

LCMS

Commission on Constitutional Matters Minutes – 2005

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MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
March 17, 2005

40. Call to Order and Opening Prayer

Chairman Albert Marcis called the teleconference meeting to order and asked Secretary Raymond Hartwig to open the meeting with prayer. All members of the Commission participated in the meeting.

41. Standard Operating Procedures Manuals (04-2404)

The Commission will reserve discussion of the operating procedures manuals for Bylaw sections 2.14, 2.15, 2.16, and 2.17 until its face-to-face meeting in April.

42. Supervision of Uncertified Church Workers (04-2415)

A district president in a December 2, 2004 letter to the Commission submitted a series of 15 questions regarding the responsibility for supervision of non-rostered church workers (including an "uncertified" pastor) employed by LCMS congregations.

- Question 1: With regard to Article XIII, under whose authority does an uncertified worker in LCMS congregations fall? If a local congregation has an uncertified worker who acts contrary to "the confession laid down in Article II and to the conditions of membership laid down in Article VI," is the local pastor as a member of Synod responsible for the supervision of the uncertified church worker in doctrine and practice? Is the congregation as a member of Synod—and their Voters Assembly in specific—responsible for the supervision of the uncertified church worker in doctrine and practice? Is this a shared responsibility between the pastor and congregation (Voter's Assembly) as members of Synod?
- Question 2: If the uncertified church worker is a pastor who acts contrary to "the confession laid down in Article II and to the conditions of membership laid down in Article VI," is the local congregation as a member of Synod—and their Voters Assembly in specific—responsible for his supervision in doctrine and practice?
- Question 3: If a congregation's pastor refuses to remove an uncertified church worker who acts contrary "the confession laid down in Article II and to the conditions of membership laid down in Article VI," is the District responsible for assuring the removal of the uncertified church worker as it is with certified workers in the LCMS in Article XIII.3? If the pastor refuses to "deal with him in accordance with the Word of God," is the pastor open to expulsion from the Synod himself or does he forfeit his membership in Synod?
- Question 4: If the local congregation refuses to remove an uncertified church worker—including its uncertified pastor—who acts contrary "the confession laid down in Article II and to the conditions of membership laid down in Article VI," is the District responsible for assuring the removal of the uncertified church worker as it is with regard to certified workers in the LCMS in Article XIII.3? If the congregation refuses to "deal with him in accordance with the Word of God," does the congregation forfeit its membership in the LCMS in accordance with Article XIII?
- Question 5: Is there a difference with regard to "offensive conduct?" If a local congregation has an uncertified worker who persists in "offensive conduct," is the pastor responsible for the

supervision of his or her conduct? Is the congregation—and their Voters Assembly in specific—responsible for the supervision of his or her conduct? Is this a shared responsibility between the pastor and congregation as members of Synod?

- Question 6: If a local pastor refuses to remove an uncertified church worker who persists in "offensive conduct," is the District responsible for assuring the removal of the uncertified church worker? If the pastor refuses to "deal with him in accordance with the Word of God," is the pastor open to expulsion for the Synod or does he forfeit his membership in Synod?
- Question 7: If the local congregation refuses to remove an uncertified church worker—including its uncertified pastor—who persists in "offensive conduct," is the District responsible for assuring the removal of the uncertified church worker? If the congregation refuses to "deal with him in accordance with the Word of God," does the congregation forfeit its membership in the LCMS in accordance with Article XIII?
- Question 8: If the congregation has "called" an uncertified church worker—including its pastor—does this change the situation? If the local congregation refuses to remove its "called" uncertified church worker—including its "called" uncertified pastor—who persists in "offensive conduct," is the District responsible for assuring the removal of the "called" uncertified church worker? If the congregation refuses to "deal with him in accordance with the Word of God," does the congregation forfeit its membership in the LCMS in accordance with Article XIII?
- Question 9: Most congregations have a clause in their Constitution and Bylaws which allow for the removal of an ordained or commissioned church worker for one of the following reasons: persistent adherence to false doctrine, scandalous life, willful neglect, or inability to perform the duties of the office. If it is not specifically stated, does the same process and reasons for "removal from office" follow for church workers who are not certified by the LCMS?
- Question 10: If a congregation has an uncertified church worker in its employ who persists in adherence to false doctrine, lives a scandalous life, willfully neglects his or her work, or is unable to perform the duties of his or her office, is the local pastor responsible for supervision of this worker in doctrine and practice? Is the congregation—and its Voters Assembly in specific—responsible for supervision of this worker in doctrine and practice? Is this a shared responsibility between the pastor and congregation as members of Synod?
- Question 11: If the uncertified church worker is a pastor who persists in adherence to false doctrine, lives a scandalous life, willfully neglects his work, or is unable to perform the duties of his office, is the local congregation—and its Voters Assembly in specific—responsible for his supervision in doctrine and practice?
- Question 12: If a local pastor refuses to remove an uncertified church worker who persists in adherence to false doctrine, lives a scandalous life, willfully neglects his or her work, or is unable to perform the duties of his or her office, is the District responsible for assuring the removal of the uncertified church worker? If the pastor refuses to "deal with him in accordance with the Word of God," is the pastor open to expulsion from the Synod himself or does he forfeit his membership in Synod?
- Question 13: If a local congregation refuses to remove an uncertified church worker—including its pastor—who persists in adherence to false doctrine, lives a scandalous life, willfully neglects his or her work, or is unable to perform the duties of his or her office, is the District responsible for assuring the removal of the uncertified church worker? If the congregation—and its Voters Assembly in specific—refuses to "deal with him in

accordance with the Word of God," does the congregation forfeit its membership in the LCMS in accordance with Article XIII?

Question 14: If the congregation has "called" an uncertified church worker—including its pastor—does this change the situation? If the local congregation refuses to remove its "called" uncertified church worker—including its "called" uncertified pastor—who persists in "offensive conduct," is the District responsible for assuring the removal of the "called" uncertified church worker? If the congregation refuses to "deal with him in accordance with the Word of God," does the congregation forfeit its membership in the LCMS in accordance with Article XIII?

Question 15: To what extent does the charge of "offensive conduct" on the part of a member of Synod (church worker or congregation) in Article XIII apply to uncertified workers in local congregations—even if the phrase is not included specifically in the Constitution and Bylaws of the local congregation? Because the congregation is a member of Synod, does this cause of removal from office apply to congregations and church workers, both certified and uncertified?

Opinion: Due to the fact that the questions asked are very similar and closely related, each will not be answered separately. This opinion will address the 15 questions as a unit.

The Commission on Constitutional Matters is charged with the interpretation of the Synod's Constitution, Bylaws, and resolutions (Bylaw 3.9.2.2 of the 2004 *Handbook*). Some of the questions asked are not addressed in Synod's Constitution and Bylaws and therefore no answer or opinion can be given. Some of the questions asked pertain to the relationship of a pastor to his congregation, the supervisory authority and responsibility of each, and the supervision of other offices in a congregation and are theological matters that should be addressed to the Commission on Theology and Church Relations. Still other questions can only be answered by the constitution and bylaws of the given congregation and the specific contract between the church worker and the congregation.

In response to the questions to which the Commission can respond, it calls attention, first of all, to Bylaws 2.5.2 and 2.5.4 (p. 52 of 2004 *Handbook*),

Congregations that are members of the Synod shall call and be served only by ordained ministers who have been admitted to their respective ministries in accordance with the rules and regulations set forth in these Bylaws and have thereby become members of the Synod.

Congregations that violate these requirements and persist in such violation shall after due admonition forfeit their membership in the Synod.

References in the questions, therefore, to an "uncertified church worker" who is a "pastor" speak of a situation that is, with one known exception in our Synod, contrary to the Bylaws of our Synod. Member congregations (as well as individual members) of the Synod obligate and commit themselves to act in accordance with the Constitution, Bylaws, and resolutions of the Synod:

Congregations together establish the requirements of membership in the Synod (Constitution, Art. VI). In joining the Synod, congregations and other members obligate themselves to fulfill such requirements and to diligently and earnestly promote the purposes of the Synod by word and deed. Members agree to uphold the confessional position of the Synod (Constitution, Art. II) and to assist in carrying out the objectives of the Synod (Constitution, Art. III), which are objectives of the members themselves. Thus,

while congregations of the Synod are self-governing (Constitutional, Art. VII), they, and also individual members, commit themselves as members of the Synod to act in accordance with the Constitution and Bylaws of the Synod under which they have agreed to live and work together and which the congregations alone have the authority to adopt or amend through conventions. (Bylaw 1.3.4, 2004 *Handbook*, pp. 24–25)

The Constitution, Bylaws, and all other rules and regulations of the Synod apply to all congregational and individual members of the Synod. The Synod expects every member congregation of the Synod to respect its resolutions and to consider them of binding force if they are in accordance with the Word of God and if they appear applicable as far as the condition of the congregation is concerned. The Synod being an advisory body, recognizes the right of a congregation to be the judge of the applicability of the resolution to its local condition. However, in exercising such judgment, a congregation must not act arbitrarily, but in accordance with the principles of Christian love and charity. (Bylaws 1.7.1 and 1.7.2, 2004 *Handbook*, p. 33)

If, therefore, a congregation violates its agreements with the Synod, or if its actions or failures to act demonstrate disagreement with the Scriptures and the Confessions (Constitution Art. II), or if it is guilty of offensive conduct (Constitution Art. VI), it is in danger of forfeiture of its membership in the Synod and is subject to discipline and expulsion from membership (Constitution Art. XIII) under the provisions of Bylaw section 2.14 (2004 *Handbook*, pp. 62–71). In such case, the congregation should be advised to give attention to the matter for the sake of its membership in the Synod.

In further response to the series of questions, the Commission notes that any layperson or non-rostered worker who is “called,” contracted, or otherwise employed by a congregation is solely under the authority and supervision of the congregation and is not subject to any supervision or protection by the Synod. Supervision by the congregation is provided according to its own constitution and bylaws in a manner that is in harmony with Holy Scripture, the Confessions, and the teachings and practices of the Synod. Although matters described in Article XIII of the Synod’s Constitution may be at issue, it is the congregation that is responsible. The Synod cannot remove or assure the removal of a non-rostered worker from a congregation, whether for the provisions set forth in Article XIII of the Synod’s Constitution or for any provisions set forth in a constitution and bylaws of a congregation.

What, then, is the role of the district president under these circumstances? While the district has no direct power or responsibility to deal with the employment status of a non-rostered employee of a congregation, the district president does have the responsibility as ecclesiastical supervisor of the member congregation to make certain that said congregation acts in a manner that is consistent with the Constitution, Bylaws, and resolutions of the Synod and, if such is not the case, to take such action as may be required.

43. Doctrinal Resolutions and Statements (04-2416)

In a December 14, 2004 letter, the executive director of the Commission on Theology and Church Relations (CTCR), acting on behalf of his commission, forwarded four overtures that had been submitted to the 2004 convention of the Synod and placed into Omnibus Resolution A for referral to the CTCR. In his letter he stated that in the opinion of the CTCR, “the concerns raised in the overtures would be more properly considered by the Commission on Constitutional Matters.” After brief review and discussion, the Commission agreed to continue its research of the topic involved, that of doctrinal resolutions and statements, and to continue discussion at its next face-to-face meeting.

44. Implementation of Dispute Resolution Panel Decision by a Congregation (05-2417)

In a January 11, 2004 letter, a member congregation of the Synod which has been involved in a dispute resolution process submitted a series of questions related to the congregation's responsibilities as regards the decisions of the Dispute Resolution Panel and the congregation's response to the panel's decisions. The congregation continues to disagree with the decision of the Dispute Resolution Panel and has chosen not to implement the panel's decision. The congregation asks generally if its decision not to implement the panel's recommendations is a violation of its membership in The Lutheran Church—Missouri Synod, specifically asking the Commission to address the following questions.

Question 1: Why can [a congregation] not interpret [Bylaw] 8.11 (now Bylaw 1.10.9) to mean that she has a right to self-governance and that the action of a Dispute Resolution Panel is to “advise,” not issue a “binding decision”?

Opinion: The covenants which bind the members of the Synod in their “walking together” are not subject to revision or reinterpretation by individual members. Bylaw 1.3.4 (2004 *Handbook*, pp. 24–25) provides, in part:

...Thus, while congregations of the Synod are self-governing (Art. VII), they, and also individual members, commit themselves as members of the Synod to act in accordance with the Constitution and Bylaws of the Synod under which they have agreed to live and work together and which the congregations alone have the authority to adopt or amend through conventions.

Membership in the Synod is voluntary. While the Synod cannot legislate or control the congregation's internal governance, it has been given the authority by the congregations of the Synod to review the actions of a congregation in light of the Holy Scriptures, and may call upon a congregation to review and revise its actions if found in violation of that standard. While the Synod recognizes that it may not force compliance, it has retained the right to take action with respect to a congregation that fails to accept a Dispute Resolution Panel decision as the Synod deems appropriate.

Question 2: Where does Bylaw 8.11 (now Bylaw 1.10.9) state that a decision not to implement Dispute Resolution Panel recommendations means that a congregation violates her voluntary association with the Synod?

Opinion: The conditions of membership are provided in Article VI of the Constitution, and the relationship of the Synod to member congregations is described in paragraph 1 of Article VII as follows:

In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body. Accordingly, no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God or if it appears to be inexpedient as far as the condition of a congregation is concerned.

This relationship is further reflected in the bylaw to which reference is made, now renumbered as Bylaw 1.10.9 in the 2004 *Handbook* (p. 43):

The congregation's right of self-government shall be recognized. However, when a decision of a congregation is at issue, a Dispute Resolution Panel may review the decision of the congregation according to the Holy Scriptures and shall either uphold the

action of the congregation or advise the congregation to review and revise its decision. If the congregation does not revise its decision, the other congregations of the Synod shall not be required to respect this decision, and the district involved shall take action with respect to the congregation as it may deem appropriate.

Bylaw 1.10.7.4 (d) (2004 *Handbook*, p. 42) states: “Subject to request for review or appeal (contemplated or pending), the final decision of a Dispute Resolution Panel shall (1) be binding upon the parties to that dispute;...” While a congregation retains its right of self-governance, its rejection of a Dispute Resolution Panel decision violates the covenants reflected in the dispute resolution process itself. Whether that action of the congregation warrants further action by the Synod is left to the discretion of the district as reflected in Bylaw 1.10.9.

Question 3: If Bylaw 8.11 (now Bylaw 1.10.9) does not allow congregations to disagree with the recommendations of a Dispute Resolution Panel without threat to such congregations’ membership in the Synod, what is the meaning and purpose of Bylaw 8.11?

Opinion: Bylaw 1.10.9 reaffirms the independence of the individual congregation. The Synod in its 2001 convention made that independence even more clear by adding to Article VII of the Constitution a second provision: “2. Membership of a congregation in the Synod gives the Synod no equity in the property of the congregation.” Should a congregation determine that it wishes to terminate its voluntary association with the Synod, or should the Synod, through appropriate process, determine that the congregation no longer meets the qualifications for membership, the congregation’s independence and property rights are retained, even though the relationship is severed. The language of Bylaw 1.10.9 reflects the range of disagreements which can develop despite our attempts to walk together, and gives discretion to the districts to evaluate a congregation’s actions in rejecting a Dispute Resolution Panel decision, and to consider whether such rejection justifies action to address and heal the breach, up to and including an action to terminate membership.

This issue is not new to this Commission’s consideration. For example, in a 1993 opinion involving questions arising out of an action for excommunication, the Commission previously wrote (Ag. 1972):

...it should be noted that while the congregation is autonomous, by its membership in the Synod it has covenanted with others in regard to doctrine and practice. It is pledged by its membership in the Synod to honor and uphold the doctrinal position and the resolutions of the Synod. It is for this reason that Bylaw 8.11 states that the “...Dispute Resolution Panel may review the decision of the congregation according to the Holy Scripture and shall either uphold the action of the congregation or advise the congregation to review and revise its decision.” In other words, if it determines that the basis for the action was contrary to Holy Scripture, it may advise the congregation to take action as indicated. Because it is autonomous, the congregation need not do so. However, if it does not, the remainder of the bylaw applies as it states, “If the congregation does not revise its decision, the other congregations of the Synod shall not be required to respect this decision, and the district involved shall take action with respect to the congregation as it may deem appropriate.”

This issue was also addressed in a 1994 opinion inquiring as to a congregation’s right to discharge a pastor. The Commission opined in Ag. 1980:

Congregational autonomy does include the authority of a congregation to dismiss its pastor for any reason. However, as noted previously, if it wishes to remain a member of the Synod, that autonomy is limited. The Commission on Theology and Church Relations

has spoken to this matter in response to a question addressed to it prior to the 1992 synodical convention. The Commission on Constitutional Matters concurs with that response which is found on page 67 of the 1992 *Convention Workbook*.

