

Morgan Lewis

MEMORANDUM

TO: American Academy of PAs

FROM: Matthew R. Elkin
Caroline Waldner
Shira M. Helstrom
Chelsea R. Rubin

DATE: REVISED July 6, 2020

SUBJECT: Allocation of Authority, Fiduciary Duties, and Confidentiality

This memorandum describes the allocation of authority between the Board of Directors (“Board”) of the American Academy of Physicians Assistants, Inc. (“AAPA”) and the House of Delegates of AAPA, describes the duties and responsibilities applicable to fiduciaries of AAPA, clarifies when those members are treated as fiduciaries, and explains the practical ramifications of breaching such fiduciary duties.

I. Summary of Structure and Allocation of Authority to Board and House of Delegates

AAPA has three groups involved in its governance structure: the voting members, the Board, and the House of Delegates. The voting members elect directors on the Board of AAPA but the members are not otherwise involved in the governance or management of the organization, which is the responsibility of the Board and staff. The House of Delegates has the authority to enact policies establishing the values, philosophies, and principles of the physician assistant profession, as delineated in the articles of incorporation. For all matters outside of that specified authority, the House of Delegates may also make recommendations to the Board, as delineated in the bylaws. Each of these bodies can take formal action either at a meeting (including by telephone conference where all can hear and be heard) with a quorum, and, in the case of the Board, by unanimous written consent,¹ in the case of the fellow members, by written consent or by written ballot.²

In the case of the House, when the House is exercising the power of the board of directors delegated to the House by AAPA Articles (as further described in detail below) it must take action in the same way the board may take action, namely, at a meeting or by unanimous written consent.³ But when the House is not exercising the power of the board, for example for other procedural matters such as voting for House Officers, the House may use the voting procedures

¹ AAPA Bylaws, Article VII, Section 6(a)-(c),(e); *see also* N.C. Stat. Ann. §§ 55A-8-21, 55A-7-04.

² N.C. Stat. Ann. §§ 55A-7-04, 55A-7-08.

³ N.C. Stat. Ann. § 55A-8-01, 55A-8-24, 55A-8-21.

outlined in AAPA Bylaws Article VI, Section 4(d), which do not require a meeting but instead provide for voting electronically in electing the House Officers.

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 provide that certain duties of the board will be performed by other individuals or a group of individuals.⁴ AAPA's articles of incorporation provide the following:

All corporate powers except those delegated herein to the Corporation's House of Delegates shall be exercised by or under the authority of the Board of Directors. 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 assistant profession.⁵

AAPA's bylaws provide the following related to the House of Delegates:

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 XIII of these Bylaws. The House of Delegates shall be solely 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).⁶

Under these provisions, the House of Delegates has authority over the policies establishing the collective values, philosophies, and principles of the PA profession. The Board has authority over all other corporate powers, including the authority to direct management of the organization, establish organizational policies, and exercise control over the assets of the organization (i.e., finances, logo/brand). The bylaws describe additional areas where the House of Delegates has the authority to "develop and recommend" and "make recommendations to the Board."⁷ 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

⁴ N.C. Stat. Ann. § 55A-8-01 (b-c).

⁵ AAPA Restated Articles of Incorporation, Article 6.

⁶ AAPA Bylaws, Article VI, Section 1.

⁷ See, e.g., AAPA Bylaws Article VII, Section 1(a), Article X, Section 2(a).

areas. It is within the authority of the Board to accept, reject or modify recommendations from the House of Delegates.

North Carolina law provides that “[t]o the extent the articles of incorporation vests authority of the board of directors in an individual or group other than the board of directors, the individual or group in the exercise of such authority shall be deemed to be acting as the board of directors.”⁸ The members of the House of Delegates are therefore considered fiduciaries of AAPA when they are exercising the authority granted to them in the articles of incorporation, and are subject to fiduciary duties with respect to that limited authority. Further, meetings of the House of Delegates must be treated as director meetings to the extent that the House of Delegates is acting to enact policies establishing the collective values, philosophies, and principles of the physician assistant profession. The Board has the authority and is subject to fiduciary duties with respect to all other areas.

II. Fiduciary Duties

Fiduciary duties are imposed on directors, officers, and the members of the House of Delegates with respect to their limited authority, 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.⁹

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, officers, delegates and other fiduciaries 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;

⁸ N.C. Stat. Ann. § 55A-8-01(d).

⁹ N.C. Stat. Ann. §§ 55A-1-31, 55A-7-40.

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 disclose any conflicts of interest, avoid the use of organizational opportunities for individual personal gain or benefit, and 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 in some cases from the 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, officers and delegates; discourage open discussions in connection with meetings and otherwise; and jeopardize effectiveness and collaboration among the fiduciaries.

III. 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 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;
- Show a 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.