creates a state and federal cause of action for damages arising out of the acts of state officials that violate an individual's civil rights. The statute provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." To establish a claim under 42 U.S.C. § 1983 a plaintiff must prove (1) a violation of a constitutional right, and (2) that the alleged violation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

In general, conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute that permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. *See* McLaughlin v. Tilendis, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claims raise questions of federal law. Hampton v. Chicago, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917. Therefore, state immunity law generally cannot be construed to insulate the wrongful actions of state authorities.

Generally, § 1983 liability will not be imposed where the consequences of state action are too remote to be classified as "state action." Thus, the relatives of a person murdered by a paroled offender cannot maintain an action against the state because the acts of the officers are too remote, the parole board owed no greater consideration to the victim than to any other member of the public, and the offenders was not acting as an agent of the state for purposes of federal civil rights liability. *See, generally*, Martinez v. California, 444 U.S. 277 (1980). *See, also*, Howlett v. Rose, 496 U.S. 356 (1990) (conduct by persons acting under color of state law which is wrongful under § 1983 cannot be immunized by state law even though the federal cause of action is being asserted in state court.) However allegations which do not attribute particular actions to individual defendant are insufficient to constitute the 'individualized participation' necessary to state a claim under §1983. *See* Esnault v. Suthers, 24 Fed. Appx. 854-55 (10th Cir. 2001). Thus an ICAOS offender alleging that defendants collectively detained him without due process and were deliberately indifferent to his rights but failed to identify any particular action by the defendants fails to state a claim under 42 U.S.C. § 1983. Grayson v. Kansas, 2007 WL 1259990 (D.C. KS 2007); *See also* Sconce v. Interstate Com'n for Adult Offender Supervision, 2009 WL 579399 (D. Mont. 2009) Furthermore, the "public duty doctrine" may also insulate state officials from liability where it can be shown that absent statutory intention to the contrary, the duty to enforce statutory law is a duty owed to the public generally, the breach of which is not actionable on behalf of the private person suffering damage. *See*, Westfarm Assocs. Ltd. Pshp. v. Washington Suburban Sanitary Comm'n, 66 F.3d 669 (4th Cir. 1995).

Within the context of ICAOS, and its predecessor compact, the U.S. Court of Appeals for the Third Circuit in Doe v. Pennsylvania Board of Probation and Parole, 513 F.3d 95 held

that the compact did not create a federally enforceable right under 42 U.S.C. § 1983 for those subject to its provisions (parolees and probationers). Relying on Cannon v. University of Chicago, 441 U.S. 677 (1979), Alexander v. Sandoval, 532 U.S. 275 (2001), and Gonzaga University v. Doe, 536 U.S. 273 (2002), the Court determined that the Compact does not confer any private right of action upon either a probationer or parolee based upon a failure to comply with its provisions and found that absent a clear and unambiguous intent on the part of Congress to create a federal cause of action, 42 U.S.C. § 1983 was not available to redress violations of the compact. *Id.* at 103-05. (“We hold that Doe does not have a private right of action under Section 1983 to enforce the provisions of the Interstate Compact because one cannot be inferred from its terms.”) *Id.* at 105. See also 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); Orville Lines v. Wargo, 271 F. Supp. 2d 649 (W.D. Pa. 2003). Therefore, regardless whether a plaintiff is seeking to enforce a federal statutory right through a private cause of action implicit in the statute itself or through § 1983, there must first be a determination that Congress intended to create a federal right. Where there is no indication from the text and structure of a statute that Congress intended to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action. Unlike the Interstate Agreement on Detainers, which confers certain right on incarcerated persons, both the prior Parole Compact and ICAOS speak only of obligations among the states. The language of the compacts did not clearly and unambiguously create a federal right of action.

A similar analysis might apply in the context of potential victims of parolees or probationers who might relocate under the provisions of the compact and at least one federal court and one state court have so held. See Hodgson v. Mississippi Department of Corrections, 963 F. Supp. 776 (E.D. Wis. 1997) (No private right of action was created under the Uniform Act for Out-of-State Parolee Supervision for the wrongful death of a victim of a Mississippi parolee who was allegedly improperly allowed to relocate to Wisconsin under the compact.) More recently the same analysis was applied in Doe v. Mississippi Department of Corrections et al., 859 So.2d 350 (2003) (Plaintiff had no claim under the Mississippi Tort Claims Act for damages sustained as the result of a rape committed by an Illinois parolee transferred under the compact whom she alleged was improperly accepted under the compact and negligently supervised by Mississippi parole officers). See also Connell v. Mississippi Department of Corrections, 841 So.2d 1127 (2003)

As a general proposition, state officials do not enjoy absolute immunity from civil liability for their public acts. In recent years, the availability of the defense of sovereign immunity has been substantially reduced by state legislatures waiving immunity for ministerial or operational acts. Two “types” of public acts generally define the extent to which a state official may be liable for conduct resulting in injuries to others.

5.3 Liability Associated with Discretionary Acts.

A discretionary act is defined as a quasi-judicial act that requires the exercise of judgment in the development or implementation of public policy. Discretionary acts are generally indicated by terms such as “may” or “can” or “discretion.” Whether an act is discretionary depends on several factors: (1) the degree to which reason and judgment is required; (2) the

nature of the official's duties; (3) the extent to which policymaking is involved in the act; and (4) the likely policy consequences of withholding immunity. *See, Heins Implement Co. v. Mo. Hwy. & Trans. Comm'n*, 859 S.W.2d 681, 695 (Mo. Banc 1993).

5.4 Liability Associated with Ministerial or Operational Acts

A ministerial act, also called an operational act, involves conduct over which a state official has no discretion; officials have an affirmative duty to comply with instructions or legal mandates or to implement operational policy. Ministerial acts are generally indicated by terms such as "shall" or "must." A ministerial act is defined as an act "that involves obedience to instructions or laws instead of discretion, judgment or skills." *See, Black's Law Dictionary*, 7th Ed. (West 1999).

5.5 Immunity Waiver

In general, state officials are not liable for injuries related to discretionary acts because the states have not waived their sovereign immunity in this regard. *See, King v. Seattle*, 525 P.2d 228 (1974). The public policy behind maintaining immunity is to foster the exercise of good judgment in areas that call for such, *e.g.*, policy development. Absent such immunity, state officials may hesitate to assist the government in developing and implementing public policy.

Many states have waived sovereign immunity for the failure to perform or the negligent performance of ministerial acts. Consequently, the failure to perform a ministerial act or the negligent performance of such an act can expose state officials to liability if a person is injured as a result thereof. Whether an act is discretionary or ministerial is a question of fact. The nature of the act, not the nature of the actor, is the determining consideration. *See, Miree v. United States*, 490 F. Supp. 768, 773 (1980).

Where immunity is waived, the state is generally liable to provide a defense and cover damages up to the amount authorized by the state legislature or the provisions of a risk or legal defense fund. *See, e.g.*, Fla. Stat. § 768.28 (2003), which limits the states liability in most circumstances to \$100,000 per person or \$200,000 per incident. There are some exceptions, which require a direct appropriation from the state legislature. A state official can be held personally liable to the extent of any damages awarded that exceed state policy. *See, e.g., McGhee v. Volusia County*, 679 So. 2d 729 (Fla. 1996) (absent statutory provision, a state official would be personally liable for that portion of a judgment rendered against him or her that exceeds the state's liability limits). However, many states specifically exempt "willful and wanton" conduct from coverage deeming such conduct to lie outside the scope of employment. *See, e.g., Hoffman v. Yack*, 373 N.E.2d 486 (Ill. 1978).

A state official who violates federal law is generally stripped of official or representative character and may be personally liable for their conduct; a state cannot cloak an officer in its sovereign immunity. *Ex parte Young*, 209 U.S. 123 (1908). Sovereign immunity does not extend to the personal actions of state officials. The intent of sovereign immunity is to protect the

treasury, not necessarily to protect or vindicate the actions of state officials simply because they are state officials.

5.6 Types of “Acts” Under ICAOS

The distinction between discretionary and ministerial is a critical consideration for state officials charged with administering the ICAOS. Examples of discretionary acts include Rule 3.101-2 (discretionary transfer of supervision), Rule 3.106 (expedited reporting instructions), and Rule 4.103 (imposition of special conditions). Examples of arguably ministerial acts include Rule 2.108 (requirement to that a receiving state must continue to provide supervision for a transferred offender who becomes mentally or physically disabled), Rule 2.110 (transfer of offenders under the Compact), Rule 3.102 (submission of transfer request), Rule 3.103 (reporting instructions for offender living in the receiving state at the time of sentencing or after disposition of a violation or revocation proceeding), Rule 3.105 (pre-release transfer request), and Rule 3.108-1 (notification to victim advocate authorities).

By contrast, Rule 4.101 arguably imposes both a discretionary duty and a ministerial duty on receiving state officials in that it mandates that a receiving state must provide supervision in a manner “determined by the receiving state and consistent with the supervision of other similar offenders.” That supervision must be provided is mandated. The level of supervision is discretionary with receiving state officials so long as it is similar to that provided like offenders. However, in cases where a receiving state would not otherwise impose supervision on a similar offender convicted in the receiving state, the receiving state is required to impose some level of supervision on an offender transferred through the ICAOS. *See ICAOS Advisory Opinion 1-2007*. Whether the level of supervision provided an out-of-state offender is “like” would give rise to both discretionary and ministerial obligations. The characterization of particular actions by state officials would be a fact question in any litigation that results from a failure to provide “like” supervision.