Question 4: The last sentence of Bylaw 8.11 (now Bylaw 1.10.9) seems to give [a] District a broad brush to implement its own interpretation of bylaws and consequential punishments for congregations who do not implement Dispute Resolution Panel recommendations. Could [a] District suspend [the congregation] for not accepting the interpreted (sic) as binding recommendations of a Dispute Resolution Panel? Could [the congregation] expect that expulsion to stand as an “appropriate” response, according to Bylaw 8.11?

Opinion: The process of suspension under Bylaw 2.13.5ff (formerly Bylaw 2.25) occurs as a result of an action to terminate membership. The process of expulsion previously contained in Bylaw 2.27 was replaced by action of the 2004 convention, and the applicable section of the *Handbook* now is Bylaw section 2.14. It is the responsibility of the district president and not the Commission on Constitutional Matters to investigate and evaluate facts that could lead to the expulsion of a member, and to determine whether to initiate that process to do so. The Commission is not a fact-finding body and is not authorized to answer the question as posed.

Question 5: On the basis of Bylaw 8.11 (now Bylaw 1.10.9), does [a] District have to take any action other than to notify other District congregations that they are not bound by [the congregation’s] decision?

Opinion: As suggested above, the response of the district to the situation is left to its discretion. At the very least, it would be anticipated that the district would convey information to other congregations potentially affected by the subject congregation’s actions, to inform them of their right not to respect the subject congregation’s actions.

Question 6: [Our congregation] has made a good faith request for a transfer to [another] district, but our compliance with Bylaw 8.11 (now Bylaw 1.10.9) and the binding interpretation of Dispute Resolution Panel recommendations have been cited as the reasons not to consider our request. Can the CCM explain, on the basis of Bylaw 8.11, why [the congregation] should not have her request considered and honored by the district board of directors?

Opinion: Bylaw 4.1.1.4 (formerly Bylaw 4.03 d) allows transfers between districts upon the mutual approval of the respective district boards of directors. The Bylaws do not provide for the review of districts’ decisions by the Commission on Constitutional Matters.

45. Dissent from Doctrinal Resolutions (05-2418)

A pastor of the Synod, in a February 14, 2005 e-mailed letter, quoted a portion of the second resolve of 2004 convention Resolution 3-08A, “To Affirm the Conclusions of the 1994 CTCR Report: *The Service of Women in Congregational and Synodical Offices*”: “That the Synod affirm that women on the basis of the clear teaching of Scripture...may serve in humanly established offices in the church [i.e. president, vp, elder].” He then stated that “the constitutions of many of our churches, once approved by the CCM, forbid or limit the service of women from the same offices here referenced, and do so on the basis of Scripture as well (citing arguments from the Order of Creation vs. the ‘humanly established argument of 8-01A)” and asked the following series of questions:

Question: How do we reconcile our congregations and our Synod’s now official position from completely opposing positions on the role of women when they both appeal to Scripture as

the basis and authority for their positions? How can a congregation hold to a constitution that is clearly now opposed to an official decision of the convention of the Synod (i.e., it forbids what the Synod declares scriptural and right)? Is it enough to offer a “Sample Paragraph for Congregational Constitutions” that now overturns what many of our churches have confessed, failing to recognize that many of them will still hold to the opposing position and reject this other position as contrary to Scripture?

Opinion: It should be noted that the introductory paragraph to the above questions contains several inaccuracies. First, its partial quotation from the convention resolution’s second resolve misleads when it applies a statement (“women on the basis of the clear teaching of Scripture”) to a later phrase in the resolution (“may serve in humanly established offices in the church...”) when the statement was in fact applied in the resolution to an earlier phrase (“may not serve in the office of pastor...”). Second, the statement, “constitutions of many of our churches, once approved by the CCM,” is not accurate in that the CCM does not approve the constitutions of congregations. Such approval is the responsibility of district boards of directors with the assistance of district constitution committees. Finally, the paragraph misidentifies Resolution 3-08A, referring to it as “8-01A.”

It should also be noted that the questions that have been asked appear to indicate a misunderstanding of the convention action by assuming that the decision of the convention overturns the constitutions of those congregations that do not make the changes allowed by the convention action. In fact, Resolution 3-08A only permits and does not require congregations to allow women to serve in humanly established offices.

The questions asked do, however, raise an appropriate concern, i.e., whether the convention resolution is in accordance with the Word of God. If a congregation or other member of the Synod believes that a decision of the Synod is not in accordance with the Word of God, opportunity exists within the structure of the Synod to express formal dissent to decisions of conventions. That process is described in Bylaw 1.8.2 (2004 *Handbook*) as follows:

Dissent from doctrinal resolutions and statements is to be expressed first within the fellowship of peers and then brought to the attention of the Commission on Theology and Church Relations before finding expression as an overture to the convention calling for revision or rescission. While the conscience of the dissenter shall be respected, the consciences of others, as well as the collective will of the Synod, shall also be respected.

46. Interpretation of Convention Resolution 2-08A (05-2419)

In a February 15, 2005 letter, the pastors of the two circuits of a district of the Synod “express[ed] grave concern regarding LCMS 2004 Resolution 2-08A, ‘To Commend Preaching and Teaching Creation.’” After brief discussion, the Commission agreed that the executive director of the Commission on Theology and Church Relations be contacted to discuss how the petitioners can be assisted and provided with a helpful response to their concerns.

47. Explanation of the Term, “Own Personal Knowledge” (05-2420)

In a letter dated February 16, 2005, a pastor of the Synod asked a series of questions in his “on-going quest to understand Resolution 8-01A as passed by [the] synodical convention in 2004.” His questions pertained to the definition provided for the phrase “own personal knowledge” by Bylaw 2.14.2 (l) (2004 *Handbook*, p. 63).

Question 1: If I were to witness a brother pastor participating in a syncretistic or unionistic worship service on television, or on a video recording of such service, does this fit the definition of “own personal knowledge”? Please provide explanation with your answer.

Question 2: In order to charge a brother pastor with adultery, does seeing him leave a motel room with a known prostitute fit the definition of “own personal knowledge,” or do I need to be in the room and witness sexual activity first hand before I can claim a “personal witness to the alleged violation?” Please provide explanation with your answer.

Question 3: Could you please articulate a clear and definitive definition of: “A personal witness to the alleged violation”?

Opinion: The questions posed relating to what one has seen on television and to what one has personally witnessed (a pastor leaving a motel room with an inappropriate companion) appear to be based upon a misunderstanding of Resolution 8-01A and Bylaw 2.26, renumbered 2.14 in the 2004 *Handbook*). The term “own personal knowledge” appears only in the context of a district president’s responsibility as one having supervision to, when appropriate, commence a proceeding to expel a congregation or individual from membership in the Synod (Bylaws 2.14.4, 2.15.4, and 2.17.4). The bylaws in question make clear that such an action can be based upon information contained either in a written complaint (accusation) or upon (facts) evidence witnessed by the district president himself.

Bylaw 2.14 (1) further defines “own personal knowledge” as not including “second-hand or hearsay information.” “Own personal knowledge” can therefore constitute either direct or circumstantial evidence. Facts can be proved by either direct or circumstantial evidence or by a combination of both.

48. Use of Robert’s Rules of Order (05-2421)

In a March 2, 2005 e-mailed letter an LCMS pastor requested an answer to two questions with the following introductory information:

In the November 2004 meeting of the Board of Directors, the Board voted 5 to 9 not to “seek legal remedy through the courts of the State of Missouri to clarify its authority according to the Articles of Incorporation, Constitution, and Bylaws of The Lutheran Church—Missouri Synod.”

The minutes of the Board which are posted on the Synod’s Web site say: “After lengthy discussion, the chair called the question and the motion failed (Yes: 5; No: 9).”

Since the minutes of the Board do not reflect who on the Board voted to oppose this motion and who supported it, it is impossible to ascertain who the five members were who were in violation of 1 Corinthians 6. It is also impossible to know how to hold individuals accountable for their actions on the Board when their individual actions are not reported to the Synod.

In light of the above information, the pastor asked for opinions in response to the following two questions.

Question 1: Is it proper for any board of the Synod to use *Robert’s Rules of Order* in order to veil an action that is contrary to Holy Scriptures?

Opinion: The function of the Commission on Constitutional Matters is to “interpret the Synod’s Constitution, Bylaws, and resolutions upon the written request of a member...” (Bylaw 3.9.2.2). Since

this question requests an opinion regarding the content of *Robert's Rules of Order*, the Commission chooses not to respond, since such matter is not included in its functions.

Question 2: If this motion had passed, would it have been in violation of 1 Corinthians 6?

Opinion: The Commission is not responsible for the interpretation of passages of Holy Scripture. Such questions should be addressed to the Synod's Commission on Theology and Church Relations. See also Opinion #1 above.

49. Adjournment

Prior to adjourning the meeting, Chairman Marcis reviewed the anticipated agenda for the Commission's next meeting in St. Louis. He then called on the Secretary to close the meeting with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

St. Louis Crowne Plaza Hotel
April 18–19, 2005

50. Call to Order and Opening Devotion

Chairman Albert Marcis called the meeting to order. Will Sohns served as chaplain for the meeting, providing devotions based on John 10.

51. Standard Operating Procedures Manuals (04-2404)

The Commission discussed at length the latest draft of the standard operating procedures manuals for Bylaw sections 2.14, 2.15, 2.16, and 2.17, noting the proposed changes advocated by the Convention Action Committee of the Council of Presidents, Ambassadors of Reconciliation, legal counsel, and the full Council of Presidents at its February 19–22 meeting. After proposing additional changes, the Commission agreed that the Secretary should provide a latest draft of the manuals to the Council of Presidents at its April 23–27 meeting in Fort Wayne.

52. Review of “Guidelines for Constitutions and Bylaws of Congregations” (04-2412)

The Commission discussed at length the need for a thorough revision of its “Guidelines for the Constitution and Bylaws of a Lutheran Congregation” to reflect 2004 convention actions and to take into consideration growing interest by congregations in varied organizational structures. The Secretary was instructed to write letters to district constitution committee chairmen (with copies to district presidents) asking their assistance in identifying questions and issues to be addressed and requesting copies of any supplemental materials used by district committees. Assignments were also handed out to Commission members as the Commission began its review.

53. Doctrinal Resolutions and Statements (04-2416)

In a December 14, 2004 letter, the Executive Director of the Commission on Theology and Church Relations (CTCR), acting on behalf of his Commission, forwarded four overtures (7-93, 7-94, 7-95, and 7-96) that had been submitted to the 2004 convention of the Synod and placed by a floor committee into Omnibus Resolution A for referral to the CTCR. In his letter he stated that in the opinion of the CTCR, “the concerns raised in the overtures would be more properly considered by the Commission on Constitutional Matters.”

The Commission noted that the omnibus resolution containing the four overtures had not been adopted by the convention, thereby relieving the Commission of bylaw responsibility to provide an opinion. However, the Commission did discuss pertinent background materials and resources and agreed that the concerns raised have value and beg further response from a future convention of the Synod. The Secretary was instructed to respond by letter to the CTCR, the letter to include a copy of this paragraph of the minutes. A copy of the letter and copies of the convention overtures are also to be forwarded to the President of the Synod, with copies of the letter also to be provided to the parties who originally submitted the overtures to the convention.

54. Interpretation of Convention Resolution 2-08A (05-2419)

In a February 15, 2005 letter, the pastors of two circuits of a district of the Synod asked a series of questions regarding LCMS 2004 Resolution 2-08A, “To Commend Preaching and Teaching Creation.” After lengthy discussion, the Commission responded to the questions as follows, recommending that the questions also be re-directed to the Commission on Theology and Church Relations without reference to LCMS 2004 Resolution 2-08A.

Question 1: Does LCMS 2004 Resolution 2-08A equate taxonomic *species* with the created *kinds* of Genesis, chapter 1?

Opinion: Since the term “taxonomic species” does not occur in Resolution 2-08A, this question as asked is outside of the Commission’s responsibility to interpret the resolutions of the Synod (Bylaw 3.9.2.2).

Question 2: Does this resolution declare fixity of species to be biblical revelation and doctrine? If so, how is the confirmed appearance of new species to be understood and explained in agreement with Scripture?

Opinion: Since the term “fixity of species” does not occur in Resolution 2-08A, this question as asked is also outside of the Commission’s responsibility to interpret the resolutions of the Synod.

Question 3: Does this resolution bind the educational institutions and agencies of The Lutheran Church—Missouri Synod and the Synod’s members to use of the equivocal terms *microevolution* and *macroevolution*?

Opinion: This resolution does not bind the Synod’s educational institutions, that is, its colleges, universities, and seminaries, to the use of the terms “microevolution” and “macroevolution” (“agencies of the Synod” does not include early childhood programs, elementary schools, and high schools unless they are directly associated with one of the Synod’s colleges, universities, or seminaries—see paragraph (a) of Bylaw 1.2.1). The resolution does require that the Synod’s educational institutions “properly distinguish between micro and macro evolution and affirm the scriptural revelation that God has created all species ‘according to their kinds.’”

Question 4: If the answers to the foregoing questions are negative, how may the Synod’s members and educational institutions and agencies rightly judge the faithfulness of their teaching in relation to this resolution? How should this resolution be interpreted and applied?

Opinion: Faithfulness of teaching and application of resolutions are matters of ecclesiastical supervision in our Synod and are the responsibility of its President and district presidents (Constitution Art. XI B 4, XII 7 and 9 a; Bylaws 1.2.1 (f), 3.3.1.1, 3.3.1.1.1, 3.3.1.2 (a), 4.4.2, 4.4.5, *et al.*).

Question 5: How might this resolution be clarified and improved by the Synod in future conventions?

Opinion: Overtures may be submitted to conventions of the Synod to offer clarification or improvement for resolutions previously adopted by the Synod (Bylaw 3.1.6.2). It is not the responsibility of the Commission to suggest such actions but to “examine all reports and overtures to the Synod...to determine their agreement in content and language with the Constitution and Bylaws of the Synod (Bylaw 3.9.2.2.1).

55. Clarification of Resolution 8-01A (05-2422)

In a letter dated March 14, 2005, written on behalf of the pastors of two visitation circuits, a pastor of the Synod asked clarification regarding specific issues associated with 2004 convention Resolution 8-01A, “To Amend Bylaws on Ecclesiastical Supervision and Dispute Resolution.” Quoting from Bylaws 2.14.3 (c) and 2.14.7.7 of the convention resolution (2004 *Handbook*, pp. 65 and 68) and confessional writings, he asked the following questions.

Question 1: “If the matter is ‘public’ as set forth in our Confessions, may we testify publicly concerning [the accused] without question of slander, injustice, or false witness?”

Opinion: The question as asked does not request an opinion regarding the right or duty of members of the Synod to respond publicly to public sin. Concerns regarding when and how a member can or should respond to perceived public sin should be addressed to the Commission on Theology and Church Relations.

The question posed assumes that the person who wishes to speak out has become an accuser under Bylaw section 2.14. Should a member of the Synod choose to initiate the Bylaw section 2.14 process, that person must abide by the provisions of that process, including the prohibition of publicity under Bylaw 2.14.7.7.(g). In an earlier opinion (01-2243), the Commission offered definition of such publicity:

The word "publicity" as used in the bylaw is defined in Webster's *New World Dictionary* as "any information or action that brings a person, cause, etc. to public notice." Use of the press or other means by a party involved in the matter to bring to the attention of the public information regarding the matter or to advocate a position is “publicity” and is prohibited by the bylaw if it occurs while a matter in dispute is still undecided or while an appeal is contemplated or pending.

Members of the Synod walk together according to the covenants that they have mutually agreed upon by such membership, as delineated in the Synod’s Constitution, Bylaws, and resolutions. One of those covenants is provided in Bylaw 2.14.3 (c), which details how members of the Synod have agreed to respond “even if the alleged violation of Article XIII of the Constitution is considered to be ‘public.’” In such case Matthew 18:15 is still followed.

Question 2: “May this testimony be immediate in response to public sin?”

Opinion: See the answer to question 1 above.

Question 3: “If the matter is ‘public,’ representing a false doctrine or practice which is affecting congregation(s) whose care we have been charged with, are we, the called pastors of those congregations, prevented from warning our flocks and sister congregations that are being impacted by said false doctrine or practice if we are also party to on-going dispute resolution procedures set forth in Bylaw [section 2.14]?”

Opinion: If a false doctrine or practice is public, a pastor is not prevented (while observing principles of Christian love) from informing his own congregation(s) regarding true doctrine or practice when there is danger that the flock will be harmed by the falsehood. This remains true (and is not to be regarded as “publicity”) also if he becomes a party to ongoing dispute resolution procedures. However, he may not assume this responsibility for other congregations that are not under his care or for the general public (which would constitute the “publicity” that the bylaw prohibits).

