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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References available at www.interstatecompact.org

Rules of the Interstate Commission for Adult Offender Supervision
Model Act, Interstate Compact for Adult Offender Supervision
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Advisory Opinions of the Interstate Commission for Adult Offender Supervision
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INTERSTATE COMPACT LAW

A HISTORICAL PERSPECTIVE

Interstate Compacts are not new legal instruments. Compacts derive from the nation's colonial past where states utilized agreements, like modern Compacts, to resolve inter-colonial disputes, particularly boundary disputes.

The colonies and crown employed a process to negotiate and submit colonial disputes 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. The modern "Compact process" was formalized under the Articles of Confederation. Article VI provided: "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."

Concerned with managing interstate relations and the creation of powerful political and regional allegiances, the Founders barred states from entering "any treaty, confederation or alliance whatsoever" without the approval of Congress. They also constructed an elaborate scheme for resolving interstate disputes. Under Articles of Confederation, Article IX, 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 [.]" Later, the concern over unregulated interstate cooperation continued during the drafting of the U.S. Constitution, resulting in the adoption of the "Compact Clause," Article I, sect. 10, cl. 3.

The Compact 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[.]" This wording is important because the Constitution does not so much authorize states to enter into Compacts as it bars states from entering into Compacts without congressional consent. Unlike the Articles of Confederation, however, in which interstate disputes concluded by appeal to 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); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925); Michael L. Buenger, Jeffrey B. Litwak, Michael H. McCabe & Richard L. Masters, *The Evolving Law and Use of Interstate Compacts 2d ed*. (ABA Publ'g 2016).

Chapter 1

General Law of Interstate Compacts

Overview

The legal framework governing Compacts encompasses a blend of Compact texts and case law from federal and state courts nationwide. Due to the limited number of court decisions that establish specific legal principles for any given Compact, courts often reference decisions from other federal and state courts when interpreting and applying Compact provisions. Additionally, courts draw on the texts and case law of other Compacts to establish generally applicable principles of Compact law. Given the intricate legal foundation and the widespread use of Compacts, judges and court personnel need to be well-versed in the law of interstate Compacts.

Interstate Compacts are not mere agreements between states open to parochial interpretations or selective application. They are statutory contracts binding member states, including their respective agencies, officials, and citizens to a set of agreed principles and understandings. These Compacts are not recommended procedures or discretionary proposals but are mandatory commitments. They differ from uniform, model, or suggested state laws and are not administrative agreements between agencies or executive officials. Understanding the unique significance of interstate Compacts within the American legal system is crucial to correctly applying their terms and conditions, thereby preventing legal jeopardy in fulfilling contractual obligations.

Bench Book

1.1 Who Must Comply with an Interstate Compact?

Interstate Compacts are binding on signatory states, meaning once a state legislature adopts a Compact, it binds all agencies, state officials and citizens to the terms of that Compact. Since the very first Compact case, the U.S. Supreme Court has consistently held that a Compact is an enforceable agreement governing the subject matter of the Compact. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89 (1823); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 108 (1938); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); *Alabama v. North Carolina*, 560 U.S. 330, 334 (2010) (applying contract law principles to Compact interpretation).

In the case of the Interstate Commission for Adult Offender Supervision (ICAOS), member states agree to a binding Compact governing the movement of supervised individuals across state lines. The ICAOS is not discretionary; rather, it binds the member states, state officials (including judges, court personnel, and probation/parole authorities), and citizens to the Compact requirements that determine the circumstances, procedures, and supervision applicable to interstate transfers. *See, e.g., M.F. v. State Exec. Dep't,* 640 F.3d 491, 497 (2d Cir. 2011) (stating, "The Compact is an agreement among sovereign states."). *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95105-106 (3d Cir. 2008) (stating, "Once New Jersey granted permission for Doe to return to Pennsylvania, Pennsylvania was required to assume supervision over Doe and to treat him as an in-state parolee. The Commission has not done so and in treating Doe and other out-of-state parolees differently, it violates its own agreement failing to do precisely what it promised . . . ."). Failure to comply with the Compact can have significant consequences for a non-complying state, including enjoinder from taking actions in contravention of the Compact. *See, e.g., Interstate Comm'n for Adult Offender Supervision v. Tenn. Bd. of Prob. & Parole,* No. 04-526-KSF (E.D. Ky. June 13, 2005) (order granting permanent injunction) (stating "[T]he defendants, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them, are hereby permanently restrained and enjoined from denying interstate transfers . . . ."). In short, the ICAOS and its rules do not create a recommended process but rather a compulsory and binding process for applicable cases.

Bench Book

1.2 Nature of Interstate Compacts

Beginning with the Articles of Confederation, states used Compacts to settle boundary disputes. In 1918, Oregon and Washington enacted the first Compact solely devoted to joint supervision of an interstate resource (fishing on the Columbia River). Three years later, New York and New Jersey enacted the first Compact to create an interstate commission (now known as the Port Authority of New York and New Jersey).

Today, more than 200 interstate Compacts directly regulate or guide policy for a range of matters as diverse as the use and allocation of water, land, and natural resources. There are Compacts for environmental protection, transportation systems, regional economic development, professional licensing, education, crime control and corrections, and child welfare. The U.S. Supreme Court has a history of encouraging states to resolve disputes through Compacts rather than litigation. *E.g., Vermont v. New York*, 417 U.S. 270, 277–78 (1974). A seminal law review article notes, "The combined legislative powers of Congress and of the states permit a wide range of permutations and combinations of power necessary for governmental action." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 688 (1925).

The ICAOS, like the 1937 Parole and Probation Compact, is integral to the longstanding and increasingly prevalent use of interstate Compacts. Similar to its predecessor, the ICAOS addresses multilateral issues that extend beyond state boundaries.

Bench Book

1.2.1 Interstate Compacts are Formal Agreements Between States

Understanding the legal nature of an interstate Compact begins with this basic point: interstate Compacts are *formal agreements between states* that exist simultaneously as both (1) statutory law, and (2) contracts between states. The contractual nature stems from the reciprocal enactment and adoption of substantially and substantively similar laws by sovereign state legislatures. There is (1) an offer (the presentation of a reciprocal law to two or more state legislatures), (2) acceptance (the actual enactment of the law by two or more state legislatures), and (3) consideration (the settlement of a dispute or creation of a joint regulatory scheme). *See Michael L. Buenger, Jeffrey B. Litwak, Michael H. McCabe & Richard L. Masters, The Evolving Law and Use of Interstate Compacts 2d* ed. 42–48 (ABA Publ'g 2016). However, if a unilateral alteration clause exists within Compact language, the agreement generally may not rise to the level of a Compact enforceable as a contract between the states. *Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

Interstate Compacts, federal statutes, and regulatory law are the only binding means of resolving interstate policy issues. Of those resolution methods, an interstate Compact is the only formal mechanism that allows individual states to reach beyond their borders and collectively regulate the conduct of multiple states and their citizens. Compacts are also one of the only exceptions to the general rule that a sitting state legislature cannot irrevocably bind future state legislatures. Buenger, et al., *supra,* at 48. Compacts regulate matters aptly described as sub-federal, supra-state in nature. *Id. at xxi.* The binding nature of interstate Compacts comes from their contractual character and judicial recognition that Compacts must supersede conflicting state laws to be effective under applicable Constitutional law.

Bench Book

1.2.2 Compacts Are Not Uniform Laws

An interstate Compact differs fundamentally from a "uniform law" in its nature and application. Unlike uniform laws, which are not contractual in nature, interstate Compacts are binding agreements between states. A state cannot selectively adopt provisions of an interstate Compact or modify them to address only intra-state concerns. Additionally, once adopted, a state cannot unilaterally amend or repeal an interstate Compact unless the Compact's language explicitly permits such actions. Even then, amendments or repeals must be conducted per the terms specified within the Compact itself. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Bench Book

1.2.3 Compacts Are Not Administrative Agreements

Compacts differ from administrative agreements in two principal ways. First, states, as sovereigns, have inherent authority to enact Compacts. *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838). Thus, states do not need any express authority to enact a Compact. In contrast, states must authorize agencies and executive officials to enact administrative agreements both intra and interstate. All states have such express authority in their constitutions, in generally applicable statutes, or in statutes that expressly authorize administrative agreements for specific purposes. These authorities commonly refer to administrative agreements as inter-local, intergovernmental, inter-municipal, or interagency agreements.

The second way that Compacts differ from administrative agreements is that state legislatures enact Compacts, whereas the executive branch enacts administrative agreements. However, the executive branch may enact Compacts if a Compact expressly authorizes executive enactment (See article VII(b)(1) of the Nonresident Violator Compact that specifically authorizes, "Entry into the Compact shall be made by a Resolution of Ratification executed by the authorized officials of the applying jurisdiction . . . ."). As well, Courts do not enforce improperly enacted Compacts. *E.g., Sullivan v. Pa. Dep't of Transp.*, 708 A.2d 481, 485 (Pa. 1998) (Driver 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). In addition, administrative agreements enacted by the executive branches of state government may bind the executive entities but those agreements do not have the same force and effect to bind a state legislature as statutorily enacted Compacts. *See, e.g., Gen. Expressways, Inc. v. Iowa Reciprocity Bd.*, 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.").

Bench Book

1.3 Delegation of State Authority to an Interstate Commission

One of the axioms of modern government is a state legislature's ability to delegate rulemaking power to an administrative body. This delegation of authority extends to the creation of an interstate commission through an interstate Compact. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (obligations imposed by an interstate commission pursuant to an interstate Compact are enforceable on the member states). An interstate Compact may also provide that its interstate commission may determine when member states breach obligations allowing for the imposition of sanctions on non-compliant states. *See, e.g., Alabama v. North Carolina*, 560 U.S. 300, 342–44 (2010) (interstate commission had such power but was not the sole

arbiter of disputes regarding a state's compliance with the Compact).

Bench Book

1.4 Congressional Consent Requirement

The ICAOS operates under Congress' consent in the Crime Control Act of 1934, 4 U.S.C. § 112 (2012).

Bench Book

1.4.1 When Consent is Required

The Compact Clause of the U.S. Constitution states, "No State shall, without the consent of Congress, . . . enter into any agreement or Compact with another State . . . ." U.S. CONST. art. I, § 10, cl. 3. Though a strict reading of the Compact Clause might appear to require congressional consent for every Compact, the Supreme Court has determined that "any agreement or Compact" does not mean every agreement or Compact. The Compact Clause triggers only by those agreements that would alter the balance of political power between the states and federal government, intrude on a power reserved to Congress, or alter the balance of political power between the Compacting states and non-Compacting states. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (agreements "which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States . . . ."); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 495–96 (1978) (non-Compact states placed at competitive disadvantage by the Multistate Tax Compact); *Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 176 (1985) (statute in question neither enhances the political power of the New England states at the expense of other states or impacts the federal structure of government).

Where an interstate agreement facilitates only what states could accomplish unilaterally, the Compact does not intrude on federal interests requiring congressional consent. *See U.S. Steel Corp.*, 434 U.S. at 472–78. The lack of requisite congressional consent, however, does not affect the contractual nature of the agreement between states.

Congress does not pass upon a Compact in the same manner as a court decides a question of law. Congressional consent is an act of political judgment about the Compact's potential impact on national interests, not a legal judgment as to the correctness of the form and substance of the agreement. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 899 (D.C. Cir. 2018).

Implied consent may exist 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*, 148 U.S. at 521–22.

Alternatively, Congress may attach conditions to its consent. Conditions can be proscriptive involving the duration of the agreement. Other congressional conditions may be compulsory, requiring member states to act in a certain manner before activation of the Compact. On the other hand, conditions authored by Congress can be substantive, altering the purposes or procedures mandated by a Compact. The only limitation imposed on congressional conditions is that they must be Constitutional. *New York v. United States*, 505 U.S. 144 (1992). Courts deem that states that adopt an interstate Compact to which Congress attaches conditions have accepted those conditions as a part of the Compact. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 277-78 (1959) (mandated provisions regarding suability of bridge commission as binding on states because Congress possessed the authority to impose conditions as part of its consent, and the states accepted those conditions by enacting the Compact).

When states amend a Compact with consent, Congress must assent to the amendment. However, there

is no requirement for additional consent if the amendment is consistent with Congress' existing authority. *See, e.g., Joint resolution granting consent to amendments to the Compact between Missouri and Illinois, Pub*. L. No. 112-71, 125 Stat. 775 (2011); *Int'l Union of Operating Eng'rs, Local 542 v. Delaware River Joint Toll Bridge Comm'n*, 311 F.3d 273, 280 n.7 (3d Cir. 2002) (where a Compact contains no provision for amendment, congressional consent to any modification would be necessary).

PRACTICE NOTE: Article XI of the Interstate Compact for the Supervision of Adult Offenders authorizes the Interstate Commission to propose amendments to the Compact for the states to adopt; however, all Compacting states must enact the amendment before it becomes effective. Congressional consent to an amendment would not be necessary unless the amendment conflicts with a condition of Congress' consent under the Crime Control Act or any actions that support Congress' implied consent.

1.4.2 Withdrawal and Modification of Congressional Consent

Once Congress grants its consent to a Compact, the general view is that it may not be withdrawn. Although the matter has not been resolved by the U.S. Supreme Court, two federal circuit courts of appeal have held that congressional consent, once given, is likely not subject to alteration. *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962) ("such a holding would stir up an air of uncertainty in those areas of our national life presently affected by the existence of these Compacts. No doubt the suspicion of even potential impermanency would be damaging to the very concept of interstate Compacts."); *Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939 (3d Cir. 1985) (following Tobin).

Notwithstanding *Tobin and Mineo*, Congress specifically reserves the right to alter, amend, or repeal its consent as a condition of approval in several Compacts. *See, e.g., Congress' consent to the Tahoe Regional Planning Compact, Pub.* L. No. 96-551 § 7, 94 Stat. 3233, 3253 (1980). Embodiment of the reservation of congressional authority exists in Congress' consent to low-level radioactive waste disposal Compacts states that reads, "Each Compact shall provide that every 5 years after the Compact has taken effect that Congress may by law withdraw its consent." 42 U.S.C. § 2021d(d). Express reservations provide prior notice to the states, but no court decision has addressed whether these reservations are proper or raise the concerns expressed in *Tobin and Mineo*.

Notwithstanding the courts' concerns in *Tobin and Mineo*, Congress may legislate within the subject matter of a Compact to which it has granted previous consent, which could have the effect of changing the landscape in which a Compact operates or making a Compact obsolete. *BUENGER, ET AL., supra, at 89; Arizona v. California*, 373 U.S. 546, 565 (1963) (Congress is within its authority to create a comprehensive scheme for managing the Colorado River, notwithstanding its consent to the Colorado River Compact). There is one exception to this general rule regarding Congress' retained authority. Article IV of the U.S. Constitution guarantees the territorial integrity of the states; thus, once Congress consents to a state boundary Compact, it may not subsequently adopt legislation undoing the states' agreement.

If Congress modifies a condition of its consent, the states would need to enact that modification into their Compact. *BUENGER, ET AL., supra*, at 89. There is no case law on this issue, but a Compact requiring consent cannot be valid if it conflicts with Congress' conditions of consent.

1.4.3 Implications of Congressional Consent

Congressional consent can significantly change the nature of an interstate Compact. "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Although most clearly articulated in *Cuyler v. Adams*, the rule that congressional consent transforms the states' agreement into federal law has been recognized since 1852. *See id.* at 438 n.7.

As federal law, disputes involving the application or interpretation of an interstate Compact with congressional consent may be brought in federal court under 28 U.S.C. § 1331 (federal question jurisdiction), except where a Compact specifically authorizes suit only in state court. Federal court jurisdiction is not exclusive; under the Supremacy Clause of the U.S. Constitution, state courts, similar to federal counterparts, have the same obligation to give force and effect to the provisions of a congressionally approved Compact. The U.S. Supreme Court retains the final word on the interpretation and application of congressionally approved Compacts no matter whether the case arises in federal or state court. *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.").

PRACTICE NOTE: Because the ICAOS regulates the supervision of persons under the jurisdiction of state courts, most of the case law involving the ICAOS is state rather than federal.

Courts apply the Supremacy Clause when there is a conflict between an interstate Compact with consent and state law or state constitutions. *See, e.g., Hinderlider v. La Plata River & Cherry Ditch Co.*, 304 U.S. 92, 108 (1938) (holding that states may, with congressional consent, enact Compacts even if those Compacts would conflict with rights granted under a state constitution); *Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312 (4th Cir. 1983) (Maryland may confer on an interstate agency federal quick-take condemnation powers not available to state agencies under Maryland's constitution); *Jacobson v. Tahoe Reg'l Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977) (holding that "causes of action based on state constitutional provisions must fail because the Compact, as federal law, preempts state law."); *Frontier Ditch Co. v. Se. Colo. Water Cons. Dist.*, 761 P.2d 1117, 1124 (Colo. 1998) (concluding, "Thus, to the extent that there might be some arguable conflict between [the Compact's] Article VI B's grant of exclusive jurisdiction to Kansas and the Colorado water court's jurisdiction [granted in that state's constitution], Article VI B is the supreme law of the land and governs the rights of the parties in this case.").

PRACTICE NOTE: Article XIV of the Interstate Compact for Adult Offender Supervision specifies, "All Compacting States' laws conflicting with this Compact are superseded to the extent of the conflict." This provision applies to conflicts between the ICAOS and state legislation, regulations, guidance documents, and other material as discussed below in section 1.6.