5.7 Judicial Immunity

Judicial immunity protects judges and court employees against liability arising from judicial decisions and the judicial process. Virtually any decision of a judge that results from the judicial process – that is, the adjudicatory process – is protected by judicial immunity. With some limitations, this immunity extends to court employees and others, such as jurors, parole and probation officers, and prosecutors who are fulfilling the court’s orders or participating in some official capacity in the judicial process. Quasi-judicial immunity may also extend to other agents of state government including probation and parole authorities. At least one court has held that absolute – as distinguished from qualified – judicial immunity extends to individual members of parole boards. On appeal, the Board members contend that they are not only entitled to qualified immunity, but that they are also entitled to absolute quasi-judicial immunity. *See, Holmes v. Crosby*, 418 F.3d 1256 (11th Cir. 2005). *See, also, Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307, 1310 (11th Cir. 1988); *Clark v. State of Ga. Pardons & Paroles Bd.*, 915 F.2d 636, 641 n.2 (11th Cir. 1990). However, quasi-judicial immunity does not extend to

probation or parole officers investigating suspected parole violations, ordering the parolee's arrest pursuant to a parole hold, and recommending that parole revocation proceedings be initiated against him. Such actions are more akin to law enforcement actions and are not entitled to immunity. *See, Swift v. California*, 384 F.3d 1184 (9th Cir. 2004).

However, not everything a judge or court employee does is protected by judicial immunity. The U.S. Supreme Court has repeatedly held that judicial immunity only protects those acting in a judicial capacity and does not extend to administrative or rulemaking matters. *See, Forrester v. White*, 484 U.S. 219, 229 (1988). Acts of judges or court employees that are purely administrative or supervisory in nature are not protected by judicial immunity and such non-judicial acts may give rise to liability under 42 U.S.C. 1983 and any state counterparts.

Generally, probation and parole officers possess absolute judicial immunity where their actions are integral to the judicial process. In determining whether an officer's actions fall within the scope of absolute judicial immunity, courts "have adopted a 'functional approach,' one that turns on the nature of the responsibilities of the officer and the integrity and independence of his office. As a result, judicial immunity has been extended to federal hearing officers and administrative law judges, federal and state prosecutors, witnesses, grand jurors, and state parole officers." *Demoran v. Witt*, 781 F.2d 155, 156, 157 (9th Cir. 1985). While judicial immunity may protect judges and court officials from monetary damages, it does not protect them against injunctive relief. *Pulliam v. Allen*, 466 U.S. 522 (1984); *Dorman v. Higgins*, 821 F.2d 133 (2nd 1987).

Generally, the protections afforded to officers apply to the extent that the officer's activities are "integral" to the judicial process. Several courts have held that actions such as supervision – distinguished from investigation – are administrative in nature and not a judicial function entitled to judicial immunity. *Acevado v. Pima City Adult Probation*, 690 P.2d 38 (Ariz. 1984). The placement of juveniles by a probation counselor is an administrative function and the court's mere knowledge of a placement is of itself insufficient to convert an administrative act into a judicial act. *Faile v. S.C. Dept. of Juvenile Justice*, 566 S.E.2d 536 (S.C. 2002). In some states, quasi-judicial immunity is available only if the probation officer "acted pursuant to a judge's directive or otherwise in aid of the court. . . . Any claim to immunity which the Commonwealth might have asserted ceased when [the probation officer] failed to aid in the enforcement of the conditions of . . . probation." *A.L. v. Commonwealth*, 521 N.E.2d 1017 (Mass. 1988). One court has held that parole officers do not enjoy absolute immunity for conduct not associated with the decision to grant, deny or revoke parole. *See, Swift v. California*, 384 F.3d 1184 (9th Cir. 2004) (parole officer does not have immunity for violations of 4th amendment rights as the activities are investigative in nature and do not involve the granting, denial or revocation of parole). *Cf. Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525 (8th Cir. 2005) (juvenile officer does not enjoy judicial immunity to the extent that he acted beyond the scope of the court's orders, acted without proper court authority, and relied on bad information to obtain orders from a court).

5.8 Qualified Immunity

Courts have recognized that parole and probation officers may possess “qualified immunity” to the extent that they act outside any judicial or quasi-judicial proceeding. Whether qualified immunity is available is largely dependent on the facts and circumstances of the particular case.

A state official may be covered by qualified immunity where they (1) carry out a statutory duty, (2) act according to procedures dictated by statute and superiors, and (3) act reasonably. Babcock v. State, 809 P.2d 143 (1991). Government officials performing discretionary functions are entitled to qualified immunity unless they violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). See also, Graves v. Thomas, 450 F.3d 1215, 1218 (10th Cir. 2006); Perez v. Unified Gov’t of Wyandotte County/Kansas City, Kan., 432 F.3d 1163, 1165 (10th Cir. 2005); Robinson v. Warden, Northern NH Correction Facility, 634 F. Supp. 2d 116 (D. Me. 2009) If the plaintiff’s allegations sufficiently allege the deprivation of a clearly established constitutional or statutory right, qualified immunity will not protect the defendant. Grayson v. Kansas, 2007 WL 1259990 (D.C. KS 2007); Payton v. United States, 679 F.2d 475 (5th Cir. 1982) (Trial court erred in finding that requesting or transmitting records and providing standard medical care pertaining to the parole decision were not actionable under Federal Tort Claim Act. Statute placed on parole board a non-discretionary duty to examine the mental health of parolee. Where government assumed the duty of providing psychiatric treatment to offender, it was under a non-discretionary duty to provide proper care.);

Parole and probation officers may enjoy qualified immunity if their actions are in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant statutory or regulatory guidelines. The immunity requires only that an officer’s conduct be in substantial compliance, not strict compliance, with the directives of superiors and regulatory procedures. Taggart v. State, 822 P.2d 243 (Wash. 1992). Whether a government official may be held personally liable for an allegedly unlawful action turns on the “‘objective legal reasonableness’ of the action in light of the legal rules that were ‘clearly established’ at the time.” Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting and interpreting Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982)). Qualified immunity is a question of law and a public official does not lose his or her qualified immunity merely because his or her conduct violates some statutory provision. Davis v. Scherer, 468 U.S. 183, 194 (1984).

5.9 Negligent Supervision

Some of the factors a court may consider in determining whether a state official is liable for negligent supervision are:

- Misconduct by a non-policymaking employee that is the result of training or supervision “so reckless or grossly negligent” that misconduct was “almost inevitable” or “substantially certain to result.” Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987).

- The existence of special custodial or other relationships created or assumed by the state in respect of particular persons. A “right/duty” relationship may arise with respect to persons in the state’s custody or subject to its effective control and whom the state knows to be a specific risk of harm to themselves or others. Additionally, state officials may be liable to the extent that their conduct creates a danger from which they fail to adequately protect the public. *See, Withers v. Levine*, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979) (inmate observed attacking by another inmate); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973), *Cf. Orpiano v. Johnson*, 632 F.2d 1096, 1101-03 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981) (no right where no pervasive risk of harm and specific risk unknown); *Hertog v. City of Seattle*, 979 P.2d 400 (Wash. 1998) (city probation officers have a duty to third persons, such as the rape victim, to control the conduct of probationers to protect them from reasonably foreseeable harm; whether officers violated their duty was subject to a factual dispute.)
- The foreseeability of an offender’s actions and the foreseeability of the harm those actions may create. Even in the absence of a special relationship with the victim, state officials may be liable under the “state created danger” theory of liability when that danger is foreseeable and direct. *See, Green v. Philadelphia*, 2004 U.S. App. LEXIS 4631 (3rd Cir. 2004). The state-created danger exception to the general rule that the state is not required to protect the life, liberty, and property of its citizens against invasion by private actors is met if: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.
- Negligent hiring and supervision in cases where the employer’s direct negligence in hiring or retaining an incompetent employee whom the employer knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others. *See, Wise v. Complete Staffing Services, Inc.*, 56 S.W.3d 900, 902 (Tex. Ct. App.2001). Liability may be found where supervisors have shown a deliberate indifference or disregard to the known failings of an employee.

The obligation of state officials to fulfill ministerial acts, which are not open to discretion, generally gives rise to liability. For example, an officer can be held liable for failing to execute the arrest of a probationer or parolee when there is no question that such an act should be done. *See, Taylor v. Garwood*, 2000 U.S. Dist. LEXIS 9026 (D.C. Pa. 2000).