56. Reconsideration of CCM Opinion 04-2409 (05-2423)

In a March 22, 2005 e-mailed letter, a pastor of the Synod submitted questions regarding the Commission's earlier Opinion 04-2409, "Effect of Congregational Vote on Implementation of 2004 Resolution 7-21." Because the Commission is aware that the Board of Directors of the Synod also plans to submit questions regarding the same opinion, response will await receipt of the Board's request. In the meanwhile, the Board of Directors will be informed by the chairman of the Commission that the above-referenced questions have been received, thereby fulfilling the requirement for consultation provided by Bylaw 3.9.2.2 (b).

57. Other Matters

The Commission provided an informal review of a recent policy document regarding accommodation employment adopted by the Council of Presidents, in keeping with its responsibility to "examine in advance the articles of incorporation and the bylaws or regulations of every agency of the Synod and all proposed amendments of such documents to ascertain whether they are in harmony with the Constitution, Bylaws, and resolutions of the Synod" (Bylaw 3.9.2.2.4). The Secretary was asked to share the Commission's discussion with representatives of the Council of Presidents. This responsibility to examine the "regulations" of agencies of the Synod will be discussed further by the Commission at its October, 2005 meeting.

Meeting location and related details for the Commission's October meeting were discussed. The chairman agreed to give further attention to meeting arrangements.

58. Adjournment

All business to come before the Commission having been attended to, the meeting was adjourned with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Conference Call Meeting
June 30, 2005

59. Call to Order and Opening Prayer

Chairman Albert Marcis called the conference call meeting to order and asked Gordon Tresch to open the meeting with prayer. All members of the Commission participated in the telephone conference call meeting.

60. Resolution 8-01A, Standard Operating Procedures Manuals (04-2404)

Secretary Raymond Hartwig called attention to the most recent draft of the *Standard Operating Procedures Manual* for Bylaw section 2.14, "Expulsion of Congregations or Individuals from Membership in the Synod," and noted the most recent changes made upon suggestion of the Council of Presidents. The Commission agreed to accept the latest version for use, subject to further input from the Council. The Commission also asked the Secretary to incorporate the same general changes into the manuals for Bylaw sections 2.15, 2.16, and 2.17, subject to final approval by the Commission on Constitutional Matters and the Council of Presidents.

61. Review of "Guidelines for Constitutions and Bylaws of Congregations" (04-2412)

Secretary Raymond Hartwig reviewed the Commission's plans to provide a revision of its "Guidelines for Constitutions and Bylaws of Congregations" by the end of 2005. Copies of responses received to date from district constitution committee chairmen identifying issues to be addressed and providing copies of supplemental materials used on the district level will be forwarded to the other members of the Commission's committee responsible for initial work on the revision, Don Little and Gordon Tresch.

62. Reconsideration of CCM Opinion 04-2409 (05-2423)

In a March 22, 2005 e-mailed letter, a pastor of the Synod submitted questions regarding the Commission's earlier Opinion 04-2409, "Effect of Congregational Vote on Implementation of 2004 Resolution 7-21." The letter from the chairman of the Commission to the chairman of the Board of Directors inviting input regarding the question received and the reply from the Board of Directors as recorded in the Board's minutes were reviewed. The Commission will continue to await further response from the Board.

63. Approval of Congregation Constitutions by District Boards of Directors (05-2424)

In a letter dated May 16, 2005, the secretary of a district, writing on behalf of his district's board of directors, submitted questions regarding matters pertaining to the approval process of congregations' constitutions and bylaws involving his district's constitution committee and board of directors.

Question 1: A congregation of our district has sought approval of bylaw provisions to its constitution that include a statement that prohibits women from serving "as a teacher of an adult Bible class containing men." Our district's constitution committee referred this back to the congregation under the opinion that this statement would not be consistent with the policy or theology of the Synod. Is the inclusion of this phrase consistent with the policy of the

Synod regarding congregational constitutions? If not, does this provide sufficient basis for the board of directors to decline approval of the proposed revision?

Opinion: In an April 29, 1983 response to questions from a district constitution committee regarding a “debatable constitution” before the committee, the Commission on Constitutional Matters offered the following opinion regarding an article in that congregation’s constitution that was very similar to the bylaw statement currently in question:

If this article implies that women can teach only women and children, it is not acceptable. The Commission can find no evidence that the Synod takes such a restrictive position toward the role of women in the church. Therefore, the Commission on Constitutional Matters concludes that the position taken in the constitution under consideration does not agree with the practice of the Synod and goes beyond its present confessional stance, and is therefore unacceptable (Ag. 1625C).

The Commission reaffirms this opinion and suggests that if any party believes that there has been a change in the teaching or practice of the Synod relevant to this question since it was provided, such theological questions should be addressed to the Commission on Theology and Church Relations.

Question 2: In a matter related to the first question, the above-mentioned phrase is modeled on bylaws of another congregation in the district that were approved at least 80 years ago. This congregation has also submitted a revision of its constitution and bylaws. In the case of proposed changes to a constitution and/or bylaws, do the entire constitution and bylaws come under review again, or only those portions that include changes from the previous edition?

Opinion: It is reasonable and in keeping with earlier opinions of the Commission on Constitutional Matters to request and review entire documents, constitutions and bylaws, when changes are submitted to district constitution committees. A May 17, 2001 opinion (01-2222) stated, “It is the primary interest of the committee, therefore, to take care that nothing in the documents they are examining is contrary to [Holy Scripture, the Confessions, and the teachings and practices of the Synod].” Again (according to June 10, 1995 Opinion Ag. 2008), “if the constitution and bylaws of a congregation included something which was not in keeping with the Constitution, Bylaws, or resolutions of the Synod, even though that constitution and bylaws had been previously approved by a district constitution committee, if something was now identified which was contrary to the Constitution, Bylaws, and resolutions of the Synod, the congregation could be required to make necessary changes to bring its documents into conformity with those synodical documents and positions.” In its January 9-10, 1987 Opinion Ag. 1796A, the Commission also stated, “when error is discovered, it is contrary to all logic and Christian expectation to suggest that it not be corrected.”

Given these prior statements of the Commission, not only should the complete documents of a congregation come under review when amendments are made, but any provision previously approved that is not in agreement with the doctrine and practice of the Synod today should be given attention by a constitution committee.

64. Authority of District Board of Directors to Instruct District Nominations Process (05-2425)

In a letter dated May 17, 2005, a pastor of the Synod included a copy of a document adopted by his district’s board of directors pertaining to the district’s nominations and elections process. He questioned the right of the board to request specific information from nominees and to instruct the nominations and elections process to act on the basis of the receipt of that information. The mailing of the board of

directors included the statement: “If the nominee does not provide all the information requested they (sic) will not be placed on the ballot.”

Question: Does the district board of directors have the authority to place restrictions on who may be placed on the ballot for the district convention that are not contained in the synodical or district constitutions and bylaws?

Opinion: Bylaw 4.2.1 (a) states: “The conventions of the districts shall be governed by the bylaws adopted by the Synod for its conventions, insofar as these may be applicable.” Bylaw 4.2.1 (b) also states: “Each district may adopt other regulations, provided these are not contrary to the Constitution and Bylaws of the Synod.” Further, Bylaw 4.7.1 states: “Each district may adopt regulations for the nomination and election of its president, the nomination, election, and ranking of its vice-presidents, and the succession in case of vacancies, as long as these provisions do not conflict with the Bylaws of the Synod.” Therefore, districts enjoy some freedom in conducting nominations and elections processes, so long as additional provisions do not conflict with the Bylaws of the Synod.

The responsibilities of a district board of directors are provided by the Constitution and Bylaws of the Synod (Constitution, Art. XII; Bylaws section 4.4; *et al.*) and the constitution and bylaws of the district. The Constitution and Bylaws of the Synod have no provision for the direct involvement of a board of directors, district or Synod, in a convention nominations process. The Synod’s Bylaws provide for nominating committees on the Synod and district levels (Bylaws 3.12.3ff. and 4.7.2), which have the responsibility for soliciting descriptions of criteria for qualified candidates (par. (b) of Bylaw 3.12.4), names (par. (c) of Bylaw 3.12.3.4), qualifications of each candidate (par. (e) of Bylaw 3.12.3.4), and pertinent information concerning each candidate (par. (c) of Bylaw 3.12.3.6) for the consideration of the committees. There is no restriction on what information a nominations committee may request. From the list of candidates, the nominations committee nominates persons that it considers appropriate on the basis of the information received.

Therefore, in answer to the question as asked, a district board of directors, like the Board of Directors of the Synod, does not have authority to place restrictions on the ballot for a district convention.

65. Change to Bylaw 1.5.9 by Handbook Revision (05-2426)

The Synod’s Human Resources Executive Director has forwarded a concern brought to her attention by parties within the Synod regarding the wording of Bylaw 1.5.9 as it appears in the revised 2004 *Handbook*. The words “board, commission, and synodwide corporate entity” of 2001 Bylaw 3.69 e have been replaced with the words “agency of the Synod” in Bylaw 1.5.9. After discussion, the Commission agreed that input regarding this matter should be sought from the Board of Directors and from legal counsel of the Synod, in accordance with Bylaw 3.9.2.2 (b). The Secretary was asked to write the appropriate letters.

66. Limits for Participation in Dispute Resolution Process (05-2427)

In a May 26, 2005 letter a district president submitted questions regarding access to the Synod’s dispute resolution process by laypersons as provided by the five categories of allowable parties defined in Bylaw 1.10.2. He indicated in his letter that his questions have specific reference to a layperson elected to his district’s nominating committee by his district’s convention according to Synod Bylaw 4.7.2.

Question 1: May an individual not defined in (1) through (5) [of Bylaw 1.10.2] invoke the dispute resolution process as a “complainant” as long as the “respondent” is an individual defined in (1) through (5)?

Opinion: The answer to this question is “no.” Bylaw 1.10.2 defines the parties to which it applies as “(1) members of the Synod, (2) the Synod itself, (3) a district or an organization owned and controlled by the Synod, (4) persons involved in excommunication, or (5) lay members of congregations of the Synod holding positions with the Synod itself or with districts or other organizations owned and controlled by the Synod.” The current bylaw derives from the prior dispute resolution process, previously found in Chapter VIII of the 2001 *Handbook* and Bylaw 1.10.2 specifically from former Bylaw 8.01. Only when both participants in a dispute are members of one of the identified classes does the bylaw apply.

Question 2: Does the language of Bylaw 1.10.2 require that both parties to a dispute be individuals defined in (1) through (5)?

Opinion: The answer to this question is “yes” for the reasons set forth above.

Question 3: Are laypersons that have been elected by a district convention to serve on the nominating committee required by Bylaw 4.7.2 “holding positions with the Synod itself or with districts” under the terms of Synod Bylaw 1.10.2 (5)?

Opinion: The answer to this question is “yes.” To the extent that the issue in dispute relates to the layperson’s role as an elected representative of the district, the person is within the list of parties identified in the fifth category, “(5) lay members of congregations of the Synod holding positions with the Synod itself or with districts or other organizations owned and controlled by the Synod.”

67. Call of Non-Rostered Commissioned Ministers (05-2428)

In a June 20, 2005 letter, a district president asked questions regarding the extending of calls to non-rostered teachers, questions raised by a particular situation in a congregation of his district. He explained that the teachers in question have been trained and certified by the Synod but have chosen not to be rostered. He added that the involved congregation understands that these teachers would have no protection under the Constitution of the Synod and are employees for whom the congregation must assume its share of the cost of Social Security and Medicare.

Question 1: May a member congregation of the Synod under its right of self-government (Constitution VII 1 and Bylaw 1.10.9) extend a call to a teacher in its school who is not on the roster of the Synod?

Opinion: The term “call” has a variety of usages in the Synod. Even volunteer workers (e.g., Sunday school teachers) and paid staff (e.g., organists) are at times referred to by congregations as “called.” In its 1981 convention Res. 6-14 the Synod defined its own usage of the term “call,” referring to it as a “solemn call” and adopting the following definition for its use in its placement procedures for teacher candidates:

A solemn call is an official request, offer, or agreement extended by a calling body in the name of the triune God to a person eligible to receive such a call into an educational ministry of the LCMS. Offers extended to such eligible persons but erroneously referred to as “appointments” or “contracts” are also to be considered calls. A call may be for a limited period of time (nontenured) or unlimited (tenured). A solemn call is also referred to as a divine call. Official synodical call documents are available from most district offices and Concordia Publishing House. Do not use locally designed documents. Calls may be changed or terminated for valid reasons.

Eligibility to receive a solemn call requires the completion of graduation or colloquy requirements at a synodical teachers college and approval for ministry by its faculty. Men and women educators who are eligible to receive calls should not be otherwise engaged.

Congregations enjoy the right of self-government, which includes the right to call church workers of their own choosing. However, by their voluntary membership in the Synod, congregations agree to limit their right of self-government and to order their rights and responsibilities (including their right to call) according to the Constitution, Bylaws, and resolutions of the Synod.

Bylaw 2.5.3 of the 2004 *Handbook* provides the following limitation on a congregation's right to call: "Congregations that are members of the Synod shall call only commissioned ministers who have been admitted to their ministries in accordance with the rules and regulations set forth in these Bylaws and have thereby become members of the Synod." Therefore it is a teacher's membership in the Synod (and not only training and certification by the Synod) that is specifically required for the receipt of a *call* from a congregation. While it might be contended that a call to a properly trained and certified but non-rostered worker is merely using the word "call" in a manner other than the *solemn call* defined above by 1981 Res. 6-14, Bylaw 2.5.3 makes clear that congregations that contract for services with a non-rostered worker cannot refer to such a contract as a *call*. Similarly, when a properly trained and certified church worker chooses not to be rostered, the worker also has chosen not to be available to receive a *call*.

The Synod places a premium upon the staffing of the classrooms of its member congregations' schools with Synod-trained and Synod-certified teachers (cf. 2004 Res. 2-07; 5-03A). The Synod also places a premium upon the call and membership of those teachers in the Synod (Bylaw 2.5.3), such membership providing opportunity for ecclesiastical supervision (Bylaw sections 2.12; 4.4) and the carrying out of the objectives of the Synod (Constitution, Art. III). The Synod therefore has encouraged its congregations "to introduce a salary adjustment that recognizes the additional and vital education received by the Synod-certified teacher" (2004 Res. 5-03A), thereby to make roster membership more desirable or, as may be necessary in some cases, more feasible (in light of related financial considerations).

Therefore, in response to the question above, member congregations of our Synod have agreed not to extend solemn calls to nonrostered individuals regardless of their training. The congregation in question is well advised to do everything possible to enable its Synod-trained and Synod-certified teachers to apply for membership and roster status in the Synod, thereby making it proper to extend a *solemn call* as defined by the Synod in 1981 Res. 6-14 and according to the expectations established by Bylaw 2.5.3.

Question 2: Are these bylaws to be interpreted to mean that a congregation that extends what in its language amounts to a call with tenure to a qualified but non-rostered teacher is subject to forfeiture of its membership in the Synod under Bylaw 2.5.4?

Opinion: Persistent non-compliance with any bylaw of the Synod may jeopardize a congregation's membership in the Synod. This is particularly true of Bylaws 2.5.1–2.5.3, given the specific mention of forfeiture of membership in Bylaw 2.5.4.

68. Other Business

Secretary Raymond Hartwig reported that the Board of Directors has completed its appointment process for the Commission on Structure for the 2004–2007 triennium. He called attention to Bylaw 3.9.5.1 requiring that a voting member of the Commission on Constitutional Matters serve as an advisory member of the Commission on Structure. After brief discussion, Wilbert Sohns was appointed to serve in that capacity.

Arrangements for future meetings of the Commission on Constitutional Matters were clarified. A face-to-face meeting of the Commission will be scheduled to overlap with an anticipated meeting of the chairmen of all district constitution committees early in 2006.

69. Adjournment

The meeting was closed with a prayer by Gordon Tresch.

Raymond L. Hartwig, Secretary

MINUTES

COMMISSION ON CONSTITUTIONAL MATTERS Orlando, Florida October 16–18, 2005

70. Call to Order

Chairman Albert Marcis called the meeting to order with all members of the Commission present and opened with an invocation and prayer. Synod President Gerald Kieschnick was also present for the Sunday evening session of the meeting held at the hotel.

The Monday and Tuesday sessions of the meeting were held at the office building of the Florida-Georgia District, where the Commission joined the district office staff for its morning devotions.

71. Executive Session

The Commission moved into executive session for the Sunday evening session to receive input from the President of the Synod regarding the requests for opinions that he had submitted and regarding questions before the Commission that had been forwarded to the Board of Directors for its input. The Commission moved out of executive session at the end of the discussion.

