



## How to Support Requests for Compassionate Release During COVID-19: FAQ for Physicians

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### Background information

#### What is Amend?

Amend at UCSF is a health-focused correctional culture change program led by experts in medicine, infectious diseases, public health, and correctional health and policy. Amend provides correctional leaders, policymakers, and advocates evidence-based tools in an effort to better protect the health and dignity of those who live and work in jails and prisons during the COVID-19 pandemic.

#### What is compassionate release?

“Compassionate release” describes the authority of federal judges to release people incarcerated in federal prisons from their sentence or to reduce the length of their sentence based on “extraordinary and compelling reasons” including terminal illness, age, and disability. Under the First Step Act of 2018, people incarcerated in federal prisons were allowed for the first time to themselves initiate a request (“motion”) for compassionate release. Prior to the First Step Act, only the federal Bureau of Prisons (BOP) was authorized to move the court for reductions of previously imposed sentences. Because the BOP rarely made such motions, Congress granted incarcerated individuals the right to make these requests themselves. Since the COVID-19 pandemic, over one thousand motions for compassionate release have been granted by federal judges.

#### What is the Compassionate Release Clearinghouse?

In early 2019, Congress amended the law to allow people incarcerated in federal prisons to request that the court that sentenced them reduce their sentence based on “extraordinary and compelling reasons.” In response, Families Against Mandatory Minimums (FAMM), the National Association of Criminal Defense Lawyers (NACDL), and the Washington Lawyers Committee for Civil Rights and Urban Affairs (WLC) formed the Compassionate Release Clearinghouse. The Clearinghouse connects, trains, and supports pro bono lawyers to represent eligible individuals seeking compassionate release.



## **What are the types of “extraordinary and compelling reasons” justifying consideration for compassionate release?**

In the years before the First Step Act, the United States Sentencing Commission issued a guideline identifying “extraordinary and compelling reasons” for release or sentence reduction. These circumstances included the person in prison developing a terminal illness or becoming unable to care for themselves in prison. After the COVID-19 pandemic, federal judges throughout the country began to consider an incarcerated individual’s likelihood of suffering serious complications or death from COVID-19 as an “extraordinary and compelling reason” justifying consideration for compassionate release.

## **How does the compassionate release process work?**

A person incarcerated in federal prison must file a motion for compassionate release with the federal court that sentenced them, after they have tried and failed to get the BOP to make the motion on their behalf. That motion generally has several components, including an explanation of the extraordinary and compelling reasons justifying consideration for release, an explanation of why release would not jeopardize the safety of others or the community, and a detailed release plan regarding the individual’s plans upon release. The United States Attorney’s Office in the jurisdiction where the motion is filed can oppose the motion. Generally, the individual may file a reply to any such opposition. The federal district judge may or may not hold a hearing on the motion before making his/her decision.

To navigate this process, the Clearinghouse tries to provide people incarcerated in prisons with pro bono legal representation whenever possible. The Clearinghouse support lawyers by providing a host of resources, including referrals to physicians who volunteer to consult about medical conditions that may support a motion for compassionate release.

## **What is the physician’s role in compassionate release?**

Physicians have played important roles in many compassionate release motions. First, legal counsel may request a consultation with a medical doctor to better understand whether a client’s situation merits a request for compassionate release. Second, physicians may be called upon to support a request for compassionate release by demonstrating how the client’s preexisting co-morbidities are likely to interact with COVID-19. Both of these situations usually require the clinician to review the client’s medical records to understand their major medical problems and prognosis. If the physician is providing a declaration, the critical portion will generally focus on the extent to which the client’s preexisting medical conditions will likely cause serious complications and/or death from COVID-19 based on current guidance from the Centers for Disease Control and Prevention (CDC).



## **What is the purpose of the Amend-Clearinghouse partnership?**

Amend is recruiting physicians to support the pro bono lawyers representing individuals seeking compassionate release. Physicians willing to volunteer their time will be trained and supervised by a senior attorney, Steven Salky, Esq., who serves as a resource counsel for both Clearinghouse lawyers and doctors. Physicians are engaged as consulting experts by the legal counsel representing the client and will work under the direction of each client's legal counsel.

