SURGERY AND PROCEDURES DURING THE COVID-19 CRISIS
March 26, 2020

To assist our members in determining whether surgeries should be done during the period of the Governor’s Order and any extensions, we have put together this memo based on the CDC (Federal), Governor Abbott’s Executive Order, the Attorney General’s guidance, and guidance from the TMB (Texas). There may also be county and city orders as well as facility requirements of which you should be aware. These are not included in this memo, but should be researched in making your decisions.

Please keep in mind that we are doing our best to keep up with this fluid situation, and will revisit these issues as necessary.

Current CDC guidelines require rescheduling elective surgeries at inpatient facilities and rescheduling non-urgent outpatient visits to help limit the spread of COVID-19.

At the state level, on March 22 Governor Abbott issued Executive Order GA 09 ordering the following:

the surgery must be postponed unless it is immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient’s physician.

On March 23, Texas Attorney General Ken Paxton, issued a statement that Governor Abbott’s order applies throughout the State and to all surgeries and procedures that are not immediately medically necessary.

At the licensing level, the TMB has taken the position that the performance of a non-urgent elective procedure is a continuing threat to the public welfare, and will be prosecuted by the Board.

Further, the TMB has adopted a mandatory duty to report any physician scheduling to perform, preparing to perform, performing, or who has performed a non-urgent elective surgery or procedure to the TMB. While this order is directed to physicians and other licensed healthcare professionals, in fact any human can report the physician to the TMB.

If a report is made to the TMB, the TMB may conduct a temporary suspension or restriction hearing with or without notice. This hearing will be judged by a panel of three board members (one of which must be a physician), at which the justification for both the necessity and urgency of the surgery or procedure at issue will be determined. This would include reviewing the medical records and utilizing applicable guidelines and literature.

If a temporary suspension or restriction hearing does not occur, the normal TMB process will occur, at which a panel of at least two physicians will determine:

1. whether or not the surgery was medically necessary given the Orders and guidelines provided above, and

2. whether the standard of care was met.

The TMB has stated it intends to rely on applicable guidelines such as the CDC, CMS, or other medical or specialty guidelines and literature in making these two determinations.
If you fail to comply with this Order, the consequences to you and your career are severe, and include:

1. $1,000 fine;
2. 180 days in jail;
3. Temporary suspension or restriction by the TMB;
4. Investigation by the TMB and possible loss of license;
5. Mandatory report to the NPDB.

Therefore, we urge our members to apply the following standard in determining whether surgery should be performed at this time:

**Is the medical act a surgery or procedure?**

If No, and you are performing other medical acts, such as a history, physical exam, non-invasive diagnostics, or ordering/performing lab tests, you may proceed with the medical act.

If Yes, is this immediately medically necessary to correct a serious medical condition or to preserve the life of a patient and would this patient, without immediate performance of the surgery or procedure, be at risk for serious adverse medical consequences or death?

If Yes, you may perform the surgery.

Given the severe consequences of these decisions, we urge our members to use caution in proceeding with surgery at this time. In fact, before even scheduling the surgery, it may be wise to obtain a second opinion from a colleague in writing or a consensus within your community, as well as the approval of all medical professionals involved.

In short, the TPS advises you to be a good doctor, care for your patients and community, consider outcomes, and document.

We understand the gravity of this situation, and the consequences to you of postponing surgeries. However, we urge you to think long term, and recognize that this is a temporary situation. As a physician, your skills and talents will surely be necessary as this crisis evolves.

Sincerely,

Brian Bruel, MD
President, Texas Pain Society
On behalf of the Board of Directors

**NOTICE:** Texas Pain Society is providing this information as a service to its members. Neither TPS nor its attorneys are engaged in providing legal advice to individual members with respect to their practices. Neither TPS nor its attorneys assume legal responsibility for damages arising from the use of this information. We encourage you to seek legal advice from your personal legal counsel.