Courts also construe Compacts with consent under federal law, use federal law methods for interpreting the Compact and reviewing interstate commission interpretations and applications of the Compact. *See, e.g., Carchman v. Nash*, 473 U.S. 716, 719 (1985); *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 507 F.2d 517, 521-25 (9th Cir. 1974) ("[A] congressionally sanctioned interstate Compact

within the Compact Clause is a federal law subject to federal construction"); *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1170–74, 1189 (Or. 2009) (applying the federal Chevron method for reviewing the interstate Commission's interpretation of federal law granting consent to the Compact, and the federal Auer method for reviewing the interstate Commission's interpretation of its own administrative rules).

Consent can also make federal remedies available for violations of a Compact. For example, the Interstate Agreement on Detainers (to which the United States is also a signatory) is considered a law of the United States; a violation of which is grounds for habeas corpus relief under 28 U.S.C. § 2254. *See, e.g., Bush v. Muncy,* 659 F.2d 402, 407 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982).

Finally, unrelated to the federal law character of a Compact with consent, Congress can use the consent process to alter substantively the application of federal law in Compact situations. *See, e.g., McKenna v. Wash. Metro. Area Transit Auth.*, 829 F.2d 186, 188–89 (D.C. Cir. 1987) (Congress' consent to Title III of the Washington Metropolitan Area Transit Regulation Compact effectively altered the application of the Federal Employers' Liability Act to the Washington Metropolitan Area Transit Authority and exempted it from liability under that act).

Bench Book

1.5 Interpretation of Interstate Compacts

Because Compacts are statutes and contracts, courts interpret interstate Compacts in the same manner as interpreting ordinary statutes and by applying contract law principles.

PRACTICE NOTE: No court has explained when to apply statutory construction principles versus contract law principles when interpreting an interstate Compact.

When determining whether a state or Compact agency applied the Compact in a permissible manner, courts generally apply a statutory construction approach. *See, e.g., Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1170–74 (Or. 2009) As noted in section 1.4.2 above, for Compacts with consent, courts apply federal law, including federal decisional law unless the consent statute or Compact specifically makes state statutory, regulatory, or decisional law applicable. For Compacts that do not have consent, courts apply state law.

When interpreting a Compact to determine whether a party state is in breach of the Compact, courts typically apply principles governing the interpretation of contracts. Where there is an ambiguity, courts apply contract interpretation principles such as negotiating history *(Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991)); course of performance (*Alabama v. North Carolina*, 560 U.S. 330, 346 (2010)); and usage of trade (*Id.* at 341–42 (considering Compacts that received contemporaneous consent); *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 633 (2013) (considering Compacts of the same subject matter, but not receiving consent contemporaneously)). In applying contract law principles, courts recognize that a Compact represents a political compromise between "constituent elements of the Union" in contrast with a commercial transaction. For example, the Eighth Circuit states in one case:

> *While a common law contract directly affects only the rights and obligations of the individual parties to it, an interstate Compact may directly impact the population, the economy, and the physical environment in the whole of the Compact area. A suit alleging that a state has breached an obligation owed to its sister states under a congressionally*

> *approved interstate Compact also raises delicate questions bearing upon the relationship among separate sovereign polities with respect to matters of both regional and national import.*

Entergy Arkansas, Inc. v. Nebraska, 358 F.3d 528, 541–42 (8th Cir. 2004). Consequently, the right to sue for breach of the Compact differs from a right to sue for breach of a commercial contract; it arises from the Compact, not state common law.

Courts generally strive to interpret and apply a Compact uniformly throughout the states where the Compact is effective. *See, e.g., In re C.B.*, 116 Cal. Rptr. 3d. 294, 295 (2010) (stating, "One of the key elements of any interstate Compact is uniformity in interpretation."). To achieve a uniform interpretation, courts commonly look to other courts decisions; however, there is often no uniformity. *E.g., id*. at 294–95 (looking at a dozen other state and federal court decisions and finding no uniformity); *State v. Springer*, 406 S.W.3d 526 (Tenn. 2013) (same).

PRACTICE NOTE: Courts help ensure a uniform interpretation of Compacts by citing interstate commissions' statements about and interpretations of their Compacts. Interstate commissions prepare these statements and interpretations to avoid disputes and to help the states implement the Compact uniformly. Courts commonly cite ICAOS advisory opinions and the ICAOS Bench Book. *See, e.g., State v. Brown*, 140 A.3d 768, 776, 777 n.5 (R.I. 2016); *Voerding v. Mahoney*, No. CV 09-73-H-DWM-RKS, 2010 U.S. Dist. LEXIS 32059 (D. Mont. Apr. 1, 2010); *In re Paul*, No. A-3905-08T2, 2010 N.J. Super. Unpub. LEXIS 1729 (N.J. Super. Ct. App. Div. Apr. 10, 2010).

Bench Book

1.6 Application of State Law that Conflicts with an Interstate Compact

Where state law and a Compact conflict, courts are required under the Supremacy Clause (for Compacts with consent) and as a matter of contract law to apply the terms and conditions of the Compact to a given case. The fact that a judge may not like the effect of a Compact or believes that other state laws can produce a more desirable outcome is irrelevant. The Compact controls over individual state law and must be given full force and effect by the courts. For a full discussion of giving Compacts effect over conflicting state law, see *BUENGER, ET AL., supra*, at 54–66.

Many Compacts are silent about how states may apply their own state law. In cases involving such Compacts, courts use different analyses that generally reach the same holding. For example, the Ninth Circuit held that states may not apply state law unless the specific state law to be applied is specifically preserved in the Compact. *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conserv. Planning Council*, 786 F.2d 1359, 1364 (9th Cir. 1986). Similarly, states do not have the unilateral right to exercise a veto over actions of an interstate commission created by a Compact:

> *[W]hen 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. C. T. Hellmuth & Assocs., Inc. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976).*

Some Compacts with just two or a few member states specifically allow states to apply new state law to

a Compact provided that the other member states concur with applying that law. Most courts reason that the concurrence of other member states occurs when all of the states enact substantively identical law and express an intent that the law applies to a specific Compact. *E.g., Int'l Union of Operating Eng'rs, Local 542 v. Delaware River Joint Toll Bridge Comm'n*, 311 F.3d 273 (3d Cir. 2002) (citing cases and also noting New Jersey state courts use a less demanding analysis).

Occasionally, courts invoke the Contracts Clause of the U.S. Constitution in analyzing whether a state may apply its own law to a Compact. *See, e.g., U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 32 (1977). Some courts use a contractual analysis without reference to the Contracts Clause of the federal or any state constitution. *E.g., 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.").

By entering into a Compact, the member states contractually agree that the terms and conditions of the Compact supersede parochial state considerations. In effect, Compacts create collective governing tools to address multilateral issues and, as such, they govern the multilateral contingent on the collective will of the member states, not the will of any single member state. This point is critically important to the success and uniform application of the ICAOS. Compacts are ultimately more successful when states enact statutes and regulations to support them.

PRACTICE NOTE: Most Compacts expressly preserve some state law or state authority, and states frequently enact statutes and regulations that support and complement their administration of a Compact.

Bench Book

1.7 Special Considerations for Litigation Involving Interstate Commissions

Special Considerations for Litigation Involving Interstate Commissions

Bench Book

1.7.1 Relief Must Be Consistent with the Compact

In *Texas v. New Mexico*, the Supreme Court sustained exceptions to a Special Master's recommendation to enlarge the Pecos River Compact Commission, holding 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." 462 U.S. 554, 564 (1983). The Court emphasized this principle in *New Jersey v. New York*, stating, "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." 523 U.S. 767, 769 (1998). Although these cases were original jurisdiction cases in the U.S. Supreme Court, other courts applied this principle to consider appropriate relief in cases involving interstate commissions and states' application of Compacts. *E.g., 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); *HIP Heightened Independence & Progress, Inc. v. Port Auth. of N.Y. & N.J.*, 693 F.3d 345, 357 (3d Cir. 2012).

Where the Compact does not articulate the terms of enforcement, courts have wide latitude to fashion remedies that are consistent with the purpose of the Compact. In a later *Texas v. New Mexico* 482 U.S.

124, 128 (1987) proceeding, the Supreme Court has opined, “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.” The Court further notes, “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.’” *Id*. at 130–31; *see also Kansas v. Nebraska*, 135 S. Ct. 1042, 1052–53, 1057 (2015) (stating that within the limits of *Texas v. New Mexico*, “the Court may exercise its full authority to remedy violations of and promote compliance with the agreement, so as to give complete effect to public law” and allowing a disgorgement remedy not specified in the Compact).

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1.7.2 Eleventh Amendment Issues for Interstate Commissions

The Eleventh Amendment guarantees state sovereign immunity from suit in federal court. The Eleventh Amendment ensures that states retain certain attributes of sovereignty, including sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). Over the years, the U.S. Supreme Court has established a clear approach to determining whether an interstate commission is a “state” or political subdivision thereof such that it enjoys immunity under the Eleventh Amendment; or, if through participation in a Compact, states waived immunity. Now, however, the application of the Eleventh Amendment immunity to interstate commissions is well established. In *Petty v. Tennessee-Missouri Bridge Commission, supra* at 277-78, the Supreme Court has opined that the text of the Compact stating that the Bridge Commission should have the power “to contract, to sue and be sued in its own name,” and Congress’ grant of consent to the Compact, stating “that nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters . . . ” effectively abrogates the states’ Eleventh Amendment immunity by reserving the jurisdiction of the federal courts. 359 U.S. 275, 277 (1959).

In *Hess v. Port Authority Trans-Hudson Corp* 513 U.S. 30, 52 (1994), the Supreme Court has determined that when the *Lake Country Estates* factors point in different directions, the Eleventh Amendment’s “twin reasons for being”—(1) respect for the dignity of the states as sovereigns, and (2) the “prevention of federal-court judgments that must be paid out of a State’s treasury” should be the court’s prime guide. 513 U.S. 30, 47-48 (1994).

There are many different actors involved with administering the ICAOS—the Interstate Commission, state agencies and officials, and local agencies and officials. Local agencies and officials do not enjoy Eleventh Amendment Immunity and a suit may be brought against them in federal court. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). However, the Eleventh Amendment may apply to the Interstate Commission and state agencies and actors. The “sue and be sued” provisions in Articles III and IV of the ICAOS may constitute a state waiver of immunity from suits against the Interstate Commission in state courts, but it does not necessarily constitute a waiver of Eleventh Amendment immunity against suits in federal courts. *See, e.g., Fla. Dep’t of Health and Rehab. Servs v. Fla. Nursing Home Assoc.*, 450 U.S. 147, 150 (1981); *Trotman v. Palisades Interstate Park Comm’n*, 557 F.2d 35, 39-40 (2d Cir. 1977). 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 513 U.S. at 47-48. 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.

Even if the Eleventh Amendment does not offer protection, the commission may be immune from suit governed by non-Eleventh Amendment considerations. For example, in *Morris v. Washington Metropolitan Area Transit Authority*, the court has determined that a bare "sue and be sued" clause extends only as far as other more specific partial waivers in the Compact, not to any and all suits. 781 F.2d 218, 221 n.3 (D.C. Cir. 1986). (*For a broader discussion of immunity issues associated with the application of the ICAOS, see Chapter 5.*)

Article VII of the ICAOS requires that judicial review of the Interstate Commission's rulemaking actions be brought in federal court for the District of Columbia or the federal district where the Commission has its principal offices. Additionally, Article XII.C specifies that the Interstate Commission may seek to enforce the ICAOS in the same federal courts. These two provisions specifying suit in federal court are specific to the types of suits described. Not all types of disputes involving the Interstate Commission may be brought in federal court.

PRACTICE NOTE: Currently the principal offices of the Commission are located in Lexington, Kentucky. Any challenge to an Interstate Commission's rulemaking action brought in state court would be subject to removal to federal court.

Bench Book

1.8 Party State, Interstate Commission, and Third-Party Enforcement Compacts

Some Compacts authorize the interstate commission to seek judicial action to enforce the Compact against a party state. Article XII.C of the ICAOS is a good example. *See Interstate Comm'n for Adult Offender Supervision v. Tennessee Bd. of Prob. & Parole*, No. 04-526-KSF (E.D. Ky. June 13, 2005) (permanent injunction). In general, however, claims for breach of a Compact typically involve one party state filing an action against another party state in the U.S. Supreme Court under the Court's original jurisdiction in Article III, Section 2 of the U.S. Constitution and 28 U.S.C. § 1251(a). *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 564 (1983). However, an interstate commission may join a party state as a plaintiff in an original jurisdiction action provided that it makes the same claims and seeks the same relief or its claims are wholly derivative of the plaintiff states' claims. *Alabama v. North Carolina*, 560 U.S. 330, 352–57 (2010).

Many cases involve third parties seeking to enforce a Compact, but the issue whether a third party may enforce a Compact arises only occasionally. *E.g., Medieros v. Vincent*, 431 F.3d 25 (1st Cir. 2005) (commercial fisherman sought to enforce the Atlantic States Marine Fisheries Compact against a state). In some cases, courts expressly conclude that third parties may enforce the Compact. *E.g., Borough of Morrisville v. Del. River Basin Comm'n*, 399 F. Supp. 469, 472 n.3 (E.D. Pa. 1975) (allowing several municipalities to challenge a DRBC resolution that imposed a charge for consumptive use of water, reasoning, "to hold that the Compact is an agreement between political signatories imputing only to those signatories standing to challenge actions pursuant to it would be unduly narrow in view of the direct impact on plaintiffs and other taxpayers.").

Two U.S. Courts of Appeals have held that there is no indication from the text and structure of the ICAOS that the Compact intended to create new individual rights. In addition, there is no basis for a private suit, whether under section 1983 or under an implied right of action to enforce the Compact. *See, e.g., Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 103 (3d Cir. 2008); *M.F. v. N.Y. Exec. Dep't Div. of Parole*, 640 F.3d 491, 495 (2d Cir. 2011).

PRACTICE NOTE: Courts do not always analyze Compacts for implied enforcement by third parties, which suggests that parties and courts generally recognize third parties' actions, unless there is good reason to believe that third parties may not bring actions. However, recent case law clarifies that absent language showing an intent to create individual rightssuch rights will not be implied.

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1.9 Recommended Sources of Compact Law and Information

For additional information on interstate Compact law and interstate Compacts generally, *see Michael L. Buenger, Jeffrey B. Litwak, Michael H. McCabe & Richard L. Masters,, The Evolving Law and Use of Interstate Compacts 2d ed. (ABA Publ'g 2016) and Jeffrey B. Litwak, Interstate Compact Law: Cases and Materials 3d ed. (Semaphore Press 2018)*

For historical context on interstate Compacts, see Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685 (1925)*.

For historical context on Compacts and as applicable to transfer of supervision of individuals on probation and parole under the ICAOS, see 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)*.

See also the legal analysis concerning the contractual nature of ICAOS as interpreted and applied in *Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 105 n.7 (3d Cir. 2008) (analyzing the contractual nature of ICAOS and citing the foregoing article); James G. Gentry, *The Interstate Compact for Adult Offender Supervision: Parole and Probation Supervision Enters the Twenty-First Century, 32 MCGEORGE L. REV. 533 (2001).*

For a report on interstate Compact agencies and good governance, see U.S. Gov't Accountability Office, No. GAO-07-519, Interstate Compacts: *An Overview of the Structure and Governance of Environment and Natural Resource Compacts (2007).*

Chapter 2

Interstate Commission for Adult Offender Supervision (ICAOS)

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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. Also 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 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 Bd. of Prob. & Parole*, 513 F.3d 95, 99 (fnl) (3d Cir. 2008). Prior to the adoption of the ICPP, there was no formal means for controlling the interstate movement of probationers and parolees. In many circumstances, courts and paroling authorities exercised discretion regarding a supervised individual's permission to engage in interstate travel or relocation. Often, a receiving state obtained little or no notice of a supervised individual's relocation. The ICPP was the primary mechanism for regulating interstate movement until it was succeeded by the ICAOS.

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2.2 Why the Interstate Compact for Adult Offender Supervision?

The intent of the ICAOS is not to dictate judicial sentencing or place restrictions on the court's discretion relative to sentencing. *See Scott v. Virginia*, 676 S.E.2d 343, 347 (Va. App. 2009). The ICAOS contains no provisions directing judges on sentencing in particular cases; and, it does not alter individual state sentencing laws, although the ICAOS may alter how those laws affect transfer decisions under the Compact. See, e.g., ICAOS *Advisory Opinion 6-2005* (deferred sentencing) & *Advisory Opinion 7-2006* (second offense DUI). The ICAOS only comes into play when a supervised individual seeks to transfer their supervision to another state.

If part of complying with a judge's sentence would require or permit travel or relocation to another state, the rules of the ICAOS may apply. When applicable, those rules would be binding on state officials in both the sending and receiving states.

Similar to its application relative to the courts, the ICAOS does not govern the underlying decisions of a parole board, except when those decisions involve travel or relocation to another state. If the parole board authorizes such travel or relocation, the ICAOS rules apply and guide the actions of officials in both states. However, the ICAOS does not regulate the transfer of incarcerated individuals to serve their confinement in another state; such transfers may be governed by the Interstate Corrections Compact.

PRACTICE NOTE: The ICAOS does not constrain the discretion of courts or parole authorities in the sending state regarding the nature of the sentence or conditions imposed on a supervised individual. Such limitations are typically governed by state law. The ICAOS becomes pertinent for courts and parole authorities when a supervised individual travels to or relocates in a state other than the one that issued the sentence or conditions.

