

Operating a Medical Practice in Texas during the COVID-19 Pandemic



(March 30, 2020): The COVID-19 pandemic is unprecedented and has resulted in President Trump declaring a National Emergency^[1] and Secretary Alex Azar, of the US Department of Health & Human Services (HHS) to declare a public health emergency^[2] for the nation. The effects of this pandemic have been felt across the country, and understandably, numerous disruptions to clinic operations have occurred. These uncertainties have left providers questioning the types of procedures that can be completed during the pandemic. This article examines COVID-19 related guidance from the Texas Governor's Office, the Texas Medical Board (Board}, and the Texas Attorney General's Office with respect to medical clinics in Texas. However, this review is not exhaustive. It should be kept in mind that due to the rapidly evolving nature of this public health emergency, that any guidance would need to be constantly updated. Therefore, it is strongly recommended that a practice consult with legal counsel to address any concerns specific to their practice.

I. The Impact of COVID-19 on Telemedicine Laws in Texas:

When possible, it is highly advisable that practices conduct visits through telemedicine or postpone visits that are able to be completed at a later date. During the pandemic, some Medicare telemedicine laws have been relaxed to expand coverage.^[3] In addition, some states have expanded access to telemedicine as well. Texas is one of the states that has expanded access to telemedicine services.

- **Expansion of Telemedicine.**

On March 14, 2020, the Governor of the State of Texas, Greg Abbott, approved the Board's request to temporarily suspend Texas Occupation Code 111.005 (a)-(b) and Title 22, Chapter 174.6 (a)(2)-(3) of the Texas Administrative Code. Pursuant to these suspensions, Texas has approved phone only consults as telemedicine. Specifically, the Board has advised: "Telemedicine, including the use of telephone only, may be used to establish a physician-patient relationship. This expanded use of telemedicine may be used for diagnosis, treatment, ordering of tests, and prescribing for all conditions. The standard of care must be met in all instances." These suspensions are in effect until the March 13, 2020 disaster declaration is lifted or expires or they

are terminated by the Office of the Governor.^[4] It is important to note that only encounters that are initiated by a patient, or the patient's proxy decision maker, are allowed to qualify as telemedicine under these rule changes.^[5]

- **Telemedicine for Chronic Pain.**

On March 19, 2020, Governor Abbott approved the Board's request to temporarily suspend 22 TAC § 174.5(e)(2)(A). This law previously stated, "Treatment of chronic pain with schedule drugs through the use of telemedicine medical services is prohibited."^[6] According to the Board, this "waiver allows telephone refill(s) of a valid prescription for treatment of chronic pain by a physician with an established chronic pain patient. Due to the seriousness of the opioid crisis and the need to ensure there is proper oversight of chronic pain management, this **suspension is only in effect until April 10, 2020.**"^[7] The Board also added however, that the physician "remains responsible for meeting the standard of care and all other laws and rules related to the practice of medicine. The standard of care must still be maintained related to the treatment of chronic pain patients." This order opens up the possibility of continuing to treat some chronic pain patients via telemedicine which previously was not possible.

However, there are still many instances that telemedicine cannot adequately address the needs of a patient. Therefore, providers in Texas need to be aware of the new limitations placed on them when completing non-urgent elective procedures or surgeries.

II. Executive Order GA-09:

On March 22, 2020, the Governor Abbott, issued Executive Order No. GA-09. Executive Order GA-09 ordered that:

[A]ll licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not 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;

PROVIDED, however, that this prohibition shall not apply to any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.

GA-09 applies to the entire state of Texas and is currently in full force and effect until 11:59 p.m. on April 21, 2020 unless the order is modified, amended, rescinded, or suspended by the governor.[\[8\]](#)

- **Related Texas Attorney General Guidance.**

On March 23, 2020, Texas Attorney General, Ken Paxton, warned all licensed health care professionals and all licensed health care facilities, including abortion providers, that ***they must postpone all surgeries and procedures that are not immediately medically necessary***. It was clarified that this prohibition applies to all surgeries and procedures that are not immediately medically necessary, “including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother.”[\[9\]](#) Attorney General Paxton noted that the failure to comply with the executive order can result in penalties of up to \$1,000 or 180 days of jail time.[\[10\]](#)

- **Related CDC Guidance.**

The CDC recommends that elective surgeries at inpatient facilities be rescheduled as necessary and recommends that urgent inpatient diagnostic and surgical procedures be moved to outpatient settings when feasible. In addition, any non-urgent outpatient visits should be rescheduled.[\[11\]](#)

- **Related CMS Guidance.**

CMS has issued guidelines regarding “Adult Elective Surgery and Procedure Recommendations: Limit all non-essential planned surgeries and procedures, including dental, until further notice.” CMS also included a tiered framework with guidance regarding the types of procedures that should be completed or postponed.[\[12\]](#)

