

 Interstate Commission for Adult Offender Supervision	Opinion Number 1-2008	Page Number: 1
ICAOS Advisory Opinion Issued by: Executive Director-Harry Hageman Chief Legal Counsel: Richard L Masters		
State Requesting Opinion Massachusetts	Dated: 3/18/2008	
Description Clarification of Rule 3.101-3(c)(1) regarding sex offenders living in the receiving state at the time of sentencing & of Rule 4.103 regarding imposition and enforcement of special conditions.		

Background & History

Pursuant to Commission Rule 6.101(c) the Commonwealth of Massachusetts has requested an advisory opinion regarding ICAOS Rule 3.101-3. In its request Massachusetts states as follows:

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

Massachusetts Probation has received several requests for reporting instructions pursuant to Rule 3.101-3(c)(1) that lack any description of the sex offense. The request for reporting instructions form requires the sending state to provide information about the offense, specifically what the instant offense is, a description of the offense, and the length of the sentence. The form also seeks an explanation of the offender's sex offense history.

Some states have challenged Massachusetts' request for this information, claiming that the rule does not require the sending state to provide this information in its request for reporting instructions.

Issue #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.

Pursuant to M.G.L. c. 265, § 47, and c.127, § 133D1/2, Massachusetts sex offenders sentenced to probation or court ordered parole or are under community parole supervision for life are required to be monitored using a global positioning system device (GPS). Accordingly, GPS monitoring is a statutory requirement imposed on these offenders in Massachusetts. However, some states do not have GPS monitoring capability and thus will be unable to enforce this condition if an offender seeks transfer from Massachusetts to that state under the Compact.

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Our confusion arises because the language in the rule appears to be different from the interpretation given to it by the Bench Book.

In pertinent part, Rule 4.103, Special conditions states:

“(d) A receiving state that is unable to enforce a special condition imposed in the sending state shall notify the sending state of its inability to enforce a special condition at the time of request for transfer of supervision is made.”

In pertinent part, the Bench Book states at p. 69:

“A sending state can also impose a special 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 special condition. *This should be of particular concern to judges* (emphasis supplied). Although a court may as a condition of probation impose a special condition and require that the condition be met in the receiving state, the receiving state can refuse to provide supervision if the condition cannot be met (emphasis added). The receiving state’s inability to enforce a special condition requires the sending state to either: (1) withdraw the special 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. Courts would, therefore, be wise to determine in advance whether a special condition might cause rejection of a transfer due to an inability in the receiving state to meet the condition.”

Can a receiving state deny a transfer request because the sending state has imposed an unenforceable condition, as the Bench Book states, or does the receiving state’s inability to enforce the condition merely require a decision on the part of the sending state to continue with the transfer despite the receiving state’s inability to enforce the condition? In other words, the Bench Book appears to shift the balance toward the receiving state, despite any express language to that effect in the rule. Requiring a receiving state to “notify the sending state of its inability to enforce a special condition” in our view is not tantamount to allowing the receiving state to deny

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the request, or to require the sending state to remove the condition. It leaves it up to the sending state whether to allow the transfer, knowing that the condition will not be enforced.

Issue #3:

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

This issue is an extension of Issue #2. As stated above, GPS monitoring is a statutory requirement imposed on sex offenders under community supervision in Massachusetts. We are seeking some guidance as to what effect Massachusetts law is given under the Compact.

Pursuant to statute, our courts are required to impose GPS on these offenders. However, if the Commission concludes that courts are required to remove the condition or face denial of a transfer request to a state that cannot enforce the condition, our courts will be in the unenviable position of effectively imposing a sentence in contravention of state law requirements. Moreover, if the offender returns to Massachusetts on a travel permit, which could include up to 45 days, he or she will be a Massachusetts offender in Massachusetts without the required in-state GPS monitoring.

Analysis and Conclusion

Taking these questions in order, with regard to *Issue #1*:

Rule 3.101-3 provides as follows:

(c) Reporting instructions for sex offenders living in the receiving state at the time of sentencing Rule 3.103 applies to the transfer of sex offenders, except for the following:

(1) The receiving state shall have five business days to review the proposed residence to ensure compliance with local policies or laws prior to issuing reporting instructions. If the proposed residence is invalid due to existing state law or policy, the receiving state may deny reporting instructions.

(2) No travel permit shall be granted by the sending state until reporting instructions are issued by the receiving state.

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ICAOS rule 3.101-3 (c) (1) clearly provides the receiving state with a meaningful opportunity to investigate the proposed residence of a sex offender who has made application for transfer under the compact. In cases such as stated by Massachusetts, where the sex offender is living in the receiving state at the time of sentencing, this is no less true. As was previously observed in ICAOS Advisory Opinion 3-2007, “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. If an investigation by the receiving state reveals a failure to provide a valid plan of supervision the application for transfer could properly be denied.” An investigation in such cases would be largely meaningless without the cooperation of the sending state in providing sufficient details concerning the sex offense in question and a refusal to provide such information so as to allow the receiving state to make a reasonable determination as to whether the proposed residence violates local policies or laws would appear to violate the intent of this rule.

As to *Issue # 2*:

Rule 4.103 concerning special conditions does not authorize a receiving state to deny a mandatory transfer of an offender under the compact who meets the requirements of such a transfer under Rule 3.101. It is well settled that Rule 3.101 affirms the sole discretion of the sending state to transfer supervision of an offender who meets the criteria set forth in the rule. This rule also 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 or other obligation related to the offender’s supervision. *See Doe v. Ward, 124 F. Supp.2d 900 (W.D. Pa. 2000); also ICAOS v. Tennessee Bd. of Probation and Parole, No. 04-526 KSF (E.D. Ky. 2005).*

Under ICAOS Rule 4.103, the addition of a special condition which 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)]. The referenced section of the ICAOS Benchbook must be interpreted in accord with the requirements

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of these rules. No provision of the current rules requires the sending state to change the terms of the offender's sentence because the receiving state has provided notice that it is unable to enforce the special condition. Neither does ICAOS Rule 4.103 (d) authorize a sending state to enforce a special condition in the receiving state once it has been notified that the receiving state is unable to enforce a special condition imposed in the sending state.

In response to *Issue #3*:

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 supercede conflicting state laws. *See Cuyler v. Adams, 449 U.S. 433, 442 (1981); also Doe v. Pennsylvania Board of Probation and Parole, 513 F.3d 95, 103 (2008)*. However the issue framed in the details provided by Massachusetts is actually a question of the interpretation of the legal effect of a sentence imposed under a Massachusetts statute on an offender who has transferred to another state under the compact in cases where the receiving state is unable to enforce the special condition under Rule 4.103.

Based on the analysis of *Issue 2*, as explained above, under the provisions of ICAOS Rule 4.103, in the event that the receiving state is unable to enforce the special condition, the sending state continues to have the discretion to transfer an offender under the compact who meets the requirements of ICAOS Rule 3.101 but does so with the understanding that the sending state will be allowing the transfer with the knowledge that the special condition will not be enforced.