72. Resolution 8-01A, Standard Operating Procedures Manuals (04-2404)

Secretary Raymond Hartwig called attention to the most recent drafts of the operating procedures manuals for Bylaw sections 2.14, 2.15, 2.16, and 2.17. After minor corrections and additions, the Commission approved this latest version of the manuals, copies of which will be provided to the Council of Presidents for its final review and approval.

73. Review of “GUIDELINES for the Constitution and Bylaws of a Lutheran Congregation” (04-2412)

Gordon Tresch, chairman of the subcommittee working on this project, reviewed the materials provided to the Commission by district constitutional committee chairmen and outlined plans for completing a final draft of the revised guidelines in time for discussion with the district chairmen at the announced February 1–2, 2006 meeting in St. Louis. Secretary Hartwig will begin to incorporate the materials provided by the subcommittee into a draft document that will be considered by the Commission at its next meeting.

74. Reconsideration of CCM Opinion 04-2409 (05-2423)

In a March 22, 2005 e-mailed letter, a pastor of the Synod submitted questions pertaining to the Commission’s earlier Opinion 04-2409, “Effect of Congregational Vote on Implementation of 2004 Resolution 7-21.” After consideration of the questions in light of other similar requests for opinions received by the Commission, the Secretary was asked to respond to the pastor by letter and to include copies of Opinions 04-2409 and 05-2434, suggesting that the pastor review the 2004 minutes of the Commission, Opinions 03-2357, 03-2358, and 03-2359, and other earlier opinions identified in his letter and ask whether his concerns had been resolved in light of Opinion 05-2434.

75. Change to Bylaw 1.5.9 by Handbook Revision (05-2426)

The Secretary of the Synod in a May 23, 2005 memorandum forwarded to the Commission a concern raised by the Synod's Human Resources Executive Director regarding Bylaw 1.5.9 and the use of the words "agency of the Synod" to replace the words "board, commission, and synodwide corporate entity" of Bylaw 3.69 (e) of the 2001 *Handbook*. Noting that issues pertaining to Bylaw 1.5.9 were also included in questions submitted by the President of the Synod (see #77 below) and that input from the President had only been received at the beginning of the meeting, the Commission agreed to defer further attention to questions pertaining to Bylaw 1.5.9 until its next regular meeting when substantial time can be devoted to the subject.

76. Amendments to Bylaws of LCMS Foundation (05-2429)

In a letter dated June 23, 2005, the Commission received from the Synod's legal counsel a request that the amendments to the LCMS Foundation Bylaws, approved by the Board of Directors of the Synod at its May 23–24, 2005 meeting, also be approved by the Commission. The Commission noted from Board of Directors' minutes that the amendments in question have already been approved by the Foundation's Trustees and Members, although Bylaw 3.9.2.2.4 requires that proposed amendments to articles of incorporation and bylaws or regulations of agencies of the Synod are to be examined "in advance" of adoption "to ascertain whether they are in harmony with the Constitution, Bylaws, and resolutions of the Synod." Nevertheless, the Commission assumes that all amendments will have been approved in the manner required by Synod Bylaw 3.6.1.6 and Article VI of the Foundation's Bylaws and that further changes discussed in this opinion will be adopted by the Foundation as required by Synod Bylaw 3.9.2.2.4.

Synod Bylaw 3.6.5.2.1 requires that the Board of Trustees of the LCMS Foundation shall consist of:

1. Two members (one ordained minister and one layperson) elected by the Synod in convention;
2. The chairman of the Board for District and Congregational Services (or his representative from that board);
3. At least seven members appointed by the Members, as provided in the Bylaws of the Foundation;
4. The President of the Synod (or his representative); and
5. The Vice-President–Finance—Treasurer of the Synod as a non-voting member.

The Commission notes that the amendment to Section 1 of Article II of the Foundation Bylaws meets the requirements of Synod Bylaw 3.6.5.2.1, which requires that seven members of the Board of Trustees be appointed by the members of the Foundation. There is nothing in the Synod's Bylaws that restricts the method of selection or the composition of the seven trustees appointed pursuant to the Foundation's Bylaws. The amended bylaws call for the election of seven trustees by members as the method of appointing them. Therefore, as stated in the Commission's previous Opinion 02-2248, "[s]ince the bylaws of the Synod do not restrict the manner of appointment, the Commission sees nothing that would prohibit the appointment through an election process as outlined in the amended Foundation bylaw."

However, there is an inconsistency in Section 1. The addition of the parenthetical statement "(one ordained minister)" after the words "seven Trustees" in the second sentence is not consistent with the second sentence following which provides that one of the trustees elected by the members "shall be an ordained or commissioned minister." To eliminate this inconsistency, the Commission requests that the parenthetical statement "(one ordained minister)" be removed from the second sentence. With this modification, the amendment to Section 1 of Article II is approved.

Section 2 of Article II has also been amended to provide for the commencement of the term of office for newly elected or appointed trustees in a manner consistent with the Foundation's practice. However, the proposed amendment is not consistent with Synod Bylaw 3.2.4 (a), which provides that "members of all elected boards of the Synod shall assume office on September 1 following the convention." The addition of the words "except for those trustees elected by the Synod in convention" at the end of the first sentence of Section 2 would eliminate the inconsistency. (The Commission also observes that the term of office for elected board members provided by Bylaw 3.2.4 (six years) is not consistent with Section 2 of Article II of the Foundation Bylaws, which provides for three-year terms of office for elected trustees.) The amendment to Section 2 of Article II is also approved with the suggested modification.

Section 3 of Article II governing the filling of vacancies has also been amended, requiring that a vacancy of a member-elected trustee shall be filled by election by the members. This amendment is also approved.

During the discussion of the proposed amendments, the Commission noted that proposals to recent conventions to adopt bylaws to govern the removal of members of boards had not received attention. It was agreed that this issue should again be brought to the attention of the Commission on Structure for its consideration.

77. Board for Human Resources and Board of Directors Policies; Bylaw 1.5.9 (05-2430)

In July 22 and August 15, 2005 letters, the President of the Synod asked two series of questions regarding the relationship of policies of the Board for Human Resources and policies of the Board of Directors in light of the wording of Bylaw 1.5.9 when compared with corresponding Bylaw 3.69 (e) of the 2001 *Handbook*. The President also requested an opportunity to appear before the Commission. Because the President's request was granted and because the requested meeting took place in conjunction with the current meeting of the Commission, it was agreed that these and related questions would be deferred to the next regular meeting of the Commission when substantial time can be devoted to the subject.

78. Board for University Education Compliance with 2004 Resolution 8-01A (05-2431)

In a July 21, 2005 letter, an interim Executive Director of the Board for University Education asked the following question regarding 2004 Resolution 8-01A, "To Amend Bylaws on Ecclesiastical Supervision and Dispute Resolution" and the particular resolve of the resolution that "in consultation with the Commission on Constitutional Matters, the Board for Higher Education shall develop and amend, as necessary, a *Standard Operating Procedures Manual* which will serve as a comprehensive procedures manual for this bylaw" (2004 *Proceedings*, p. 178).

Question: In light of Resolution 8-01A, what recommendations or suggestions does the CCM offer to University Education to be in compliance of this resolution?

Opinion: LCMS 2004 Resolution 8-01A amended the Bylaws of the Synod in regard to ecclesiastical supervision and dispute resolution, including Bylaw 3.8.3.8.9 under the Board for University Education. Paragraph (f) (4) of the bylaw refers to a *Standard Operating Procedures Manual*, stating: "All hearings shall be private, attended only by the parties and the witnesses who can substantiate the facts relevant to the matter in dispute. The Review Committee shall follow the procedures set forth in the *Standard Operating Procedures Manual* for this bylaw to be followed in the hearing and shall establish the relevancy of evidence so that each party shall be given an opportunity to present fully its respective position...."

The question that is asked refers to paragraph (j) which states: "In consultation with the Commission on Constitutional Matters, the Board for University Education shall maintain and amend, as necessary, a

Standard Operating Procedures Manual, which shall serve as a comprehensive procedures manual for this bylaw.” Resolution 8-01A even more explicitly states that the Board is to develop such a manual and amend it as necessary. The Board for University Education is therefore required, in consultation with the Commission on Constitutional Matters, to develop and maintain a operating procedures manual that will set forth in detail a standard manner for carrying out the provisions of Bylaw 3.8.3.8.9 by any and all boards of regents of the Synod’s educational institutions, to be applied in all cases dealing with complaints arising out of Bylaw 3.8.3.8.5 and other such bylaws. This *Standard Operating Procedures Manual* is to be made available to and for the benefit of each board of regents, the president of each educational institution, the parties in a dispute, each Review Committee that is formed, and others as necessary or required.

The Commission recommends that the Board for University Education proceed to develop the required manual for Bylaw 3.8.3.8.9, referring for resource help to the standard operating procedures manuals already developed by the Commission and the Council of Presidents for Bylaw sections 1.10, 2.14, and 2.17. Upon its development, the Bylaw 3.8.3.8.9 manual should be submitted to the Commission on Constitutional Matters for review.

79. Conduct of Board of Directors and Its Chairman (05-2432)

In a July 11, 2005 letter, a pastor of the Synod submitted a series of questions regarding the conduct of the Board of Directors and of its chairman in regard to 2004 convention Resolution 7-21. The questions were forwarded to the Board of Directors and the Synod’s legal counsel for consultation, but a response had not been received from the Board in time for this meeting. The Board will be informed that this matter will be placed on the agenda of the Commission’s November 28–29, 2005 meeting and that the Commission anticipates a response from the Board prior to that meeting.

80. Dissent by a Member Congregation of the Synod (05-2433)

In a letter dated July 26, 2005, a district president asked for an opinion regarding the manner in which a congregation may express its dissent to decisions of the Synod.

Question: If a congregation dissents, would Bylaw 1.8.2 of the 2004 LCMS *Handbook* apply and, if so, what steps would they follow to express their dissent? Who would be their peers, and where and how would they verbalize their dissent?

Opinion: The question is correct in recognizing that a congregation has the right of dissent based on its membership in the Synod (Article V of the Constitution). The right of brotherly dissent is granted to members of the Synod, including congregations, in Bylaw section 1.8.

Bylaw 1.8.2 is silent on the question of steps to be taken by congregations to express dissent, including who would be their peers and how they would verbalize their dissent. However, the following paragraph of a 1969 CCM opinion on dissenting groups, “An Opinion Regarding Dissenting Groups and Activities Within the Synod,” is helpful in understanding who may be included in the fellowship of peers:

Christians as well as non-Christians expect differences of opinion and judgment to arise when people walk together. The Synod has provided for forums in which such differences can be discussed and evaluated beyond the confines of the local congregation. The pastors and teacher conferences; the circuit meetings; the synodical and district board, commission, and committee meetings; the doctrinal supervision and appeals procedures; and above all the conventions of the districts and of the Synod provide the proper channels through which the issues of opinion and judgment are to be discussed

and decided. In the absence of a clear word of God issues must be decided by the majority principle, applied in Christian love and with Christian restraint (Article VIII, C). When the majority will has been determined, it must be respected. Otherwise life together (synod) becomes all but impossible. Discussion may indeed continue; but it needs to be carried on with full respect for the majority will and within the forums established by the Synod for the preservation of synodical unity. If additional channels for discussion are needed, the Synod can provide for the same in its Bylaws through appropriate convention action.

81. Reconsideration of Opinion 04-2409 (05-2434)

In a lengthy July 25, 2005 memorandum, two members of the Board of Directors speaking on behalf of the Board requested that the Commission review and reconsider its Opinion 04-2409, expressing the Board's concerns in four parts, sections of which are quoted here following.

Question 1: The first issue involved in such reconsideration is the issue of the Board's authority under Article XI F of the Constitution, posed by the Board's memorandum as follows:

Article VI of the Constitution states that the Synod has legal power to purchase, hold, administer, and sell property of every description. This power of the Synod always remains, even when the Synod has delegated such authority as it has in Article XI. Thus it has been recognized since the formation of the Synod that the Synod through its delegate convention has overriding authority over the property it owns. However, since a convention of the synod is incapable of carrying out the day-to-day management of its property, it has delegated that responsibility to the Board of Directors in Article XI of the Constitution. But, to repeat, the granting of authority in Article XI has always been under the umbrella of Article IV. Hence, the question becomes, "what is the extent of the authority the Synod has delegated to the Board of Directors in Article XI?"

Opinion: It is impossible to precisely delineate the extent of the Board's authority and responsibility in the abstract. The Board derives authority and responsibilities both from the Synod's Constitution and from its Bylaws. The two documents together outline the framework of the Synod's governance. Beyond this general framework, the Synod has also reserved the right to delegate further duties and authority by resolutions of the convention. Although the question as posed limits the inquiry to that authority granted under Article XI, a proper response to the question posed must make reference both to the Constitution and to the Bylaws of the Synod and even then could not fully explore the full extent and limits on the Board's authority without considering the existence of resolutions not incorporated into the Constitution and Bylaws. As a starting point, under Article XI, the Synod has identified the Board of Directors as both the Synod's legal representative and the custodian of the Synod's property. Each of those functions has separate duties and authority.

Legal Representative: A legal representative is someone authorized to act on behalf of another. West's Law Dictionary suggests that "the term in its broadest sense means one who stands in the place of, and represents the interests of, another." Examples of legal representatives include personal representatives and executors of estates, persons acting under a power of attorney, a guardian or conservator, or an elected official. A corporation or other business entity by definition must have a representative to interact with those outside the entity. As the Synod's legal representative, the Board's authority includes the right to interact with the secular world as the Synod's agent, and on its behalf is authorized to enter into and sign contracts, to buy and sell property in the name of the Synod, to open bank accounts, and to file reports with and respond to inquiries from federal, state, and other governmental agencies. As an agent of the Synod, the Board is to conduct itself as directed by its superior, the Synod itself.

The Board's authority as representative is limited both by implied and expressed limitations from the Synod. As with other officers of the Synod, the Board is expressly restricted by Article XI A 1, which declares that the officers of the Synod "must assume only such rights as have been expressly conferred upon them by the Synod, and in everything pertaining to their rights and the performance of their duties they are responsible to the Synod." Another expressed restriction is found in Bylaw 3.3.5.9, pursuant to which the Board may appoint vice-presidents not in line of succession, assistant officers, and other staff required from time to time to carry out the business and legal affairs of the Synod, but may only do so subject to the approval of the President of the Synod. Under current Bylaw 1.4.4, the Board's role as determined by the Synod in convention is described as follows:

The Board of Directors serves the Synod as its legal representative and as custodian of all property of the Synod, and upon it is incumbent the general management and supervision of the business affairs of the Synod, except to the extent that management authority and duties have been delegated by the Articles of Incorporation, Constitution, Bylaws, or resolutions of a convention of the Synod to other officers and agencies of the Synod or to separate corporate or trust entities (underline added).

Although the current language reflects some changes by the 2004 convention, the same conceptual limitations were contained in the previous language. For example, paragraph a of 2001 Bylaw 3.185 contained the language: "Except as otherwise provided in these Bylaws, it shall have such authority and responsibility with respect to the property of the Synod as is generally vested in and imposed upon a board of directors of a corporation, provided, however...." The general allocation of responsibilities as currently found in Bylaw 1.4.5 was further described in paragraph c of 2001 Bylaw 1.07 as follows:

The Board of Directors serves the Synod as its legal representative and as custodian of all property of the Synod, and upon it is incumbent the general management and supervision of the business affairs of the Synod. Each other board of directors, board of regents, and board of trustees also serves the Synod with respect to the property of the Synod, to the extent of its jurisdiction, as provided or authorized in these Bylaws. Upon each such board of the Synod is incumbent the general management and supervision of the business affairs of the Synod to the extent of its jurisdiction. Also, each board of directors, board of regents, and board of trustees shall, to the extent of its jurisdiction, between conventions and subject to advice or direction from any other appropriate board that has been given authority by these Bylaws or by convention resolution, (1) determine general operating policies, (2) approve program budgets, (3) allocate resources for such programs, (4) review program performance, and (5) coordinate the administration of convention resolutions. Each board of directors shall also be empowered to settle disputes within that corporate entity. Each board shall report its activities and recommendations to the respective convention.

More often the limitations are implied rather than expressed. For example, a typical secular board of directors, as legal representative and agent of the shareholders, has authority to hire and fire all officers of the corporation, including its president. While not expressly stating that the Board may not discharge the President and select a replacement of its choosing, the Synod has provided that the Synod itself in convention or pursuant to the provisions of Bylaws 2.16 or 2.17 may remove its president from office. The authority granted under Article XI F does not include such powers.

