

# BakerHostetler

**TO:** American Academy of Physician Associates  
("AAPA")

**FROM:** Matthew R. Elkin

**DATE:** April 15, 2024

**SUBJECT:** Allocation of Authority and Fiduciary Duties

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This memorandum describes the allocation of authority between the AAPA Board of Directors ("Board"), members, and the House of Delegates ("House"); the duties and responsibilities applicable to fiduciaries of AAPA; and practical ramifications of breaching such fiduciary duties.

## **I. Summary of Structure and Allocation of Authority to Members, the House of Delegates, and the Board of Directors**

AAPA has three groups involved in its governance structure: the voting members, the House of Delegates, and the Board of Directors.

The voting members elect certain officers and the directors-at-large. The members are not otherwise involved in the governance, management, or policies of AAPA.

The House of Delegates is an extension of the members. Acting on behalf of the members, the House has the sole authority "to enact policies establishing the collective values, philosophies, and principles of the physician associate profession."<sup>1</sup> The House may also make recommendations on other matters to the Board, as specified in the bylaws.

The Board has all corporate powers and authority over the affairs of AAPA except for the specific authority to enact policies of the profession as described above.<sup>2</sup>

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<sup>1</sup> AAPA Articles Section 6; Bylaws, Article VI, Section 1. N.C. Stat. Ann. § 55A-6-40(a) ("A corporation may provide in its articles of incorporation or bylaws for delegates having some or all of the authority of members.")

<sup>2</sup> N.C. Stat. Ann. § 55A-8-01 ("All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in the articles of incorporation. (c) A corporation may dispense with or limit the authority of a board of directors by describing in its articles of incorporation who will perform some or all of the duties of a board of directors").

## **II. Procedures for Actions by Members, the House of Delegates, and the Board of Directors**

Each of these bodies can take formal action through a meeting (including by telephone conference where all can hear and be heard) with a quorum. The Board can utilize a unanimous written consent,<sup>3</sup> while fellow members can take formal action by written consent or by written ballot.<sup>4</sup>

In the case of the House, when the House is enacting policies, i.e., exercising the power delegated to the House by AAPA Articles, the House must take action consistent with the procedures outlined in AAPA Bylaws Article VI, Section 4 and other House procedural policies.

## **III. Background law and AAPA Governance Documents on Allocation of Authority to the House and the Board**

Regarding the creation of the House, North Carolina law states:

A corporation may provide in its articles of incorporation or bylaws for delegates having some or all of the authority of members. The articles of incorporation or bylaws may set forth provisions relating to: (1) The characteristics, qualifications, rights, limitations, and obligations of delegates, including their selection and removal; (2) Calling, noticing, holding, and conducting meetings of delegates....<sup>5</sup>

Regarding the authority of the House, AAPA's articles of incorporation state:

The House of Delegates shall exercise the sole authority on behalf of the Corporation to enact policies establishing the collective values, philosophies, and principles of the physician associate profession.<sup>6</sup>

AAPA's bylaws provide further details on the House:

The Academy shall have a House of Delegates, which shall represent the interests of the membership. The House of Delegates shall exercise the sole authority on behalf of the Academy to enact policies establishing the collective values, philosophies, and principles of the PA profession. The House of Delegates shall make recommendations to the Board for granting charters to Chapters and for granting official recognition to specialty organizations. The House of Delegates shall make recommendations to the Board for the establishment of Academy commissions and work groups and shall establish such committees of the House of Delegates as necessary to fulfill its duties. The House of Delegates shall be entitled to vote on amendments to these Bylaws on behalf of the members in accordance with Article XIV of these Bylaws. The House of Delegates shall be solely

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<sup>3</sup> AAPA Bylaws, Article VII, Section 6(a)-(c),(e); *see also* N.C. Stat. Ann. §§ 55A-8-21, 55A-7-04.

<sup>4</sup> N.C. Stat. Ann. §§ 55A-7-04, 55A-7-08.

<sup>5</sup> N.C. Stat. Ann. §§ 55A-6-40.

<sup>6</sup> AAPA Restated Articles of Incorporation, Article 6.

responsible for establishing such rules of procedure, which are not inconsistent with these Bylaws, the Articles of Incorporation, or existing law, as may be necessary for carrying out the activities of the House (i.e., House of Delegates Standing Rules).<sup>7</sup>

North Carolina law provides that all corporate powers of a nonprofit corporation are to be exercised by the board of directors, except to the extent that the corporation's articles of incorporation provides otherwise.<sup>8</sup>

Under these provisions, the House of Delegates, acting on behalf of the members, has authority over the policies establishing the collective values, philosophies, and principles of the PA profession. The Board has all other authority and corporate powers, including the authority to direct management of AAPA, establish other AAPA policies, and exercise control over the AAPA assets.

