

# INTERSTATE COMPACTS - THE NEXT FRONTIER FOR ADMINISTRATIVE RULEMAKING

*By Kent W. Bishop\**

## **Introduction**

In the last week of January 2001, I was reviewing newly submitted Utah legislative measures, looking for proposed regulatory policy and rulemaking provisions that would impact the state's agencies. One morning, I opened up a bill to create a new Interstate Compact for Adult Offender Supervision. It contained language which delegated rulemaking functions but was worded differently than any compacts I had seen before. Where most interstate compacts impliedly authorized adoption of rules to implement substantive functions, this new Adult Offender Compact expressly mandated the adoption of such rules – according to procedures that “substantially conform to principles of the federal Administrative Procedure Act.”

The prescription that some state-to-state rulemaking actions should conform to the federal APA caught my attention. I wondered if states could conduct interstate-agreement functions under the federal APA. Could the federal APA's authority over federal rulemaking actions be applied to state rulemaking actions? And further, since publication of rules is required but no reference was made to any particular media, I wondered if the Adult Offender Compact agency would be required to publish rules in the federal register, or would some other publication be acceptable – such as the internet?

## **Looking for Answers**

The sponsoring agency quickly referred me to Rick Masters, outside counsel for the Council of State Governments and legal counsel for the drafting team. Rick answered some questions and sent some materials. He pointed out that interstate compacts are agreements between states that commit time and resources to manage joint functions or resolve problems shared by states and that if a state adopts a compact, that instrument becomes a binding contract upon future state legislatures.<sup>1</sup>

I later learned that the rulemaking language for the Adult Offender Compact had been lifted from a compact that had only been adopted by one state and would likely lapse. When I asked Rick Masters why reference was made to the federal APA rather than a state APA, he said that no one state had the “best” APA and that a single state's APA would not be acceptable to other states. I asked if the drafters had obtained any input about federal APA theory and practice from an administrative-law practitioner or scholar. I then asked if his group had considered using a separate compact as an APA for all compacts. Rick paused, and answered: “Why didn't

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<sup>1</sup> The states have devised about 195 Interstate Compacts since 1783. And although the U.S. Constitution provides that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State,” the U.S. Supreme Court has held that congressional approval is needed only when a compact increases political power in the States in a manner that encroaches upon or interferes with the supremacy of federal law. *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 707-08 (1981).

I think of that?” That was a defining moment, and I realized for the first-time that I had stumbled onto a difficult policy issue.

Rick then asked me a question: Would I join their next compact drafting team to re-write the Interstate Compact on Juvenile Offenders with about 25 persons from state and federal offices. Upon joining that group, we looked at the federal APA and the 1981 Model State Administrative Procedure Act. We finally agreed on language that has the Juvenile Offender Compact rules conforming with principles of the 1981 MSAPA, “or any other Administrative Procedure Act as selected by the Commission.” As of this date, some states have now adopted the Juvenile Offender Compact, and it is being introduced in others.

## **Breaking with the Past**

In 2002, another group drafted a new Compact on Insurance Product Regulation and took the same rulemaking approach our Juvenile Offender Compact used. So now, there are four interstate compacts, with one having already been adopted, that mandate adoption of rulemaking procedures. To my way of thinking, this signals an important change in compact law. A whole new body of administrative rulemaking is emerging, and while these four compacts may lack some of the structure and process typical of most state’s notice and comment methods, this is a new direction for interstate compact rulemaking.

In the past, for the most part, rules and/or policies issued under most interstate compacts normally were not the product of administrative law methodology. I looked at several older compacts and noted three fairly typical rulemaking patterns:

- (a) Most early compacts empowered their commissions to administer their substantive functions, but rulemaking and or other similar regulatory processes were not prescribed by those compacts. Examples include the Interstate Compact on Corrections and the Interstate Compact on Civil Defense.
- (b) Later compacts, into the late 1950’s, rarely mentioned rules. They only required a compact’s policies to comply with each adopting state’s statutes, rules, or regulations pertinent to their implementation. The Interstate Compact on Wildlife Violators is an example.
- (c) Recent compacts, through the 1980’s, tended to provide for administrative regulations, but without specifying rulemaking procedures. Examples include the Interstate Compact on Vehicle Equipment Safety and the Commission for Higher Education.

When courts upheld rules under these prior interstate compacts, they found implied rulemaking authority to carry out the substantive functions enumerated by each particular compact – essentially the “contract law” approach. The new Adult Offender Compact diverts from that mode and specifically requires that its Commissioners make rules to implement the act.

Why have drafters of four new interstate compacts turned to express rulemaking authority? One major reason stands out: lack of enforcement authority. During our first Juvenile Offender Compact drafting meeting, delegates simply could not express enough of their complete and utter dissatisfaction with how the current Juvenile Offender Compact is failing the states. Basically, it is not being upheld by some states who feel they can choose when NOT to

comply.