Finally, it should be noted also that the Board is not the only representative of the Synod. There may be more than a single "legal representative" simultaneously. The President, for example, has been given the responsibility to represent the Synod at all meetings of the districts (Article XI B 6). Under Bylaw

3.3.1.1.2, it is also the President and not the Board who represents the Synod in official contacts with all partner churches and all other church bodies. Under Bylaw 3.8.4.2 the Board for Black Ministry Services is authorized to represent the interests of the Synod in black ministry throughout the Synod. Under Bylaw 4.4.2, a district president is also expressly identified as the representative of the Synod in his district.

Custodian of Property: This term similarly does not provide a clear definition of the authority of the Board but rather identifies one of the Board's functions. A "custodian" may be defined as a person with whom some article is left, who is responsible for the safe return of the article to the owner. A custodian can include banks holding bonds, storage companies where furniture or files are deposited, a parking garage, or a kennel or horse ranch where an animal is boarded. The real issue here is the authority accompanying the role of "custodian."

Article XI F designates the Board as the default entity holding the assets and funds of the Synod on its behalf. Article XI expressly authorizes the Board to delegate such authority to other agencies of the Synod. The Board exercises such delegation, for example, in the budgeting process under Bylaw 3.3.5.5, in the Board's discretionary delegations of powers and duties to agencies of the Synod under Bylaw 3.3.5.5 (b), and in the Board's mandatory delegations of authority to districts to buy and hold property in the district's own name, as is required in Bylaw 3.3.5.7 (a).

The Antecedent of "It": In the discussion that follows the Board's question, the Board asks the Commission to consider the meaning or interpretation of the word "it" in the third sentence of Article XI F 2 of the Constitution and implies that the answer to that grammatical question answers the broader, more fundamental question posed. The Commission concedes that the most logical antecedent noun to which "it" applies is the Board itself and not the Synod (acting in convention). However, Opinion 04-2409 was not based upon an interpretation of the word "it." That grammatical observation does not resolve the issue. Instead, as suggested above, there is no complete answer to the question posed, and recognizing the Board of Directors as the legal representative of the Synod and the custodian of its property does not resolve the matter. As will be discussed more fully below, the Board is the primary entity charged with management of the property and business affairs of the Synod. But the Synod is not organized primarily for business purposes, and the Synod has chosen to delegate to the Board property and business authority and not ecclesiastical authority. The Synod's Board of Directors is the Synod's agent, acting not under a corporate governance model but under a structure designed to fulfill business functions within a much broader structure designed to fulfill the Synod's primarily ecclesiastical purposes.

The Commission appreciates the Board's expressed recognition of the ultimate authority of the Synod in convention. The turmoil created in the Synod by those who during the last triennium suggested that only a board of directors could lawfully hold such authority was a primary impetus for the consideration and adoption by the 2004 convention of many resolutions, including Resolution 7-21, which was the subject of Opinion 04-2409.

Question 2: As the Board's discussion in its memorandum continued, the issue of balance of authority was raised:

The structure of the Synod is unique, and the extent of the authority of the program boards and commissions is very often not clearly delineated. The Board of Directors has been given authority over the property and business affairs of the Synod. At the same time, program boards and commissions have been given policy and administrative duties in defined areas.

Policy and administration overlap with property and business affairs. Likewise, property and business affairs impact policy and administration. Thus there is not, nor can there be, a clear line of division between property and business affairs on the one hand and policy and administration on the other. Accordingly, there has developed over the years a gentle tension between the two, and in those instances where agreement has not been reached because there is a lack of clarity or a contradiction in the Bylaws, the Commission on Constitutional Matters has been called upon to be the arbiter. Many of the decisions referenced by the Commission in Opinion 04-2409 are of that nature and do not support Opinion 04-2409 as rendered.

Opinion: The Commission agrees that the structure of the Synod is unique and that there is and always has been a tension between the property and business affairs of the Synod on the one hand and the policy and administration on the other. Using the term “property and business” in this context, however, is not the same as using that term in a business setting where the acquisition and management of property for the purpose of generating a profit for the shareholders is the purpose of the organization. The Synod’s purposes and objectives are detailed in Article III of the Constitution. The power of the Synod to hold and manage property (Article IV of the Constitution) is solely for the purposes of meeting the Synod’s stated objectives, which may generally be described as ecclesiastical and not secular. In light of that context, the last comment in the Board’s last referenced paragraph is in error. Opinion 04-2409 does not effect any change in the authority or responsibilities of the Board.

The business powers delegated to the Board on behalf of the Synod are generally described in Article IV of the Constitution:

The Synod shall have legal powers:

1. To purchase, hold, administer, and sell property of every description in the interest of the Synod.
2. To accept, hold, administer, and, if deemed advisable, dispose of legacies, donations, commercial papers, and legal documents of every description in the interest of its work.

These secular functions are identified as being limited to those “in the interest of the Synod” and “in the interest of its work,” which objectives were identified in Article III of the Constitution. While the Board has no authority for ecclesiastical supervision, it serves the ecclesiastical functions of the Synod by its management of those business functions that have been delegated to it.

The fact that “business affairs” is understood in the Synod as a limited function and not as an all-encompassing recognition of authority and purpose is evidenced in Article XI B 8, the list of authorities granted to the President of the Synod. After identifying many specific duties, responsibilities, and authorities of the President, paragraph 8 imposes on the President and not the Board of Directors the duty and authority between conventions to submit business matters to a vote of the congregations of the Synod. That paragraph reads:

8. When matters arise between meetings of the Synod in convention which are of such a nature that action thereon cannot be delayed until the next convention, the President is authorized to submit them to a written vote of the member congregations of the Synod only after full and complete information regarding the matter has been sent to member congregations by presidential letter and has been published in an official periodical of the Synod. If such matters are related to the business affairs of the Synod, such a vote shall be conducted only after the President has consulted with the synodical Board of Directors

(underline added). In all cases at least one-fourth of the member congregations must register their vote.

Note that only in the limited circumstance that the matter is related to “business affairs” must the President even consult with the Board of Directors.

In interpreting the Constitution and Bylaws of the Synod, the Synod’s primary purpose of serving its ecclesiastical purposes influences very strongly the balance that must be made and the factors that must be considered in determining whether an issue is truly one primarily of “property and business” concern for which the Board has primary responsibility or whether it is more accurately recognized as an ecclesiastical function, responsibility, and authority which is more likely to be delegated by the Synod to its ecclesiastical supervisors such as the President and district presidents or to one of its program boards or commissions. The language and grammar of a single sentence or phrase in one sentence or section of the Synod’s governing documents must also be considered in light of those documents as a whole and the governance structure of the Synod as a whole.

As implied in the Board’s question, the Synod has recognized that some person or group within the Synod must have the authority and responsibility for carrying out the day-to-day management of its property. That authority has been delegated to the Board of Directors, again subject to limitations. Expanding on the discussion above, for example, the Board must under Bylaw 3.3.5.5 “allocate available funds to the program boards, commissions, councils, and departments of corporate Synod and hold them responsible therefor.” Having allocated those funds and thereby delegated responsibility for the use and management of those funds, however, the Board has not been authorized to manage the day-to-day functioning of the boards, commissions, or other entities of the Synod to whom those funds are allocated. Rather, the Board continues to “have general oversight responsibility as set forth in the Bylaws.” Opinions 03-2357, 03-2358, 03-2359, and other prior opinions of the Commission cited in the challenged opinion support this position.

Question 3: The Board’s third question addressed the breadth of Opinion 04-2409:

The question presented to the Commission on Constitutional Matters in Opinion 04-2409 is whether a failure to pass Amendment A will impact the implementation or validity of any other resolutions passed by the 2004 convention of the Synod. This answer given by the Commission is “no.” By its answer the Commission infers that all other resolutions or changes to the Bylaws adopted by the 2004 convention are valid. This is contrary to the past practice of the Commission, which restricted its opinions to specific issues and specific resolutions as well as specific changes to the Constitution and Bylaws. In Opinion 04-2409 the Commission, with a broad statement, validates all resolutions and bylaw changes made by the 2004 convention which in any way relate to Article XII F 2 and, to some extent, forecloses itself from examining specific issues in the future which find their genesis in resolutions and bylaws adopted at the convention.

Opinion: The Board’s concern is at least in part well taken. The answer provided in Opinion 04-2409 was broader than required and could have been more clearly drafted. The Commission cannot anticipate in advance every circumstance or challenge that might be raised as to the impact of each resolution of the 2004 convention, and certainly not without examining each individual resolution. It would be unmanageable to attempt in advance and without context to consider each of the more than forty resolutions in that regard. In a broad sense, the answer given in Opinion 04-2409 represents an acknowledgment that the Commission’s prior opinions as referenced in Opinion 04-2409 do support the proposition that the passage or failure of Resolution 7-21 would not change those prior opinions, which opinions were expressly and vigorously challenged in overtures to the convention. None of the opinions

of the Commission were overruled by the convention and continue to be binding as set forth in Bylaw 3.9.2.2 (b). However, the Commission must recognize the potential need to examine specific issues in the future that find their genesis in the resolutions and bylaws adopted by the convention. It would thus have been more proper had the last sentence of the opinion's first paragraph read as follows (underline indicates new wording):

As such, the answer to the question presented is that if the proposed Constitutional Amendment A entitled "To Amend Constitution Regarding Officer and Board Responsibilities" as set forth in Resolution 7-21 of the 2004 convention of the Synod is not passed by a two-thirds majority vote, ~~it would not effect the implementation or validity of any other resolutions or changes to the bylaws passed at the 2004 convention~~ the CCM has been unable to identify any resolution or change to the Bylaws by the 2004 convention whose validity or implementation would be prevented. Should concerns exist as to any particular resolution, a specific inquiry should be directed to the Commission for further study.

Opinion 04-2409 is so modified.

Question 4: The Board's final question expressed concern that the Commission's interpretation served to undo a grant of authority by the 1998 convention:

Article XI F was amended by the 1998 convention of the Synod to its present wording. Prior to that amendment, paragraph 2 of Article XI F read as follows:

The voting members of the Board of Directors are the legal representative of the Synod and the custodians of all property of the Synod, and upon them are incumbent the general management and supervision of all the business affairs of the Synod.

Relative to the proposed change to the present wording, the *Blue Ribbon Committee Report* to the convention states, "Takes account of need to delegate authority in a large organization," further demonstrating in the wording of its proposal that the "it" in question is intended to refer to the Board of Directors (1998 *Blue Ribbon Committee Report*, p. 57, lines 41-42—Exhibit A). The same comment, "Takes account of need to delegate authority in a large organization," also occurs in Resolution 8-03B as adopted by the convention (1998 *Proceedings*, p. 162—Exhibit B). Thus the Synod in amending paragraph 2 clearly stated its intention to allow the Board of Directors to delegate its authority. This is consistent with the commentary provided by the Blue Ribbon Committee early in its report in a section entitled "Description of Committee Recommendations" where it is stated: "The heart of these changes is to retain the Board of Directors' authority to supervise all the business affairs of corporate Synod, while limiting its authority with reference to separate corporate or trust entities to 'general oversight'" (*Blue Ribbon Committee Report*, p. 13, paragraph 56—Exhibit C). Amendment A proposed to delete the very authority that was given to the Board of Directors in 1998. Therefore, for the Commission in Opinion 04-2409 to state that such proposed deletion stated more clearly what the paragraph adopted by the 1998 convention already meant is contrary to fact and warrants reconsideration by the Commission.

In summarizing its concerns, the Board of Directors indicated:

Therefore, in summary, it is requested that the Commission on Constitutional Matters reconsider Opinion 04-2409 for the reasons stated above and primarily because such opinion has the effect of nullifying the ability of the Board of Directors to delegate to agencies of the Synod its authority to exercise supervision over the property and business affairs of the Synod and thus brings into question the validity of previous and existing delegates of such authority.

Opinion: Prior to the 1998 convention action, the language of Article XI indicated that it was the voting members of the Board, rather than the Board as a whole, who served as custodians of the property of the Synod.

The 1998 amendments achieved at least two purposes. They made clear that it was the Board itself and not its individual members that was to fulfill the function of custodian of the Synod's property. Secondly, they made clear that the Board could expressly delegate such custodial responsibilities to agencies of the Synod. That delegation authority, contrary to the suggestion of the Board's inquiry, is unchanged by Opinion 04-2409. The authority to delegate to other agencies of the Synod is instead consistent with the actions and process of the Synod itself in making such delegations in the past, as reflected in the prior opinions of the Commission cited in Opinion 04-2409. It remains consistent with Bylaw 3.3.5.7 (b), which expressly grants to the Board the authority to "delegate to any agency of the Synod powers and duties with respect to property of the Synod for which such agency of the Synod has direct supervisory responsibility."

Amendment A did not purport to delete any authority of the Board of Directors to delegate authority, which power is found in the second and not the third sentence of Article XI F 2: "It [the Board of Directors] is the custodian of all the property of the Synod, directly or by its delegation of such authority to an agency of the Synod." Rather than read Opinion 04-2409 as a restriction on the Board's authority to delegate, the opinion should instead be understood as an affirmation by the Commission of that historical practice of both the Synod as a whole and of the Board of Directors in its service function to the Synod.

Should the Board have particular concerns about limitations on that authority in particular circumstances, it is invited to submit additional inquiries to the Commission on Constitutional Matters.

82. Interpretation of Bylaw 1.5.12 re Conflict of Interest (05-2435)

In a September 7, 2005 letter, the interim Executive Director of the Board for University Education submitted a request for an interpretation of Bylaw 1.5.12 regarding its interpretation and enforcement. In a September 15, 2005 e-mailed letter to the secretary and chairman of the Commission, that request was withdrawn.

83. Number of Voting Members of Boards of Regents (05-2436)

In a memorandum dated September 8, 2005, a pastor of the Synod submitted the following question regarding the number of voting members on boards of regents of schools of the Synod.

Question: Bylaw 3.8.3.6.2 states "the board of regents for each college and university shall consist of 13 voting members." Does this mean that only 13 board of regents members may serve on the board as voting members? Or can this also be interpreted that at least 13 board of regent members are to serve as voting members?

Opinion: Bylaw 3.8.3.6.2 directs that each board of regents shall consist of 13 voting members. It does not provide for any nonvoting members. Although there have been overtures and resolutions submitted to

the various conventions of the Synod over the years advocating change, Bylaw 3.8.3.6.2 establishes the current makeup of the boards pursuant to the will of the conventions. Unless and until a convention changes the bylaw, a board of regents will consist solely of 13 voting members.

84. Involvement of Districts in the Call Process of Mission Congregations (05-2437)

In a September 7, 2005 letter, a circuit counselor asked the following question regarding the role of the district in the calling process of a district-subsidized mission congregation.

Question: Can a district mission executive require a pastor to decline a properly issued call by revoking the mission subsidy promised to a congregation?

Opinion: At its March 5, 1982 meeting the Commission on Constitutional Matters addressed a related question from a congregation in the Central Illinois District (Ag. 1573): “Does a congregation, duly organized, in membership with The Lutheran Church–Missouri Synod, have the inherent and unalterable right to call her own pastor, or may a provision be made in the constitution of said congregation stating and affirming that the right and power of calling a pastor for such a congregation shall be delegated to and vested with the District’s Board of Directors?” The Commission responded: “The congregation must retain the right to call a pastor. To be sure, consultation, especially in situations of subsidized congregations, has always been customary. But the right itself belongs to the congregation (see for instance Article VII; Article VI, 3; Bylaw 5.01, a).”

In a March 23, 2000 opinion (99-2171) the Commission, after referring to the above-referenced 1982 opinion, further stated: “In view of the above, the Commission concludes that the right to call a pastor rests solely with the congregation that the pastor is to serve. Should a District threaten to withhold its subsidy unless a subsidized congregation adheres to the wishes of the District relative to the calling of a pastor, the congregation may utilize the Synod’s dispute resolution process to determine if such a threat is coercion and a violation of Article VII of the Constitution of the Synod.”

Accordingly, the Commission responds as follows to the question at hand: If the congregation in question is a rostered member of the Synod, the Synod has assured the congregation in Article VII of its Constitution, “In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation’s right of self-government it is but an advisory body.” As a member of the Synod, the congregation has agreed, in accordance with Bylaws 2.5.1 and 2.5.2, to seek the counsel of its district president when calling a pastor and to call and be served only by LCMS-rostered ordained ministers.

Therefore, assuming that the congregation in question has sought the counsel of its district president during the calling process, a district (or one of its staff persons) may not coerce the congregation relative to the calling of its pastor nor may it coerce a pastor upon receipt of the congregation’s call, since the right and responsibility to call the pastor rests solely with the calling congregation. Should a district threaten to withhold its financial support of the subsidized congregation unless the calling congregation and/or the called pastor adhere to the wishes of the district relative to the call of the pastor, the congregation may utilize the Synod’s dispute resolution process to determine if such a threat is coercion and a violation of Article VII of the Constitution of the Synod.