- **Texas Medical Board Emergency Rules and Guidance.**

On March 24, 2020, the Texas Medical Board (Board) issued guidance stating that it will enforce Executive Order GA-09 and passed emergency Board rules to enforce the “Executive Order’s prohibition against performing surgeries or medical procedures that are not immediately medically necessary through April 21, 2020.”[\[13\]](#)

A. Board Emergency Rules.

On March 23, 2020, the Board adopted emergency rules to enforce Executive Order GA-09. These rules allow the Board to quickly act if it is determined that a licensee is in violation of the Executive Order. The emergency rules have amended 22 TAC § 187.57(c) and 22 TAC § 178.4(d). The Board updated 22 TAC § 187.57(c) to amend the current definition of “Continuing Threat to the Public Welfare” to include the “performance of a non-urgent elective surgery or procedure.”[\[14\]](#) The

Board also amended 22 TAC § 178.4(d) to require immediate reporting of “any physician scheduling to perform, preparing to perform, performing, or who has performed a non-urgent elective surgery or procedure.”[\[15\]](#)

B. Board Guidance and Answers to Frequently Asked Questions (FAQs):

The Board has recognized that there are different levels of need for “elective” surgeries. These levels of need can be distinguished by terms such as “urgent,” “emergent,” “or acuity.” Despite the differences in terminology used, the Board has stated that the physician must determine “if these types of procedures are delayed or canceled, will a patient be at risk for serious adverse medical consequences or death.”[\[16\]](#)

Due to the changes in 22 TAC § 187.57(c), the Board defined procedures that are “urgent or elective urgent” as “a surgery or procedure is scheduled where there is a risk of patient deterioration of disease progression that is likely to occur if the procedure is not undertaken immediately and/or the surgery or procedure is significantly delayed. The resulting decline in the patient’s health could make them more vulnerable to COVID-19 and other issues.”[\[17\]](#)

As Executive Order GA 09 and 22 TAC § 187.57(c) provides that this prohibition does not apply to a *procedure* that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment (PPE) needed to cope with the COVID-19 disaster. What does this mean? As the Board's guidance reflects:

“Executive Order GA 09 stated that PPE and hospital capacity needed to fight COVID-19 should not be depleted. Because PPE and hospital capacity are a critical need, procedures under this section of Executive Order GA 09 and 22 TAC § 187.57(c) must still meet the criteria of being medically necessary to prevent ‘risk for serious adverse medical consequences or death, as determined by the patient’s physician,’ regardless of the office, facility, local, regional, or state availability of PPE and hospital capacity.”[\[18\]](#)

In order to assist providers with determining whether a surgery or procedure can be performed, the Board has drafted a number of questions for the provider to consider:

Question #1: Does this prohibition apply to me or my practice location?

"The prohibition applies to ALL licensed healthcare providers and their delegates. It also applies to all licensed healthcare facilities. If you are a licensed healthcare professional or delegate, or performing the medical act in a licensed healthcare facility, proceed to #2.

Question #2: Is the medical act a surgery or procedure?

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Yes, proceed to #3.

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No, I am performing other medical acts, such as a history, physical exam, non-invasive diagnostics, or ordering/performing lab tests. If your answer is no, you may proceed with the medical act.

Question #3: If the medical act is a surgery or procedure, then you must ask the following questions:

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Is this immediately medically necessary to correct a serious medical condition or to preserve the life of a patient?

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Would this patient, without immediate performance of the surgery or procedure, be at risk for serious adverse medical consequences or death? If you answer yes to either of the above questions, you can proceed with the medical act. You should document the medical necessity and serious risk in the patient's medical record. In determining how to answer the above questions, please review the above discussion of urgent vs. non-urgent and

elective surgery or procedure.

Also note that performance of the following medical acts would generally not be considered immediately medically necessary/pose a serious risk:

Routine dermatological procedures;

- ***Routine ophthalmological procedures;***
- ***Routine dental procedures;***
- ***Nonemergent orthopedic surgeries;***
- ***Cosmetic and plastic surgeries;***
- ***Nonsurgical cosmetic procedures; and***
- ***Abortion not medically necessary to preserve the life or health of the mother.***

If a physician determines that an elective surgery is necessary and that the surgery would not violate Executive Order GA-09 or Board rules, the Board advised: “Documentation is key. It is very important that the medical record clearly reflects why the elective surgery or procedure was urgent and necessary to prevent serious adverse medical consequences or death. This documentation could include information on the patient’s medical history, prescriptions, lab results, imaging, or other relevant factors used to help make the determination of the urgent necessity of the elective surgery or procedure.” Therefore, if a surgery or procedure must be performed, it is very important that the physician clearly document why the procedure or surgery was necessary at this time.