This enforcement-authority question was the major reason for changing the old Adult Probationer/Parolee Compact. In the mid-1980's, when the former Interstate Compact for Supervision of Parolees and Probationers was first being considered for revision, having been adopted in 1937, there was much discussion of a problem that had surfaced over the years. When one state refused to cooperate, the Probationer/Parolee Compact offered the "state-having-jurisdiction" little or no relief. Frustrated, the National Institute of Corrections in 1986 funded a Commission to Re-Structure the Probationer/Parolee Compact, and in their study, they identified eight major enforcement gaps, six of which could be addressed through the provision of express rulemaking authority:

1. Outdated client eligibility requirements, which preclude acceptance of certain client groups...(i.e., misdemeanants);
2. Inefficient, inflexible and cumbersome operational procedures, resulting in delays in transfers, arrests, and program delivery;
3. A lack of authority in some states to arrest out-of-state violators;
4. An inefficient interstate parole and probation violation process;
5. A lack of uniformity in administration of preliminary revocation hearings; and
6. Conflicting state policies in the areas of misdemeanor supervision, administration of supervision fees and supervision of certain difficult client groups (for example, clients with diseases like AIDS).

## **A Question of Force of Law**

I suggest that the Adult Offender Compact drafters have turned to federal APA notice and comment rulemaking because of two basic reasons: (a) requiring notice & comment and publication in a document like the federal register will garner more deference by courts; and (b) requiring that the promulgation of rules substantially conform to an Administrative Procedure Act will help impart the force of law.

It is the concept that a compact rule needs to have the force of law that is of interest here. Let me focus on that for a moment. When I informed my office's legal counsel that the Adult Offender Compact was seeking an increased force of law, he noted that if administrative rulemaking was adopted by states for implementing compacts, then other states might possibly gain enforcement powers against our own state. He wasn't sure he liked the idea of another state being able to bring stronger enforcement action against our state. But let me suggest that his issue cuts both ways. If a state doesn't want to enforce certain mutually-agreed-upon solutions to common problems, then I would argue that state should not join a compact in the first place. If one state finds that another state has the authority to take them to court over an issue of non-compliance, and wants to avoid the consequence of that policy, then that state should take steps to withdraw from that compact.

## **Seeking Uniformity**

In wrestling with these questions, I noted that while APA-type rulemaking may be an

option for newly enacted compacts, there are another 190 plus interstate compacts currently in force that do not mandate administrative rulemaking methods. How can an APA rulemaking option be provided to agencies operating under those compacts? At some point in my discussion with Rick Masters, I concluded that a new APA could be drafted using the best features of the federal APA, the 1981-MSAPA and existing state APAs. It could also take advantage of much of the rulemaking scholarship from over the past 25 years.

If such a new APA were prepared for interstate compacts, I see two options: Option-1 – It could be adopted by the states as a separate interstate compact on administrative procedure covering all compacts that any one state has entered into. Such a compact APA would be a controlling act, would delegate rulemaking authority, would define time-frames and filing calendars, and provide notice and comment procedures similar to APAs already adopted by the 50 states. But the downside is clear. A state would need to adopt this new APA compact through legislation. What happens if one or more states fail to adopt? Would Congress have to consent to such an APA compact?

Option-2 – The new draft APA language could become a “rule on rules.” This approach would allow each of the existing 190+ compact commissions to adopt the language as a rule or by-law. But there is a downside here as well. At least in some states, a legal “cloud” might exist. Courts might hold that because an APA rulemaking method was not included in the wording of these older compacts, and didn’t even exist as an option at all prior to 1946, many compact agencies may not have the option of adopting APA-type procedures without passing an amendment to the compacts themselves.

## **Conclusion**

It is not clear to this author that wholesale adoption of the federal APA is well suited to serving the needs of an interstate compact agency. Likewise, exclusive application of the 1981 State Model APA may be equally unsuitable. Drafting some other APA holds promise but is not risk free. To give meaningful consideration to these options – and to address other deficiencies in compact administrative law in the areas of adjudication, judicial review, openness and management – the Section of Administrative Law and Regulatory Practice has embarked on a project to research and draft a model APA for interstate compacts. Approximately forty volunteers in the legal profession – from academia, government and private practice – have joined together in an effort to survey case law on interstate compact procedure, review the provisions of existing APAs at the federal and state levels, and examine current rules and regulatory policies of compact agencies. The project is co-chaired by myself and Bill Morrow, general counsel of the Washington Metropolitan Area Transit Commission, and is expected to take two to three years. Anyone interested in joining should contact Bill Morrow at [wmatc@erols.com](mailto:wmatc@erols.com), or the author at [kbishop@utah.gov](mailto:kbishop@utah.gov).