85. Authority of the Board of Directors (05-2438)

A pastor member of the Synod in a letter dated September 10, 2005, after calling attention to several bylaws describing the authority of the Board of Directors and of the President of the Synod, asked a series of questions regarding a specific action of the Board of Directors during its August 2005 meeting. The

questions were forwarded to the Board of Directors and the Synod's legal counsel for consultation but a response from the Board was not received prior to this meeting. The Board will be informed that this matter will be placed on the agenda of the Commission's November 28-29, 2005 meeting and that the Commission anticipates a response from the Board prior to the meeting.

86. Procedure for Filling Vacancies in Elected Positions (05-2439; 05-2440; 05-2442)

In a letter dated September 10, 2005, a pastor member of the Synod submitted a series of questions regarding the validity of actions by the Board of Directors during its August, 2005 meeting to fill vacant positions on the Board of Directors of Concordia Publishing House and the Synod's Board of Directors. Similar letters were received from another pastor of the Synod and from the chairman of the nominations committee of the Synod, asking whether the Board of Directors violated Bylaw 3.2.5 and 2004 convention Resolution 7-14.

These questions having been forwarded to the Board of Directors and Synod's legal counsel for consultation, the Commission considered the request from the Board that consideration of this and other questions be deferred because of the Board's inability to respond due to insufficient time. After discussion, the Commission decided to respond without delay out of concern for the consequences of a delay. During the discussion the Commission also noted the importance of being given the opportunity to review in advance any changes to regulations of the agencies of the Synod, as provided by Bylaw 3.9.2.2.4.

Question 1: Did the LCMS Board of Directors act in violation of Bylaw 3.2.5 when it filled vacancies on the CPH Board of Directors and on the LCMS Board of Directors with candidates who were nominated from the floor rather than from the list of candidates provided by the synodical nominating committee?

Opinion: 2004 convention Resolution 7-14 states:

WHEREAS, Bylaw 3.63 b [now Bylaw 3.2.5] requires that vacancies on synodically elected boards and commissions be filled by the Board of Directors of the Synod from a list of nominees determined by the Secretary of the Synod, the Director of Human Resources, and the chairman of the synodical nominating committee; and

WHEREAS, The Secretary of the Synod serves on the Board of Directors, and the Director of Human Resources is not an elected position; therefore be it

Resolved, That Bylaw 3.63 b be amended to read as follows:

PRESENT/PROPOSED WORDING

b. The Secretary of the Synod shall be responsible for gathering a list of nominees from the board or commission where the vacancy occurs, the synodical President, the District boards of directors, and the slate of candidates from the previous synodical convention within 90 days of notification of the vacancy. As list of at least three but no more than five candidates shall be submitted as soon as possible to the appropriate appointing body. This list shall be determined by the ~~Secretary of the Synod, the Director of Human Resources, and the chairman of the synodical nominating committee~~ chairman and two members of the synodical nominating committee as determined by the nominating committee. The Synod's Director of Human Resources shall be consulted in developing the candidate list.

The amended bylaw, now Bylaw 3.2.5 (2004 *Handbook*), therefore reads:

- (a) The Secretary of the Synod shall be responsible for gathering a list of nominees from the board or commission where the vacancy occurs, the President of the Synod, the district boards of directors, and the slate of candidates from the previous convention of the Synod within 90 days of notification of the vacancy.
- (b) A list of at least three but no more than five candidates shall be submitted as soon as possible to the appropriate appointing body.
- (c) This list shall be determined by the chairman and two members of the Committee for Convention Nominations of the Synod as determined by the committee. The Synod's Director of Human Resources shall be consulted in developing the candidate list.

The first whereas paragraph of Resolution 7-14 makes it very clear that the Board of Directors is required to fill the vacancies of boards and commissions elected by the Synod from the list provided by the nominations committee. Bylaw 3.2.5 does not make provision for nominations from the floor.

It is helpful to note that a whereas paragraph is an integral part of a resolution. Special Standing Rule #7 of the 2004 convention of the Synod reads, "The preface, preamble, rationale, and whereas sections shall be regarded as integral parts of resolutions and therefore subject to the same consideration and adoption as the main motion" (*Today's Business*, p. 9). The August, 1969 opinion of the Commission on Constitutional Matters, "An Opinion on the Constitutionality of Denver Resolution 3-15," also opined that "the entire document—'Preamble,' 'Whereases,' and 'Resolves'—forms a complete unit."

The actions of the Board of Directors as recorded in the minutes of the Board (August 19–20, 2005—item 66) in the filling of the vacancies on the Board of Directors of the Synod and the Board of Directors of Concordia Publishing House are violations of Bylaw 3.2.5 and Resolution 7-14.

Question 2: If the LCMS Board of Directors acted in violation of Bylaw 3.2.5, should the election of Peter Cage to the CPH Board and Walter Brantz to the LCMS Board of Directors be declared null and void?

Opinion: Yes, any action or resolution by any officer, board, commission, district, or other agency of the Synod that is in violation of the Synod's Constitution and Bylaws is null and void. A June, 1974 Commission on Constitutional Matters opinion (Ag. 632) opined that all resolutions of districts that provide for action which is in conflict with the Synod are unconstitutional and therefore null and void. An August 13, 1976 opinion, "Opinion re Legality of District Conventions and Circuit Meetings Involving Ineligible Participants," also concluded that elections by illegally seated delegates are to be considered null and void. Therefore, the positions in question remain vacant.

Question 3: If the above elections are declared null and void, should the LCMS Board of Directors be required to fill the vacancies on these two boards with candidates provided by the nominations committee?

Opinion: Yes. Article XI A 1 of the Constitution of the Synod states, "The officers of the Synod must assume only such rights as have been expressly conferred upon them by the Synod, and in everything pertaining to their rights and the performance of their duties they are responsible to the Synod."

Bylaw 1.4.1 states in part:

The delegate convention of the Synod is the legislative assembly that ultimately legislates policy, program, and financial direction to carry on the Synod's work on behalf of and in support of the member congregations. It reserves to itself the right to give direction to all officers and agencies of the Synod. Consequently, all officers and agencies, unless otherwise specified in the Bylaws, shall be accountable to the Synod for all their actions, and any concerns regarding the decisions of such officers or agencies may be brought to the attention of the Synod in convention for appropriate action.

And Bylaw 1.4.3 also states in part:

Elected officers of the Synod and its agencies serve in accordance with duties assigned to them or otherwise authorized by the Constitution and appropriate bylaws. Primary responsibility is given to each officer, to the extent of his jurisdiction, for implementing specific decisions of the appropriate conventions, boards, and commissions and for supervising and coordinating the day-to-day activities of the respective staffs.

For the appropriate procedure to be followed, see answer to question 1 above, which quotes Bylaw 3.2.5.

Question 4: Does the Board of Directors have the authority to flout the requirements of Bylaw 3.2.5 (c) on the basis of an appeal to *Robert's Rules of Order*?

Opinion: No. While the Bylaws of the Synod refer to "accepted parliamentary rules," such as Bylaw 1.5.2 ("All agencies shall organize themselves as to officers and subcommittees at the initial meeting after election or appointment and shall conduct business in accordance with accepted parliamentary rules.") and Bylaw 3.1.9 (i) (3) ("The President shall conduct the sessions according to accepted parliamentary rules and make every effort to arrange the schedule of business so that the sessions do not exceed one week in duration."), the Constitution, Bylaws, and resolutions of the Synod supersede any "accepted parliamentary rules."

Question 5: If the Board does not have such authority, are any appointments made on such a basis valid and operative, or do the positions remain vacant until filled in accordance with the provisions of the Bylaws?

Opinion: See the response to question 2 above. The positions remain vacant.

Question 6: Can the Commission on Constitutional Matters inform and direct the Board of Directors that its former actions are null and void?

Opinion: The Commission on Constitutional Matters through this opinion has informed the Synod (including the Board of Directors) that the aforementioned appointments are null and void, but it does not have the responsibility to enforce the Constitution, Bylaws, and resolutions of the Synod or its opinions. Therefore the Commission cannot "direct" the Board of Directors concerning their action. The Commission only interprets, that is, explains and tells what the collective will of the Synod is as expressed in the Constitution, Bylaws, and resolutions of the Synod.

See also the answers to the above questions.

87. Human Resource Policies and the President's Use of Executive Power (05-2441)

A pastor of the Synod in a September 9, 2005 letter asked a series of questions regarding the reference in Bylaw 1.5.9 to human resource policies and regarding the use of executive power by the President of the

Synod under Bylaw 3.3.1.3 (k). Because these questions address issues similar to those raised by the President of the Synod (see #77 above), a response was deferred to the next regular meeting of the Commission for the reasons stated, when all related questions will be given careful consideration (see also #75 above).

88. Activity of Small Groups Within the Synod (05-2443)

In a letter dated September 19, 2005, three members of the Council of Presidents submitted a series of questions regarding the propriety of certain activities of small groups within the Synod.

Question 1: Is it in harmony with the Constitution and Bylaws (1.3, 1.4, 1.8, 1.10, 3.1.1, and 3.1.6.2) of the Synod for any member of the Synod or unofficial group within the Synod to engage in activities that seek to carry out the objectives of the Synod (Article III) that the Synod has reserved until itself, though such members or groups have not been given such responsibility by the Synod itself? (E.g.: *“Resolved, that we send our pastor and one layman to represent _____ Lutheran Church of _____ to form a coalition of other confessional congregations and pastors to formulate a united plan of action for marking and avoiding (Romans 16:1) those who hold to the above stated errors in doctrine and practice.”*)

Opinion: On October 16, 1969, the Commission on Constitutional Matters issued a landmark opinion on the subject of “Dissenting Groups and Activities Within the Synod.” A portion of that opinion speaks directly to the question above:

The very nature and purpose of a synodical fellowship need to be restated once again. A synod is a "walking together." The choice of the word "synod," derived from the Greek, is significant because it emphasizes the idea of unity. For good reason our church body has chosen for itself the name: "The Lutheran Church—Missouri Synod." We are congregations, pastors, and teachers who have decided to join hands and to walk together.

The Preamble of the Constitution has the sub-heading: "Reason for the Forming of a Synodical Union." Union was the major concern in effecting the organization of the Synod. The concepts of fellowship, togetherness, brotherhood, and "walking together" express the basic purpose of the Synod's existence.

The reasons given in the Preamble for forming the union are "1. The example of the apostolic church, Acts: 15:1-31," and "2. Our Lord's will that the diversities of gifts should be for the common profit, 1 Cor. 12:4-31." Once again the emphasis falls upon the idea of unity.

In Article III, Objects, the fundamental thrust of the Synod is not only clearly stated but is given preeminence. The first purpose of the Synod is listed as: "The conservation and promotion of the unity of the true faith (Eph. 4:3-6; 1 Cor. 1: 10) and a united defense against schism and sectarianism (Rom. 16:17)." The Scripture references include the admonitions to preserve the unity of the Spirit in the bond of peace, to avoid all divisions, and to beware of division makers.

Objects 2, 3, 4, 5, and 6 continue with this theme. All of these imply the quest for oneness, its preservation and extension.

Objects 7 and 8 need special emphasis in view of the questions which have been raised regarding the formation and continuation of groups which attempt to carry out the purposes which the Synod reserves for itself:

7. The supervision of the ministers and teachers of Synod with regard to the performance of their official duties;

8. The protection of pastors, teachers, and congregations in the performance of their duties and the maintenance of their rights.

The Synod was organized and is maintained to carry out these objects. The congregations, pastors, and teachers who by their own free decision have joined the Synod have done so with the determination that the important functions described in Article III (and we would stress especially Objects 1, 7, and 8 in view of the questions which have been raised) should be carried out by the Synod. Any assumption of these responsibilities by secret or open, voluntary or auxiliary, new or established groups is disruptive of the synodical purpose and cannot be tolerated.

Christians as well as non-Christians expect differences of opinion and judgment to arise when people walk together. The Synod has provided for forums in which such differences can be discussed and evaluated beyond the confines of the local congregation. The pastors and teachers conferences; the circuit meetings; the synodical and district board, commission, and committee meetings; the doctrinal supervision and appeals procedures; and above all the conventions of the districts and of the Synod provide the proper channels through which the issues of opinion and judgment are to be discussed and decided. In the absence of a clear word of God issues must be decided by the majority principle, applied in Christian love and with Christian restraint (Article VIII C). When the majority will has been determined, it must be respected. Otherwise life together (synod) becomes all but impossible. Discussion may indeed continue; but it needs to be carried on with full respect for the majority will and within the forums established by the Synod for the preservation of the synodical unity. If additional channels for discussion are needed the Synod can provide for the same in its Bylaws through appropriate convention action.

It is incongruous for separate groups to organize for the purpose of policing the members of the Synod; it is equally incongruous for groups to organize for the purpose of either shaping or nullifying a decision in an area of concern in which the Synod has reserved to itself the right of making decisions. Where the Synod has not reserved this right to itself (e.g., the decision to establish orphanages, high schools, old folks homes, hospitals), congregations and individuals have the right to effect an organization so long as its objectives and operations do not interfere with the purposes and functions of the Synod. However, where the Synod has reserved this right to itself (e.g., the administration of its colleges and seminaries; the supervision of doctrine; the declaration of fellowship with other church bodies), congregations and individuals have no right under the Constitution of the Synod without the express approval of the Synod to effect organizations to achieve purposes for which the Synod itself exists or to carry on activities which rightfully belong to the duly elected or appointed officials of the Synod. Under these circumstances such organizations become divisive and schismatic and therefore subversive of the very purposes of the Synod.

Accordingly, and in response to the question submitted to the Commission, it is not in harmony with the Constitution and Bylaws of the Synod for a member of the Synod or an unofficial group within the Synod to assume such responsibilities as the Synod has reserved for itself in its stated objectives, “which are the objectives of the members themselves” (Bylaw 1.3.4).

Question 2: Is it in harmony with the Constitution and above Bylaws of the Synod for any member of the Synod or any groups within the Synod to advocate the withholding of funds from the Synod?

Opinion: In an October, 1966 opinion, the Commission on Constitutional Matters, in response to an inquiry from the President of the Synod, stated:

It is the opinion of the Commission that a congregation which withholds funds from the Synod is subject to serious admonition for divisive and unbrotherly conduct which destroys the synodical concept itself of “a walking together.” If all efforts at admonition fail, such a congregation shall in due course be subject to suspension and to eventual expulsion.

In a second October, 1966 opinion in response to a second question from the President of the Synod, the Commission stated the following regarding the activities of a group that was receiving and disbursing funds for mission work:

Quite aside and apart from any legal rights which The State of the Church, Inc. may or may not have, such synodically-unauthorized receiving of funds raises suspicion in the minds of the members of the congregations of the Synod and is divisive. Furthermore, since the disbursement of such funds is on a selective basis, this likewise is divisive. The Commission therefore holds that such activities can only militate against the essential unity implied and involved in a synodical structure (“a walking together”).

Accordingly, in response to the current question, a member of the Synod or any groups within the Synod that advocate the withholding of funds from the Synod are subject to admonition for activities that militate against the essential unity intended by the structure of the Synod as provided in its Constitution and Bylaws.

Question 3: Is it in harmony with the Constitution and above bylaws of the Synod for any member of the Synod or any groups within the Synod to teach publicly, publicly advocate, or promote any position contrary to the position of the Synod?

Opinion: Again, the above-referenced 1969 opinion (see response to question 1 above) speaks to this issue:

In this opinion the Commission is not attempting to limit the right of individuals to speak their own minds. Before and after the passage or rejection of synodical resolutions individuals must be free to express their concerns, especially to their peers. Frank and open discussion, carried on in a spirit of Christian love and forbearance, must be part of our life together in the Synod. It can be proper and salutary. However, in this opinion the Commission is addressing itself to the organizing of groups, to the calling of meetings, secret or open, to attempted manipulation of existing groups, to circularizing activities, and to a wide scale of joint actions, all of which by their very nature tend to polarize or fragment the constituency of the Synod, and thus have the effect of disrupting the synodical unity.

All members of the Synod and of its congregations are to beware of the danger of groups and activities which divide and splinter the Synod. Synodical and district officers and board and commission members have a special responsibility to identify divisive and subversive movements and to avoid them. By their example and advice they are to conserve and promote the unity of the true faith and the oneness of the Synod.

Accordingly, it is not in harmony with the Constitution and Bylaws of the Synod for any member of the Synod or any groups within the Synod to teach publicly, publicly advocate, or promote any position contrary to the position of the Synod. Dissent activities are to be governed by section 1.8 of the Bylaws of the Synod to which members have “commit[ted] themselves to act in accordance with” and “under which they have agreed to live and work together” (Bylaw 1.3.4).