5.10 Summary of Cases Discussing Liability in the Context of Supervision

5.10.1 Cases finding that liability may be imposed

In the following cases, the courts found liability on the part of government officials supervising offenders or other persons:

- Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976): Mother brought an action against psychiatric institute, a physician, and a probation officer, seeking recovery for the death of her daughter, who was killed by a probationer that had been a patient at the institute. Mother alleged that appellants were negligent in failing to retain custody over the patient until he was released from the institute by order of the court. The court concluded that the state court's probation order imposed a duty on appellants to protect the public from the reasonably foreseeable risk of harm imposed by the patient. The court held that the breach of the state court's order by the defendants was the proximate cause of the daughter's death.
- Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska, 1986): A newly released offender shot and killed his teenaged stepdaughter and her boyfriend, and raped, beat and strangled to death another woman. Relatives of the murdered persons sued the state of Alaska, claiming the state was negligent in failing to impose special conditions of release, to supervise offender adequately on parole in allowing offender to return to a small, isolated community without police officers or alcohol counseling, and in failing to warn his victims of his dangerous propensities. The Supreme Court affirmed in part and reversed in part, holding that offender's victims and his actions were within the zone of foreseeable hazards of the state's failure to use due care in supervising a parolee. The state had a legal duty to supervise offender and the authority to impose conditions on parole and to re-incarcerate offender if these conditions were not met. The state was obligated to use reasonable care to prevent the parolee from causing foreseeable injury to other people. *See, also* Bryson v. Banner Health Systems, 2004 Alas. LEXIS 54 (Alaska 2004) (Private treatment center liable for injuries caused by known rapist with extensive history of alcohol-related crimes who attacked other program participants. As part of the treatment, center encouraged all members of the group to contact and assist each other outside of the group setting. Center knew that the rapist had an extensive criminal history of alcohol-related crimes of violence, including sexual assaults. The rapist relapsed into drinking while being treated and attacked fellow patient. Court correctly held that the center owed the victim an actionable duty of due care to protect her from harm in the course of her treatment, including foreseeable harm by other patients.)
- Acevedo v Pima County Adult Probation Dept., 690 P.2d 38 (Ariz. 1984): Action brought against county probation department and four officers for damages suffered as a result of the alleged negligent supervision of a probationer. The court held that probation officers were not protected from liability by judicial immunity. It was alleged that the children of the plaintiffs had been sexually molested by the

probationer, who had a long history of sexual deviation, especially involving children. Probation officers permitted the probationer to rent a room from one of the plaintiffs knowing there were five young children in the residence and despite the fact that as a special condition of probation the probationer was not to have any contact whatsoever with children under the age of 15. The court noted that whether a particular officer was protected by judicial immunity depended upon the nature of the activities performed and the relationship of those activities to the judicial function. A non-judicial officer was entitled to immunity only in those instances where he performed a function under a court directive and that was related to the judicial process. Not all supervising activities of a probation officer are entitled to immunity because much of the work is administrative and supervisory, not judicial in function. The court concluded that judicial immunity could not be invoked because the officers did not act under a court's directive and, in fact, had ignored the specific court orders.

- Johnson v State, 447 P.2d 352 (Ca. 1968): Action brought by foster parent against the state for damages for an assault on her by a youth placed in her home by the youth authority. Plaintiff alleged that the parole officer placing the youth failed to warn her of the youth's homicidal tendencies and violent behaviors. Court held that placement of the youth and providing adequate warnings was a ministerial duty rather than a discretionary act. Therefore, the state was not immune from liability. The court determined that the release of a prisoner by the parole department would be a discretionary act, whereas the decision of where to place the probationer and what warnings to give constituted only a ministerial function for which liability could attach.
- Sterling v. Bloom, 723 P.2d 755 (Id. 1986): A car operated by probationer whose blood alcohol was .23 percent by weight, struck plaintiff's motorcycle while under legal custody and control of Idaho Board of Corrections. A special condition of his probation was that probationer was not to drive a motor vehicle except for employment purposes for the first year of probation. The court held that under state law, every governmental entity was subject to liability for money damages whether arising out of a governmental or proprietary function, if a private person or entity would be liable for money damages under the laws of the state. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. The key to this duty is not the supervising individual's direct relationship with the endangered person or persons, but rather is the relationship to the supervised individual. Where the duty is upon government officials, it is a duty more specific than one to the general public.
- Mianecki v. Second Judicial Dist. Court, 658 P.2d 422 (Nev. 1983), *cert. dismissed* 464 U.S. 806 (1983): Convicted sex offender on probation for the sexual assault of a boy in Wisconsin relocated permanently to Nevada with approval. Offender moved in with the parents and child, who were uninformed of the offender's history. The offender victimized the child. Parents sued alleging that the Wisconsin and the employee, who approved the offender's travel permit, violated the Interstate Compact

- for the Supervision of Parolees and Probationers. The complaint also alleged negligence. Nevada Supreme Court concluded that Wisconsin and the employee were not immune from suit in Nevada. If the acts complained of had been committed by Nevada Department of Parole and Probation, sovereign immunity would not have barred suit against the state. Nevada as the forum state was not required to honor Wisconsin's claim of sovereign immunity. In addition, the law of Wisconsin was not granted comity, as doing so would have been contrary to the policies of Nevada.
- Hansen v. Scott, 645 N.W.2d 223 (N.D. 2002) *cert denied*, 537 U.S. 1108 (2003): Daughters brought an action in connection with the murder of their parents by the parolee who had been transferred to North Dakota for parole supervision by Texas officials. The daughters alleged that the employees of Texas authority failed to notify North Dakota officials about the inmate's long criminal history and dangerous propensities. Daughters sought to hold the employees liable on their wrongful death, survivorship, and 42 U.S.C.S. § 1983 claims. The court held that the claims against the employees stated a prima facie tort under N.D. R. Civ. P. 4(b)(2)(C) and thus the exercise of personal jurisdiction over the employees was proper because the employees' affirmative action of asking North Dakota to supervise their parolee constituted activity in which they purposefully availed themselves of the privilege of sending the parolee to North Dakota. The employees could have reasonably anticipated being brought into court in North Dakota, and the exercise of personal jurisdiction over the employees comported with due process.
 - Reynolds v. State, Div. of Parole & Community Servs., 471 N.E.2d 776 (Ohio 1984): The victim was assaulted and raped by the prisoner while the prisoner was serving a prison term for an involuntary manslaughter. The prisoner had been granted a work release furlough. Under Ohio Rev. Code Ann. § 2967.26(B), the prisoner was to have been confined for any periods of time that he was not actually working at his approved employment. Victim contended that the state was liable for the injuries suffered because the state breached its duty to confine the prisoner during the non-working period when he raped the victim. The court found that, although the victim was unable to maintain an action against the state for its decision to furlough the prisoner, the victim was able to maintain an action against the state for personal injuries proximately caused by the failure to confine the prisoner during non-working hours as required by law. Such a failure to confine was negligence per se and was actionable.
 - Jones-Clark v. Severe, 846 P.2d 1197, (Ore. App. 1993): Probation department had a duty to control court probationers to protect others from reasonably foreseeable harm. Even though officers could not act on their own to arrest a probationer or to revoke probation, they were in charge of monitoring probationers to ensure that conditions of probation were being followed, and had a duty to report violations to the court.
 - Doe v. Arguelles, 716 P.2d 279 (Utah 1985): Plaintiff sued the state and parole officer on behalf of 14-year-old ward who was raped, sodomized, and stabbed by juvenile offender while he was on placement in the community, but before he had

been finally discharged from the Youth Detention Center (YDC). State Supreme Court concluded that the state and officer could be held liable for injuries to the extent that the officer's conduct involved the implementation of a plan of supervision, not policy decisions. However, under state law, plaintiffs must show officer acted with gross negligence to establish personal liability.

- Joyce v. Dept. of Corr., 119 P.3d 825 (Wash. 2005): The state corrections department was supervising an offender convicted of two felonies when the offender stole a car, ran a red light, and collided with a vehicle killing the occupant. At trial the jury found that the state's negligence caused the death and awarded damages. On appeal, the court refused to limit the state's duty to supervise offenders, finding that once the state had taken charge of an offender, it had a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of parolees. However, the court found errors at trial regarding jury instructions and remanded for new trial on the issue of the state's negligence.
- Hertog v. City of Seattle, 979 P.2d 400 (Wash. 1999): A young child was raped by a person on probation for a lewd conduct conviction in municipal court and on pretrial release awaiting trial in county court for a sexually motivated burglary. Plaintiff, the child's guardian ad litem, sued the city and county claiming that the city probation counselor and the county pretrial release counselor negligently supervised the individual who committed the rape. Defendants' summary judgment motion was denied and the denial was upheld by the appellate court. The court ruled that defendants did have a duty to third persons, such as the rape victim, to control the conduct of probationers and pretrial releases to protect others from reasonably foreseeable harm. Whether defendants violated their duty was subject to a factual dispute. In addition, because the probationer had signed a written release allowing mental health professionals to report to the city probation officer, he had no expectation of confidentiality as to his records as they were no longer subject to the psychologist-client privilege.
- Bishop v. Miche, 943 P.2d 706 (Wash. C.A. 1997): Parents of a child killed in a car accident with a drunk driver sued the drunk driver for wrongful death and the county for negligent supervision by a probation officer. Plaintiffs alleged that had the probation officer properly supervised the driver and reported his probation violations, the driver would have been jailed and their son would not have been killed. The court held that although the county could not be held liable for the sentencing error, there were fact issues with respect to plaintiffs' negligent supervision claim. The court stated that the probation officer had sufficient information about the driver to cause her to be concerned that he was violating his probation terms and to cause her to be concerned that he might start drinking and driving again.