As a general proposition, convicted persons enjoy no right to interstate travel or a constitutionally protected interest to supervision in another state. *See Jones v. Helms*, 452 U.S. 412, 418-20 (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 individual 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*, No. 06-C-243-C, 2006 WL 1706426, at *7 (W.D. Wis. June 16, 2006) (Simply put, individuals on probation do not have a constitutional right to have supervision of their probation transferred from one jurisdiction to another.) *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, 638 (7th Cir. 1986) and, *Wilkinson v. Austin*, 545 U.S. 209, 228-30 (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 is being "field tested" toward rehabilitation. Therefore, one cannot 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 essentially the same as an inmate's and, thus, not in need of any specific constitutional protection. *See Paulus v. Fenton*, 443 F. Supp. 473, 476 (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 unlawful conduct. *United States v. Scheer*, 30 F.Supp. 2d 351, 353 (E.D.N.Y. 1998); *O'Neal v. Coleman*, No. 06-C-243-C, 2006 WL I 706426, at *7 (W.D. Wis. June 16, 2006). A categorical denial of the right to travel applicable to supervised individuals 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, 93 (R.I. 2004) (for probationers, the right of interstate travel may exist, if at all, but 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, 581 (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).

The absence of rights to interstate travel has important implications on the return of supervised individuals. Because supervised individuals possess no presumptive right to travel, in addition to public safety considerations and the management of corrections resources, states have discretion in managing both their sending and return. The ICAOS is the primary tool for managing the interstate movement of supervised individuals subject to conditional release and/or community supervision. The Compact, therefore, controls such movement as well as the return of supervised individuals. The level of process owed supervised individuals in transferring supervision to another state is therefore 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 supervised individuals for supervision. The improper refusal by the receiving state to accept the transfer of an otherwise eligible supervised individual 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 a supervised individual unless one of these two circumstances is present. The Compact imposes no obligation on sending states to transfer supervision and therefore appears to present no due process concerns in this context. A supervised individual does not have a right to transfer and a sending state has no affirmative obligation to grant a transfer.

PRACTICE NOTE: Supervised individuals do not have a constitutional right to relocate. Sending states have no obligation to allow a supervised individual to travel to or relocate to another state. Except as outlined in the ICAOS and its rules, member states are not obligated to assume jurisdiction and supervision over individuals from other states. The process for relocating and the responsibilities of states to approve or accept such relocations are governed by federal law and interstate agreements like the ICAOS.

Bench Book

2.4 Historical Development of the ICAOS

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. Thus, the enforcement tools provided for in the rules of the Parole and Probation Compact Administrators' Association (PPCAA) were limited and problematic;
- 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, 916 (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); and,

- Questions regarding which individuals were covered by the Compact, especially with the growing use of alternative sentencing practices, such as suspended imposition of sentence and diversion programs, which did not easily align with the terms and definitions of the ICPP.

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2.5 Purpose of the ICAOS

Against this backdrop, concerned parties proposed a new Compact to the states. Defined in Article I, the purpose of the Compact provided:

> *[T]he 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.*

Bench Book

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). Accordingly, the agreement created a Compact that must be construed as federal law enforceable on member states through the Supremacy Clause and the Compacts 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. For example, a state parole board may not impose terms and conditions on parolees from other states that exceed or attempt to override the requirements set by the Commission

PRACTICE NOTE: A distinctive feature of the ICAOS among Compacts is the impact that rules adopted by the Interstate Commission have on state law. The ICAOS explicitly grants the Interstate Commission the authority to adopt rules necessary to fulfill the agreement's objectives. According to the Compact's provisions, these rules hold the force of 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 other interstate Compacts, the ICAOS inaugurated when state legislatures enacted statutes that adopted the provisions of the agreement. For the ICAOS, the Compact required adoption by thirty-five states to become active. Unlike some Compacts that are created through Executive Orders or delegated authority to state officials, the ICAOS was initiated by passing statutes that closely mirrored the draft Compact and included all relevant provisions. The following states 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	A.C.A. § 12-51-101 (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	MA GEN L CH 127 SECTION 151a-n (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	TCA § 40-28-401 (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 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.

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2.8 Effect of Withdrawal

As previously discussed, supervised individuals do not have a constitutional right to travel, and states are not constitutionally required to accept supervised individuals from other states. Consequently, the ICAOS is the sole mechanism by which states can regulate the interstate movement of adults under community supervision. A state that repeals the ICAOS forfeits its participation in a formal system that governs such movement. This means that, theoretically, a state could direct a supervised individual to relocate to a non-member state without adhering to basic considerations, such as providing prior notice, reviewing a proposed supervision plan, or assessing the availability of resources to support the supervision plan's goals. In essence, non-member states risk becoming both a dumping ground for individuals from other states and being subject to similar practices. Additionally, individuals from states that are not members of the ICAOS may face a range of state laws and regulations that could even prohibit relocation. *See, e.g., COLO. REV. STAT. § 17-27.1-101(3) (b) (2002)*. For example, a state statute that mandates psychological testing and registration for all out-of-state individuals being supervised for a felony offense may not be enforceable against felons from states that are members of the ICAOS, *cf., Doe v. Ward*, 124 F. Supp.2d 900, 916 (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 guarantees not only the regulated movement of individuals under community supervision but also ensures that out-of-state supervised individuals receive the same resources and supervision as their in-state counterparts. This includes access to incentives, corrective actions, graduated responses, and other supervision techniques. Conversely, non-participation or withdrawal from the Compact could result in differential treatment of out-of-state supervised individuals, potentially leading to disparate requirements that may effectively hinder their transfer to the non-member state, while still complying with due process and equal protection principles.

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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 also allows for a number of non-voting ex-officio members representing various interest groups such as the Conference of Chief Justices, crime victim advocates, and others;
- Broad rulemaking authority;
- Extensive enforcement authority, including requirements for remedial training, imposition of fines, and suspension of non-compliant states; and,
- 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 states. The State Council is a forum where intrastate

management issues can be resolved short of intervention by the Commission.

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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 supervised individuals 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

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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. 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 considerations regarding the actions of the Commission.

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2.11.1 Primary Powers of the Commission

The powers of the Commission appear in Article V of the ICAOS. Among its primary powers, the Commission:

- Promulgates rules, which are binding on the states and have the force and effect of statutory law within each member state;
- Oversees, supervises, and coordinates the interstate movement of supervised individuals subject to the Compact;
- Enforces compliance with all the Compact rules and terms;
- Creating mechanisms for resolving disputes between states;
- Coordinates the Commission's education, training, and awareness relative to supervised individual's interstate movement;
- Establishes uniform standards for reporting, collecting, and exchanging data; and,

- Performs other functions as necessary to achieve the purposes of the Compact.

2.11.2 Rulemaking Powers

Among the powers of the Commission, its rulemaking authority is the most distinctive and far-reaching. The rules established by the Commission carry the force of statutory law within member states and must be fully enforced by all state agencies and courts. *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 have the force and effect of law in Virginia and Ohio.") Id. at 346. *See also Johnson v. State*, 957 N.E.2d 660, 663 (Ind. App. 2011).

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, 103 (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, 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. In addition, insofar as 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 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, no 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: In promulgating a rule, the Interstate Commission is only required substantially to comply with the requirements of the Administrative Procedures Act. The rule would only be set aside upon failing substantially to comply with the Act. Failure to fully comply with all aspects of the Administrative Procedures Act does not justify setting aside a duly promulgated rule of the Interstate Commission.

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

A key feature of the ICAOS is the Commission's enforcement mechanisms designed to ensure state compliance with the Compact. These tools are not aimed at compelling compliance from supervised individuals—that responsibility lies with the courts, paroling authorities, and corrections officials within each member state. Instead, the ICAOS provides tools specifically intended to ensure that member states meet their contractual obligations by adhering to the Compact's terms and any rules established by the Commission.

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2.12.1 General Principles of Enforcement

The Commission possesses significant enforcement authority against states deemed in default of their obligations under the Compact. The decision to impose a penalty for non-compliance rests with the Commission as a whole or its executive committee acting on the Commission's behalf. 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 fulfill such obligations as are imposed by the terms of the Compact, its by-laws, or any duly promulgated rule.

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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 costs incurred in prosecuting or defending a suit, including reasonable attorney's fees. *See,* Art. XII § C; Rule 6.104 (prevailing party shall be awarded all costs associated with the enforcement action, including reasonable attorneys' fees).

All courts and executive agencies in each member state must enforce the Compact and take all necessary actions to achieve 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, 581 (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 has 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 affect the powers, responsibilities or actions of the Commission. *See Art. IX, § A*. It is not clear what influence the failure to provide service to the Commission would have on the enforceability of a judgment vis-à-vis the Commission.

Chapter 3

The ICAOS Implications for the Courts

States are bound by the Commission's rules under the terms of the Compact. The rules adopted by the Commission have the force and effect of statutory law and all courts and executive agencies shall take all necessary measures to enforce their application. *See Art. V. See also Scott v. Virginia*, 676 S.E.2d 343, 346 (Va. App. 2009). 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 could lead the Commission to take corrective or punitive action, including a 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 Compact's broad definitions, the Commission is not limited to specific classifications of supervised individuals, unless it chooses to impose such limitations. As an interstate Compact approved by Congress, it carries the force and effect of federal law under 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 Commission's rules. This principle would extend to state court enforcement of the Compact as federal law under the Supremacy Clause.

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3.1 Key Definitions in the Rules

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

- **Abscond** means to be absent from the supervised individual's approved place of residence and employment; and failing to comply with reporting requirements;
- **Arrival** means to report to the location and officials designated in reporting instructions given to a supervised individual at the time of the supervised individual'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 a supervised individual 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 supervised individual of the terms and conditions of supervision ordered by the court;
- **Plan of Supervision** means the terms under which a supervised individual 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 a supervised individual accused of violating the terms or conditions of the supervised individual'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 a supervised individual 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;
- **Supervision** means the oversight exercised by authorities of a sending or receiving state over a supervised individual for a period of time determined by a court or releasing authority, during which time the supervised individual 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 supervised individual at the time of the supervised individual's release to the community or during the period of supervision in the community;
- **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 a supervised individual;
- **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 using a nationwide pick-up radius with no bond amount set.

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3.2 Judicial Considerations

Judicial Considerations

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3.2.1 Eligibility Criteria

Determining eligibility under the Compact involves a multi-faceted analysis, starting with the broad definition of a "supervised individual." According to Rule 1.101, a "supervised individual" is an adult who is placed under supervision due to a criminal offense and is released into the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies, and who is required to request a transfer of supervision according to the terms of their supervision. Once an individual qualifies as a "supervised individual" under the Compact, eligibility for a transfer of supervision is assessed based on the nature of the offense and the specifics of the supervision.

In interpreting the definition of "supervised individual," the Commission has clarified that the type of supervision to be provided in the receiving state does not affect transfer eligibility. (See Advisory Opinion 9-2004.) Additionally, due to the broad scope of the definition, the Compact encompasses individuals under the supervision of probation and parole officials, correctional departments, courts, related agencies, and private entities acting on behalf of these authorities.

PRACTICE NOTE: If a supervised individual does not satisfy the eligibility criteria, they are not governed by the ICAOS. Reasons for ineligibility may include failing to meet the definition of a supervised individual, not having committed an offense covered by the Compact, or not being under any form of community supervision. Individuals who are not subject to the ICAOS may, depending on the terms of their adjudication, be able to move across state lines without needing prior approval from the receiving state.

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3.2.1.1 Individuals Covered by the ICAOS

According to the Commission's definition of "supervised individual," the ICAOS can regulate a wide range of adults under supervision. An individual does not need to be on formal "probation" or "parole" to be eligible for transfer and supervision under the ICAOS. To qualify for an initial transfer of supervision under the ICAOS, the individual must (1) be under some form of community supervision, which can include supervision by a court, paroling authority, probation authority, treatment authority, or any person or agency providing supervision services under contract, and (2) have committed an offense covered by the Compact's rules.

Supervised individuals eligible for transfer of supervision under the ICAOS and its rules include:

- Those subject to traditional parole or probation, e.g., individuals 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 treated as an adult by court order, statute, or operation of law;
- A misdemeanant 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 sexual offense that requires the supervised individual to register as a sex offender under the laws of the sending state. (See *Rule 2.105*); and,
- Those subject to deferred prosecution programs, to the extent that participation in such programs requires the supervised individual 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 may allow a person covered by the Compact to relocate to another state except as provided by the Compact and its rules. Therefore, a court cannot order or direct an eligible supervised individual to leave a state and relocate to another state unless such relocation occurs in accordance with the Compact and its rules.

Those not eligible for transfer of supervision under the ICAOS and its rules include:

- Supervised individuals 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, 884-85 (2011) (offenders convicted under Sexually Violent Predators Act (SVPA) ineligible for transfer under ICAOS because the act is civil, not criminal); and
- Juveniles who are not deemed "adults" for purposes of prosecution.

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3.2.1.2 Eligibility of Supervised Individuals, Residency Requirements

General Overview

Transfers are classified into two categories, (1) mandatory acceptance and (2) discretionary acceptance. The authority to transfer a supervised individual to another state lies solely with the sending state. See Rule 3.101. The supervised individual does not have a constitutional right to transfer their supervision to another state, even if otherwise eligible. Accordingly, Rule 3.101 should not be construed as creating any constitutionally protected right for a supervised individual to relocate. Rather, Rule 3.101 imposes an obligation on the receiving state to accept the individual for supervision once the sending state has decided to transfer supervision. The sending state's decision to deny a transfer of supervision is final and is entitled to judicial deference. *See Com. v. Mowry*, 921 N.E.2d 565 (Mass. App. 2010); also *Strong v. Kansas Parole Bd.*, 115 P.3d 794 (Kan. Ct. App. 2005).

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

- 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 supervised individual can obtain employment or has a means of support.

If a valid plan of supervision requires the supervised individual to demonstrate they have a means of economic support, failure to meet this obligation may result in the denial of transfer even if the individual satisfies the residence requirements. See ICAOS *Advisory Opinion 8-2005* and *Rule 1.101*.

The intent of adding "substantial compliance" to the eligibility criteria is to prevent the transfer of supervised individuals who are not adhering to the terms and conditions of their supervision in the sending state. However, pending charges in the receiving state are irrelevant to the transfer decision when the issuing authority takes no action. Therefore, if the sending state does not act on these warrants or determines that the pending charges do not warrant revocation proceedings, the transfer application should not be rejected solely for this reason. Denying transfers on this basis alone unjustifiably prevents supervised individuals, who are residents of the receiving state, from transferring their supervision. See ICAOS *Advisory Opinion 07-2004*.

A receiving state can accept the transfer of a supervised individual who does not meet the mandatory acceptance criteria. However, this acceptance is at the discretion of the receiving state under circumstances not covered by mandatory acceptance. For instance, a supervised individual who is ineligible for mandatory transfer due to the nature of the offense or failure to meet residency and employment requirements may still be transferred under the discretionary provisions of the rules. See

ICAOS *Advisory Opinion 4-2005*. 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 the sending and receiving states. The failure to obtain such consent prohibits the transfer of supervision.

PRACTICE NOTE: Accepting a transfer on grounds other than those mandated in *Rules 3.101* & *3.101-1* lies within the discretion of the receiving state under *Rule 3.101-2*.

The sending state must submit a transfer request 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 the receiving state prior to transfer.

With limited exceptions, a sending state shall not allow a supervised individual to relocate without the receiving state's explicit acceptance. See *Rule 2.110*. Allowing the supervised individual to relocate prior to acceptance may trigger two events:

> *(1) the sending state shall order the supervised individual to return to the sending state, and*
>
> *(2) the receiving state can reject the placement, requiring a new transfer request.*

See ICAOS Advisory Opinion 9-2006. Practically, this means that no court or paroling authority may authorize a supervised individual 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.

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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 (3) veterans for medical or mental health services. Military Personnel are eligible for reporting instructions and transfer through the ICAOS when they are under orders by the military to another state.

If a supervised individual resides with a family member who is in the military, their 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 with a family member who is under orders by the military; and,
6. will be living with the family member who is subject to military orders.

Veterans referred for medical and/or mental health services in a receiving state by the Veterans Health Administration are eligible for 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 or acceptance documentation and is approved for care at the receiving state Veterans Health Administration.

See Rule 3.101-1

Bench Book

3.2.1.4 Employment Transfers of Supervised Individuals and Their Families

Other circumstances in which a receiving state is mandated to accept supervision include the employment transfer of a supervised individual or the employment transfer of a family member with whom the supervised individual resides. Rule 3.101-1(a)(3) and (a)(4) covers such instances. A supervised individual 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,
4. are directed to transfer by the full-time employer of either the supervised individual or the supervised individual's family member as a condition of maintaining employment.

Bench Book

3.2.1.5 Persons Not Covered by the ICAOS

A supervised individual not subject to the ICAOS is not eligible to have their supervision transferred to another state, but neither are they restricted in their travel, 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.")

Supervised individuals with three months or less of supervision and 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 as a necessary element of the sentence. For example, the Compact does not cover individuals convicted of low-level misdemeanor offenses and is subject only to "bench probation" with no reporting requirements or conditions other than monetary conditions, the only requirement of which is to "go and commit no further offense." However, a court should not attempt to circumvent the Compact by placing supervised individuals on "unsupervised" status, particularly those who pose a public safety risk. Such an action would undermine the purpose of the Compact and could encourage other states to adopt similar practices, compromising the Compact's underlying principles. Placing a supervised individual on "bench probation" to circumvent the ICAOS poses a significant risk of additional harm to the community, especially if the individual is high risk.

The ICAOS contains no provision authorizing "side agreements" between member states, thus the Compact is the only means for transfer of supervision.

Bench Book

3.2.1.6 Sentencing Considerations

The ICAOS applies to all individuals who meet the eligibility requirements and are subject to some form of community supervision or corrections. The term "supervised individual" is intentionally broad to accommodate changes in sentencing practices and manage supervised populations flexibly. As a result, whether a supervised individual is formally "sentenced" and subject to "probation" or "parole" is largely irrelevant. 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. In this way, the ICAOS applies in a broad range of cases and dispositions beyond traditional conviction followed by probation or parole.