This partnership was created to increase the Compassionate Release Clearinghouse's capacity during the COVID-19 pandemic and reduce the backlog in cases seeking medical consultations. Volunteer physicians will help alleviate the caseload currently handled by 8 physicians currently serving pro bono for the Clearinghouse. The current physicians include a pulmonologist, a cardiologist, a nephrologist, a rheumatologist, a neurologist, and three internal medicine specialists. To date, approximately 120 individuals have been granted compassionate release through the Clearinghouse.

## **Do I have to be familiar with correctional medicine? What training will I receive?**

Participating physicians will be expected to attend a ~1 hour Zoom training with Attorney Salky (or watch a recording of such a training). You do not need to be familiar with correctional medicine to participate in this program.

## **What is the expected workload?**

After training, the average case requires 5-10 hours of the physician's time but range from a few hours to many more hours. There is no typical case, as each client's condition is unique. Physicians will be informed at the outset whether the case is more or less complex to gauge the amount of time they might need to spend on the case.

## **What kind of support will I be asked to provide?**

Cases tend to fall into two general categories.

1. Some cases require a review of medical records and consultation with legal counsel, helping them decide whether the client's condition merits a motion for compassionate release, and whether the motion can proceed without the need for a declaration.
2. Other cases involve providing a declaration based on the physician's evaluation of the client's medical records. Declarations are presented to the judge evaluating the motion and differ in both



length and formality, depending on the lawyers' determination of what is required in light of differences between judges, degrees of government opposition, etc.

In many cases, lawyers will draft the declaration after consultation with the physician and the physician will be asked to edit/modify the draft. Some physicians prefer to prepare their own drafts and have lawyers suggest modifications.

### **I'm a busy physician and my schedule is really varied. What flexibility do I have with regards to case load?**

The assignment of cases is made by Attorney Salky, according to the fit between the physician's expertise and patient's primary preexisting conditions, the scheduling needs of the case, and physician case load. To date, the Clearinghouse has been able to avoid having a doctor being overburdened. Physicians are welcome to communicate if and when they are free to take an assignment. The purpose of Amend's recruitment efforts is to prevent overburdening any individual physician.

### **Who will I be working with?**

Although Attorney Salky will assign you to a lawyer seeking a consultation, each physician will be engaged by the lawyer or law firm representing the client. The communications with legal counsel are generally considered privileged and confidential. The consulting physician will not communicate directly with the client. Further, the consulting physician will not communicate with the medical personnel at the BOP regarding the client's diagnosis or treatment. In rare cases, multiple doctors will share record review and prepare a joint declaration. The vast majority of the cases are handled by a single physician, although that physician may seek a consultation from another member of the Clearinghouse on a matter beyond their specialization.

### **Are you looking for certain specialties?**

We gratefully welcome any board-certified physicians willing to offer their time. Licensed nurse practitioners and physician assistants can also participate. We are specifically seeking the support of board-certified **geriatricians, cardiologists, palliative care physicians, and pulmonologists.**

### **Can medical trainees (such as resident physicians) participate?**

Licensed residents can be of great service in assisting with records review to determine if an initial motion for compassionate release is warranted. Only board-certified physicians can write medical declarations.



### **Do I need special malpractice coverage to participate in writing these medical declarations?**

No physician will be examining, treating, prescribing, or undertaking activities that typically constitute the practice of medicine. The physician will not interact directly with the patient requesting compassionate release. Mr. Salky, aided by a team of Harvard Law students, reviewed the laws of all 50 states and the District of Columbia and has determined that the activities engaged in by the physicians are regulated (if at all) as those of consulting experts. Although some states restrict out of state physicians from consulting in medical malpractice matters, only Mississippi appears to restrict out of state physicians appearing as experts in their federal courts on any other medical matters, such as motions for compassionate release. Accordingly, Mr. Salky asserts that consultations on compassionate release cases are fully compliant with all state statutes and state medical board regulations, save perhaps where the patient is a Mississippi resident.

### **Do I need to get the permission of my employer before participating in case review for compassionate release?**

UCSF medical leadership has already granted permission for physicians to participate in review of cases for compassionate release.

### **How can I learn more or get involved?**

Interested physicians should email Amend's Compassionate Release Program Assistant, Apoorva Rangan, at arangan97@gmail and CC Amend's director of health education Dr. Leah Rorvig at Leah.Rorvig@ucsf.edu.