

## WHITE PAPER

### LEGAL IMPLICATIONS OF REMOTE HEARINGS IN RELATION TO ICAOS RULES

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

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

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

#### **Sex Offenders**

One glaring way this issue presents itself is in the context of sex offenders who are already residents of a receiving state—that is, an offender commits an offense in the sending state, but is already physically residing in the receiving state. If the offender is not in custody and the sending state uses remote sentencing hearings, the

question becomes whether ICAOS Rules permit the offender to remain in the receiving state, or if he or she must nonetheless physically travel to the sending state. Fortunately, the Rules offer some guidance for member states to consider in this analysis.

Rule 3.101-3(f), fortunately, expressly contemplates the possibility that some sex offenders may currently reside in the receiving state at the time of sentencing. This provision specifically makes consideration for “[r]eporting instructions for sex offenders living in the receiving state at the time of sentencing,” and cross-references Rule 3.101-1 and Rule 3.103.<sup>1</sup> In this sense, sex offenders are to be treated similarly to the other classifications of offenders enumerated within Rule 3.101-1. There are, of course, added considerations applicable specific to sex offenders—*i.e.*, registration, suitability of the residence, etc.—but the Rules essentially treat sex offenders in this scenario the same as other offenders who, for one reason or another, are already physically present in the receiving state at the time of sentencing.

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

Altogether, ICAOS Rules do envision scenarios in which sex offenders are *already* residing in the receiving state. By cross-referencing the Rules’ treatment of other qualified individuals who either currently reside in a receiving state or require an expedited transfer, the Compact does provide some guidance for this situation. The question then becomes whether the offender must travel to the sending state

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

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

when he or she has not been arrested and the sending state intends to conduct the offender's sentencing remotely, and in this sense, this becomes less of an issue specific to sex offenders, but more broadly applicable to *any* offender facing charges in a sending state but currently residing elsewhere. Here, it is again important to remain mindful of the purposes of the Compact and the twin goals of public safety and cooperation between sending and receiving states. Member states should encourage open dialogue between state court systems to ensure that, in this context, the states are clear as to who possesses supervisory jurisdiction over the offender.

### **Absconders**

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

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

This understandably results in difficulties and potential inconvenience for both sending and receiving states, as well as the offenders themselves. On one hand, Rule 5.103-1 promotes the sending state's accountability for offenders convicted and sentenced under its laws by respecting the sending state's jurisdiction and not overwhelming a receiving state that is supervising the offender as a result of its participation in the Compact. On the other hand, the Rule seemingly makes no distinction between the severity of an offender's violation or whether the sending state is likely to simply resume supervision in the receiving state. In many respects, these competing interests have long persisted before the rise of remote hearings, which have only exacerbated those concerns. Short of amending the Rules, however, Rule 5.103-1(c) requires physical retaking of an absconding offender when probable cause of a violation is established.

### **Conclusion**

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

### Q & A

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

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

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

A: No, the answer provided only addresses whether the offender's presence in a receiving state *at sentencing* violates the rules, addressing 3.101-1 (a) only. Prior to sentencing, the rules do not apply. Therefore, the rules cannot dictate procedures for sentencing, including whether remote or in-person sentencing occurs.

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

A: A revision to Rule 3.101-3, effective April 1, 2020, clarifies the protocol for issuing reporting instructions for sex offenders '*living in the receiving state at the time of sentencing.*' Having established that remote hearings are allowable in this circumstance, it is important states remain mindful of the purposes of the Compact and the twin goals of public safety and cooperation between sending and receiving states. When issuing reporting instructions for sex offenders, the rule makes it incumbent on receiving states to evaluate how they handle similar sex offenders sentenced in their jurisdiction to ensure consistent treatment and procedures are applied. For example, immediate denial of reporting instructions would not be appropriate in such instances

where a similar sex offender convicted in the receiving state may be afforded time to secure a new residence that is not in violation of sex offender laws. Cooperation/communication between sending and receiving states should be of utmost importance in these matters as to ensure the sex offender is not displaced or subjected to unnecessary movement/return.

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

A: While ICAOS rules do allow for remote hearings to adjudicate a violation, it is important for states to cooperate, involving key stakeholders and decision makers when navigating these situations. As a receiving state may require physical retake of an offender under the rules in certain violation situations, knowing the sending state's intent in disposing of a violation is an important consideration. For example, if it is unlikely the sending state will pursue revocation for the violation and a plan of supervision exists in a receiving state, retaking the offender just to simply re-transfer back to a receiving state may not conform to the Compact's goals. For analysis on offenders transferring from your state after being retaken, see the ['Offenders Retaken Then Re-transferred'](#) dashboard.

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

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