The Commission does not regard provisions like "bench" probation as eligible for transfer under the ICAOS, as these are more akin to instructions such as "go and commit no further offenses." The ICAOS envisions a more formal type of supervision, incorporating elements such as regular reporting and oversight. A sentence that merely instructs an individual to "commit no other offenses" without including supervision and reporting requirements does not establish a "supervision" relationship that triggers the ICAOS. However, if reporting requirements are imposed, even if only to the court, and all other eligibility criteria are met, the supervised individual may be subject to the ICAOS. This is particularly relevant when courts impose probation that includes only treatment elements and reporting requirements, as such individuals may indeed fall under the ICAOS. *See discussion, infra at 3.2.2.1.*

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3.2.1.6.1 Deferred Sentencing

In addition to traditional cases where an individual is formally adjudicated and placed on supervision, the ICAOS also applies in so-called "suspended sentencing," "suspended adjudication," and "deferred sentencing" contexts. Rule 2.106 provides that "supervised individuals subject to deferred sentences are eligible to transfer supervision under the same eligibility requirements, terms and conditions applicable to all supervised individuals 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," Rule 2.106 would apply if the court lawfully entered a conviction on its records even if it suspended the imposition of a final sentence and subjected the offender to a program of conditional release. The rule would also apply if the defendant entered a plea of guilt or no contest to the charge(s) and the court 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 if the court entered a conviction on the record and sentenced the offender but 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, as a condition precedent, made some finding that the offender did indeed commit 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 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 can vary from state to state and is of limited benefit in determining whether an offender is subject to the Compact. Individual states can use terms that are significantly different from other states to describe the same legal action. In determining the eligibility of an offender and the application of the ICAOS, one must not look at the legal definitions, but rather the legal action taken by a court of competent jurisdiction or the 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 4-2004.

In addition to the nature of the adjudication, eligibility also depends 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 a supervised individual for a period of time determined by a court or releasing authority, during which time the supervised individual 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 supervised individual at the time of release to the community or during the period of supervision in the community. See Rule 1.101.

Bench Book

3.2.1.6.2 Deferred Prosecution

Some states may use a "sentencing" option referred to as deferred prosecution. Authorized by state statutes, this option allows the supervised individual to admit to or stipulate the facts of the criminal conduct but defers prosecution contingent upon the completion of a treatment program or other conditions. If the individual successfully meets the court's requirements, the case is typically dismissed, and no criminal judgment is entered. Conversely, if the individual fails to comply, the court may enter a conviction and proceed with criminal sentencing.

The question with deferred prosecutions is whether the supervised individual is covered by the ICAOS, given that there is no formal conviction, and the individual remains in a "pretrial" status. However, the Commission has interpreted its rules to include such individuals. See ICAOS *Advisory Opinion 6-2005*. The Commission determined that there is little practical difference between "deferred prosecution" and "deferred sentencing." In both cases, the supervised individual generally admits to the facts of the underlying criminal conduct. While deferred prosecution does not involve a formal judgment of conviction or suspension of sentencing, as in deferred sentencing, the court still accepts the individual's admission to certain facts and places them under a probationary-type status. Unlike someone under pretrial, whose guilt has not been established, the individual in a deferred prosecution has admitted to the essential facts of their conduct and no longer enjoys the presumption of "innocent until proven guilty." As noted by the Commission, "In determining that *Rule 2.106* applies to deferred prosecutions,

we focus on the actual actions taken…rather than the label used by the legislature." Factors to consider in determining whether the Compact applies to a supervised individual subject to a deferred prosecution program include, but are not limited to:

- Is the supervised individual 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 supervised individual returned to court and in jeopardy of having a conviction entered without trial?
- Is the supervised individual, 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?

A supervised individual in a deferred prosecution program that includes elements such as admissions of material fact and waiver of rights, would be subject to the Compact. By contrast, if the deferred prosecution program operates solely as a prosecutorial diversion, without court involvement or the need to waive fundamental rights in future proceedings, it is likely not covered by the Compact.

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

Special attention should be given to individuals convicted of a second or subsequent offense for driving while impaired (DUI and DWI offenses). Because state laws vary significantly in defining what constitutes a second or subsequent conviction, the Commission has issued ICAOS Advisory Opinions to clarify how the ICAOS applies to these cases. Therefore, even if a sentencing court treats a second or subsequent conviction as a "first conviction" for sentencing purposes, the Commission considers the actual number of convictions rather than how they are classified for sentencing under state law. Consequently, a supervised individual with a second or subsequent conviction, even if sentenced as if it were a first-time offense, remains subject to the ICAOS. See ICAOS *Advisory Opinion 7-2006*.

Bench Book

3.2.2 Special Considerations

Special Considerations

Bench Book

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 require enrollment in a community-based or in-house treatment program in another state. Successful completion of the treatment program is commonly 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 a supervised individual 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.

Supervised individuals placed in an out-of-state treatment program may still trigger the requirements of

the Compact, even if they are not subject to supervision by corrections officials. If the treatment program is a condition of release and includes requirements for progress reports to be submitted to the court, along with the possibility of probation revocation for non-compliance, it is sufficient to invoke the Compact and its rules.

Enrollment in out-of-state treatment programs is generally considered a "discretionary" transfer unless the supervised individual meets the residency or family ties criteria with means of support specified in *Rule 3.101*. Therefore, courts should exercise caution when sentencing individuals, especially high-risk ones, to out-of-state treatment programs, even if the treatment is intended to be short-term (less than 30 days). Such sentencing practices could create a difficult situation if the individual is required to participate in the program but cannot transfer or continue treatment (if the short-term treatment extends to 45 days or more) due to the receiving state's refusal to accept the case.

Bench Book

3.3 Initiating the Transfer Process

Initiating the Transfer Process

Bench Book

3.3.1 Time of Transfer

The Commission's rules can significantly affect the time between the final disposition of a case and the supervised individual's ability to move to another state. Even if the supervised individual is eligible for transfer under the Compact, the court cannot order the individual to relocate to the receiving state before it has accepted the transfer. Consequently, the individual may need to remain under the custody of the sending state until the transfer is approved and the receiving state issues reporting instructions, even if they are a resident of the receiving state.

Rule 3.102 requires the sending state to send a transfer application and all pertinent information ***allowing prior to he supervised individual to relocate*** to the receiving state. Under Rule 3.104, the receiving state has up to 45 days to investigate and respond to a sending state's transfer request. There are provisions for emergency transfers to expedite reporting instructions. See Rule 3.106. 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) until the receiving state has investigated, accepted the transfer of the supervised individual, and issued reporting instructions. See Rule 3.102.

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. See Rule 3.104(b). Therefore, failure to transmit all necessary information when requesting a transfer may substantially delay the processing of the transfer request and such insufficiencies may result in a denial of a transfer by the receiving state.

For incarcerated individuals seeking to transfer their supervision upon release, Rule 3.105 stipulates that the sending state must submit a completed transfer request no earlier than 120 days before the individual's scheduled 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 Sauers, (No H034179, 2010 WL 290584 at *9 fn 6 (Cal. Ct. App. Jan 26, 2010).

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. See Rule 3.108. The rules also provide guidelines for victims to request the opportunity to be heard regarding the supervised individual's transfer or return request. See Rule 3.108-1.

A supervised individual seeking an interstate transfer must agree to waive extradition from any state to which they might abscond while under supervision in the receiving state. States that are party to the Compact waive all legal requirements for the extradition of supervised individuals who become fugitives from justice. See Rule 3.109.

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3.3.1.1 Expedited Transfers

The Commission's rules provide an "expedited" option, allowing a supervised individual to transfer supervision on a "pending acceptance" basis. To qualify for expedited reporting instructions, both the sending and receiving states must agree that an emergency justifies such a transfer. See *Rule 3.106*. The receiving state must respond to a request for expedited reporting instructions no more than two (2) business days after receiving the sending state's request. (*Rule 3.101-3 applicable to sex offenders extends the receiving state's response to five (5) business days.*) After obtaining the supervised individual's signature on all necessary forms, the sending state must issue a departure notice when the individual leaves the state. Granting expedited instructions does not limit the receiving state's authority to reject the transfer upon full investigation. If the transfer is rejected, the supervised individual must return to the sending state. If the individual fails to return, retaking procedures must be initiated to regain custody and return them. In this context, retaking does not appear to trigger the probable cause hearing requirements of *Rule 5.108* unless the sending state is considering revoking conditional release based on violations committed in the receiving state while the transfer is pending.

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3.3.1.2 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 adopted Rule 3.103 to address situations where individuals, upon sentencing, live in the receiving state and need to relocate before acceptance and receiving reporting instructions. This rule permits a supervised individual who is residing in the receiving state at the time of initial sentencing or following the disposition of a violation or revocation proceeding to receive reporting instructions. This allows them to live in the receiving state while awaiting the transfer of supervision. The rule specifically applies only to those supervised individuals who are already living in the receiving state.

The sending state may grant a seven-day travel permit to a supervised individual 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. (Rule 3.101-3 applicable to sex offenders extends the receiving state's response to five (5) business days and travel permits for 'sex offenders' shall not be provided until reporting instructions are issued).* While a supervised individual living in the receiving state would meet the eligibility requirements for reporting instructions under Rule 3.103, the receiving state may deny the transfer if the investigation reveals the individual does not satisfy the 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 supervised individual to return to the sending state or be retaken upon issuance of a warrant. *See ICAOS Advisory Opinion 3-2007*.

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3.3.2 Pre-Acceptance Testing

A supervised individual who is otherwise eligible for transfer under Rule 3.101 may not be required to submit to psychological testing by the receiving state as a condition for accepting the transfer. Imposing such "pre-acceptance" requirements on eligible supervised individuals introduces additional conditions not authorized by the Compact or commission rules. This action represents an impermissible and unilateral attempt to amend the Compact. While certain testing requirements may apply equally to both in-state and out-of-state supervised individuals, these requirements cannot prevent the transfer of supervision. See also ICAOS *Advisory Opinion 5-2006* (it is inappropriate to establish a sex offender risk level if a similar requirement is not imposed on supervised individuals in the receiving state.)

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3.3.3 Post-Acceptance Testing

While receiving states cannot impose pre-acceptance requirements on supervised individuals that would violate their obligations under the Compact, the Compact and its rules do not prohibit receiving states from imposing post-acceptance testing requirements on supervised individuals. Upon meeting the eligibility criteria under Rule 3.101, a supervised individual must be accepted by the receiving state without impediment. Subsequently, the receiving state may impose additional requirements on the supervised individual, provided these requirements are applied equally to both in-state and out-of-state supervised individuals. Failure to comply with such additional requirements, such as sex offender registration or psychological testing, could constitute grounds for retaking. The same rule would apply to discretionary transfers under Rule 3.101-2. *See Critelli v. Florida*, 962 So.2d 341 342-44 (Fl. Dist. Ct. App. 2007).

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3.3.4 Transfer of Supervision of Sex Offenders

The Commission recognizes that the transfer of sex offenders is complex due to individual state laws regarding sex offender registries and various residency and employment restrictions. Rule 3.101-3 addresses these challenges in order to promote accountability, public safety, and sharing comprehensive information regarding these individuals and their offenses. The process of transferring supervision of this high-risk population is uniform in regulation.

This rule specifically provides exceptions to the procedures for issuing reporting instructions for sex offenders who meet the criteria of Rules 3.101-1, 3.103 and 3.106 as addressed in previous sections. In cases of sex offenders, there is a disallowance for travel permits. Accordingly, a sex offender must remain in the sending state until the issuance of reporting instructions, unless the sex offender was sentenced remotely. A receiving state has five (5) business days to review a sex offender's proposed residence and respond to a request for reporting instructions. A denial may result if similar sex offenders sentenced in the receiving state would not be permitted to live at the proposed residence.

In addition to providing these exceptions, this rule also prohibits a sex offender from any travel outside of a sending state pending a request for transfer. The rules require a sending state to provide additional information at the time the transfer request is made, if available. This additional information requirement assists the receiving state in determining risk and appropriate supervision levels for sex offenders. *See Rule 3.101-3*. To implement further special considerations and processes for sex

offenders, the Commission defines a sex offender as:

> *[A]n 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 registered or required to register as a sex offender in the sending or is under sex offender terms and conditions in the sending 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 Commission acknowledges that state laws vary regarding the criteria for classifying a person as a sex offender. Consequently, the definition of a sex offender in the Compact rules does not interfere with individual state definitions or registration requirements in a receiving state. Instead, it focuses on whether the supervised individual is required to register as a sex offender in the sending state or is being supervised as a sex offender.

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3.4 Supervision in the Receiving State

Supervision in the Receiving State

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3.4.1 Duration of Supervision

When interpreting the ICAOS and its rules, eligibility for transferring supervision hinges on the nature of the offense, the sentence imposed, and the status of the supervised individual, rather than the duration of supervision remaining under *Rule 3.101*. *Rule 4.102* specifies, “A receiving state shall supervise individuals transferred under the interstate Compact for a length of time determined by the sending state” (emphasis added). Therefore, the duration of supervision is solely within the jurisdiction of the sending state, leaving officials in the receiving state with minimal discretion in this regard. The ICAOS rules mandate that a receiving state must supervise an out-of-state individual, even if this supervision period exceeds that typically allotted to an in-state individual.

Several states have supervision programs known as “CSL” or “Community Supervision for Life,” designed to monitor high-risk individuals, such as sex offenders. These programs typically require that such individuals undergo extended community-based supervision, potentially for the duration of their lives. This imposes a requirement on the receiving state to provide a level of supervision that may not be recognized by its own laws. Additionally, CSL programs can strain resources significantly, putting pressure on receiving states to either reject these cases or prematurely terminate supervision. (Refer to the example of New York and New Jersey in ICAOS *Advisory Opinion 9-2004*.)

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3.4.2 Type of Supervision in Receiving State

While the sending state has sole authority to determine the duration of supervision, whether through the court's sentence or by paroling authorities, the receiving state retains discretion over the type of supervision it will provide. Rule 4.101 requires the receiving state to supervise the individual in a manner consistent with how it supervises similar individuals within its jurisdiction. As a result, there may be differences in the quality and nature of services provided by the sending state compared to those offered by the receiving state under its own rules and laws.

The principle of treating individuals moving through the compact equally applies to both the quality and quantity of supervision and 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 individual if these conditions aid in rehabilitation and promote community safety (*see discussion infra, at § 3.3.2*). However, it would violate the Compact for a receiving state to create barriers to rehabilitation programs or to impose conditions on out-of-state individuals that are not similarly applied to in-state individuals. See e.g., *ICAOS v. Tennessee Bd. of Probation and Parole*, No. 04-526 KSF (E.D. Ky. 2005).

Rule 3.101 affirms the sending state's sole discretion and prevents the receiving state from unilaterally imposing additional conditions to obstruct the transfer of supervised individuals it deems undesirable or from shifting the financial obligation of supervising the individual to the sending state. See *Doe v. Ward*, 124 F. Supp.2d 900, 915-16 (W.D. Pa. 2000) (interpreting a similar provision in the old ICPP to invalidate aspects of Pennsylvania's "Megan's Law" that treated out-of-state supervised individuals differently from those supervised in-state). See also ICAOS *Advisory Opinion 9-2004* ("[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 that receiving states supervise individuals transferred under the Compact in the same manner as they would supervise in-state individuals. Receiving states must apply all supervision techniques and behavior responses used for in-state individuals, except for modifying the supervision term or revoking conditional release.

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3.4.2.1 Disabled Supervised Individuals

A receiving state is obligated to continue supervising individuals "who become mentally ill or exhibit signs of mental illness or who develop a physical disability while under supervision in the receiving state." See *Rule 2.108*. Therefore, it would be impermissible for a receiving state to terminate supervision or to demand that a sending state retake an individual solely due to mental or physical disability.

Bench Book

3.4.2.2 Continuing Jurisdiction over Supervised Individuals Between the Sending & Receiving States

Transferring an individual's supervision through the Compact does not deprive the sending state of jurisdiction over the individual unless the record indicates 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 individual for supervision purposes, the sending state retains jurisdiction for probation or parole revocation. See

ICAOS *Advisory Opinion 3-2008*.

The Compact does not give the receiving state the authority to revoke the probation or parole imposed by authorities in a sending state, nor can a receiving state decide not to provide supervision once the individual transfers in accordance with the ICAOS rules. *See Scott v. Virginia* supra. at 347; *See also, Peppers v. State*, 696 So. 2d 444 (Fla. Dist. Ct. App. 1997). A receiving state may independently initiate criminal proceedings against supervised individuals who commit crimes while in that state. *See Rule 5.101-1*. However, the receiving state cannot revoke the probation or parole imposed by the sending state as part of the individual's conviction for these crimes. Additionally, whether the sending state continues to exercise jurisdiction over a supervised individual or has relinquished or forfeited that jurisdiction is a matter determined solely by the sending state.

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3.5 Other Considerations

Other Considerations

Bench Book

3.5.1 Post-Transfer Change of the Underlying Circumstances

As discussed, the transfer of supervision for a supervised individual is mandatory in some circumstances. Receiving states are required to accept the transfer if the individual meets the eligibility criteria outlined in Rules 3.101 and 3.101-1. As covered in Chapter 5, the sending state has sole discretion to retake the individual, unless the individual is convicted of a new felony or violent crime or engages in behavior requiring retaking. See *Rule 5.102* and *5.103*. This presents a question: What happens if the supervised individual neither commits a new felony nor receives a new conviction for a violent crime and does not demonstrate a pattern of noncompliance but the original circumstances leading to the transfer significantly change?