5.10.2 Cases Rejecting Liability:

In the following cases, the courts refused to impose liability on government officials responsible for supervising offenders or other persons:

- Dept. of Corr. v. Cowles, No. S-11352, No. 6082 (Alaska, December 15, 2006): A parolee murdered his girlfriend and shot himself. One of the bodies fell on a child, leading to suffocation. The complaint alleged that the State committed negligence by failing to implement and enforce an appropriate parole plan, to require appropriate post-release therapy, to enforce parole violations, to properly supervise the parolee, and to revoke his parole. The Alaska Supreme Court held that the state's duty of care in supervising its parolees should be narrowly construed. However, the selection of conditions of parole were operational activities not entitled to immunity but that at least some of the state's alleged acts of negligence were shielded by discretionary function immunity. The state could not be held liable for the parole officer's alleged negligence in failing to take affirmative action to discover parole violations absent notice. Material issues of fact remained with respect to the issue of causation.
- Martinez v. California, 444 U.S. 277 (1980): Parole officials released a known violent offender who subsequently killed the decedent. The family sued the state alleging reckless, willful, wanton, and malicious negligence and deprivation of life without due process under 42 U.S.C.S. § 1983. The Supreme Court held that the California statute granting immunity was not unconstitutional. The Court further held that the U.S. Constitution only protects citizens from deprivation by the state of life without due process of law. The decedent's killer was not an agent of the state and the parole board was not aware that decedent, as distinguished from the public at large, faced any special danger. The Court did not resolve whether a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole for purposes of 42 U.S.C.S. § 1983 liability.
- Weinberger v Wisconsin, 906 F. Supp 485 (WD Wis. 1995): Probation officers were not liable for injuries caused by drunken probationer collision with plaintiff's car based on a failure to arrest probationer a night earlier when found driving under the influence (DUI). It was decision of judge to allow probationer to remain out of custody pending disposition of petition that left probationer able to drive and re-offend. Failure of probation officers to arrest probationer did not proximately cause injuries.
- Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478 (M.D. Ala. 1976), *affirmed without opinion*, 548 F.2d 354 (5th Cir. 1977): Plaintiff sued for damages from the state when minor daughter was allegedly raped and killed by a parolee of the Alabama Board of Pardons and Paroles. Plaintiff alleged that granting of parole and subsequent supervision was either negligent or done in a willfully and wantonly manner. Court held that the board of pardons and paroles was immune from suit by virtue of the Eleventh Amendment and the doctrine of official immunity. Court held that individual parole officers should be granted same immunity accorded judges notwithstanding allegations of misfeasance, nonfeasance and malfeasance in the conduct of their supervision of parolee.

- McCleaf v. State, 945 P.2d 1298 (Ariz. Ct. App. Div. 1 1997): Probation officer did not act with “actual malice” in connection with allegedly negligent supervision of probationer. Because manner of supervision was a discretionary act, officer was immune from liability for pedestrian struck and killed by probationer who was driving while intoxicated and without driver's license. Probationer had told the officer that he was not using alcohol or drugs and officer saw no signs of such use. Nothing in the record indicated that officer in any way encouraged or condoned probationer's drinking or drunken driving.
- Department of Corrections v. Lamaine, 502 S.E.2d 766 (Ga. 1998): Conduct of parole officer in supervising parolee, who was on conditional release after 10 years in prison for aggravated rape and sodomy convictions and while out raped and killed fellow restaurant employee, was not reckless. There was no proof that the officer was aware of a risk so great that it was highly probable that the injuries would follow or that he acted with conscious disregard of a known danger.
- Anthony v. State, 374 N.W.2d 662 (Iowa 1985): Plaintiffs filed action against the state for injuries caused by a sex offender whom the state released to work in the community without imposing any conditions on his release. The court found that the state had breached no duty to plaintiffs because the decision to adopt a work release plan for a prisoner was a discretionary function. State law barred negligence claims against the state for the failure to exercise or perform a discretionary function. Furthermore, the state had not breached a duty of care under a negligent supervision theory for the same reason. Additionally, the evidence concerning implementation was not so strong as to compel a finding of negligence as a matter of law. Finally, there was no duty to warn because there was no threat to an identifiable person.
- Schmidt v. HTG Inc., 961 P.2d 677 (Kan. 1998), cert. denied, 525 U.S. 964 (U.S. 1998): Probation officer’s failure to report violations by probationer who injured child while driving under influence of alcohol was not liable for damages. Officer did not take custody of probationer sufficiently to create a duty to protect the public. Statutory duty to report probation violations was owed to court and not to general public.
- Lamb v Hopkins, 492 A.2d 1297 (Md. 1985): Probation officer who had probationer arrested on warrant for violating terms of probation did not have actual ability to control probationer by preventing his release which resulted in additional crimes. Even assuming that officer had provided available information about other pending charges against probationer to the court at revocation hearing, decision whether to revoke probation was within control of court, not probation officer.
- Johnson v. State, 553 N.W.2d 40 (Minn. 1996): The trustees of victim, who was raped and murdered by parolee who had failed to report to a halfway house, initiated a wrongful death action against the state and halfway house. The court held that statutory immunity and official immunity barred the trustees’ claim because the

decision to release the prisoner was a protected discretionary function. The court further found that the immunities protected the state and county for the alleged failure of its agents to determine whether the parolee had arrived at the halfway house because imposing this liability would undermine public policy clearly manifested by the legislature to provide for the release of parolees into the community. The court found that the halfway house was not negligent in that it had no legal duty to control the parolee; the halfway house neither had custody of the parolee nor had it entered into a special relationship with him due to his failure to arrive at the halfway house.

- Hurst v. State Dep't of Rehabilitation & Correction, 650 N.E.2d 104 (Ohio 1995): Parolee was declared absent without leave. Pursuant to the policy of the Department of Rehabilitation and Correction, parole officer waited 30 days before drafting a parole violator-at-large (PVAL) report, which was never entered into the computer networks. Parolee was arrested for his participation in the beating death of decedent. The executor of decedent's estate brought an action against state alleging wrongful death, negligence, and negligence per se. The court held that the only affirmative duty imposed upon state officials was to report the status of a PVAL and to enter this fact into the official minutes of the Adult Parole Authority. There was no statute or rule that imposed a specific, affirmative duty to enter the offender's name on any computer network. Therefore, the plaintiffs failed to establish the existence of a special duty owed the decedent by the state and the public duty rule applied to bar liability on the part of the Adult Parole Authority.
- Kim v. Multnomah County, 909 P.2d 886 (Ore. 1996): Action brought against probation officer alleging gross negligent supervision with reckless disregard for safety of others. Plaintiff alleged officer's unreasonably heavy caseload, failure to make home visit, and failure to recognize mental condition of perpetrator was worsening. Court held that probation officer did not create dangerous condition or cause death of son and that the officer was immune from liability for damages resulting from negligence or unintentional fault in performance of discretionary duties.
- Zavalas v. State, 809 P.2d 1329 (Ore. App. 1991): Parole officer enjoyed judicial immunity in action by mother of eight-year-old child, despite allegations that the officer was negligent in failing to supervise sex offender who was subject to a condition that he refrain from knowingly associating with victims or any other minor except with written permission of the court or officer. Plaintiffs could not establish evidence that the officer knew the parolee was violating probation nor did terms of probation prohibit parolee from living next to families or children's playground. Officer was carrying out the court's direction to supervise parolee and level of supervision exercised by him was within authority granted by court.

All Advisory Opinions At-A-Glance

Any state may submit an informal written request to the Executive Director for assistance in interpreting the rules of this compact. The Executive Director may seek the assistance of legal counsel, the Executive Committee, or both, in interpreting the rules. The Executive Committee may authorize its standing committees to assist in interpreting the rules. Interpretations of the rules shall be issued in writing by the Executive Director or the Executive Committee and shall be circulated to all of the states. / [Advisory Opinion Policy](#)

2015	Details	At Issue	Finding
Rule(s): Opinion #: Issued: Requester:	1.101 & 2.106 3-2015 12.8.15 Florida	Whether a Maryland offender whose sentence includes a requirement of successful completion of 2 years in the Home Detention Program (HDP), or other such program in another state, should be considered to be subject to the Interstate Compact for Adult Offender Supervision during the period in which the terms of the HDP are in effect?	Based upon the terms of the Compact, the referenced rules and the legal authorities cited, an offender who has been convicted of a criminal offense and who is released to the community under a Home Incarceration Program in Maryland, or similar program in another state, and relocates to the State of Florida, or any other compact state, for the purpose of completing 90 days or more of a period of time required by such a program is eligible for transfer of supervision under the Interstate Compact for Adult Offender Supervision.
Rule(s): Opinion #: Issued: Requester:	1.101 & 2.106 2-2015 03.12.15 Virginia	Whether an offender who has been granted a conditional pardon in the Commonwealth of Virginia and is transferred to a secure treatment facility in the State of Florida is eligible for transfer under the Interstate Compact for Adult Offender Supervision.	Based upon the terms of the Compact, the referenced rules and the legal authorities cited herein, an offender who has been granted a conditional pardon in the Commonwealth of Virginia and is transferred to a secure treatment facility in the state of Florida is eligible for transfer of supervision under the Interstate Compact for Adult Offender Supervision.
Rule(s): Opinion #: Issued: Requester:	4.101, 4.103 (a)(b) & 4.109 (a)(b) 1-2015 02.12.15 North Carolina	Whether an offender whose supervision is transferred under the Compact to the state of North Carolina and commits a violation of one or more of the terms and conditions of probation may be subjected to confinement for short periods in lieu of revocation of probation pursuant to a state statute applicable to offenders sentenced in North Carolina.	Based upon the terms of the Compact, the above referenced rules and the legal authorities cited herein, an offender whose supervision is transferred under the Compact to North Carolina and commits a violation of one or more of the terms and conditions of probation may be subjected to confinement for short periods in lieu of revocation of probation pursuant to a state statute applicable to offenders sentenced in North Carolina. ICAOS Rules contemplate that the receiving state is required to "supervise an offender transferred under the Interstate Compact

in a manner determined by the receiving state and consistent with the supervision of other similar offenders sentenced in the receiving state.” However, in the interest of fairness to both the offender and the sending state, it seems reasonable to conclude that the imposition of this limited period of incarceration, in lieu of revocation of probation (‘Quick Dip’), would ‘qualify’ as a ‘special condition’ under Rule 4.103, which would require North Carolina to notify the sending state of such condition of supervision ‘at the time of acceptance or during the term of supervision’ as required under this rule.