The bylaws describe additional areas where the House of Delegates has the authority to “develop and recommend” and “make recommendations to the Board.”<sup>9</sup> The articles of incorporation therefore grant the House of Delegates authority to take unilateral action within a specified area while the bylaws grant the House of Delegates the ability to make recommendations to the Board regarding additional areas outside the House of Delegates specified authority, but not to take unilateral action with respect to such additional areas. It is within the authority of the Board to accept, reject or modify recommendations from the House of Delegates.

#### **IV. Fiduciary Duties**

Fiduciary duties are imposed on directors and officers,<sup>10</sup> and require that these fiduciaries act in the best interests of the corporation when acting in their fiduciary capacity. The primary fiduciary duties are the duty of care, the duty of loyalty, and the duty of obedience.

If a fiduciary breaches any of his or her fiduciary duties, he or she may be personally liable for that breach. Such a breach can be the subject of civil action brought by the corporation directly, a member or director in a derivative action, or by the North Carolina Attorney General for failure to comply with the provisions of the North Carolina Nonprofit Corporation Act.<sup>11</sup>

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<sup>7</sup> AAPA Bylaws, Article VI, Section 1.

<sup>8</sup> N.C. Stat. Ann. § 55A-8-01 (“All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in the articles of incorporation.”).

<sup>9</sup> See, e.g., AAPA Bylaws Article VII, Section 1(a), Article X, Section 2(a).

<sup>10</sup> N.C. Stat. Ann. § 55A-8-30; § 55A-8-42.

<sup>11</sup> N.C. Stat. Ann. §§ 55A-1-31, 55A-7-40.

### **A. The Duty of Care**

The duty of care requires a fiduciary to be informed prior to making business decisions and to act with the degree of diligence, care and skill of an ordinarily prudent person. The fiduciary's duty of care applies both to decision-making functions and oversight functions. To satisfy their duty of care, directors and officers should:

1. Demonstrate a strong interest in and understanding of the organization's mission, goals and business within the context in which the organization operates;
2. Attend and participate actively at all meetings of the body on which they participate;
3. Review meeting materials and agendas in advance;
4. Request appropriate information before making decisions or taking actions;
5. Protect the corporation's confidences and privileges (e.g., attorney-client privilege); and
6. Be sensitive to indications of potential problems or concerns and make further inquiry until reasonably satisfied that those concerns are addressed appropriately.

### **B. The Duty of Loyalty**

The duty of loyalty requires a fiduciary to act in the interest of the organization and not in their own interest or in the interest of any other entity, particularly one with which they have a formal relationship. When acting on behalf of the organization, fiduciaries must put the interests of the organization before their personal or professional interests. This requires, among other things, that fiduciaries:

1. Disclose any conflicts of interest,
2. Avoid the use of organizational opportunities for individual personal gain or benefit, and
3. Not disclose confidential information about the organization.

### **C. The Duty of Obedience**

The duty of obedience requires a fiduciary to ensure that the mission of the organization is upheld and perpetuated. A fiduciary must ensure that the organization's activities are reasonably focused on the mission and must avoid activities that do not support the mission. The duty of obedience

also requires that fiduciaries of a nonprofit organization comply with all documents governing the organization and its operation, such as the articles of incorporation, bylaws, and policies.

#### **D. Confidentiality**

A specific duty derived from the duty of care and duty of loyalty is that fiduciaries have a duty to protect corporate information and to maintain the confidences of the corporation. Corporate information provided to fiduciaries in their role as fiduciaries should only be used to inform discussion among fiduciaries and to inform the action taken by the body. Fiduciaries have an obligation to keep confidential all non-public information obtained in their role as a fiduciary. Fiduciaries must not use or disclose such information to any person or entity during or after service, except with written authorization of the Board or as may be otherwise required by law or regulation (e.g., during a legal proceeding). Unauthorized disclosure can damage the trust among the directors and officers, discourage open discussions in connection with meetings and otherwise, and jeopardize effectiveness and collaboration among the fiduciaries.

#### **V. Minutes**

Minutes of meetings should clearly state the actions that took place at the meeting and the basis for the actions that were taken, such as the reports or advisors relied on by the meeting participants. However, it is recommended that the minutes avoid verbatim transcripts or even detailed descriptions of discussions.

Audio recordings are generally not recommended because of the potential to stifle open and frank conversation during the meeting and the inability to control the dissemination of such recordings.

It is also recommended that meeting minutes:

- Reflect the general nature of the discussion and not identify specific comments by specific directors;
- Reflect the thoughtful, deliberate and informed process to make important decisions;
- Document any advice given by outside professionals such as counsel or accountants, noting the name of the professional, his or her position, and a brief description of the subject matter;
- List any written materials provided in connection with an important decision (e.g., draft agreements, reports by management or advisors);
- Document compliance with the conflict of interest policy. For example, the minutes should record that a member disclosed that they had a potential conflict with respect to a matter, the conflicted member recused themselves from the discussion and decision making, and the remaining disinterested members voted on the matter and determined how to manage any conflict.