Under ICAOS rules and as a general principle, a change in the underlying circumstances that mandated the transfer of a supervised individual does not, by itself, require the sending state to retake that individual 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 such cases, the transfer is voluntary, and the receiving state could demand retaking based on a change of circumstances if this condition was placed on the supervised individual. For example, Rule 4.103 allows the receiving state to impose conditions post-transfer, which could include a requirement that the supervised individual demonstrate and maintain a means of support, with the failure to do so being grounds for retaking by the sending state. Any conditions imposed on a supervised individual, whether at the time of acceptance or during the term of supervision, must be reasonably related to the overall purposes of the Compact, which are to promote rehabilitation and public safety. The rule of "reasonableness" applies to mandatory and discretionary transfers without distinction.

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3.5.2 Travel Permits

Supervised individuals may be granted travel permits, which are defined as "written permission granted to a supervised individual authorizing travel from one state to another." See *Rule 1.101* *Rule 3.110* requires a receiving state to notify the sending state prior to issuing a travel permit for travel to the

sending state. Exceptions to this rule exist for travel that is necessary for employment or medical purposes. See Rule 3.110.

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3.5.3 Victims' Rights

The ICAOS specifically creates distinct rights for victims of crime and certain obligations on courts and supervising authorities with respect to those rights. While the Compact statute itself is general on the rights, the commission's rules spell out specific obligations. Under Rule 3.108-1, victims of crime have a right to notice of a supervised individual's transfer. The notification requirement is triggered one business day after the issuance of reporting instructions by the receiving state. The sending state initiates notification procedures to related victims in accordance with its own state laws. Additionally, once an individual relocates, the receiving state shall respond to requests for information from the sending state within five (5) business days following the receipt of the request.

In addition to the right to receive various notifications, victims have the right to appear, be heard, and express their concerns regarding an individual's proposal to transfer supervision to another state. *See Rule 3.108*. The obligation to notify the victim of the right to be heard rests with the 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.

The responsibility for administering the rights given by the ICAOS to victims falls 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.

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3.6 Conditions

Conditions

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3.6.1 General Conditions

While a state may be required to accept supervision based on the supervised individual's eligibility status, the receiving state may determine that certain conditions are necessary at the time of acceptance. The receiving state can only impose conditions that it would impose on similarly supervised in-state individuals. See *Rule 4.103(a)*. A receiving state cannot impose conditions on out-of-state supervised individuals to avoid its obligations under the Compact, nor can it preemptively impose conditions prior to acceptance to prevent a transfer. Such actions, whether on a case-by-case basis or as a routine practice, violate the Commission's rules. For instance, the receiving state may require out-of-state supervised individuals to comply with registration and testing requirements (e.g., DNA testing, sex offender registration, etc.) if these are mandated by state laws and applied to in-state supervised individuals. *See Rule 4.104(a)*. However, the timing of imposing these conditions is critical to their validity. According to *Rule 4.103*, the receiving state may impose conditions only after acceptance.

Rule 4.103 mandates that the receiving state notify the sending state of its intent to impose a condition.

Once the transfer is accepted, the receiving state can impose conditions on a supervised individual resulting from any permissible investigation. By seeking transfer, the individual agrees to any conditions imposed by the receiving state; thus, applying for transfer and acceptance by the receiving state entails acceptance of these conditions, or risks forfeiting the ability to transfer supervision. The receiving state can impose a condition after acceptance but before the supervised individual physically relocates to the receiving state. *See Warner v. McVey*, (2010 WL 3239385 (W.D. Pa., July 9, 2010). A supervised individual accepted for transfer may refuse to comply with the conditions set by the receiving state. However, such refusal will prevent the individual from physically relocating their supervision.

A sending state may also impose a condition on a supervised individual as a condition of transferring supervision; however, in this context, the receiving state must receive an opportunity to inform the sending state of its inability to meet a condition. This may be of particular concern to judges. A court may impose a condition and require that it be met in the receiving state; yet the receiving state can refuse to enforce the condition if it is unable to do so. See ICAOS *Advisory Opinion 1-2008*. The receiving state's inability to enforce a condition requires the sending state either to withdraw the condition and allow the supervised individual to relocate to the receiving state or withdraw the transfer request and continue to supervise the individual in the sending state.

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3.6.2 Authority to Impose Conditions

Courts and paroling authorities have wide latitude in imposing conditions. Generally, a condition imposed as a part of probation or parole must be reasonably related to the underlying offense, promote the individual's rehabilitation, not unreasonably impinge on recognized liberty interests, protect the community, and not be so vague as to make compliance difficult. If a statute governs authorization of a condition and/or does not violate any constitutional protections, habeas corpus relief is unavailable to a supervised individual contesting the condition. *See People of the State of New York ex rel. William Stevenson v. Warden*, 806 N.Y.S.2d 185-86 (N.Y. App. Div. 2005). Conditions deemed appropriate include:

- Pursuant to a North Carolina statute applicable to supervised individuals 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 a 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 a supervised individual convicted of weapons charges that included a ban on the 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, 838 (6th Cir. 2001), cert. denied 534 U.S. 859 (2001);
- Social contact notification imposed on supervised individuals with history of domestic violence. *United States v. Brandenburg*, No. 05-1261, 2005 WL 3419999, 157 F. App'x 875, 878 (6th Cir. 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, 961-62 (10th Cir. 2005);
- Participation in sex offender treatment programs and the prohibition against contact with minor children was upheld because the condition against contact allowed a sex offender to seek and obtain prior approval. *United States v. Heidebur*, 417 F.3d 1002, 1005-06 (8th Cir. 2005);
- Prohibiting a sex 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);
- The restitution scheme requiring a supervised individual convicted of mail fraud to set up a trust fund for those whom he defrauded was in keeping with the purposes of probation because of the establishment of aggrieved parties in civil litigation. *United States v. Barringer*, 712 F.2d 60 (4th Cir. 1983); and,
- Mandatory statutory condition prohibiting a sex offender convicted of sexual misconduct with a minor from living with a child and which did not permit exceptions for the sex offender's own children was a valid probation condition and did not violate due process. *State v. Strickland*, 609 S.E.2d 253, 256 (2005).

Individuals who transfer supervision under the Compact may be subject to graduated sanctions or short periods of confinement in the receiving state if they violate the terms and conditions of their supervision. These sanctions are designed to modify the individual's behavior as an alternative to revoking their supervision and returning them to the sending state. The ICAOS rules require receiving states to "supervise individuals transferred under the interstate Compact in a manner consistent with the supervision of other similar individuals sentenced in the receiving state." See Rule 4.101. However, it is reasonable to conclude, that the imposition of limited periods of incarceration, in lieu of revocation, qualifies as a condition under Rule 4.103, requiring the receiving state to notify the sending state of supervision conditions 'at the time of acceptance or during the term of supervision' as required under this rule.

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3.6.3 Limitations on Conditions

Notwithstanding the authority of the sending and receiving state to impose conditions on a supervised individual, several courts assert 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 a supervised individual to be 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*, 278 Mont. 200, 211, 924 P. 2d 679, 685 (1996), cert. denied, 519 U.S. 1082 (1997). Similarly, most jurisdictions examining the issue of banishment from a geographical area generally hold that such a condition cannot be broader than necessary to accomplish the goals of rehabilitation and social protection. *Jones v. State*, 727 P.2d 6, 8 (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, 82 (Minn. 2000) (vacating condition excluding defendant from Minneapolis, Minnesota); State v. Ferre, 734 P.2d 888, 890 (1987) (determining condition restricting the defendant from the county where the victim lived was broader than necessary and trial court must draw a more limited geographical area); *Johnson v. State*, 672 S.W.2d 621, 623 (Tex. App. 1984). (Determining banishment from county where defendant resides is unreasonable).

Some jurisdictions invalidate banishment conditions as contrary to 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 hold that probation conditions restricting a defendant from geographic areas encompassing a county or areas within a city or town reasonably relate to the goals of rehabilitation and the protection of society. *See Oyoghok v. Municipality of Anchorage*, 641 P.2d 1267, 1269 (Alaska Ct. App. 1982) (approving condition restricting a supervised individual convicted of soliciting prostitution from being within a two-block radius where street prostitution occurs); *People v.*

Brockelman, 933 P.2d 1315, 1320 (Colo. 1997) (affirming condition restricting a supervised individual convicted of assault from the two towns where the victim lived and worked); *State v. Nolan*, 759 A.2d 721, 724 (Maine 2000) (trial court's special probation condition which prohibited a supervised individual 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 bear no reasonable relationship to rehabilitation, public safety, or the underlying offense. For example, a condition requiring sex offender registration is invalid where the trial court imposes the condition not because of the underlying offense (armed bank robbery), nor because of the conduct leading to revocation, but because of an unrelated 1986 sex-offense conviction. See *United States v. Scott*, 270 F.3d 632, 636 (8th Cir. 2001). In the Scott case, the court opined that the condition has had no reasonable relationship to the nature of the underlying offense and the record has not shown that the condition is reasonably necessary to deter the sex offender from repeating a sex crime from 15 years earlier. Likewise, the courts have found that a condition restricting computer use is not reasonably related to present or prior offenses. See *United States v. Peterson*, 248 F.3d 79, 83-4 (2nd Cir. 2001) (computer and internet restriction unreasonable for a supervised individual guilty of writing bad checks who also had previous incest charge and probation violations for accessing legal pornography). Thus, 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 upheld the conditions but determined their enforcement was flawed due to insufficient notice being given to the supervised individual regarding prohibitions on certain conduct. In *State v. Boseman*, 863 A.2d 704 (Conn. Ct. App. 2005), the court held that revocation of a supervised individual's probation for violating a no-contact order violated due process because the individual 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). Similarly, a condition requiring a supervised individual to reimburse attorney's fees was deemed invalid when the trial court did not assess the individual's ability to pay. *State v. Drew*, No. 83563 (Ohio Ct. App. 8th Dist., July 8, 2004).

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3.7 Sex Offender Registration

Courts have generally upheld sex offender registration requirements for sex offenders whose supervision transfers 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 sex offenders.

In *Doe v. McVey*, 381 F. Supp. 2d 443, 451 (E.D. Penn. 2005) aff'd sub nom. *Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F. 3d 95 (3d Cir. 2008), the court struck down the application of Pennsylvania's "Megan's Law" to an out-of-state sex offender. The court determined that under the law as applied, an in-state sex offender was entitled to a civil hearing to determine whether they were a "sexually violent predator" before required registration. An out-of-state sex offender seeking transfer of supervision was subject to the requirement of automatic registration without the corresponding hearing available to an in-state sex offender. The court found that, although protecting citizens from sex offenses was 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 consistent protection from sex offenses. Thus,

according to the court, Pennsylvania's Megan's Law violated the Equal Protection Clause.

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3.8 Financial Obligations

Financial Obligations

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3.8.1 Restitution

As the ICAOS governs the movement of supervised individuals and not the terms and conditions of sentencing, the ICAOS rules are silent on the imposition of restitution. This is therefore a matter governed exclusively by the laws of the sending state and the court imposing sentence. Further, *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 a supervised individual's sentence. The only obligation imposed on the receiving state is to notify the supervised individual of any default and their failure to comply with the conditions of supervision. See *Rule 4.108(b)*. The actual collection and enforcement of the financial obligation rests with the sending state. Failure to fulfill financial obligations constitutes a breach of the supervision agreement, which can lead to the sending state retaking the supervised individual and revoking their probation or parole. *See, e.g., Gelatt v. County of Broome*, 811 F.Supp. 61 (N.D.N.Y. 1993) (decided on other grounds).

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3.8.2 Fees

Rule 4.107 permits the collection of fees from individuals subject to the Compact. Specifically, Rule 4.107(a), allows the sending state to impose a transfer application fee, while Rule 4.107(b) authorizes the receiving state to impose a supervision fee. Generally, such fees are established by state statutes or state administrative rules. 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 a supervised individual's Constitutional rights to due process of law). It is important to note that once a supervised individual 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. Therefore, while a sending state can impose a supervision fee for the time the supervised individual is physically present in that state, it cannot continue to charge such a fee under the pretense of monitoring the individual's progress once they have moved to the receiving state.

A sending state may impose other fees on supervised individuals so long as those fees are not related to supervision. For example, 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 the context of AO 14-2006, a state statute allowed for the collection of an annual fee from sex offenders to support the maintenance of the state's sex offender registry and victim notification systems. This fee was an annual assessment and was distinct from an ongoing supervision fee related to the active supervision of an individual. The ICAOS concluded that while the sending state could impose such a fee, it was solely responsible for collecting it and could not transfer this responsibility to the receiving state.

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

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and rules promulgated pursuant thereto are intended to protect certain healthcare information from disclosure to authorized persons or entities. Generally, prior to disclosure of health care information, the holder of that information must obtain 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 to obtain a written release from a supervised individual prior to disclosure of protected health care information. *See 45 C.F.R. 164.512(f)(1).* Protected healthcare 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 at large 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).*

The release of protected health care information must be strictly for law enforcement purposes and should not imply that supervised individuals forfeit their privacy rights regarding their health care data. Disclosure of protected information is permissible under HIPAA only when it is essential for the supervision of the individual. If the disclosure is more general and not directly related to a necessary aspect of supervision, it may violate HIPAA regulations. Therefore, before releasing protected health care information to authorities in another state, it is crucial to assess whether the release is essential for the individual's supervision or for ensuring public safety.

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*, No. 06-C-243-C, 2006 WL 1706426, at *10 (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 Supervised Individuals to the Sending State

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4.1 Status of Supervised Individuals Subject to ICAOS

A key objective of the ICAOS is to facilitate the effective transfer of supervised individuals between states and to manage their return to the sending state through mechanisms other than formal extradition. Consequently, a supervised individual's status as a convicted person significantly impacts the process they are entitled to under both the ICAOS and constitutional due process principles.

The U.S. Supreme Court has held that the granting of probation or parole is a privilege, not a right guaranteed by the Constitution. Probation or parole 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). A supervised individual 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).

Courts have held that probation, parole, or conditional pardon is not a right that a supervised individual can demand; rather it is subject to the conditions imposed. Therefore, revocation of these privileges does not typically deprive a supervised individual of any legal rights. Instead, it simply reverts the individual to the status they held 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 ruled that probation, parole, or conditional pardon functions like a contract between the supervised individual and the state. The individual can choose to accept these conditions or reject them and serve the full sentence. By choosing to accept probation, parole, or conditional pardon, the individual agrees to abide 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. Regardless of the underlying theory – grace, contract, or both – the general argument is that probation is a privilege so that if the supervised individual refuses to comply with 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). Importantly, although a supervised individual is not entitled to supervised release, the individual 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).

Over time, courts found that the uniform application of procedures prescribed by the interstate Compact did not constitute a violation of Fourteenth Amendment equal protection. See People ex rel. *Rankin v Ruthazer*, 107 N.E.2d 458 (N.Y. 1952). Similarly, in *Ex parte Tenner*, 128 P2d 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 determined that there was no constitutional violation when an out-of-state supervised individual could potentially transfer parole to another state while an in-state supervised individual did not have the same opportunity. The court upheld the legislature's authority to create reasonable classifications among prisoners to achieve the statute's objectives. If the convict was a nonresident and the law would not permit his parole outside of the state, these reasons would become impotent. The court concluded that the statutory distinction between resident and nonresident convicts did not deprive anyone of an advantage. Cf., *Williams v. Wisconsin*, 336 F.3d 576 (7th Cir. 2003) (while supervised individuals have a right to marry, a state can impose reasonable travel restrictions, which have the effect of incidental interference with the right to marry; such restrictions did not give rise to a constitutional claim if there was 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).

A person’s status as an out-of-state supervised individual does not mean that person possesses no constitutional rights. Supervised individuals 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 has determined that equal protection rights would be violated if a “dead time” statute is interpreted in such a way that a person paroled out-of-state is not credited with 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 the Browning 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 part of the time to be served. However, the court also concluded that a prisoner who was paroled out of state and subsequently violated parole by committing an offense in another state did not have his dead time end until declared available by the other state for return to Michigan. The court stated that the “dead time” statute, if interpreted to operate in this manner, 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 based on geography and constituted a violation of equal protection guarantees.

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 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 the defendant's admissions to violations, specifically to whom and when they were made, and when the offending behavior took place.

Bench Book

4.2 Waiver of Formal Extradition Proceedings

Waiver of Formal Extradition Proceedings

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4.2.1 Waiver of Extradition under the ICAOS

Principal among the provisions of the ICAOS are the waiver of formal extradition requirements for returning supervised individuals 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 supervised individual 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*, a supervised individual is required to waive extradition as a condition of transferring supervision. That rule provides:

> *(a) A supervised individual applying for interstate supervision shall execute, at the time of application for transfer, a waiver of extradition from any state to which the individual may abscond while under supervision in the receiving state; and,*
>
> *(b) States that are parties to this Compact waive all legal requirements to extradition of supervised individuals who are fugitives from justice.*

It is important to note that, under certain requirements, a sending state always retains the authority to enter a receiving state and retake a supervised individual. *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 supervised individual 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 sought and that they are acting with lawful authority, e.g., they are lawful agents 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 supervised individuals 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. Even in the absence of a written waiver by the supervised individual, extradition is not available, 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 supervised individuals 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 a supervised individual with supervision transferred under the Compact are not violated by the denial of an extradition hearing, as the individual is not an absconder but is 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 the supervised individual enjoys under the Texas Extradition Statute, he has not been deprived of a federally protected right and therefore a writ of habeas corpus is properly denied; even assuming that involvement of a constitutional right, 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 supervised individuals 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 supervised individual may also be affected by recent changes to the ICAOS rules imposing time limits on probable cause determinations. See *Rule 5.108(e) & (f)*.