2014	Details	At Issue	Finding
Rule(s): Opinion #: Issued: Requester:	4.109-1, 5.101 (c) & 5.111 1-2014 02.12.14 Vermont	Whether an offender under supervision in the receiving state, who is charged with a new criminal offense in the receiving state and arrested but released on bail on the new offense, may be subsequently arrested and detained for retaking by the sending state pending the resolution of the new criminal charge.	In summary, based upon the terms of the compact, the above referenced rules, and the legal authorities cited herein, since an offender under supervision in the receiving state who is charged with a new criminal offense cannot be retaken until one of the prerequisites of ICAOS Rule 5.101 (c) has been satisfied, it is inconsistent with both the ICAOS rules and due process for a warrant to be issued by the sending state or for the offender to be arrested and detained indefinitely, if subsequently released to bail on a new criminal charge. However, once the provisions of Rule 5.101 (c) have been satisfied, both arrest and detention of the offender without bail on the compact warrant are required.
2012	Details	At Issue	Finding
Rule(s): Opinion #: Issued: Requester:	5.108(d) 5-2012 10.11.12 Colorado	Whether ICAOS Rule 5.108(d) permits the use of 2-way video closed circuit television during probable cause hearings where determined by the hearing officer to be necessary to protect a witness from harm which might result from testifying in person.	Based upon the referenced guidance in these U.S. Supreme Court decisions, it seems clear that if the Sixth Amendment’s confrontation clause allows the use of 2-way video closed circuit television in the actual trial of a criminal defendant in order to prevent harm to a witness which might result from testifying in person, such a procedure is also permissible, if determined by the hearing officer to be necessary, during the informal inquiry required at the preliminary hearing to determine probable cause under ICAOS Rule 5.108(d). In summary, based upon the terms of the compact, the referenced rules and the legal authorities cited herein, ICAOS Rule 5.108(d) permits the use of 2-way video closed circuit television during probable cause hearings where determined by the hearing officer to be necessary to protect a witness from harm which might result from testifying in person.
Rule(s): Opinion #: Issued: Requester:	2.110 4-2012 10.11.12 Minnesota	Whether or not the definition of the term ‘Relocate’ in ICAOS Rule 1.101 and as applicable in ICAOS Rule 2.110, should be interpreted	While such a practice may be subject to criticism based on public safety concerns, the current definition of ‘Relocate’ does not appear to limit the cumulative number

to mean that an offender may not proceed and remain in another state for a cumulative period exceeding 45 days in any 12 month period without being in violation of ICAOS Rule 2.110?

of days within which an offender may be permitted to remain in another state to a total of 45 cumulative days during the same 12 month period.

<p>Rule(s): 2.110 Opinion #: 3-2012 Issued: 05.14.12 Requester: California</p>	<p>Whether an offender whose supervision was never transferred under the Compact and who subsequently absconds supervision is subject to the terms of the Compact and ICAOS rules and may the State from which the offender absconded return the offender under the Compact or is the Extradition Clause of the U.S. Constitution the only means by which such an absconder may be returned?</p>	<p>Where jurisdiction over a parolee or probationer is vested in the compact transfer process, as provided under the Compact and ICAOS Rules, the Constitutional provisions concerning extradition need not apply. If the offender was transferred into the state under the provisions of the interstate compact, then the return of the offender, even in the case of an absconder, is properly accomplished pursuant to the provisions of the Compact and its duly authorized rules and regulations.</p> <p>However, when the offender's supervision was never transferred to a receiving state under the Compact and no application for transfer or waiver of extradition ever occurred, neither the Compact nor the ICAOS rules apply to this offender who, as a 'fugitive from justice' having absconded from probation in California, must be apprehended and returned under the extradition clause of the U.S. Constitution.</p>
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<p>Rule(s): 3.105(a) Opinion #: 2-2012 Issued: 04.20.12 Requester: Arizona</p>	<p>Can a receiving state's acceptance of an application for transfer of supervision under ICAOS Rule 3.105(a) or approval of reporting instructions be the cause of a release of an offender from a correctional facility which would otherwise keep the offender incarcerated?</p>	<p>In summary, based upon the terms of the compact, the referenced rules and the legal authorities cited herein, under ICAOS Rule 3.105(a) neither the acceptance of a request for transfer by a receiving state nor approval of reporting instructions can be the basis for either the determination of whether the sending state will release an offender from a correctional facility or the planned release date.</p>
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<p>Rule(s): 3.101 Opinion #: 1-2012 Issued: 01.30.12 Requester: New Jersey</p>	<p>Are persons 'acquitted' by reason of insanity under the New Jersey 'Carter-Krol' statute eligible for interstate transfer of supervision under the Compact?</p>	<p>Based on the facts as set out in the request and considering the provisions of the New Jersey statute, the literal language and plain meaning of the applicable definitions and provisions of both the Interstate Compact and ICAOS Rules, and other applicable legal authorities, it is our opinion that persons 'acquitted' by reason of insanity under the New Jersey 'Carter-Krol' statute are not eligible for interstate transfer of supervision under the Compact.</p>
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2011	Details	At Issue	Finding
<p>Rule(s): 5.103-2 Opinion #: 2-2011 Issued: 01.24.11 Requester:</p>	<p>Whether ICAOS Rule 5.103-2 requires the sending state to determine an offender's status as a 'violent offender' as defined in</p>	<p>The current language of ICAOS Rule 5.103-2(b) does not mandate that the sending state make a determination that an offender is a 'violent offender' at the</p>	

Colorado

ICAOS Rule 1.101 at the time of the transfer of supervision to the receiving state.

time of transfer of supervision to the receiving state under the terms of the compact.

Rule(s): [2.105](#)
Opinion #: [1-2011](#)
Issued: 01.24.11
Requester: Washington

Whether ICAOS Rule 2.105 applies to misdemeanor violations pertaining to hunting which involve the use of a firearm and whether offenders convicted and sentenced to supervision for such violations are thus subject to transfer under the compact.

ICAOS Rule 2.105 applies to all misdemeanor violations, including those pertaining to hunting, which involve the use of a firearm and offenders convicted and sentenced to supervision for such violations are thus subject to transfer under the compact.

2010 **Details** **At Issue** **Finding**

Rule(s): -
Opinion #: [4-2010](#)
Issued: 07.15.10
Requester: West Region

What is the effect of a Washington statute providing that the Department of Corrections is not authorized to supervise certain offenders who are sentenced to a term of community custody, community placement, or community supervision on supervision cases under the compact.

While the Washington law clearly provides that the DOC is not authorized to supervise any offender **"sentenced to a term of community custody, community placement, or community supervision or any probationer unless the offender or probationer is one for whom supervision is required (under this act),"** no provision of the statute prohibits a sentencing Court from imposing upon an offender reporting requirements directly to the Court in lieu of the DOC.

This is attributable to a Constitutional concern on the part of the legislature about the 'separation of powers' among the executive, legislative and judicial branches of government. However, this discrepancy could result in anomalous cases in which a Court in Washington orders some type of 'reporting' to the Court or completion of some behavioral modification or treatment program and that the results are to be submitted directly to the Court rather than the Washington DOC.

Should this occur, such a case would qualify as being 'supervised' under the terms of the compact and the rules notwithstanding the fact that the Washington law does not permit the DOC to supervise the offender. See ICAOS [Rule 1.101 "Supervision,"](#) also ICAOS [Advisory Opinion 3-2005, 9-2004,](#) and [8-2004.](#)

Rule(s): [1.101](#)
Opinion #: [3-2010](#)
Issued: 07.22.10
Requester: Missouri

Whether a California statute effective in 2010 which classifies certain eligible California offenders as not subject to active supervision or revocation of parole has the effect of removing such offenders from the jurisdiction of the ICAOS.

It is still possible that a California Court could order some type of 'reporting' directly to the Court or completion of some behavioral modification or treatment program and that the results are to be submitted directly to the Court in lieu of the California Department of Corrections and Rehabilitation.

Should this occur with regard to an offender who moves to another State, such a case would qualify as being

'supervised' under the terms of the compact and the rules notwithstanding the fact that the California law does not permit the offender to be supervised by the DOCR. See ICAOS [Rule 1.101 "Supervision,"](#) also ICAOS [Advisory Opinion 3-2005, 9-2004,](#) and [8-2004.](#)

Rule(s): [4.112 \(a\)\(1\)](#)
Opinion #: [2-2010](#)
Issued: 07.15.10
Requester: Arizona

Does ICAOS Rule 4.112 permit a sending state to advise a receiving state to close interest in a supervision case upon modification of the sentencing order so that the status of the offender no longer qualifies as "supervision" under ICAOS Rule 1.101 but the sending state does not terminate the case.

Whether the sending state refers to its determination to modify the terms of the sentence as a discharge or not, by operation of law, once supervision has ceased in the sending state there is no further basis upon which the receiving state can continue to act as an agent for the sending state to perform supervision on its behalf when no such authority over the offender continues to exist in the sending state. This is consistent with the previous position taken in [Advisory Opinion 11-2006](#) that discharge of the offender under Rule 4.112 (a)(1) is determinative of eligibility for supervision under the compact.