89. Proper Dissent by Members of the Synod (05-2444)

In a September 9, 2005 letter, seven members of the Council of Presidents asked a series of questions regarding the propriety of various processes of dissent and dispute and the use of the Synod’s dispute resolution process. After discussion, the Commission agreed to finalize its response at its next meeting.

90. Constitution Article VI Reference to “Heterodox Tract and Missionary Activities” (05-2445)

A pastor of the Synod in a letter dated September 15, 2005, requested information regarding “specific circumstances that might be considered ‘heterodox tract and missionary activities’” under Article VI of the Constitution and its application to a particular event sponsored by his congregation. The Commission advised that he direct his questions to the staff of the Commission on Theology and Church Relations, adding that the Commission on Constitutional Matters would be pleased to respond to any questions that remain after such consultation, so long as they pertain to the Commission’s area of responsibility.

91. Missouri District Bylaw Amendments (05-2446)

With a September 29, 2005 letter, an officer of the Missouri District submitted the amendments to the Missouri District Bylaws that will be proposed to the district’s 2006 convention. After a careful review, the Commission offers the following suggestions to the district:

- Article II A 1 (p. 2) – The Commission encourages that the district consider using the wording provided in the Constitution and Bylaws of the Synod to describe the office of the president of the district, as in Synod Constitution Art. XII 7 and Bylaw 4.4.5.
- Article II D 2 (p. 4) – The Constitution Committee listed under paragraph 2, (although it is a committee and not a board) better belongs under the following paragraph 3 (mistakenly numbered “5”) since the Bylaws of the Synod make the committee directly responsible to the district board of directors (Bylaws 2.2.1 and 2.4.1).
- Article II E 2–4 (p. 5) – No mention is made of term limitations of circuit counselors.
- Article III D 11 (p. 9) – It may be a helpful clarification to insert the word “staff” after the word “salaried.”
- Article IV A 1–2 (p. 10) – The Commission again encourages that the district consider using the wording provided in the Constitution and Bylaws of the Synod (see first bullet above) for the sake of consistency with the documents of the Synod.

- Article IV A 1 (p. 10) – No mention is made of licensed deacons, which are to be included under the supervisory responsibilities of the president of the district.
- Article IV D 5 (p. 13) – This statement is in conflict with Article II B 2 (p. 3) where the position of Director of Financial Planning and Control has been removed.
- Article V B (p. 14) – A section heading in bold type is missing for this section.
- Article V C 5 (p. 14) – The Bylaw reference should read “Article V C 2” and include reference also to Article III D 15.
- Article VI B (p. 17) – An erroneous phrase in bold-faced type from Article V B 4 found its way into this section: “life, youth, parish education, singles, and older adults ministries;”
- Article VII A (p. 17) – Reference should be to Bylaw section 1.10 of the Bylaws of the Synod rather than chapter VIII.
- Article VII B 1 (p. 17) – Reference might be made to Synod Bylaw 1.10.2 which is the source of the quoted material.
- Article VII B 2 (p. 18) – Reference should be to Bylaw section 1.10 of the Bylaws of the Synod rather than chapter VIII.

92. Implementation of Circuit Realignment (05-2447)

In a letter dated October 5, 2005, a district president asked the Commission to review a proposal of his district’s Circuit Realignment Committee that establishes a schedule for implementation of the realignment of circuits in his district should proposed actions to that effect be adopted by the 2006 district convention.

Question: Is the proposed schedule for the implementation of circuit realignment as stipulated in the enclosed resolution acceptable? As you will note, because of the schedule of the conventions of the district and the Synod, we are proposing that circuits be realigned so that the new configuration of circuits takes effect for the 2007 convention of the Synod and for the 2009 convention of the district.

Opinion: Article XII 3 c gives responsibility to districts to establish visitation circuits by including among district officers “as many circuit counselors as each district may determine upon.” Bylaw 1.3.2 expands upon that understanding: “The Synod divides itself into districts and authorizes the districts to create circuits.” Accordingly, Bylaw 4.3.1 includes “a circuit counselor for each circuit established by the district” in a list of officers to be elected by each district, with Bylaw 5.2.2 providing the process to be used for such elections.

The Bylaws also authorize the creation of a second kind of circuit. While Bylaw 5.1.1 establishes the criteria for creating the visitation circuits provided for above, Bylaw 3.1.2 establishes the criteria for creating electoral circuits from those existing visitation circuits to provide delegates to conventions of the Synod. In both cases, the Constitution and Bylaws of the Synod are silent regarding the manner in which the implementation of these bylaw requirements is to take place.

The implementation schedule proposed by the district’s Circuit Realignment Committee, advocating that the electoral circuits in question be realigned for the 2007 Synod convention with the realignment of visitation circuits waiting until the 2009 district convention is not workable, given the requirement of the Synod’s Bylaws that the establishment of electoral circuits depends upon existing visitation circuits. To change electoral circuit configurations prior to changing visitation circuit configurations is not possible or

appropriate, since visitation circuits are the building blocks by which electoral circuits are constituted (paragraph (a) of Bylaw 3.1.2).

The question of how best to introduce circuit realignments when district convention action is required therefore remains, especially given bylaw requirements for the election of circuit counselors by a process that involves a detailed pre-convention process that necessarily involves existing circuit alignments. The Commission offers the following two options that are consistent with existing constitutional and bylaw requirements.

Option 1: Postpone implementation of any realignment decided by the convention until the next following district convention (in this case, 2009), electing current circuit counselors according to the existing alignment of circuits and authorizing that the circuit counselor nominations process provided by Bylaw 5.2.2 be applied according to the new realignment when preparing for the following convention. In the meanwhile, electoral circuits for the following year's Synod convention (in this case, 2007) would continue to be formed from the existing circuit configuration according to the requirements of Bylaw 3.1.2. After the implementation of the realignment (in this case, 2009), the formation of electoral circuits would be carried out according to the new circuit configuration in preparation for the following year's Synod convention (in this case, 2010).

Option 2: Provide for implementation of the realignment effective immediately (in this case, 2006), electing circuit counselors according to the new alignment of circuits and allowing for the formation of electoral circuits for the coming year's Synod convention according to the new configuration. Under this option, the election of circuit counselors would become more involved, since the nominations process outlined by Bylaw 5.2.2 in preparation for the convention would of necessity have been carried out according to the then-existing circuit configuration. Bylaw 5.2.2 (f) makes clear, however, that the election of circuit counselors is not final until the slate provided by the nominations process has been ratified by the convention. As part of that process, Bylaw 5.2.2 (c) and (d) provide for the holding of a caucus of the pastors and lay delegates of a circuit at the time of the convention, thereby to act on behalf of the circuit's congregations to resolve any issues regarding a circuit counselor nomination. In this case, such caucusing would allow the delegates from the congregations of visitation circuits affected by the realignment to meet prior to final ratification by the convention of the slate of nominees for circuit counselor (Bylaw 5.2.2 (f) and to nominate to that slate a pastor of their newly formed circuit to serve as counselor. Use of this option should be accompanied by clear notice to the congregations of the district of its process and consequences.

93. New Jersey District Bylaw Amendments (05-2448)

Proposed amendments to the Bylaws of the New Jersey District, forwarded by the district president and received October 10, 2005, were given brief consideration. Because the documents had been only recently received, the Commission agreed to give attention to the matter at its next meeting.

94. Other Matters

Raymond Hartwig and Wilbert Sohns provided reports on recent meetings of the Commission on Structure and the Blue Ribbon Task Force on Synodical Structure and Governance. Other matters briefly discussed during the meeting:

- Secretary Hartwig was asked to provide to the Commission such information that will help it to get started in fulfilling its responsibility as provided by Bylaw 3.9.2.2.4, to examine in advance not only the articles of incorporation and bylaws of every agency of the Synod but also its "regulations."

- Secretary Hartwig was asked to follow up on a matter forwarded to the Commission on Theology and Church Relations with Opinion 04-2416.

95. Adjournment

After dates and availability of Commission members for future meetings were discussed, Chairman Marcis closed the meeting with a prayer and benediction.

Raymond L. Hartwig, Secretary

MINUTES

COMMISSION ON CONSTITUTIONAL MATTERS Conference Call November 18, 2005

96. Call to Order

Chairman Albert Marcis called the meeting to order with all members of the Commission participating in the conference call. LCMS President Gerald Kieschnick and Board of Directors Chairman Robert Kuhn also participated in the first portion of the meeting. Dr. Kuhn was asked to open the meeting with a prayer.

Dr. Kieschnick and Dr. Kuhn were invited to address the Commission regarding a mutual interest of the President and Board of Directors that the Commission revisit its Opinion 05-2439; 05-2440; 05-2442 in light of input to be provided by the Board of Directors and that copies of input recently provided by legal counsel to the Commission also be provided to the Board.

97. Decision to Revisit Opinion 05-2439; 05-2440; 05-2442

Prior to its October 16–18, 2005 meeting, the Commission, although not required by Bylaw 3.9.2.2 (b), had invited input from the Board of Directors and the Synod’s legal counsel regarding agenda item 05-2439, 05-2440, and 05-2442. Because of concern for the consequences of a delay in issuing an opinion, the Commission chose to issue its opinion at its October 16–18 meeting. In light of the input since received from legal counsel regarding the matter and in light of the informal input provided by the President of the Synod and the chairman of the Board of Directors, the Commission determined to revisit its opinion in order to take into consideration the input received and any further input to be received from the Board of Directors in advance of the Commission’s next scheduled meeting.

98. Decision to Provide Legal Counsel Memoranda

Prior to its October 16–18 meeting, the Commission, although not required by Bylaw 3.9.2.2 (b), had invited input from the Board of Directors and the Synod’s legal counsel regarding agenda items 05-2439, 05-2440, and 05-2442. Upon request of the President and Board of Directors that the memoranda from the Synod’s legal counsel providing input to the Commission regarding this agenda item be shared with the Board, the Secretary of the Synod, as a member of the Commission, was directed to provide to the Board, in this instance and subject to the confidentiality of executive session, copies of the memoranda received from legal counsel.

99. Adjournment

With no further business to come before the Commission at this conference call meeting, Chairman Albert Marcis closed the meeting with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES

COMMISSION ON CONSTITUTIONAL MATTERS November 28–29, 2005 St. Louis, Missouri

100. Call to Order

Chairman Albert Marcis called the meeting to order and called on Don Little for an opening devotion. Several items were added to the agenda of the meeting by the members of the Commission.

101. Minutes of November 18 Conference Call Meeting

Secretary Raymond Hartwig presented the minutes of the November 18, 2005 conference call meeting. In the discussion that preceded their adoption, it was noted that copies of an October 11, 2005 memorandum from the Synod's legal counsel to the Commission regarding agenda items 05-2432, 05-2438, 05-2439, and 05-2441 mistakenly had been provided to the Board of Directors at the time that copies of a November 11, 2005 memorandum were provided. The chair was instructed to communicate to the Board of Directors that the Commission had not intended for the October 11 memorandum from legal counsel to be provided to the Board (copy of letter attached to protocol copy of these minutes).

102. Standard Operating Procedures Manuals (04-2404)

Secretary Hartwig reported that the Council of Presidents gave its final approval to the standard operating procedures manuals for Bylaw sections 2.14, 2.15, 2.16, and 2.17 at its November 15–17 meeting. Copies of each of the manuals were provided to the district presidents, who will produce copies as needed. The Commission asked that it also receive printed and electronic copies of the manuals.

103. Review of “Guidelines for the Constitution and Bylaws of a Lutheran Congregation” (04-2412)

The Commission gave careful consideration to a latest draft of the “Guidelines for the Constitution and Bylaws of a Lutheran Congregation.” It was agreed to include an index and that the text of all referenced bylaws be provided in endnotes to the document. The Secretary will incorporate changes and revisions into the document in preparation for review and discussion with the chairmen of district constitution committees at a scheduled February 1–2, 2006 meeting in St. Louis.

104. New Handbook Changes to Bylaw 1.5.9 (05-2426; 05-2430)

The Secretary of the Synod in a May 23, 2005 memorandum forwarded to the Commission a concern raised by the Synod's Human Resources Executive Director regarding Bylaw 1.5.9 and the use of the words “agency of the Synod” to replace the words “board, commission, and synodwide corporate entity” of Bylaw 3.69 (e) of the 2001 *Handbook*.

In July 22 and August 15, 2005 letters to the Commission, the President of the Synod asked two series of questions regarding the relationship of policies of the Board for Human Resources and policies of the Board of Directors in light of the wording of Bylaw 1.5.9 when compared with corresponding Bylaw 3.69 (e) of the 2001 *Handbook*.

Given the involved nature of the issues related to these questions, the Commission agreed to allow itself time for further study and to give priority time to this requested opinion at the time of its next regular meeting.

105. Conduct of Board of Directors and Its Chairman (05-2432)

In a July 11, 2005 letter, a pastor of the Synod submitted a series of questions regarding the conduct of the Board of Directors and of its chairman with regard to 2004 convention Resolution 7-21. The questions were forwarded to the Board of Directors and the Synod's legal counsel for consultation. Because the responses from the Board and legal counsel were only lately received, the Commission agreed to postpone finalizing its opinion to allow time to take this input from legal counsel and the Board of Directors into consideration.

106. Authority of the Board of Directors (05-2438)

A pastor member of the Synod in a letter dated September 10, 2005, after calling attention to several bylaws describing the authority of the Board of Directors and of the President of the Synod, asked a series of questions regarding the following action of the Board of Directors during its August, 2005 meeting:

WHEREAS, It is most important that all activities sponsored by and/or conducted under the auspices of The Lutheran Church—Missouri Synod are in accordance with the doctrine and practice of our Synod; and

WHEREAS, Concerns have been expressed regarding the theological positions or articulations of some of the presenters at past LCMS National Youth Gatherings; therefore be it

Resolved, That the Board of Directors evangelically encourage the Board for District and Congregational Services of the Synod, in consultation with the Office of the President, to evaluate carefully and thoroughly all presenters invited to future National Youth Gatherings to ensure that they are faithful to the doctrine and practice of The Lutheran Church—Missouri Synod; and be it further

Resolved, That the Board of Directors express its concerns regarding potential liability or adverse financial consequences connected with future National Youth Gatherings; and be it finally

Resolved, That the Board of Directors requests the Board for District and Congregational Services to report to the Board of Directors at its February, 2006 meeting the progress that is being made in addressing and resolving the issues that have been discussed between the Board of Directors and the Board for District and Congregational Services regarding the LCMS National Youth Gathering.

After noting the repeated references in the resolution to “doctrine and practice” and to “theological positions or articulations,” the questioner asked:

Question 1: In light of Bylaw 3.3.5.4, by what authority did the Board of Directors pass a resolution dealing with “doctrine and practice” and “theological positions or articulations”?

Question 2: In light of Bylaws 3.3.1.1 and 3.3.1.1.1, did the Board of Directors usurp the authority of the synodical President?

Question 3: If the Board of Directors did in fact usurp the authority of the synodical President, should the resolution adopted by the Board of Directors be declared null and void?

Opinion:

Ecclesiastical Authority of the Board of Directors

As reflected in Opinion 05-2434 (see minutes of the Commission's October, 2005 meeting), the precise limits of the authority of the Board of Directors cannot be delineated in the abstract. As suggested in that opinion, the primary responsibilities of the Board are in the areas of business, property, and legal affairs, including general oversight responsibility for all the business and property of the Synod.

According to Bylaw 3.3.5.4: "The Board of Directors shall be responsible for the general management of the business and legal affairs of the Synod..." Bylaw 3.3.1.1 states: "As the chief ecclesiastical officer of the Synod, the President shall supervise the doctrine taught and practiced in the Synod, including all synodwide corporate entities." And Bylaw 3.3.1.1.1 states: "The President of the Synod has ecclesiastical supervision of all officers of the Synod and its agencies, the individual districts of the Synod, and all district presidents."

Essentially, the basic issue raised in these three questions is whether the Board of Directors has responsibility and authority with regard to ecclesiastical matters. If it has any such authority, such authority does not derive from Article XI F of the Constitution, under which the Board has been delegated authority with respect to property and business affairs of the Synod. The Bylaws of the Synod are similarly not the source of any such authority or responsibility. The authority granted under Bylaw 3.3.5, the general grant of authority to the Board of Directors, again imposes responsibilities with respect to the general business affairs of the Synod but does not provide any general grant of ecclesiastical authority. Rather, the Bylaws give different measures of the ecclesiastical authority and/or responsibility to many others, including the President under Bylaws 3.3.1.1 and 3.3.1.3, the district presidents under Bylaw section 4.4, and those involved in the termination of membership processes described in Bylaw sections 2.13 through 2.17. Various ecclesiastical purposes of the church are also assigned to some of the Synod's program boards and commissions including, for example, the Board for Pastoral Education, the Board for Communication Services, the Commission on Doctrinal Review, and the Commission on Theology and Church Relations.