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4.2.2 Uniform Extradition Act Considerations

A supervised individual who absconds from a receiving state is a fugitive from justice. The procedures for returning a fugitive to a demanding state can be affected by the Uniform Extradition and Rendition Act (UERA). 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 UERA prevents a person from voluntarily returning to a state. Several courts have recognized that an interstate Compact governing supervision of out-of-state individuals provides an alternative procedure by which a person can be returned to the demanding state without complying with the formalities of the *UERA. 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 determined to supersede the UERA concerning certain supervised individuals, necessitating minimal formalities for their return. Additionally, the supervised individual's agreement to waive extradition as a condition of relocation eliminates the requirement for formal extradition proceedings upon the sending state's request for their return.

PRACTICE NOTE: The ICAOS benefits supervised individuals by allowing them to live and receive supervision in a state where they have family and community ties. In exchange for this privilege, the terms of the ICAOS, including *Rule 3.109* regarding the waiver of extradition, bind the supervised individual. Consequently, an individual under the ICAOS is subject to the "alternative procedures" outlined in the Compact and its rules, rather than the provisions of the UERA.

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4.3 Retaking

As previously noted, Article I of ICAOS authorizes officers from a sending state to enter a receiving state, or any state where a supervised individual has absconded, for the purpose of retaking. Except for limited exceptions, the decision to retake lies solely at the discretion of the sending state. See *Rule 5.101(a)*. However, if a supervised individual faces charges for a new offense in the receiving state, the sending state may not retake the individual without prior consent from receiving state authorities until the criminal charges are dismissed, the sentence is satisfied, or the supervised individual is released on supervision. See *Rule 5.101-1*.

Several exceptions limit the sending state's discretion for retaking a supervised individual. These exceptions, invoked by a receiving state, require retaking by the sending state when supervision is no longer feasible. First, a sending state must retake a supervised individual upon the request of the receiving state or a subsequent receiving state if the individual has been convicted of a felony offense or violent crime. See *Rule 1.101* and *Rule 5.102*. The sending state may retake only after the charges are dismissed, the sentence is satisfied, or the individual is released on supervision for the subsequent offense unless both states mutually agree to the retaking. Second, the sending state is required to retake a supervised individual upon the receiving state's request if the individual has engaged in behavior requiring retaking. See *Rule 1.101* and *Rule 5.103*. Furthermore, only the receiving state can invoke *Rule 5.103*, and the applicability of this rule assumes that the violating behavior occurred in the receiving state. 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 a supervised individual even if the violating act or pattern of non-compliant behavior would not result in revocation under the standards of the sending state. So long as the receiving state documents the violation(s) showing the behavior could not be successfully addressed through corrective action or graduated responses, and it 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 or probable cause hearing in the receiving state as required by *Rule 5.108.*

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 a supervised individual even if the violation(s) would not have been given the same weight by that state.

Under the Compact, officers from the sending state may enter the receiving state, or any other state to which the supervised individual has absconded, to retake the individual. Since the Compact and *Rule 3.109* waive formal extradition proceedings, officers only need to establish their authority and confirm the identity of the supervised individual. 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 sending state officers establish

authority and meet due process requirements, authorities in a receiving state may not prevent, interfere with or otherwise hinder the transportation of the supervised individual back to the sending state. See *Rule 5.109*. Interference by court officials would constitute a violation of the ICAOS and its rules.

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4.3.1 Violation Reports Requiring Retaking

A receiving state is obligated to report to sending state authorities within 30 calendar days of the discovery or determination that a supervised individual has engaged in behavior requiring retaking. "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 may differ from state to state. Moreover, a sending state may be required to retake a supervised individual for violating acts or non-compliant behavior that, had they occurred in the sending state, may not have constituted grounds for revocation.

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4.3.2 Supervised Individuals Convicted of a Violent Crime

At the request of a receiving state, Rule 5.102 requires the sending state to retake a supervised individual 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.

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4.4 Arrest and Detention of Supervised Individuals in the Receiving State

The courts have defined the relationship between the sending state and receiving state officials as an agency relationship. Courts recognize that in supervising out-of-state supervised individuals the receiving state acts on behalf of and as an agent of the sending state. See *State v. Hill*, 334 N.W.2d 746, 748 (Iowa 1983) (trial court erred in granting bail to an out-of-state supervised individual, as the individual's status 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."); See 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 supervised individuals, authorities in a receiving state do not act exclusively as authorities under the domestic law of that state, but also act 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." While the receiving state assumes the obligation to monitor probationers, 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 supervised individual can fall under three broad categories. First, such an individual is clearly subject to arrest and detention for committing a new offense in the receiving state. *Rules 5.101*, *5.101-1*, and *5.102* acknowledge that a supervised individual may be held in a receiving state for committing a crime and is not subject to retaking unless the receiving state consents, the term of incarceration for the new crime is completed, or the supervised individual has been placed on probation. The authority to incarcerate a supervised individual inherently includes the authority to arrest them for committing an offense.

Second, an out-of-state supervised individual is subject to arrest and detention upon request of the sending state if it intends to retake the individual. This can occur either at the demand of the receiving state or because the sending state intends to revoke probation. Under this circumstance, upon notification to retake the individual, the sending state must issue a warrant and file a detainer with the holding facility when the individual is in custody. Courts have consistently recognized the right of a receiving state to arrest and detain a supervised individual 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) (supervised individual cannot be admitted to bail pending retaking); *Crady v. Cranfill,* 371 S.W.2d 640 (Ky. Ct. App. 1963) (detention of supervised individuals is proper as only courts in the sending state can determine the status of their jurisdiction over the individual).

PRACTICE NOTE: A supervised individual who is arrested and detained for violating the conditions of their supervision may have certain due process rights. If the sending state plans to use the individual's violations in the receiving state as a basis for potentially revoking their conditional release, both U.S. Supreme Court rulings and Commission rules mandate that both states adhere to specific hearing requirements. See discussion, beginning at Section 4.4.3

The third circumstance in which officials in the receiving state can arrest an out-of-state supervised individual is for violations that occur physically in the receiving state. This third circumstance may prove to be the most confusing and difficult, given the supervised individual may or may not face charges for 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 supervised individuals are subject to arrest for violations that occur in the receiving state. See, e.g., *Kaczmarek v. Longsworth*, 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 supervised individual. Rule 4.109-1 provides that, "A supervised individual 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: Despite *Rule 4.109-1*, state officials should first verify whether their state laws permit the arrest of a Compact-supervised individual who is not already in custody, including whether a warrant is required. Rule 4.109-1 grants receiving state officials the authority to arrest out-of-state supervised individuals, as long as this is consistent with the receiving state's laws.

Beyond the specific rule authorization, public policy supports the arrest of an out-of-state supervised individual, regardless of the receiving state's domestic law. The ICAOS aims not merely to manage the movement of supervised individuals but to serve vital purposes such as enhancing public safety and safeguarding the rights of crime victims. See *INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, ART. I.* All activities of the Commission and the member states endeavor to promote these two overriding purposes. Member states, their courts and criminal justice agencies must take all necessary action to "effectuate the Compact's purposes and intent." See *INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION*, art. IX, § A.

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4.5 Discretionary Disposition of Violation

As previously discussed, Rule 5.102 requires the sending state to retake a supervised individual for a new felony or violent crime conviction after the individual's release from incarceration for the new crime. This can lead to a significant delay between the occurrence of the crime, the completion of the incarceration term, and the time when the sending state retakes the individual and imposes its sanction for the new crime conviction 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. A sentence of incarceration imposed on a supervised individual for a new crime committed outside the sending state during the compact period may fully or partially satisfy the sentence imposed by the sending state for the violation. This requires the approval of the sentencing authority or releasing authority and consent of the supervised individual. 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*.

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4.6 Arrest of Absconders

Upon receiving a violation report for an absconding supervised individual, the sending state must issue a national arrest warrant once notified of the individual's absconding status. If the absconding individual is apprehended in the receiving state, the sending state must file a detainer with the holding facility where the individual is located. *See Rule 5.103-1*. Additionally, the receiving state must conduct a probable cause hearing upon the sending state's request, as outlined in Rule 5.108. It is crucial to note that a probable cause hearing is necessary if the sending state plans to terminate supervised release and incarcerate the individual.

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4.6.1 Arrest of Absconders Who Fail to Return to Return to Sending State as Ordered

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 in no less than fifteen (15) business days. Warrant requirements apply to supervised individuals who fail to return to the sending state as ordered. See *Rules 4.111* & *5.103(c)*. The supervised individual's failure to comply and return to the 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. Absconders are subject to arrest in all Compact member states, not only the receiving state and sending state. When read in conjunction with Rule 5.111 (Denial of Bail to Certain Supervised Individuals), Compact member states are obligated to arrest and detain absconding supervised individuals. According to Rule 5.101(b), absconding supervised individuals who are arrested, detained, and returned to the sending state do not have federal due process rights to compel state authorities to issue a parole violation warrant, file or hear a petition for revocation, or reach a decision on their parole within a specific timeframe.

PRACTICE NOTE: Admission to bail or other release of an absconding supervised individual subject to 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 must be effective in all member states without regard or limitation to a specific geographical area.

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4.7 Post-Transfer Hearing Requirements

Post-Transfer Hearing Requirements

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4.7.1 General Considerations

Supervised individuals, including those under ICAOS supervision, 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 supervised individual 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).

Supervised individuals enjoy some modicum of due process, particularly with regards to revocation, which impacts the retaking process. In addition to the rules of the Commission, several U.S. Supreme Court cases uphold the process for returning supervised individuals 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 supervised individuals subject to probation or parole have some liberty interests, but that they need not be afforded 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 Gagnon, supra*.

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4.7.2 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 supervised individual if she or he may have difficulty in presenting their version of disputed facts, cross-examining witnesses, or presenting complicated documentary evidence. *See Gagnon, supra* at 788. Presumptively, counsel should be provided if the indigent probationer or parolee, after being informed of his right, requests counsel based on a timely and plausible 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 individual'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 of retaking 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 individual has no right to supervision in another state.

Some courts have read the *Morrissey and Gagnon* decisions governing revocation hearings and the appointment of counsel to apply only after the incarceration of the defendant. *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 opines that once a prison term triggers, the incarceration of the defendant is 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 notes 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), is not whether incarceration occurred immediately or only after some delay. Rather, the critical point is 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 sentence 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 is 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.

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4.7.3 Specific Considerations for Probable Cause Hearings under ICAOS

The ICAOS recognizes that the transfer of supervision (and hence the relocation of an offender) is a matter of privilege subject to the absolute discretion of the sending state and, to a more limited extent, the discretion of the receiving state. Courts have also recognized that under an interstate compact, conditions can be attached to the transfer of supervision and if violated, can form the basis for the offender's return and ultimate revocation of their conditional release from incarceration. Yet, while numerous courts have held that convicted persons do not have a right to relocate from one state to another, courts have also recognized that once relocation is granted states should not lightly or arbitrarily revoke the relocation.

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4.7.3.1 When a Probable Cause Hearing is Not Required

A supervised individual convicted of a new conviction in the receiving state forming the basis for retaking is not entitled to further hearings, the conviction being conclusive as to the status of the individual'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 D'Amato v. U.S. Parole Com'n*, 837 F.2d 72, 79 (2d Cir. 1988)

It is important to distinguish between retaking that may result in revocation and retaking that will not. As noted earlier, a supervised individual has no inherent right to supervision in another state, and under the ICAOS, the sending state retains the authority to retake the individual for any reason or no reason at all. *See Paull v. Park County*, 218 P.3d 1198 (S. Ct. Mt. 2009). For instance, a sending state may retake a supervised individual due to non-compliance with a condition. This failure might lead officials in both the sending and receiving states to determine that the individual would be better managed under supervision in the sending state. However, if there is any uncertainty about whether the sending state intends to revoke the supervised individual's conditional release based on violations in the receiving state, the individual should be granted a probable cause hearing as outlined in *Rule 5.108*. Failing to provide this hearing could prevent the violations from being considered in future revocation proceedings in the sending state.

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

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4.7.3.2 Probable Cause Hearings when Violations Occurred in another State

Where the retaking of a supervised individual may result in revocation of conditional release by the sending state, the individual 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:

> *A supervised individual 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)*

Second, a supervised individual 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 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 supervised individual'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 supervised individual. *See Fisher v. Crist*, 594 P.2d 1140 (Mont. 1979); *State v. Maglio*, 459 A.2d 1209 (N.J. Super. Ct. 1979) (when the sentencing state is a great distance from the supervising state, a supervised individual 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 a supervised individual 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 over such hearings, it is essential to conduct these proceedings in a manner that upholds the due process requirements established by U.S. Supreme Court rulings. A supervised individual's due process rights are violated if a witness against them is permitted to testify through 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 uncertainty about whether the sending state intends to revoke a supervised individual's conditional release based on violations in the receiving state, the individual should be granted a probable cause hearing in accordance with *Rule 5.108*. This process ensures that a proper record is established, and the individual's due process rights are upheld. Failure to conduct such a hearing may prevent the consideration of these violations in future revocation proceedings in the sending state.

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4.7.3.2.1 Supervised Individual's Basic Rights at a Probable Cause Hearing

Rule 5.108(d) defines the supervised individual's basic rights for a probable cause hearing. However, each state may have procedural variations. Therefore, to the extent that a hearing officer is unclear on the application of due process procedures in a particular retaking proceeding, it is important to consult with local legal counsel to ensure compliance with state law. One example is a supervised individual's right to counsel during a probable cause hearing. As stated in the preceding section, Rule 5.108 does not guarantee a supervised individual's right to counsel. However, local procedures may grant this right depending on the particular facts and circumstances of the case.

The supervised individual 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 supervised individual 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 (supervised individual 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 is meritless; 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 the supervised individual was 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 the 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.

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4.7.3.2.2 Probable Cause Hearing Report

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 along with 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 probable cause hearing results in exoneration of the supervised individual, 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, despite any findings that the supervised individual 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, since 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, believing that the supervised individual 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). This rule provides, in part, that officials in the receiving state must show through documentation that the supervised individual has engaged in behavior requiring retaking. See Rule 5.103(a). To support the receiving state's request for mandatory retaking, as well as to provide a basis for subsequent proceedings in the sending state, which could result in revocation, the hearing officer in the receiving state should determine whether sufficient cause exists to conclude that the act or pattern of non-compliant behavior committed by the supervised individual 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 occurs based on violations of a condition imposed by the receiving or sending state, two considerations arise. First, the hearing officer must determine whether the supervised individual violated the conditions of supervision, e.g., the supervised individual indeed failed to comply with a condition. If the hearing officer so concludes, a second determination may need to be made. If the sending state notifies the receiving 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 sufficient nature that it would typically result in revocation in the receiving state. A hearing officer could conceivably find that the violation occurred, but that retaking is not warranted because it would not rise to the level of revocation in the receiving state. Two important points must be emphasized. First, the determination of the "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 implications.

Second, despite the fact that the determination of "likelihood of revocation" is based on 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 supervised individual's conditional release. Such an assertion by the sending state would prevent 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 affirming 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 the supervised individual was not granted an on-site probable cause hearing prior to retaking; waiver of hearing will not be inferred by supervised individual's failure to demand hearing).

PRACTICE NOTE: Under Gagnon and Morrissey, supervised individuals have the right not to have their liberty interests – however limited – revoked arbitrarily. State officials must establish grounds for revocation. Therefore, if violations occurring in a state other than the sending state will form the basis of revocation, the supervised individual is entitled to a more robust due process hearing which may be very similar to the revocation proceeding itself.

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4.7.3.2.3 Post Probable Cause Hearing

If the hearing officer determines that probable cause exists and the supervised individual has committed the alleged violations, the receiving state may detain the individual 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 supervised individual, or (2) take other action. See *Rule 5.108(f)*. The sending state must retake a supervised individual within 30 calendar days of the decision to retake. Therefore, it is conceivable that a receiving state may have to hold a supervised individual for up to 45 days after the hearing officer issues a report. If held in custody by the receiving state, the supervised individual cannot be admitted to bail or otherwise released from custody. See *Rule 5.111*. See also, the discussion at § 4.4.3. The cost of incarceration is the responsibility of the receiving state. See *Rule 5.106*.

The rules do not impose any timeframe for initiating the probable cause hearing on the receiving state. 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, Rule 5.108 imposes mandatory timeframes on the sending state after the issuance of the hearing officer's report. The failure to comply with these timeframes could give rise to challenges to incarceration in either the sending or receiving states. See *Williams v. Miller-Stout,* No. 205-CV-864-ID WO, 2006 WL 3147667, at *1 (M.D. Ala. Nov. 2, 2006). (person named as a 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 does not find probable cause that the supervised individual committed the alleged violations, the receiving state must continue supervision. See *Rule 5.108(g)*. The supervised individual must be released if they are 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, supervised individuals 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 supervised individual's admission of having committed one or more of the violation(s). See *Rule 5.108*. This rule requires that a supervised individual 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. Supervised individuals may be entitled to appointed counsel based on the specific facts and circumstances of their case. A finding by the sending state that a supervised individual has violated the terms of supervision is generally conclusive in proceedings in the receiving or asylum state, provided that fundamental due process rights were observed by the sending state. If the required due process standards are met during a hearing in the receiving state and the supervised individual is not facing further criminal charges in that state (or an asylum state), the sending state may "retake" the individual. This allows sending state authorities to return the individual without interference from any ICAOS member 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 a supervised individual. 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 supervised individual'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 of the supervised individual's incarceration, e.g. a determination of probable cause by a sending state. In this context, it is sufficient that officials conducting the hearing in the state where the supervised individual is physically located are satisfied in the face of any documents presented that an independent decision maker in another state has determined that there is probable cause to believe the supervised individual 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 supervised individual is entitled to notice. The hearing may be non-adversarial. The supervised individual, 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).