Rule(s): [3.101](#)
Opinion #: [1-2010](#)
Issued: 03.08.10
Requester: Arkansas

Whether a receiving state may require all documents concerning the offender which it considers relevant and the authority to return an offender whom it determines can no longer be safely supervised in that state as conditions precedent to accepting a transfer of supervision of an offender under the compact.

Based upon the terms of the compact, the above referenced rules and the legal authorities cited herein, neither the State of Washington nor any other ICAOS member state may refuse otherwise valid mandatory transfers of supervision under the compact on the basis that additional information concerning the criminal history of these offenders, not required by Rule 3.107 to be furnished, has not been provided or that the State of Washington will be vested with the authority to unilaterally decide when any of these offenders transferred can no longer be safely supervised in the community and that the offender needs to be returned to the sending state in contravention of Rule 5. 103 (a), which requires a showing of a minimum of three (3) significant violations establishing a pattern of non-compliance before retaking by the sending state is required.

2009	Details	At Issue	Finding
Rule(s): 3.105 Opinion #: 1-2009 Issued: 12.22.09 Requester: East Region		Transfer request for offenders incarcerated at the time the request is submitted Whether a sending state may request that a receiving state investigate a request to transfer supervision under the compact prior to the offender's release from incarceration when the offender is subject to a "split sentence" of jail or prison time and release to probation supervision, or must wait until	Based on the foregoing analysis and consistent with the clear intent of the compact and the ICAOS rules as well as the language and design of the compact and the rules, a sending state may request that a receiving state investigate a request to transfer supervision under the compact prior to the offender's release from incarceration when the offender is subject to a "split sentence" of jail or prison time and release to probation supervision.

the offender is released to supervision in order to make such a request.

2008	Details	At Issue	Finding
<p>Rule(s): 4.101 Opinion #: 3-2008 Issued: 11.19.08 Requester: Massachusetts</p>		<p>Guidance Concerning Out-of-State Travel for Sex Offenders Whether a receiving state's compact administrator may prohibit an offender, whose supervision was transferred to the receiving state pursuant to ICAOS, from traveling outside of the receiving state while under supervision in the receiving state? Whether the sentencing court in the sending state retains the authority, in light of ICAOS and its attendant rules and regulations, to authorize an offender's out-of-state travel for work purposes once his or her supervision has been transferred to another state pursuant to ICAOS?</p>	<p>Since ICAOS Rule 4.101 requires that a receiving state shall supervise a compact offender "consistent with the supervision of similar offenders sentenced in the receiving state" then compact offenders should be subject to the same exception as offenders sentenced in the state.</p> <p>The sentencing court in the sending state does not surrender its' jurisdiction over an offender whose supervision is transferred to another state. The sending state court continues to exercise some authority over a compact offender for the duration of the period of supervision.</p>
<p>Rule(s): 2.105 & 2.110 (b) Opinion #: 2-2008 Issued: 07.07.08 Requester: Texas</p>		<p>Authority to Issue Travel Permits Authority of judges and probation or parole officers to permit certain offenders to travel outside of Texas who, by reason of the type of crime committed or the duration of the travel, are not eligible for transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision ("ICAOS") or ICAOS administrative rules. Whether offenders whose offenses otherwise qualify for transfer of supervision under the provisions of ICAOS rules may be permitted to travel out of state for a period of forty-five (45) days or less?</p>	<p>Offenders not subject to ICAOS may, depending on the terms and conditions of their sentences, be permitted to move across state lines without prior approval from the receiving state and neither judges nor probation officers are prohibited by ICAOS from allowing such offenders to travel.</p> <p>An offender who is not relocating but simply leaving the state (for a period not exceeding 45 consecutive days) for routine business travel, vacations, visits to family, medical appointments, and other such out-of-state travel normally undertaken in the activities of everyday life is not subject to the ICAOS rules concerning a transfer of supervision, other than notification requirements in victim sensitive cases, even if otherwise eligible to transfer supervision under the Compact.</p>
<p>Rule(s): 3.101-3(c)(1) & 4.109 Opinion #: 1-2008 Issued: 03.17.08 Requester: Massachusetts</p>		<p>Clarification of Rule 3.101-3(c)(1) regarding sex offenders living in the receiving state at the time of sentencing and of Rule 4.103 regarding imposition and enforcement of special conditions.</p> <p>1. Whether a sending state is required to provide details of the sex offense in a request for reporting instructions for sex offenders living in the</p>	<p>The provisions of Rule 3.103 (e) (1) and (2) (governing offenders in the receiving state at time of sentencing) are premised on the proposition that the offender's continued lawful presence in the receiving state under the compact ultimately depends upon the determination of the offender's eligibility for transfer.</p> <p>Under ICAOS Rule 4.103, the addition of a special condition which</p>

receiving state at the time of sentencing, pursuant to Rule 3.101-3 (c)(1).

2. Whether a receiving state can deny a transfer request of an offender where the sending state has imposed a condition on the offender that the receiving state is unable to enforce.

3. Whether the provisions of the Compact and its rules supersede conflicting state laws.

the receiving state is unable to enforce only requires that the receiving state notify the sending state of its inability to enforce a special condition at the time the transfer request is made [ICAOS Rule 4.103 (d)].

It is unquestionably the case that the provisions of the Compact and its rules, by virtue of congressional consent under Article I, Section 10, Clause 3 of the federal Constitution have been 'transformed into federal law' and supersede conflicting state laws.

2007	Details	At Issue	Finding
Rule(s): Opinion #: Issued: Requester:	5.103 4-2007 11.14.07 Massachusetts & New York	Whether All Violations Must Occur in the Receiving State	<p>Although the rule does not explicitly state that such violations must occur in the receiving state, it is unreasonable to assume that Rule 5.103 (a) intends that significant violations occurring in the sending state prior to transfer are also to be considered by the receiving state to satisfy the requirements of the rule. The provisions of ICAOS Rule 3.101 are unequivocal in requiring that to be eligible for mandatory transfer an offender must be "in substantial compliance with the terms of supervision in the sending state," in addition to the other requirements set forth in that rule.</p> <p>In order to qualify for a subsequent 'mandatory transfer' under Rule 3.101 an offender would have to demonstrate 'substantial compliance' with the terms of supervision in the sending state without which such offender would be disqualified. If the receiving state has accepted the subsequent transfer and by such act has in effect agreed that the offender is in substantial compliance with the terms of supervision, then it is unreasonable to assume the subsequent application of Rule 5.103 (a) to include those prior violations as a basis to require retaking.</p>

Rule(s): Opinion #: Issued: Requester:	3.103 (a)(2) 3-2007 09.17.07 Pennsylvania	Denial of Reporting Instructions	<p>Where an investigation by the receiving state reveals that a transfer request for an offender living in the receiving state at the time of sentencing does not comply with the provisions of Rule 3.101(b) which requires a valid plan of supervision, a receiving state may properly deny the transfer request. If this determination is made prior to the expiration of the time frames set forth in Rule 3.103(a) the issuance of reporting instructions to such an offender has become moot. If the investigation has not been completed, reporting instructions are required to be issued as provided in Rule 3.103(a). Upon completion of investigation, if the receiving state subsequently denies the transfer on the same basis or upon failure to satisfy any of the other requirements of Rule 3.101, the provisions of Rule 3.103(e)(1) and (2) clearly require the offender to return to the sending state or be retaken upon issuance of a warrant.</p>
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Rule(s): [3.101 \(b\)](#)
Opinion #: [2-2007](#)
Issued: 05.10.07
Requester: New Jersey

Offenders in Federal Housing

A receiving state is not authorized to deny a transfer of an offender based solely on the fact that the offender intends to reside in Section 8 housing. Denial of transfer on this basis, with the exception of sex offenders and those convicted of the manufacture or production of methamphetamine, is tantamount to adding a special condition or requirement prior to the acceptance of transfer in violation of ICAOS Rule 3.101.

Rule(s): [4.101](#)
Opinion #: [1-2007](#)
Issued: 05.10.07
Requester: Idaho

Clarification that a receiving state "shall supervise an offender... consistent with the supervision of other similar offenders sentenced in the receiving state"

Under the Compact an offender whose sentence includes provisions which, for example, require completion of other terms and conditions such as a court ordered treatment or behavioral modification program or periodic reports filed with the court in addition to merely requiring compliance with all laws, is not in actuality an "unsupervised offender." As such the relocation of offenders under such sentences is subject to the jurisdiction of the ICAOS and applications for transfer should continue to be submitted and investigated as required under the Compact. During the term of the conditions imposed by the sending state such an offender is subject to the rules of the Compact governing supervision of offenders generally as provided in Chapters 4 and 5 of the Compact rules.

2006	Details	At Issue	Finding
Rule(s): 5.108 & 4.109-1 Opinion #: 17-2006 Issued: 03.15.07 Requester: Rules Committee		Clarification of Rules 5.108 and 4.109-1.	Each state should determine the extent to which authority is vested in parole and probation officers as well as other law enforcement and peace officers to effect such an arrest, including the need for a warrant. If application for issuance of an arrest warrant must be made to a judge, it may be helpful to point out that Article V, subsection (b) of the state statute enacting ICAOS provides that ICAOS rules have the force and effect of statutory law and are binding in the compacting states. Article IX further provides that the courts of each compacting state shall enforce the Compact and take all actions necessary and appropriate to effectuate the Compact's purposes and intent.

