February 10, 2020

Office of the Chief Clerk
MC 112-2A, Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

Via email to ChiefClerk@tdi.texas.gov


To All Interested Parties:

The Texas Society of Pathologists (TSP) represents Texas pathologists practicing at hospitals, independent laboratories, ambulatory surgical centers, physician offices and academic medical centers. TSP supported the legislative efforts to pass SB 1264 during the 2019 legislative session and remain committed to the implementation of the important policies that protect Texas patient’s rights to access healthcare and make decisions that are in their best physical and financial health.

SB 1264 contains specific statutory language to allow for an exception to the prohibition on balance billing if the patient is informed and can make an educated and rational determination that utilizing that exception would be in the patient’s best interest. The members of TSP are greatly concerned that the Texas Department of Insurance (TDI) has fashioned an emergency regulation and is preparing to implement a rule creating a process to provide for that exception that is inconsistent with the statutory intent of Senate Bill 1264. The proposed 10-day waiver notice requirement creates a “one size fits all” approach in the proposed rule, 28 TAC §21.4901 – 21.4904, which fails to recognize important distinctions in the delivery of healthcare by different types of providers. The disclosure process contemplated by this new rule does not have any practical or reasonable application to non-scheduling physicians, such as pathologists who, for the
most part, do not have direct interaction with patients and who do not “schedule” visits with patients. Pathologists, who receive patient specimens need to know, at the time a diagnostic pathology service is provided, if the patient specimen referred included the waiver or not in order to properly bill the patient when the waiver is executed.

It is important to underscore with TDI that the intention of the law and similar laws in other states is not to establish unreasonable and impractical impediments to patients who voluntarily wish to avail out-of-network services. The National Association of Insurance Commissioners (NAIC) model legislation (MDL-74) on this matter includes a clear disclosure that: “Section 7 (J) Applicability. “Drafting Note: This section is not intended to be used in situations where the covered person affirmatively chooses, prior to the provision of the services, to obtain health care services from a non-participating facility-based provider.” Accordingly, similar laws in other states contain substantively similar disclaimer and exemption language that does not establish regulatory impediments to patients who voluntarily select out-of-network providers, including pathologists.

Thus, what TDI has effectuated in the emergency regulation is a clear dilatory impediment to patient voluntary access of out-of-network pathology/laboratory services. Such an impediment, unreasonably crafted by TDI, has no statutory basis in Texas and impedes health care delivery (for at least, potentially, 15 days, if not more when the amount of time required for a dubious written estimate is included) for those patients who wish to select out-of-network pathology/laboratory services.

In addition to these regulatory changes, form AH025 is cited and certified under subdivision (e) of § 21.4903. This form requires a written estimate of services be provided by a pathologist or other physician in advance to patients seeking out-of-network service waivers. It is the position of TSP that this rule evolves the statutory language of SB 1264 requiring “projected amounts into a highly detailed “estimate of services” and supply costs that is fundamentally incompatible with the practice of medicine with all attendant unpredictable diagnostic and clinical variables. Under the detailed estimate sheet promulgated by TDI a physician is expected to definitively list the date of service; the service or supply code; amount to be billed; and the column to calculate the amount the patient would need to pay.

While a physician may realistically meet the Texas statutory requirement for specifying “projected amounts” in a range, for example $100 to $500; the requirements of TDI stipulated under the emergency rule and concomitant designated form AH025 require a magnitude of specificity that is beyond the capability of pathologists in many, if not most, clinical circumstances. In addition, an out of network (OON) physician has no way to definitively ascertain what the enrollee’s insurance will cover, and thus the line to furnish
“amount the patient would need to pay” becomes an entirely fallacious, and largely frivolous, exercise.

Accordingly, TSP urges TDI to consider expedited amendments to the emergency regulation (§ 21.4903) as follows:

(c) If an out-of-network provider elects to balance bill an enrollee, rather than participate in claim dispute resolution under Insurance Code Chapter 1467 and Subchapter PP of this title, the out-of-network provider or agent or assignee of the provider must provide the enrollee with the notice and disclosure statement specified in subsection (e) of this section, prior to scheduling the non-emergency health care or medical service or supply. To be effective, the notice and disclosure statement must be signed and dated by the enrollee no less than 10 business days before the date the service or supply is performed or provided. The enrollee may rescind acceptance within five business days from the date the notice and disclosure statement was signed, as explained in the notice and disclosure statement form.

In sum, unless this rule and form AH 025 is amended by TDI, Texas patients who want to avail a second out-of-network pathologist opinion on a cancer diagnosis, or a specialized advanced laboratory test that is not in the patients panel of laboratory providers, or to confer with a preeminent pathologist who may specialize in a particular disease state or cancer, will have to face the nearly insurmountable bureaucratic obstacles that TDI has formulated without a statutory basis. **As physicians who are concerned about our patient’s welfare, we urge TDI to forthwith revise these proposed rules to facilitate and expedite willful and voluntary patient selection of out of network pathology and laboratory providers, as such is clearly contemplated by the Texas law.**

Thank you for your consideration of these comments.

Sincerely,

James S. Malter, MD, President
Texas Society of Pathologists