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4.7.3.3 Probable Cause Hearings Waiver

The supervised individual 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). Waiving the probable cause hearing has dual implications. Firstly, it means the supervised individual forfeits the right to an on-site hearing where the receiving state must present evidence of the violations. Secondly, and more significantly, by waiving the hearing, the supervised individual implicitly acknowledges that their actions could warrant revocation of supervised release if they were solely under the jurisdiction of the receiving state.

The critical elements of such a waiver are:

1. *The supervised individual is apprised of the right to a probable cause hearing;*
2. *The supervised individual is apprised of the facts and circumstances supporting their retaking;*
3. *The supervised individual is apprised that by waiving the right to a hearing, he or she is also waiving the right to contest the facts and circumstances supporting their retaking;*
4. *The supervised individual admits in writing to one or more violations of their supervision; and,*
5. *The supervised individual is apprised in writing that by admitting to the offenses, the supervised release may be revoked by the sending state based on the admissions.*

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4.8 Bail Pending Return

A supervised individual subject to retaking proceedings has no right to bail. Rule 5.111 specifically prohibits any court or paroling authority in any state from admitting a supervised individual to bail pending completion of the retaking process, individual state law to the contrary notwithstanding. Since 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 were a statutory law promulgated by that state's legislature. See Article V.

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 supervised individual to bail was reversed notwithstanding a prohibition against such action. In *Ex parte Womack*, 455 S.W.2d 288 (Tex. Crim. App. 1970), the court found no error in denying bail to a supervised individual 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 be released 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, a supervised individual cannot be held indefinitely. See *Windsor v. Turner*, 428 P.2d 740 (Okla. Crim. App. 1967) (supervised individual 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 and its courts an absolute prohibition against admitting a supervised individual to bail pending retaking.

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4.9 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*. For example, if the receiving state imposed a condition of drug treatment at the time of acceptance and the supervised individual violated that condition, the sending state would be required to give effect to that violation even if the condition was not part of the original plan of supervision.

PRACTICE NOTE: The 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 included in the original plan of supervision.

Chapter 5

Liability and Immunity Considerations for Judicial Officers and Employees

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5.1 Introduction

Given the large number of individuals under supervision through the Interstate Compact for Adult Offender Supervision (ICAOS, or the Compact), legal actions against judicial officials, correctional staff, and other administrators of the Compact are inevitable. This chapter discusses the various pathways through which those actors might face legal liability for their work. It also considers the different types of immunity and related defenses available to those actors when they are sued. This chapter is not intended as a comprehensive resource on these subjects, which turn out to be especially complicated and subject to numerous exceptions as a matter of state law. Rather, it is meant as a survey of liability and immunity issues that have actually arisen in the context of the Compact.

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5.2 Liability

The two principal pathways through which government officers might face legal liability through their work related to ICAOS are (1) federal civil rights lawsuits under 42 U.S.C. § 1983 and (2) state law tort claims. Plaintiffs will also sometimes attempt to sue under the Compact itself, but courts have not deemed the agreement to give rise to a private right of action.

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5.2.1 Liability under 42 U.S.C. § 1983

One of the primary vehicles through which officials might be sued for their work related to the Compact is 42 U.S.C. § 1983 (Section 1983), a federal statute that creates a cause of action for violations of a person's civil rights. The statute gives a right to sue for "deprivations of any rights, privileges, or immunities secured by the Constitution and laws" caused by persons acting under color of law. To succeed on a Section 1983 claim, a plaintiff must show (1) a deprivation of a federal right and (2) that the person who caused the deprivation acted under color of state law. Gomez v. Toledo, 446 U.S. 635 (1980).

As discussed below in section 5.3, many officials will enjoy either absolute or qualified immunity to suits under Section 1983.

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5.2.1.1 No Statutory Right under ICAOS Itself

The federal right in question in a Section 1983 action is typically a constitutional right (for example, the right to equal protection under the law or the right to be free from an unreasonable search under the Fourth Amendment to the United States Constitution). But, under the language of Section 1983, it could also be a right created by a federal statute. The question of whether a federal statute creates an individual right enforceable through Section 1983 turns out to be a difficult one—and the subject of a

fair amount of litigation. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (holding that the Family Educational Rights and Privacy Act of 1974 did not create an individual right enforceable under Section 1983).

Fortunately, the question has been answered by the federal courts in the context of ICAOS. In Doe v. Pennsylvania Board of Probation and Parole, the United States Court of Appeals for the Third Circuit concluded that ICAOS contains neither express "rights creating" language nor an implied intent to create a federal right or remedy. Therefore, Congress did not intend for it to give Compact supervised individuals enforceable individual rights. 513 F.3d 95 (3d Cir. 2008); accord *M.F. v. N.Y. Exec. Dep't Div. of Parole*, 640 F.3d 491 (2d Cir. 2011).

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5.2.1.2 Constitutional Violations Related to ICAOS

While the Compact does not create a private right of action, this does not leave supervised individuals without recourse under Section 1983. Instead, their claims must be framed as violations of constitutionally protected rights. There are numerous reported cases that illustrate the types of constitutional violations supervised individuals may allege in connection with their supervision under the Compact.

A leading case is *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 95, the Third Circuit case noted in the subsection immediately above. In Doe, a sex offender who transferred his probation and parole supervision from New Jersey to Pennsylvania filed a Section 1983 lawsuit against officials in the receiving state. He claimed that his equal protection rights were violated when he was subjected to community notification requirements more stringent than those applied to non-ICAOS supervised individuals in Pennsylvania. Specifically, Pennsylvania mandated that all out-of-state sex offenders submit to community notification, while individuals convicted of similar offenses within Pennsylvania were only required to do so if they were designated as sexually violent predators following a civil hearing. The court rejected Pennsylvania's justifications for the differential treatment, noting that the state's own compact-enabling legislation explicitly mandated that ICAOS supervised individuals be supervised under "the same standards that prevail for its own probationers and parolees." Id. at 108. Even applying the most deferential level of constitutional scrutiny (rational basis review), the court found no rational relationship between Pennsylvania's legitimate interest in public safety and its policy of disparate treatment for out-of-state supervised individuals. The court therefore held that Pennsylvania violated Doe's right to equal protection under the Fourteenth Amendment to the United States Constitution. Id. at 112.

In *Jones v. Chandrasuwan*, 820 F.3d 685 (4th Cir. 2016), the United States Court of Appeals for the Fourth Circuit ruled in a Section 1983 action that probation officers from the sending state (North Carolina) violated an ICAOS probationer's Fourth Amendment rights by seeking his arrest without a reasonable suspicion of a violation. The alleged violations (a failure to pay fines and costs, absconding) were not properly coordinated through the receiving state's (Georgia) ICAOS office, which led to a misunderstanding about the probationer's address and whereabouts. He was arrested and improperly detained for seven days. Notwithstanding the finding that the probation officers had violated the defendant's constitutional rights, the court ultimately determined that the officers were entitled to qualified immunity, as discussed below in section 5.3.6.

Of course, not every alleged violation will be an actual constitutional violation. For example, in *Brock v. Washington State Department of Corrections*, No. C08-5167RBL, 2009 WL 3429096, at *1 (W.D. Wash. Oct. 20, 2009), a parolee transferred supervision from Montana to Washington through the Compact. The supervised individual alleged, among other things, that Washington parole officials violated his federal constitutional rights (1) under the Due Process Clause by failing to hold a probable cause hearing on the alleged violation and (2) under the Confrontation Clause by offering hearsay testimony at

his violation hearing. The court concluded that the failure to hold a preliminary hearing—even if required by statute—did not give rise to a constitutional violation when the final violation hearing was held three days after the violation report was filed. And as for the alleged Confrontation Clause violation, the court found that Sixth Amendment confrontation rights apply in a criminal trial, not at a parole violation. Id. at *8. With no constitutional violation alleged, the court dismissed the suit without any need to consider whether the defendant-officials were protected by immunity or another defense.

A common situation that has generally not been considered a constitutional violation is when a receiving state fails to promptly release a supervised individual from detention after being informed that the sending state does not intend to retake them. In *Kaczmarek v. Longsworth*, 107 F.3d 870 (6th Cir. 1997) (unpublished), the United States Court of Appeals for the Sixth Circuit found no constitutional violation when a Compact probationer was held in the receiving state (Ohio) for more than a month after officials there learned that the sending state (Michigan) would not pursue retaking. The court rejected the supervised individual's argument that the delay violated his rights to due process and to be free from cruel and unusual punishment, noting that the sending state alone does not "call the shots" in Compact cases. Id. at *4. To the contrary, the receiving state was entitled to apply the same standards to Compact-supervised individuals that it would apply to its own supervisees—including detaining them when they had other charges pending, as was the case here. Id. at *2. See also *Perry v. Pennsylvania,* No. 05-1757, 2008 WL 2543119, at *1 (W.D. Pa. June 25, 2008) (a receiving state did not violate a supervised individual's constitutional rights by detaining him without bond during the pendency of charges in the receiving state, even after the sending state determined that it would not issue a probation warrant related to the receiving state charge).

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5.2.1.3 No Supervisor Liability under Section 1983

In general, Section 1983 liability will not be predicated solely on a theory of respondeat superior. For example, a chief probation officer or other supervisor or manager will not automatically be deemed vicariously liable simply because he or she sits higher on the chain of command than an officer who violated a supervised individual's constitutional rights. A supervisory official will be liable only when he or she plays an affirmative part in the complaint of misconduct. In Warner v. McVey, for example, the court dismissed a supervised individual's suit against the chair of the state parole board who had never met or communicated with the individual, rejecting their claim that the chair was "totally responsible for all of the subordinates that she oversees." No. 08-55 Erie, 2010 WL 3239385, at *1, *11 (W.D. Pa. July 9, 2010).

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5.2.1.4 No Substitute for Appeal or Habeas Corpus

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court clarified that a Section 1983 action should not be used to challenge the validity of a criminal judgment. If the alleged civil rights violation would be one that would render a conviction, sentence, or—in the case of a Compact supervised individual—a probation or parole revocation invalid, then it should be raised either as part of the criminal case or appeal or through habeas corpus. The distinction can be a fine one, though. For example, a Section 1983 action can be raised to challenge the use of improper revocation procedures in connection with the Compact. Compare *French v. Adams Cty. Det. Ctr.*, 379 F.3d 1158 (10th Cir. 2004) (Heck did not bar a Compact parolee's suit alleging that he was held for 73 days without a hearing or counsel, when the claim was being used to seek damages for using the wrong procedure, not for reaching the wrong result, and when success on the claim would not invalidate the underlying conviction), with *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977) (holding that challenges to specific conditions of probation in an ongoing case should be raised through a petition for habeas

corpus, not by a Section 1983 action).

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5.2.1.5 Official Capacity versus Individual Capacity

Plaintiffs can bring Section 1983 actions against defendants in their official capacity or in their individual capacity. Defendants sued in their official capacity will generally be immune from suits for monetary damages under the Eleventh Amendment to the United States Constitution, but that immunity will not necessarily bar a suit seeking injunctive or declaratory relief. The Eleventh Amendment will not bar a Section 1983 suit for monetary damages against an official acting in his or her individual capacity, but officials may be able to raise qualified immunity defenses in those cases. Qualified immunity bars recovery from officials to the extent that their conduct did not violate clearly established rights of which a reasonable person would have been aware. Immunity issues are discussed in detail in section 5.3.

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5.2.1.6 Persons Acting under Color of Law

There is rarely any doubt in the case law that probation and parole officials are “persons” and that, in performing their duties, they are acting under “color of law” within the meaning of Section 1983. The law also allows suits against municipalities and other local governments, but not merely because such an entity employs an officer who violates someone’s civil rights. Instead, a local government unit will be liable under Section 1983 only when the alleged violation was the product of an official policy or custom. The test for determining whether a local government can be deemed liable was spelled out by the Supreme Court in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

Occasionally a plaintiff will sue a probation or parole official under Section 1983, claiming that an injury or death caused by a supervised individual amounts to a violation of the constitutional rights of the victim or the victim’s family. In *Martinez v. California*, the Supreme Court held that California parole authorities could not be held responsible under Section 1983 for a murder committed by a parolee five months after his release. 444 U.S. 277 (1980). The supervised individual was in no sense an agent of the parole board, and the decedent’s death was “too remote a consequence of the parole officers’ action to hold them responsible under the federal civil rights law.” Id. at 285.

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5.2.2 State Tort Claims

In addition to civil rights lawsuits, supervised individuals (and others) sometimes file tort claims related to conduct arising under the Compact. In many cases, some form of immunity will apply, and questions related to immunity will generally turn on the state law of the sending or receiving state. Nevertheless, some of the cases in which tort claims have been raised are illustrative, highlighting the types of claims likely to arise in the context of the Compact.

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5.2.2.1 Tort Claims by Supervised Individuals

Supervised individuals will sometimes allege that officers were negligent in carrying out their duties

under the Compact. For example, in *Grayson v. Kansas*, No. 06-2375-KHV, 2007 WL 1259990, at *1 (D. Kan. Apr. 30, 2007), a probationer transferred under the Compact from Missouri to Kansas alleged that Kansas officials were negligent in detaining him for more than five months after a preliminary violation hearing without notifying Missouri officials that he was incarcerated. The court concluded that, as a matter of controlling Kansas law, the Kansas officials' failure to act did not implicate a specific duty necessary to sustain a negligence claim. Id. at *5. The court reached a similar conclusion with respect to officials in the sending state. Id. at *8. None of the officials committed an affirmative act or made a specific promise to the plaintiff that would suffice to create an exception under Kansas' public duty doctrine, which states that law enforcement officers owe their duty to the public at large and not to any particular individual, absent an affirmative act causing injury or a specific promise to the individual. (The public duty doctrine is discussed in greater detail in section 5.3.7.)

In a later order issued in the same case, the court again noted the lack of an affirmative act sufficient to breach Kansas' public duty doctrine. *Grayson v. Kansas*, No. 06-2375-KHV, 2007 WL 2994070, at *1, *10 (D. Kan. Oct. 12, 2007). The court also noted that a special duty can arise under Kansas law for non-discretionary responsibilities that an officer is required to carry out by law. Such a duty existed in the context of ICAOS Rule 4.109(a), which uses the word "shall" and thus requires a receiving state to notify a sending state of any violation within 30 calendar days of discovery of the violation. In this case, however, there was no dispute that Kansas officials fulfilled that duty, initially sending their violation report to Missouri in a timely fashion. Because no other nondiscretionary rule applied with respect to the supervised individual's lengthy incarceration after the initial notification, there was no additional duty, and therefore no actionable negligence. Still, it is important to note the distinction between discretionary and non-discretionary acts, which can play a role in the defenses available to officers sued in tort. (That distinction is discussed in section 5.3.2.)

Other cases have found that the language of the Compact and related state compact-enabling statutes can give rise to a duty of care supporting tort liability. In *Paull v. Park County*, 218 P.3d 1198 (Mont. 2009), a Compact probationer was injured when the contract van service hired to transport him from the receiving state (Florida) back to the sending state (Montana) for a violation hearing crashed, killing one of the drivers and injuring the probationer. The probationer sued Montana officials, alleging that the crash and his injuries were caused by the driver's negligence and that the drivers were agents of the state probation officials who had hired them to do the work. (The facts of the crash were extraordinary. The driver lost control of the van and rolled it as he was swerving, trying to spill plastic containers into which the shackled prisoners had urinated when the drivers would not allow them to make toilet stops.)

The Supreme Court of Montana held that under the language of Montana's compact-enabling statute, the state had a responsibility for its probationers and a responsibility for returning them to Montana when necessary. The court also held that the transportation of prisoners was an inherently dangerous activity and that, therefore, under Montana law, a governmental unit that contracts to transport prisoners may be held vicariously liable for injuries caused by an independent contractor carrying out the activity.

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5.2.2.2 Tort Claims by Others

An unfortunate fact pattern that arises from time to time is when a Compact supervised individual causes the injury or death of a victim. Victims of those incidents (or their family members or estate) will sometimes raise tort claims against correctional or judicial officials related to those injuries or deaths.

In some of those case, courts will find that the officials' actions were not the proximate cause of the harm done to the victim, because the link between state action and the harm is too attenuated. See, e.g., *Goss v. State*, 714 A.2d 225 (N.H. 1998). Other courts have established a forgiving standard of care for officials, finding them liable only for the "grossly negligent or reckless release of a highly dangerous

prisoner." See *Grimm v. Ariz. Bd. of Pardons & Parole*, 564 P.2d 1227 (Ariz. 1977). And finally, in many cases, resolution of the case will turn on the various immunities enjoyed by the defendant-officials, discussed in section 5.3.2. See, e.g., *Hodgson v. Miss. Dep't of Corr.,* 963 F. Supp. 776 (E.D. Wis. 1997) (a Compact case in which the sending state officials were deemed immune from a wrongful death suit filed by the father of a woman murdered in the receiving state).

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5.2.3 Claims under the Compact Itself

Some federal statutes have their own enforcement mechanism through an express or implied cause of action in the federal statute itself. See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (applying the test through which a court determines whether a statute creates a freestanding private right of action and determining that no such right of action exists to enforce disparate-impact regulations issued under Title VI of the Civil Rights Act of 1964). Courts have concluded that nothing in the Interstate Compact agreement or the underlying federal statute reveals any intent by Congress or the compacting states to create private rights or remedies for supervised individuals. *M.F. v. N.Y. Exec. Dep't Div. of Parole*, 640 F.3d 491 (2d Cir. 2011). Along similar lines, a claim styled as one against the Compact itself will be dismissed. *Flinn v. Jones*, No. 3:17cv653-LC-CJK, 2018 WL 3372043, at *1, *2 (N.D. Fla. June 27, 2018) ("Any claim under the ICAOS, or against the 'Florida Interstate Compact,' therefore, is due to be dismissed.").