Rule(s): [2.105\(a\)\(1\)](#)
Opinion #: [16-2006](#)
Issued: 03.06.07
Requester: Colorado

Interpretation of "physical harm".

In summary, a person charged and adjudicated on a misdemeanor offense of assault would be subject to the compact pursuant to Rule 2.105(a)(1), assuming all other provisions of the compact and rules apply. The fact that the instrumentality of the harm was an automobile has no bearing on the determination of eligibility under Rule 2.105(a)(1). Each state establishes the elements of its own criminal laws. Rule 2.105(a)(1) addresses only the nature of the offense committed ("an offense in which a person has incurred direct or threatened physical or psychological harm"), not the particular instrumentality used in the

commission of the offense. If the law of the sending state recognizes the use of an automobile as an element in an assault offense and the offender is so adjudicated, Rule 2.105(a)(1) applies.

Rule(s): [3.101](#)
Opinion #: [15-2006](#)
Issued: 08.30.06
Requester: Massachusetts

Obligation of the sending state when the offender no longer meets requirements of Rule 3.101.

Under the current rules there is no such retaking requirement which is provided either explicitly or by implication or reasonable inference. In fact, under Rules 5.101, 5.102, and 5.103 retaking by the sending state is "at its sole discretion" except for situations in which the offender has been charged with a subsequent criminal offense and completion of a term of incarceration for that conviction, or placement on probation; or upon a showing that the offender has committed three or more "significant violations" which establish a pattern of "noncompliance of the conditions of supervision."

Rule(s): [4.107\(b\)\(2\)](#)
Opinion #: [14-2006](#)
Issued: 08.15.06
Requester: Michigan

Clarification on Offenders being charged fee by sending state after transferred to receiving state.

The fee imposed annually under Wisconsin law does not appear to be for the purpose of the supervision of such offenders by parole or probation officers and instead is for the purpose of defraying the cost of sex offender registration and victim notification, it does not appear to fit the criteria of a "supervision fee" and may be collected on Compact offenders. However, under ICAOS Rule 4.108 (a) Wisconsin is solely responsible for the collection of such an annual assessment. While there is no requirement that Michigan undertake to require payment of this fee by an offender, under Rule 4.108 (b), upon notice from Wisconsin that the offender is not complying with this financial obligation, Michigan must notify the offender that this is a violation of the conditions of supervision and must comply as well as providing the offender with the address to which payments are to be sent.

Rule(s): [3.101](#)
Opinion #: [13-2006](#)
Issued: 08.01.07
Requester: Washington

Clarification on offenders who are undocumented immigrants.

1. An undocumented immigrant who meets the definition of "offender" and seeks to transfer under the Compact is subject to the jurisdiction of the Compact and the immigrant's status as "undocumented" would not be a per se disqualification as long as the immigrant establishes that the prerequisites of Rule 3.101 have been satisfied. This includes the requirement that the immigrant be in 'substantial compliance' with the terms and conditions of supervision in the sending state.

2. If a Court knowingly releases an undocumented immigrant to supervision under the compact, the language of the current rules requires that the supervision of such an offender must be transferred if the mandatory criteria of Rule 3.101 are met and the sending state does not revoke parole or probation based upon an offender's status as an undocumented immigrant.

3. Under Rule 5.101 retaking of an undocumented immigrant is at the sole discretion of the sending state unless the offender comes within the exceptions provided in Rule 5.102 (upon conviction for a new felony offense and completion of incarceration or placement on probation) or as provided in Rule 5.103 (upon a showing that the offender has committed three or more significant violations arising from separate incidents which establish a pattern of non-compliance with the conditions of supervision). In the event that the offender was transferred under the 'discretionary

transfer' provisions of Rule 3.101-2 and the receiving state has added a special condition to the acceptance of said discretionary transfer which would require retaking of the offender upon determination that the offender is undocumented, then such a special condition would appear to be permitted under the Compact and the rules as was previously concluded in Advisory Opinion 8-2006.

Rule(s): [5.101](#)
Opinion #: [12-2006](#)
Issued: 08.11.06
Requester: North Carolina

Clarification on Retaking by the sending state.

Neither ICAOS Rule 5.101(b) nor any other current rule requires that a warrant be issued by the sending state when an offender absconds. While Rule 5.101 (a) provides that a sending state may retake any compact offender at its sole discretion, except as required under Rule 5.102 and 5.103, neither the time frame nor the means by which the retaking of the offender shall occur are provided.

Rule(s): [4.112](#)
Opinion #: [11-2006 - R](#)
Issued: 10.10.06
Requester: North Carolina

Closing supervision by the receiving state.

A Receiving State Closing supervision interest under Rule 4.112, does not preclude the jurisdiction of the Compact except for cases where the original term of supervision has expired.

Article I of the Compact and Rule 5.107 specifically authorize officers of a sending state to enter a state where the offender is found and apprehend and retake the offender notwithstanding case closure under Rule 4.112 with the exception of cases in which the original term of supervision has expired.

Rule(s): [5.103](#)
Opinion #: [10-2006](#)
Issued: 08.14.06
Requester: Massachusetts

Offenders transferred under the compact prior to August 1, 2004.

Offenders transferred prior to the adoption of ICAOS rules August 1, 2004 may be retaken under the current rules if one of the significant violations occurred after August 1, 2004.

Rule(s): [2.110](#)
Opinion #: [9-2006](#)
Issued: 08.14.06
Requester: Minnesota

An offender being in the receiving state prior to investigation as a valid reason for rejection.

States which allow eligible offenders to transfer prior to the receiving state having an opportunity to investigate are in violation of the Compact under Rule 3.102 (b) and Rule 2.110. In such circumstances the receiving state can properly reject the request for transfer of such an offender, until returned to the sending state, due to the prior failure of the sending state to comply with the requirements of the compact and the rules referenced.

Rule(s): [3.101-2](#)
Opinion #: [8-2006](#)
Issued: 06.19.06
Requester: Massachusetts

Condition obligating offender to complete residential program.

A receiving state may impose a special condition on an offender transferred under Rule 3.101-2 to attend a treatment facility and may order the sending state to return the offender if that offender has failed the program if the offender has no other means of support in the receiving state.

Under the compact and its rules the expectation of the special condition imposed on a discretionary case would be that the sending state would immediately initiate retaking procedures by ordering the return of the offender or issuing a warrant for his return.

Rule(s): [2.105](#)
Opinion #: [7-2006](#)
Issued: 04.26.06

Determination of second or subsequent misdemeanor DUI offense.

Rule 2.105 (a) (3) provides no such discretion but unequivocally provides that if the "instant offense includes... a second or subsequent misdemeanor

Requester: Pennsylvania

offense of driving while impaired by drugs or alcohol" that such a misdemeanor offender "shall be eligible for transfer." The rule provides no exceptions to applicability based on either the time period between the first and subsequent offense(s) or the jurisdiction in which the convictions occurred.

Rule(s): [3.101](#)
Opinion #: [6-2006](#)
Issued: 04.26.06
Requester: Massachusetts

Clarification of 90 day period of supervision is determined.

Rule 3.101 (a) should be determined at the time a sending state submits a request for transfer of the offender who at the time of said application must have "more than 90 days or an indefinite period of supervision remaining."

Rule(s): [3.104](#) & [4.101](#)
Opinion #: [5-2006](#)
Issued: 04.04.06
Requester: North Dakota

Time allowed for investigation by receiving state, Rule 4.101 - Manner and degree of supervision.

45 Calendar days is the maximum time the receiving state has under the rules to respond to a sending state's request for transfer.

This rule does not permit a receiving state to impose the establishment of sex offender risk level or community notification on offenders transferred under the Compact if the receiving state does not impose these same requirements on its own offenders.

Provisions of Rule 4.101 only apply to the manner in which a receiving state supervises an offender who has already been transferred in compliance with the Compact and the Rules.

Rule(s): [2.109\(a\)\(3\)](#)
Opinion #: [3-2006](#)
Issued: 02.14.06
Requester: New York

Region Members Casting Votes: Does Rule 2.109(a)(3) require that a proposed rule or rule amendment which is voted on by the member states of a region for submission to the Interstate Commission office for referral to the Rules Committee must be adopted by a majority vote of Commissioners from that region and whether non-commissioners, such as deputy compact administrators, may cast votes for this purpose.

No provisions of the compact, bylaws, or rules contemplates that a proposed rule or rule amendment may be officially voted upon at any point in the rulemaking process by anyone other than the duly appointed Commissioner of each state.

Rule(s): [4.107](#)
Opinion #: [2-2006](#)
Issued: 01.27.06
Requester: Pennsylvania

May a sending state continue to collect supervision fees on a case that is transferred to a receiving state which has no law authorizing the collection of supervision fees.

The sending state is prohibited under this rule from imposing a supervision fee once the offender has been transferred under the Compact.

Rule(s): [3.103](#)
Opinion #: [\(b\)\(1\)\(B\)](#)
Issued: [1-2006](#)
Requester: 01.18.06
Ohio

Shock probation released from prison.

This rule provides that the exception available to offenders under provisions of Rule 3.103 (a)(1)(A) which allows a sending state to grant a travel permit to an offender who was living in the receiving state at the time of sentencing are not applicable to "offenders released to supervision from prison."

