

## **ELECTIVE SURGERY DURING COVID-19: Best Medical Judgment & Documentation**

The Center for Disease Control has issued "Interim Guidance for Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States."<sup>1</sup> The CDC makes the following recommendations for inpatient facilities:

- Reschedule elective surgeries as necessary.
- Shift elective urgent inpatient diagnostic and surgical procedures to outpatient settings, when feasible,<sup>2</sup> among other recommendations.

The CDC does not offer any further guidance, leaving these decisions to the individual medical providers and hospitals. In New York City, the hospitals and ambulatory centers have been ordered by the Mayor to immediately move to cancel or postpone elective procedures and to cease performing such procedures within 96 hours of March 16, 2020.<sup>3</sup> Even in the direct order, the definition and the determination of "elective" is to be determined on a case by case basis.

Following the CDC's lead, the American College of Surgeons (the "College") issued "COVID-19: Recommendations for Management of Elective Surgical Procedures"<sup>4</sup> on March 13, 2020, and the College issued follow up guidance, on March 17, 2020, entitled "COVID-19: Guidance for Triage of Non-Emergent Surgical Procedures."<sup>5</sup> The College recommends:

- Each hospital, health system, and surgeon should thoughtfully review all scheduled elective procedures with a plan to minimize, postpone, or cancel electively scheduled operations, endoscopies, or other invasive

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<sup>1</sup> <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html>

<sup>2</sup> It should be noted that the CDC also recommends to "[c]onsider accelerating the timing of high priority screening and intervention needs for the short-term, in anticipation of the possible need to manage an influx of COVID-19 patients in the weeks to come."

<sup>3</sup> <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>

<sup>4</sup> <https://www.facs.org/about-acs/covid-19/information-for-surgeons/elective-surgery>

<sup>5</sup> <https://www.facs.org/about-acs/covid-19/information-for-surgeons/triage>

procedures until we have passed the predicted inflection point in the exposure graph and can be confident that our health care infrastructure can support a potentially rapid and overwhelming uptick in critical patient care needs.

- Immediately minimize use of essential items needed to care for patients, including but not limited to, ICU beds, personal protective equipment, terminal cleaning supplies, and ventilators.

To offer further guidance, recognizing that medical urgency is not as simple as whether a case is on an elective surgery scheduled, the College recommends:

- Hospitals and surgery centers should consider both their patients' medical needs, and their logistical capability to meet those needs, in real time.
- The medical need for a given procedure should be established by a surgeon with direct expertise in the relevant surgical specialty to determine what medical risks will be incurred by case delay.
- Logistical feasibility for a given procedure should be determined by administrative personnel with an understanding of hospital and community limitations, taking into consideration facility resources.
- Case conduct should be determined based on a merger of these assessments using contemporary knowledge of the evolving national, local, and regional conditions, recognizing that marked regional variation may lead to significant differences in regional decision-making.
- The risk to the patient should include an aggregate assessment of the real risk of proceeding and the real risk of delay, including the expectation that a delay of 6-8 weeks or more may be required to emerge from an environment which COVID-19 is less prevalent.

## BEST RISK MANAGEMENT PRACTICES

Moving forward with the CDC and American College of Surgeon's recommendations, as well as the mandate by New York City, physicians will need to use their best medical judgment if and when deciding whether to proceed with "elective surgery." In most cases, the decision to move forward or to defer surgery is a matter of medical judgment.

At law, a doctor is not liable for an error in medical judgment, if they proceed with what they decide is best after careful

evaluation, so long as the judgment is one that a reasonably prudent doctor could have made under the circumstances. Said another way, a doctor is not liable for malpractice if they choose one of two or more medically acceptable courses of action.

In this circumstance, using one's medical judgment will take into consideration the environmental factors, healthcare status in the state and locality, prevalence of COVID-19, availability of medical resources, including physicians and nurses and medical supplies., availability and capacity of beds, and the risks and benefits presented for each patient.

MLMIC recommends that a physician's best risk management practice is to document everything in the record:

- If the hospital environment is impacting or dictating care, clearly document the existing health circumstances in the geographical and medical community, which can include the prevalence of COVID-19 in the community, the availability and anticipated availability of medical supplies, the number of available hospital beds overall and currently available – if known, among any other relevant environmental factors.
- Document all the relevant medical factors for the patient, including potential risks of undergoing surgery during COVID-19 prevalence and risks of waiting an unknown period of time.
- In addition to the usual informed consent discussion and documentation, a surgeon should also consider discussing and documenting the additional risks posed by COVID-19 in real time, such as additional risks of exposure to COVID-19 while in the hospital, the rapidly changing environment in a hospital, and the risk of developing complications during a time of a pandemic with limited resources.
- Physicians should maintain any documentation/emails from the hospitals requiring that surgeries be canceled and/or note conversations regarding same.

For additional guidance, please consult with your local municipality and your hospital administration. MLMIC will continue to facilitate any guidance, mandates, and orders from the Federal and State government. If there are legal questions, please call our attorneys at Fager, Amsler, Keller & Schoppmann, LLP, at (518) 768-2880.