Supervised individuals occasionally argue that the Compact is a contract that creates enforceable rights for third-party beneficiaries—namely, the supervised individuals themselves. Though courts (including the Supreme Court) agree that interstate compacts are contracts, *see, e.g., Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275 (1959), they have not found any express or implied intent by Congress and the compacting states that supervised individuals are intended third-party beneficiaries under ICAOS, see *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 107 (3d Cir. 2008) ("The Compact speaks of cooperation between states, protection of the rights of victims, regulation and control of supervised individuals across state borders and the tracking, supervision and rehabilitation of these individuals. . . . Doe and similarly situated parolees are not beneficiaries of this Compact; they are merely the subjects of it."); *Cuciak v. Ocean Cty. Prob. Office*, No. 08-5222 (MLC), 2009 WL 1058064 (D.N.J. Apr. 20, 2009) (ICAOS creates no private right of action through which a probationer can complain about one state's failure to effectuate a prompt transfer to another state—which in any event is not ever required under the Compact rules).

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5.3 Immunity and Related Defenses

Under the doctrine of sovereign immunity, the government may not be sued without its consent. The concept flows from the common-law notion that the "the king can do no wrong" and that a lawsuit could not be brought against him in his own courts. Through an overlapping web of federal, state, and common-law rules, judicial and correctional officials and employees will often be immune from suit for their actions taken in relation to the Compact.

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5.3.1 Eleventh Amendment Immunity

Under the Eleventh Amendment to the United States Constitution, "[t]he Judicial power of the United

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment thus bars most lawsuits seeking damages from states and from units of state government in federal court.

In many instances, applying this rule is straightforward. For example, when a supervised individual sues the State of Washington and the Washington Department of Corrections in federal court for damages related to an alleged civil rights violation, the court will typically dismiss the claims against those defendants without hesitation. They are immune from such suits under the Eleventh Amendment. *Brock v. Wash. Dep't of Corr.,* No. C08-5167RBL, 2009 WL 3429096, at *1 (W.D. Wash. Oct. 20, 2009); see also *Warner v. McVey,* No. 08-55 Erie, 2010 WL 3239385, at *1 (W.D. Pa. July 9, 2010) (finding the Pennsylvania Parole Board immune from suit on Eleventh Amendment grounds in a case involving an interstate transfer from Iowa to Pennsylvania).

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5.3.1.1 Official Capacity versus Individual Capacity

Eleventh Amendment immunity also extends to state government officers and employees to the extent that they are sued in their official capacity, but not to suits against them in their individual capacity. The distinction between official-capacity and individual-capacity lawsuits can be confusing.

Individual-capacity lawsuits are those seeking to impose personal liability on government officers or employees for actions taken under color of state law as a part of their government work. They are typically suits seeking damages to be paid from the pocket of the officer himself or herself (or from applicable insurance policies). Officers and employees are not immune to such suits under the Eleventh Amendment, but they might enjoy one of the common-law immunities discussed below.

By contrast, official-capacity lawsuits are actually suits against the entity of which the officer is an agent (the state or state agency), seeking a recovery from the state treasury. See *Kentucky v. Graham*, 473 U.S. 159 (1985). The naming of a specific officer in his or her official capacity is merely a pleading device that offers a way around the language of the Eleventh Amendment; it does not necessarily pierce the immunity afforded by the amendment. State officers and employees sued in their official capacity are immune from lawsuits seeking monetary damages. *Ford Motor Co. v. Dep't of the Treas.,* 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."). Applying that rule to ICAOS, suits seeking monetary damages from state probation officers and administrators acting in their official capacity typically will readily be dismissed on Eleventh Amendment grounds. *See, e.g., Hankins v. Burton,* No. 4:11-cv-4048-SLD-JAG, 2012 WL 3201947, at *1, *6 (C.D. Ill. Aug. 3 2012) ("Thus, as a state agency . . . . [t]he Missouri Department of Correction is therefore immune from this suit.").

Importantly, the Eleventh Amendment does not preclude suits against state officers and employees in their official capacity seeking prospective injunctive relief—that is, a court order requiring the defendant to take, or to refrain from taking, certain actions to protect the plaintiff's rights. *Ex parte Young,* 209 U.S. 123 (1908). Thus, a federal court will hear a supervised individual's suit seeking an injunction of an ongoing constitutional violation. *Edelman v. Jordan,* 415 U.S. 651 (1974).

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5.3.1.2 No Protection for Local Governments

Eleventh Amendment immunity does not extend to the political subdivisions of a state (its municipalities

and counties) or to the officers and employees of those subdivisions. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). Those entities may therefore be sued in federal court as far as the Eleventh Amendment is concerned, although other immunities, discussed below, may apply.

Not every state organizes its probation and parole officers in the same way, and in some cases, it will not be clear whether they are state officers or local officers for the purposes of an Eleventh Amendment analysis. For instance, in Hankins, discussed in the subsection immediately above, the court concluded that "county" probation offices in Arkansas were actually local branches of a state agency and that officers sued in their official capacity under Section 1983 were therefore immune from suit under the Eleventh Amendment. 2012 WL 3201947, at *5.

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5.3.1.3 Waiver of Eleventh Amendment Immunity

There are several ways a state might waive its Eleventh Amendment immunity from suit in federal court. First, immunity can be waived by express state law. It can also be waived by voluntary participation in a federal program that expressly conditions state participation on the state's consent to suit in federal court. *See, e.g., Westinghouse Elec. Corp. v. W.V. Dep't of Highways,* 845 F.2d 468 (4th Cir. 1988). Finally, it can be waived when a state removes a case from state court to federal court. *See, e.g., Grayson v. Kansas,* No. 06-2375-KHV, 2007 WL 1624630, at *1 (D. Kan. June 4, 2007).

It is clear, though, that no waiver of immunity should be inferred from the mere fact of a state's participation in an interstate compact. In *Hodgson v. Mississippi Department of Correction,* the court rejected the plaintiff's argument that a waiver of sovereign immunity could be inferred for any state that joined the Uniform Act for Out-of-State Parolee Supervision. 963 F. Supp. 776 (E.D. Wis. 2002).

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5.3.2 State Sovereign Immunity

State sovereign immunity is, as noted above, the doctrine that prevents a state from being sued in its own courts without its consent. It will generally be a matter of state law, and of course not every state is the same. Many states have narrowed or waived their sovereign immunity to some degree through the purchase of liability insurance or by the enactment of a state tort claims act, which allows certain suits against the state and its officers in certain circumstances.

An application of state sovereign immunity in a case arising under the Compact can be seen in *Hodgson v. Mississippi Department of Corrections.* 963 F. Supp. 776 (E.D. Wis. 1997). As discussed in section 5.2.2.2, Hodgson involved a woman who was murdered in Wisconsin by a Mississippi parolee being supervised there under the Compact. The victim's father sued various Mississippi officials in tort for wrongful death.

As state officials acting in their official capacities, the Mississippi officials were deemed immune from suit. Under the applicable Mississippi law—as applied by the federal court in Wisconsin, where the suit was filed—state officials are immune from tort suits for their "discretionary" acts (those requiring personal deliberation, decision, and judgment) but not for their "ministerial" acts (those duties positively imposed by law and required in specified circumstances). The court concluded that the officials' acts under the Uniform Act for Out-of-State Parolee Supervision were discretionary, and thus found them to be immune from suit on the plaintiff's wrongful death claim. Id. at 789. (The father's claim against the Mississippi Department of Corrections and its officers in their official capacities was also deemed barred in federal court under the Eleventh Amendment.)

The distinction between discretionary and ministerial (some states use different terms, such as "operational") acts is not unique to Mississippi, and it could have a bearing on the sovereign immunity analysis under many states' tort laws. In those states, an official doing work related to the Compact would be likely to have stronger immunity protection when carrying out discretionary functions under the Compact, such as discretionary transfers under ICAOS *Rule 3.101-2* or the imposition of conditions under *Rule 4.103*, than he or she would carry out functions susceptible to being interpreted as ministerial/operational, such as a sending state's failure to issue a warrant within fifteen (15) business days of a supervised individual's failure to appear as required by ICAOS *Rule 2.110*.

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5.3.3 Immunity in Another State's Courts

Neither the Eleventh Amendment nor other formulations of sovereign immunity bar a suit against a state in the courts of another state. *Nevada v. Hall,* 440 U.S. 410 (1979). In *Mianecki v. Second Judicial Court of Washoe County,* 658 P.2d 422 (Nev. 1983), sovereign immunity did not prevent a tort suit in Nevada against the state of Wisconsin and one of its ICAOS administrators who failed to notify a transferring probationer's new housemates of his criminal and sexual history, leading to the sexual abuse of their minor son. Under *Nevada v. Hall*, Wisconsin and its administrator were not immune from suit in Nevada's courts. The Supreme Court of Nevada also held that Nevada was not required to grant full faith and credit to the immunity the defendants would have enjoyed in Wisconsin's courts. On the contrary, Nevada law applied in this case. Under Nevada law, the failure to notify the victim's family about the nature of the supervised individual's prior offense was considered an "operational" deficiency (i.e., not discretionary), which meant that sovereign immunity would be waived. *Mianecki,* 658 P.2d at 424.

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5.3.4 Judicial Immunity

Judges have absolute immunity from liability as long as they are performing a judicial act and there is not a clear absence of all jurisdiction. *Stump v. Sparkman,* 435 U.S. 349 (1978). A judge is not deprived of absolute immunity from liability for damages because an action he or she took was in error, illegal, or even done maliciously. *Mireles v. Waco,* 502 U.S. 9 (1991). Judicial immunity offers protection from suits for monetary damages, but it will not necessarily bar prospective injunctive relief. *Pulliam v. Allen,* 466 U.S. 522 (1984).

Under that framework, a federal court found that a sentencing judge was absolutely immune from a lawsuit brought by a Compact-supervised individual who claimed that the judge's sentence infringed on his rights by hindering his transfer to his home state of Alabama. *Flinn v. Jones,* No. 3:17cv653-LC-CJK, 2018 WL 3372043, at *1, *3 (N.D. Fla. June 27, 2018).

Judicial immunity is not limited to judges; it can extend to others who perform functions "intimately related to" or that are "an integral part of" the judicial process. *Ashbrook v. Hoffman,* 617 F.2d 474 (7th Cir. 1980). For example, a hearing officer holding ICAOS preliminary violation hearings was deemed to have absolute judicial immunity to the extent that she was performing a function previously assigned to judges. *Brock v. Wash. Dep't of Corr.,* No. C08-5167RBL, 2009 WL 3429096, at *1, *9 (W.D. Wash. Oct. 20, 2009).

Judicial immunity can, in certain circumstances, extend to probation and parole officers. For example, an officer might have absolute judicial immunity for activities related to the preparation of a pre-sentencing report, *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970), or when taking actions necessary to carry out and enforce the conditions of probation imposed by the court, see *Acevedo v. Pima Cty. Adult*

Prob.Dep't, 690 P.2d 38 (Ariz. 1984). More generally, it has been said that probation and parole officers are absolutely immune from suits challenging conduct intimately associated with the judicial phase of the criminal process. *Copus v. City of Edgerton,* 151 F.3d 646 (7th Cir. 1998) (probation officer).

However, not all officer duties will be accorded judicial immunity. In *Grayson v. Kansas,* No. 06-2375-KHV, 2007 WL 1259990, at *1 (D. Kan. Apr. 30, 2007), a Compact supervised individual sued probation officials in the receiving state under Section 1983 for violating his due process rights. The state's ICAOS administrator, deputy administrator, and two probation/parole officers argued that they were entitled to absolute judicial immunity from liability stemming from the performance of their duties related to the judicial process. The court disagreed, noting that the functions of a parole officer were too far removed from the judicial process to be accorded absolute immunity. *Id. at* *7 (citing Mee v. Ortega, 967 F.2d 423 (10th Cir. 1992)); see also *Russ v. Uppah,* 972 F.2d 300 (10th Cir. 1992).

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5.3.5 Prosecutorial Immunity

Like judges, prosecutors have absolute immunity from lawsuits seeking monetary damages. *Imbler v. Pachtman,* 424 U.S. 409 (1986). That immunity allows prosecutors to exercise the independence of judgment essential to their work—and to avoid the deluge of retaliatory lawsuits that criminal defendants would undoubtedly file against them were they not immune. Prosecutorial immunity extends to probation violation proceedings, *Hamilton v. Daley,* 777 F.2d 1207 (7th Cir. 1985), including proceedings related to a probationer who transferred under the Compact, *Tobey v. Chibucos,* 890 F.3d 634 (7th Cir. 2018).

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5.3.6 Qualified Immunity

Government officials sued in their individual capacity have what is known as qualified immunity from suits for damages to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). A qualified immunity analysis thus asks two questions: (1) was there a violation of a right?; and, (2) was the right at issue "clearly established," such that it would have been obvious to a reasonable officer in the situation that his or her conduct was unlawful? Qualified immunity is a high hurdle for plaintiffs to overcome; it has been said to "provide ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335 (1986).

Courts often engage in a circumstance-specific inquiry when analyzing whether a right is clearly established for qualified immunity purposes. General awareness of the Bill of Rights will not suffice to put an officer on notice that his or her acts violated a clearly established right. Instead, the analysis typically focuses on whether case law from the Supreme Court, the controlling federal circuit, or the state high court had already decided a similar case or articulated a clearly governing rule. Few ICAOS cases have reached those courts, and even fewer have involved rules the court deemed "clearly established" in the manner necessary to overcome the defendants' qualified immunity protection.

For example, in *Jones v. Chandrasuwan,* 820 F.3d 685 (4th Cir. 2016), the United States Court of Appeals for the Fourth Circuit concluded that receiving state officers violated a supervised individual's constitutional rights by seeking his arrest without reasonable suspicion. However, because the level of suspicion necessary to arrest a probationer had not been established "beyond debate" by the Supreme Court or the Fourth Circuit, the law was not sufficiently clearly established to put a reasonable official on notice that he or she was violating the right. The officers were therefore entitled to qualified immunity. Id. at 696.

In order to be “clearly established” for purposes of a qualified immunity analysis, the right in question must have been clearly established at the time of the alleged violation. Resolution of the right through other case law decided after the alleged violation will not render the right clearly established. For instance, in *Warner v. McVey,* 429 F. App’x 176, 178 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit held that a sex offender’s constitutional right to due process before being classified as a sex offender was not clearly established at the time when Pennsylvania probation officials made that determination without a hearing. The appellate court case clarifying the scope of the right—*Renchenski v. Williams,* 622 F.3d 315 (3d Cir. 2010)—was not decided until after the individual was designated a sex offender, and so a reasonable official would not have been on notice of the rule.

None of this is to say that no constitutional right is clearly established in the context of the Compact. For example, in **Grayson v. Kansas,** No. 06-2375-KHV, 2007 WL 1259990, at *1 (D. Kan. Apr. 30, 2007), the court determined, based on relevant federal circuit precedent, that the continued detention of a supervised individual, which a reasonable officer would recognize as unlawful, constituted a violation of the individual's due process rights. The officers therefore were not entitled to qualified immunity—although they later succeeded in showing that they did not have any personal participation in the actual violation.

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5.3.7 The Public Duty Doctrine

Some states recognize the so-called public duty doctrine—the idea that a government official has no legal duty to protect an individual citizen from harm caused by a third person. The rule recognizes the limited resources of law enforcement and a refusal to expose the police and others to liability for every criminal’s act. The doctrine applies to probation officers in some jurisdictions. In North Carolina, for example, the public duty doctrine barred a claim against a probation officer who failed to take action when a supervised individual’s electronic leg band broke and the individual went on to kill a woman. *Humphries v. Dep’t of Corr.,* 479 S.E.2d 27 (N.C. Ct. App. 1996).

There are exceptions to the public duty doctrine in the jurisdictions where it exists. In North Carolina, a promise by law enforcement to protect a specific person can give rise to a special duty that overrides the public duty doctrine. *See, e.g., Braswell v. Braswell,* 390 S.E.2d 752 (N.C. Ct. App. 1990). Additionally, certain categories of people fall within a special relationship exception to the doctrine, such as police informants. In the probation context, a probation officer might be deemed to have a special relationship with the children who live in the residence approved by the officer if the supervised individual assaults those children. *Blaylock v. N.C. Dep’t of Corr., Div. of Cmty. Corr.,* 685 S.E.2d 140 (N.C. Ct. App. 2009).

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5.3.8 Personal Jurisdiction

The Compact necessarily involves supervised individuals moving across state lines. Therefore, considerations of different courts’ personal jurisdiction over the parties to a suit might come into play. Unfortunately, different courts have reached different results when considering the role of the Compact in evaluating their jurisdiction over the defendants to a suit.

In *Hansen v. Scott,* 645 N.W.2d 223 (N.D. 2002), the Supreme Court of North Dakota concluded that its courts had personal jurisdiction over Texas officials sued for their failure to fully disclose the criminal history of a Texas parolee who transferred to North Dakota under the Compact and wound up killing two people there. The court held that by affirmatively asking North Dakota to supervise the parolee under the Compact, the Texas officials purposefully availed themselves of the privilege of conducting

activities in North Dakota, such that they could reasonably anticipate being hauled into court there—as they were when they were sued by the victims' children.

By contrast, in *Hankins v. Burton,* No. 4:11-cv-4048-SLD-JAG, 2012 WL 3201947, at *1 (C.D. Ill. Aug. 3 2012), a federal court in the receiving state (Illinois) determined that it did not have personal jurisdiction over probation officials from other states (Arkansas and Missouri) who were being sued under Section 1983 for allegedly keeping the probationer under supervision beyond her lawful supervision term. The court stated that the mere existence of a compact between the states for transferring probationers did not constitute purposeful availment by the defendants of the privilege of conducting activities in Illinois. Therefore, exercising personal jurisdiction over them would violate due process. Id. at *6.