The Board has also stated in its guidance that the performance of a non-urgent elective procedure may be determined by the Board to be a continuing threat to public welfare. If the Board received a complaint of this nature, it “may result in a temporary suspension or restriction hearing with or without notice depending on the circumstances. Any Board action to restrict or suspend a licensee’s license, even if temporary, will trigger a mandatory report to the National Practitioner Data Bank (NPDB).”[\[19\]](#)

III. Conclusion:

If a surgery or procedure is elective and it is possible to postpone the procedure, the procedure

should be postponed. However, where 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, it may be performed. While the rules state that if the procedure were performed in accordance with the commonly accepted standard of clinical practice, the [non-urgent elective surgery or procedure] would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster, then the physician may perform the procedure. However, the Board has clearly stated that due to the pandemic, all surgeries must meet the criteria of being medically necessary to prevent "risk for serious adverse medical consequences or death, as determined by the patient's physician."

If a practice in Texas is going to perform any surgeries or procedures while these rules are in effect, the decision to perform the surgery or procedure must be made on a case by case basis. The physician will need to make a determination that the specific patient would be at risk for a serious adverse medical consequences or death without performance of the procedure. These findings would need to be clearly documented in the patient's record along with any support for the findings. A Texas physician who performs any procedure during this disaster should be prepared to defend the procedure in front of the Board if necessary.

Physicians should be aware though that the Board has significant authority to enforce the recently passed emergency legislation. Physicians are required under the newly enacted laws to immediately report "any physician scheduling to perform, preparing to perform, performing, or who has performed a non-urgent elective surgery or procedure."^[20] If a physician was reported for having performed a non-urgent elective surgery or procedure, it could result in a temporary suspension hearing with or without notice depending on the circumstances. Any Board action to restrict or suspend a licensee's license, even if temporary, would trigger a mandatory report to the NPDB. Therefore, if a physician believed that any of the surgeries or procedures performed by another physician were non-urgent, that physician would be required to immediately report the performing physician. The performing physician could then have to defend the action before the Board at a temporary suspension hearing. As the Board can temporarily suspend a practitioner without notice, the provider may not have an opportunity to defend the procedures until after the suspension has been put in effect. In addition, the suspension would be reported to the NPDB which would then send out a notice to all payors the provider is credentialed with. Therefore, all providers should be aware that the performance of any procedure or surgery at this time comes at a risk and therefore, only truly necessary procedures or surgeries should be completed.

Liles Parker attorneys and staff are closely monitoring HHS, CMS and CDC guidance and will update this article as new information becomes available. Please contact us with questions or for assistance with your response to this unprecedented National Emergency.

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<https://www.lilesparker.com>



Meaghan McCormick is an Associate at Liles Parker, Attorneys & Clients at Law. She has experience representing health care providers and suppliers around the country in connection with a wide range of health law matters. Questions regarding the impact of recent coronavirus guidance on your organization? Call Liles Parker, PLLC for a free consultation. We can be reached at: 1 (800) 465-1906.

[1] Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Issued on March 13, 2020. A link to the declaration can be found [here](#).

[2] Determination that a Public Health Emergency Exists, issued by Secretary Azar on January 31, 2020. A link to the determination can be found [here](#).

[3] An article that discusses the updates made by Medicare for telemedicine can be accessed [here](#).

[4] The Board's press release regarding these changes can be accessed [here](#).

[5] The Board's responses to the FAQs regarding telemedicine during Texas disaster declaration for COVID-19 pandemic can be accessed [here](#).

[6] 22 TAC § 174.5(e)(2)(A) can be accessed [here](#).

[7] The Board's Press Release regarding the waiver for chronic pain patients can be accessed [here](#).

[8] The full text of the order can be accessed [here](#).

[9] It should be noted that some providers have filed suit against Texas regarding Attorney General Paxton's declaration.

[10] Press release from Texas Attorney General Ken Paxton can be accessed [here](#).

[11] CDC guidance for healthcare facilities can be accessed [here](#).

[12] CMS' guidance and tier list can be accessed [here](#).

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[13] The Board's press release regarding the emergency rules passed to enforce Executive Order GA-09 can be accessed [here](#).

[14] The amended 22 TAC § 187.57(c) can be accessed [here](#).

[15] The amended 22 TAC § 178.4(d) can be accessed [here](#).

[16] The Board's responses to the FAQs regarding non-urgent, elective surgeries and procedures during Texas disaster declaration for COVID-19 pandemic can be accessed [here](#).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] The amended 22 TAC § 178.4(d) can be accessed [here](#).