2005

Details

At Issue

Finding

Rule(s): Opinion #: Issued: Requester:	<u>3.101</u> <u>8-2005</u> 11.21.05 Illinois	Can a receiving state make a determination that an offender is not in substantial compliance in the sending state, when the offender commits a crime in the receiving state during the period of investigation, or when the offender has an outstanding warrant in the receiving state?	The sending state determines if an offender is in "Substantial Compliance". If a sending state has taken no action on outstanding warrants or pending charges the offender is considered to be in substantial compliance under the rule.
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Rule(s): Opinion #: Issued: Requester:	<u>3.101 (a) (2)</u> <u>7-2005</u> 09.29.05 Arizona	Resident & Valid Plan of Supervision: Under Rule 3.101 (a) (2), does the resident criterion stand alone for purposes of acceptance? In other words, can a receiving state deny a transfer request for an offender who meets the resident definition but he is unemployed or has no means of support at the time of the transfer request?	Mandatory transfers require that the offender is either a resident of the receiving or has resident family and employment in the receiving state. In either situation under this rule all mandatory transfers are subject to the requirement that they be pursuant to a "valid plan of supervision".
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Rule(s): Opinion #: Issued: Requester:	N/A <u>HIPAA</u> 08.26.05 Pennsylvania	Guidance from the U.S. Department of Health & Human Services, Office of Civil Rights as to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") Coverage & Exemptions for the Interstate Compact for Adult Offender Supervision	HIPAA specifically authorizes disclosures of protected health information to law enforcement officials who need the information in order to provide health care to the individual and for the health and safety of the individual. [45 CFR 164.512 (k)(5)]. Under these provisions it appears that disclosures of health information which are required to provide for treatment of adult offenders subject to the ICAOS would also be exempt from HIPAA requirements.
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Rule(s): Opinion #: Issued: Requester:	<u>2.106</u> <u>6-2005</u> 06.13.05 Washington	Opinion as to Washington's "deferred prosecution" statute.	Even if a statute is labeled as deferred prosecution it may be the equivalent of a deferred sentence if a finding or plea of guilt has been entered and all that is left is for the Court to impose sentence.
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Rule(s): Opinion #: Issued: Requester:	<u>3.105</u> & <u>3.107</u> <u>5-2005</u> 06.13.05 Pennsylvania	Interpretation of Pre Parole Transfers requests in 3.105	A transfer request from a sending state must be provided up to 120 days in advance of the offender's planned prison release date. Rule 3.105 (b) requires the sending state to notify the receiving state of the offender's date of release from prison. Section (b) of this rule is equally clear that notification by the sending state must be furnished to the receiving state if the date of the offender's release from prison is "withdrawn or denied."
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Rule(s):	<u>3.101 (c)</u> &	Are offenders who are not eligible to transfer under the provisions of Rule 3.101 (a) or Rule 2.105 of the Rules of the Interstate Compact for Adult Offender Supervision permitted to transfer under Rule 3.101 (c) as a discretionary transfer?	An offender who is under supervision as that term is defined by the Compact and the rules but who is disqualified based on the nature of the offense or the failure to satisfy the eligibility criteria of Rule 3.101 (a) is nevertheless eligible for transfer of supervision under Rule 3.101 (c) as a discretionary transfer.
Opinion #:	<u>3.101-2</u>		
Issued:	<u>4-2005</u>		
Requester:	05.05.05 Oklahoma		

Rule(s):	<u>All</u>	1. Are the ICAOS rules, which became effective August 1, 2004, applicable to the Final Probation Order entered by the Court on October 2, 2003?	1. Interim rules for the administration of the new compact remained in effect until superseded by the new rules promulgated by the Commission.
Opinion #:	<u>3-2005</u>	2. If the answer to the first issue is "no," and the Court allows the defendant, now present in Maryland, to leave the State in order to enroll in the Florida program, would such action constitute an order that would trigger the new Rules of the ICAOS?	2. A subsequent order allowing the defendant residing in Maryland to leave the state for a Florida program would trigger the new Rules of ICAOS.
Issued:	03.30.05	3. If the answer to either the first or second issues is "yes," under the new rules, is the defendant's probation supervised within the meaning of ICAOS?	3. If this subsequent order imposes a condition or requirement, such as successful completion of a treatment program, and requires the facility to monitor these conditions or any violations then this would constitute supervision as defined by the ICAOS rules.
Requester:	Maryland		

Rule(s):	<u>5.103</u> &	Arresting & Detaining Compact Probationers and Parolees.	Out of State offenders can be arrested and detained for committing new crimes in the receiving state pursuant to State Law or upon the request of the sending state pending retaking.
Opinion #:	<u>5.108</u>	Authority of officers to arrest an out-of-state offender sent to Florida under the ICAOS on probation violations.	Out of state offenders can be arrested and detained for failure to comply with conditions of probation if such a failure would have resulted in an arrest of a similar situated in-state offender.
Issued:	<u>2-2005</u>		
Requester:	03.04.05 Florida		

Rule(s):	<u>3.107 (a)(12)</u>	Clarification regarding Rule 3.107 (a)(12) requiring that a sending state include a criminal history as part of the transfer packet.	Criminal History information obtained from NCIC can and should be attached pursuant to compact rules with the transfer request application.
Opinion #:	<u>1-2005</u>	Oregon uses the Oregon Law Enforcement Data System (LEDS) which queries NCIC which provides an automated CCH report. LEDS and NCIC rules restrict us from forwarding	
Issued:	01.06.05		
Requester:	Oregon		

automated CCHs to any other criminal justice agency. NCIC policy is that once you receive a response to the CCH inquiry, the information becomes outdated. Therefore, any information that is sent as part of the transfer application packet is no longer valid.

2004	Details	At Issue	Finding
Rule(s): Opinion #: Issued: Requester:	<u>1.101</u> (Offender), <u>1.101</u> (Substantial Compliance), & <u>3.101</u> <u>9-2004</u> 12.06.04 New Jersey	Offenders sentenced under the Violent Predator Incapacitation Act who seek transfer CSL supervision outside the state of New Jersey.	Considering the literal language and plain meaning of the rules of the Interstate Compact for Adult Offender Supervision, as referenced herein, it is our opinion that CSL offenders are subject to supervision under the Interstate Compact for Adult Offender Supervision and upon proper application and documentation of a valid plan of supervision and verification of the residency and employment criteria as required under those rules should be permitted to transfer to other states for supervision under the Compact.
Rule(s): Opinion #: Issued: Requester:	<u>1.101</u> (Offender), <u>1.101</u> (Supervision) <u>8-2004</u> 12.20.04 Georgia	Oklahoma sex offender court ordered under control of Oklahoma DOC.	The Oklahoma offender was clearly placed under the supervision of the Oklahoma Department of Corrections and conditions were imposed upon the offender as part of the suspended sentence that require payment of restitution in addition to other requirements which are conditions of probation. Both of the above criteria for supervision under the compact have been satisfied and it appears that any transfer of the offender to another state must be under the terms of the Compact and its' rules.
Rule(s): Opinion #: Issued: Requester:	<u>3.101</u> <u>7-2004</u> 11.24.04 Wisconsin	Rejection of Transfers Based on Outstanding Warrants. May a state reject a transfer request from an offender, who is a resident of that state and has verified employment, when there are warrants or pending charges in the receiving state?"	Intent of 3.101 is that while the sending state controls the decision of whether or not to transfer an offender under the Compact, the receiving state has no discretion as to whether or not to accept the case as long as the offender satisfies the criteria provided in this rule. If the sending state has taken no action on these warrants <i>and has not specifically determined these warrants or pending charges to be a basis for revocation proceedings, then the transfer application should not be rejected only on this basis.</i>
Rule(s): Opinion #: Issued: Requester:	N/A <u>MA Proposal</u> 08.11.04 Massachusetts	Consider adoption of an emergency rule under Section 2.109 of the Rules pertaining to the supervision of offenders from the Commonwealth of Massachusetts.	The Compact statute does not provide for an alternative means of compact membership and the previous "transition period" for the applicability of the rules under the predecessor compact are now "null and void" based on the explicit provisions of the compact statutes of the

member states.

Rule(s): Opinion #: Issued: Requester:	<u>2.106</u> <u>4-2004</u> 06.30.04 Florida	Clarification as to the eligibility for transfer of supervision of an offender subject to "deferred sentences" pursuant to Section 2.106 of the amended rule adopted March 12, 2004.	In determining the eligibility of an offender and the application of the ICAOS, one must look not at the legal definitions but rather the legal action taken by a court of competent jurisdiction or paroling authorities. To find otherwise would lead to disruptions in the smooth movement of offenders, the equitable application of the ICAOS to the states, and the uniform application of the rules.
Rule(s): Opinion #: Issued: Requester:	<u>2.106</u> <u>Legal Opinion</u> 06.30.04 Florida	Clarification as to the eligibility for transfer of supervision of an offender subject to "deferred sentences" pursuant to Section 2.106 of the amended rule adopted by the ICAOS at its special meeting for the Commission on March 12, 2004.	In determining the eligibility of an offender and the application of the ICAOS, one must look not at the legal definitions but rather the legal action taken by a court of competent jurisdiction or paroling authorities.
Rule(s): Opinion #: Issued: Requester:	<u>2.110</u> , <u>3.102</u> , & 4-106 (Note: Transition Rule) <u>3-2004</u> 04.15.04 Utah	Issuing travel permits to the Receiving state during the investigation period.	Once an application has been made under the Compact an offender may not travel to the Receiving State without the Receiving State's permission.