The Synod also delegates authority through resolutions of its conventions. In adopting such resolutions, the Synod has often recognized the distinction between business issues and those of an ecclesiastical nature. For example, as recognized in Opinion 02-2259, 2001 Resolution 7-03C charged the President and Board of Directors with specific responsibilities to see to it that the Constitution and Bylaws of the Synod are observed but directed that, when a failure to comply with the Constitution and Bylaws is discovered, the President or Board of Directors, whichever is charged with supervision or oversight, shall act to correct such failure to comply as quickly as possible. Here, any failure of the Board for District and Congregational Services regarding doctrinal issues would fall under the responsibility of the President.

Analysis of the Challenged Resolution

It is not the responsibility or authority of the Commission on Constitutional Matters in general to review resolutions of the Board of Directors. The question presented, however, asks the Commission to interpret the Constitution, Bylaws, and resolutions of the Synod to evaluate whether an action of the Board of Directors is consistent with them. Unfortunately, the resolution of the Board is fairly brief. Both whereas clauses refer to doctrine and practice and to theological positions or articulations. If there are concerns regarding theological issues relating to the LCMS National Youth Gatherings or, for that matter, any of the other programs operated by the various boards and commissions of the Synod, those issues must be addressed by the appropriate ecclesiastical supervisors and those charged by the Synod with the

responsibility for assuring faithfulness in doctrine and practice. While as individual members of the Board of Directors each member may find it appropriate to express concern to the appropriate ecclesiastical supervisor and to the involved board or commission itself, it is not appropriate for the Board of Directors to supervise or critique the doctrine and practice or the theological positions or articulations of such boards or commissions.

Having made those general observations, however, the inquiry is not complete. Bylaw 3.3.5.5 (a) (2) allows the Board of Directors to call up for review the action or policy of any program board, commission, or counsel, except opinions of the Commission on Constitutional Matters. However, that authority to call up for review is conditioned by paragraph (a) of that bylaw: “To the extent of its responsibilities relative to the general management of and supervision of the business and legal affairs of the Synod...” In the Board resolution in question, the whereas clauses express concern regarding doctrine and practice together with theological positions and articulations. Those concerns do not fall within the “general management and supervision of the business and legal affairs” of the Synod. Rather than adopting such a resolution regarding theological concerns, it would have been more appropriate for the members of the Board of Directors to have communicated their individual concerns to the Board for District and Congregational Services and to the President of the Synod (to exercise his responsibilities under Article XI B of the Constitution and Bylaw 3.3.1.1.1) rather than to handle the matter through a formal resolution outside the Board’s area of responsibility. Insofar as the subject resolution requires the Board for District and Congregational Services to report to the Board of Directors regarding theological matters, the resolution exceeds the authority of the Board of Directors.

Financial Concerns of the Board of Directors

The second resolve of the Board’s resolution expresses concerns regarding the potential liability or adverse financial consequences connected with the future National Youth Gathering. Unfortunately, nothing in the whereas clauses articulates a basis for this resolve. The Board of Directors is properly concerned with potential liability and adverse financial consequences that may occur by reason of the conduct of agencies of the Synod. In considering that issue, however, it should be recognized that not all issues having a fiscal impact upon the Synod are within the Board’s area of authority.

For example, it is the President of the Synod who articulates in a public fashion the positions of the Synod with respect to ecclesiastical issues. While there may be a reduction in contributions to the Synod or to individual churches of the Synod by reason of a public statement regarding the church’s position on abortion, the role of women in the church, the inappropriateness of various fraternal organizations, and many other topics, it is entirely outside of the Board of Directors’ authority to restrict the President’s communications in such areas. Similarly, the Commission on Theology and Church Relations is charged with the responsibility of assisting in maintaining doctrinal unity within the Synod and suggesting to the Synod studies of contemporary issues, including current social issues as they affect the church and as the church may affect such social issues. Certainly, a number of those studies and activities of the Commission can have the effect of causing some persons to leave the membership of the church or to choose not to become associated with the church. In the same sense, the responsibilities of the Board for District and Congregational Services, including the National Youth Gathering, are a program function of the church delegated specifically to that Board. The Board for District and Congregational Services is expressly charged by the Synod under Bylaw 3.8.6 with the responsibility to determine the number and nature of ministry areas necessary to meet expressed district and congregational needs, to arrange and carry out a comprehensive and effective program of Christian education (particularly as it relates to the Synod’s children and youth), as well as to provide input to assist those within the Synod that includes proper scriptural motivation in all gift programs.

Relationship of the Board of Directors and the Board for District and Congregational Services

The Board of Directors is not authorized to interfere with the Board for District and Congregational Services in the performance of those functions delegated to it by the Synod in convention. The final resolve of the resolution in question requests that the Board for District and Congregational Services report to the February, 2006 meeting of the Board of Directors. The Board of Directors is, under Bylaw 3.3.5.5, certainly responsible to hold the program boards of the Synod responsible for funds allocated to them by the Board. To the extent of its responsibilities relative to the general management and supervision of the business and legal affairs of the Synod, the Board of Directors may also receive such reports as it requests on the operations and policies of the program boards, commissions, and councils. To the extent that the Board's resolution attempts to seek input from the Board for District and Congregational Services with respect to those fiscal functions, the resolution is appropriate. To the extent that it seeks to challenge the judgment of the Board for District and Congregational Services as to the theological appropriateness of the program or presenters of the LCMS National Youth Gatherings, such a request would exceed the jurisdiction of the Board of Directors. Nothing in the resolve suggests that the Board of Directors, in this resolve, is attempting to influence or control the program decisions, doctrine and practice, or theological positions or articulations of the Board for District and Congregational Services.

Effect of the Resolution

In summary, the Board of Directors does not have the authority to pass resolutions dealing with "doctrine and practice" and "theological positions or articulations." It is the responsibility of the President of the Synod, together with all others to whom ecclesiastical responsibility has been delegated, to address concerns regarding the doctrine and practice and theological positions or articulations taken by the Board for District and Congregational Services as a whole or in its implementation and development of program and presentation for the National Youth Gathering. The Board of Directors does have responsibility to review fiscal functions of the Board for District and Congregational Services and to request appropriate reports under Bylaw 3.3.5.5.

107. Procedure for Filling Vacancies in Elected Positions, Revisited (05-2439; 05-2440; 05-2442)

As reflected in its November 18, 2005 minutes, the Commission on Constitutional Matters determined to revisit its Opinion 05-2439; 05-2440; 05-2442: "Procedure for Filling Vacancies in Elected Positions," giving consideration to input from the Board of Directors and the Synod's legal counsel that was not available at the time of the issuance of the opinion, despite the timely request for such input. While the question presented is not one which pertains primarily to business, legal, finance, civil rights, or property matters and therefore required to be submitted to either the Board of Directors or the Synod's legal counsel pursuant to Bylaw 3.9.2.2 (b), the Commission chose to solicit that input, as it has always been able to do. The current issue relates to filling vacancies on elected board positions of the Synod. While this issue may qualify under a very broad definition of "legal," by that definition almost every issue to come before the CCM is legal. Surely this was not the intention of the Synod. It is ultimately the responsibility of the Commission on Constitutional Matters and not the Synod's legal counsel or the Board of Directors to interpret the governing documents of the Synod. The Synod has chosen the Commission on Constitutional Matters and not the Synod's legal counsel, the Board of Directors, or the civil courts to interpret the Synod's Constitution, Bylaws, and resolutions. The Commission appreciates the input provided. It trusts that such input serves to focus and refine its analysis and to provide the best service possible to the Synod.

Each of the questions submitted is properly within the scope of the responsibilities assigned to the Commission under Bylaw 3.9.2.2, and each requires the Commission to consider the Constitution,

Bylaws, and resolutions of the Synod. In fulfilling that function and considering the issue properly presented, the Commission must consider whether particular actions of the Board of Directors are consistent with those governing documents. While the Commission has no enforcement authority, its opinions are of binding effect on all within the Synod unless and until overturned by the Synod in convention. No opinion can simply be ignored within the Synod or treated as having no force and effect. It is the responsibility of the President and others with supervisory responsibility, and not the Commission on Constitutional Matters, to see to it that those within the Synod abide by the opinions of the Commission.

The Commission reaffirms that Resolution 7-14 makes it very clear that the Board of Directors (as well as all other entities filling vacancies pursuant to the provisions of Bylaw 3.2.5) is required to fill the vacancies of boards and commissions elected by the Synod from the list provided by the nominations committee. This interpretation is consistent with the past practice of the Synod and the express language of Resolution 7-14, which recited: “Bylaw 3.63 b [current Bylaw 3.2.5] requires that vacancies on synodically elected boards and commissions be filled by the Board of Directors of the Synod from a list of nominees...” This requirement applies to both of the specific appointments raised in the question presented, i.e., a replacement on the Concordia Publishing House Board of Directors and on the Board of Directors of the Synod. Bylaw 3.2.5 does not make provision for nominations from the floor. Instead, the Bylaws provide a detailed procedure for gathering a list of nominees and the submission of a list of three to five names off of that list as “candidates” to the Board of Directors. The clear intent of this detailed procedure in the bylaw is that the vacancy can be filled only from among the three to five candidates (or nominees). Otherwise, this detailed procedure is at best a “hollow” exercise.

The Board of Directors (or, for that matter, any other entity filling a vacancy under Bylaw 3.2.5) does have opportunity to provide input regarding possible nominees/candidates. Each provision of a bylaw or resolution must, if possible, be given some reasonable meaning. No word, clause, or sentence should unnecessarily be rendered meaningless or superfluous. This is applicable when filling a vacancy on the Board of Directors under Bylaw 3.2.5. The bylaw provides that the source of a list of nominees shall be secured from, among others, the board where the vacancy occurs. Thus, the Board of Directors has input into the selection process for the list of nominees for the vacancy on the Board of Directors. If the Board of Directors thereafter has the right to make floor nominations to the list of candidates prepared in the prescribed manner, the candidate selection process set forth in Bylaw 3.2.5 is meaningless. Although nominees are sought from sources other than the Board of Directors and a separate selection committee chooses a list of three to five nominees, floor nominations by the Board of Directors would result in the nominee of the Board of Directors being elected and the interim steps of selecting candidates would be superfluous.

Having considered the additional input, the Commission reaffirms prior Opinion 05-2439; 05-2440; 05-2442.

108. Human Resource Policies and the President’s Use of Executive Power (05-2441)

A pastor of the Synod in a September 9, 2005 letter asked a series of questions regarding the reference in Bylaw 1.5.9 to human resource policies and regarding the use of executive power by the President of the Synod under Bylaw 3.3.1.3 (k). Because these questions address issues similar to those raised by the President of the Synod (see #103 above), a response was deferred to the next regular meeting of the Commission for the reason stated, when all related questions will be given careful consideration.

109. Proper Dissent and Dispute by Members of the Synod (05-2444)

In a letter dated September 9, 2005, a series of questions were addressed to the Commission by five district presidents and two vice-presidents of the Synod regarding whether or not the Synod’s

Constitution and Bylaws provide actions available to persons who have conflict with various actions taken by the Synod in convention or by duly elected officers of the Synod other than by filing a lawsuit against the Synod and/or by the use of other avenues that are in violation of the Constitution and Bylaws of the Synod.

Question 1: Is it in harmony with the Constitution and Bylaws (1.3, 1.4.1, 1.7, 1.8, 1.10, 3.1.1, and 3.1.6.2) of the Synod for any member of the Synod or any group within the Synod as an avenue or form of dissent or dispute to engage in promoting non-compliance with the resolutions of the Synod and making charges against the Synod, the President, and others of the Synod by use of lawsuits, publications, letters, or meetings and conferences that are not in keeping with the polity of the Synod as set forth in the Constitution and Bylaws?

Opinion: No, every member of the Synod (individual and congregation) joins the Synod voluntarily and in doing so agrees to relate to, live, and serve together with one another (“walk together”) in harmony with the Constitution and Bylaws:

In joining the Synod, congregations and other members obligate themselves to fulfill such requirements and to diligently and earnestly promote the purposes of the Synod by word and deed. Members agree to uphold the confessional position of the Synod (Art. II) and to assist in carrying out the objectives of the Synod (Art. III), which are objectives of the members themselves. Thus, while congregations of the Synod are self-governing (Art. VII), they, and also individual members, commit themselves as members of the Synod to act in accordance with the Constitution and Bylaws of the Synod under which they have agreed to live and work together and which the congregations alone have the authority to adopt or amend through conventions. (Bylaw 1.3.4) (Emphasis added)

DISSENT

I. “While retaining the right of brotherly dissent, members of the Synod are expected as part of the life together within the fellowship of the Synod to honor and uphold the resolutions of the Synod” (Bylaw 1.8.1).

In their agreement to live and work together in harmony (in harmony with the Constitution and Bylaws) the members of the Synod, when and where dissent exists, have agreed to and encourage the right of brotherly dissent. Dissent that is “brotherly” will always regard another as a brother or being in a “brotherhood” (Cf. reference to “brotherhood” in Bylaw 1.10.1.1) and will treat and relate to others in the “fellowship” as brothers.

1971 convention Resolution 2-21 explains: “To honor and uphold (emphasis added) means not merely to examine and study them, but to support, act, and teach in accordance with them until they have been shown to be contrary to God’s Word.” Honoring and upholding the resolutions of the Synod means that the dissenter is not to preach, teach, disseminate, or promote any position contrary to the position of the Synod nor engage in loveless public criticism nor to degrade, belittle, or depreciate the position of the Synod while dissenting.” In regard to violation of then-Bylaw 2.39 c (current Bylaw 1.8.1), a 1993 Commission on Constitutional Matters opinion (Ag. 1956) regarding doctrinal dissent stated: “Doctrinal discipline must be exercised in the case of the pastor who teaches contrary to the position of the Synod....” And in a Commission opinion of October 23, 1996 (Ag. 2048):

...the dissenter is not free to teach the dissenting view...to so teach publicly that the position of the Synod is contrary to the Scriptures would be to elevate a matter of human opinion to the level of Scriptural doctrine—which from the viewpoint of the Synod

would be contrary to the Scriptures...If permitted to do so, every member of the Synod would have the right to determine which of the positions of the Synod in similar matters it wished to accept and which to reject.

II. "Dissent from doctrinal resolutions and statements is to be expressed first within the fellowship of peers and then brought to the attention of the Commission on Theology and Church Relations before finding expression as an overture to the convention calling for revision or rescision. While the conscience of the dissenter shall be respected, the consciences of others, as well as the collective will of the Synod, shall also be respected" (Bylaw 1.8.2).

The "dissent from doctrinal resolutions and statements" is first of all expressed within the "fellowship of peers." A 1969 Commission opinion on "dissenting groups" is helpful in understanding a partial background of the current bylaw:

The Synod has provided for forums in which such differences can be discussed and evaluated beyond the confines of the local congregation. The pastors and teachers conferences; the circuit meetings; the synodical and district board, commission, and committee meetings; the doctrinal supervision and appeals procedures; and above all the conventions of the districts and of the Synod provide the proper channels through which the issues of opinion and judgment are to be discussed and decided...If additional channels for discussion are needed the Synod can provide for the same in its Bylaws through appropriate convention action.

In a report of the Commission on Theology and Church Relations, November, 1973, "Guiding Principles for the Use of 'A Statement of Scriptural and Confessional Principles' with Special Reference to the Expression of Dissent," the "fellowship of peers" is explained this way:

The Synod's established procedures for registering dissent with its doctrinal statements include the following: a. "That we call upon those who teach publicly in the church (pastors, teachers, and professors) to test their findings and opinions with their peer groups before presenting them to the church at large and to refrain in brotherly love from disseminating doctrinal positions in such manner and in such situations as will cause confusion and offense in the church" (1965 Resolution 2-08, *Proceedings*, p. 96). It is expected that pastors and teachers will discuss their objections and concerns in their conferences, that professors will discuss such matters with their teaching and administrative colleagues, and that staff members will discuss their objections with their boards and other staff persons.

Then the dissent is brought to the attention of "the Commission on Theology and Church Relations" before finding expression as "an overture to the convention." This, together with the expression of dissent within the fellowship of peers, gives the dissenter the privilege and responsibility to advise and persuade or convince the "fellowship of the Synod" on the basis of the power of the Word of God and in an orderly harmonious way.

Brotherly and formal dissent should not be confused with the wholesome need to discuss differing viewpoints, to have frank and open discussions, and to always examine and review all positions and resolutions of the Synod. A 1969 Commission opinion ("Dissenting Groups") stated:

In this opinion the Commission is not attempting to limit the right of individuals to speak their own minds. Before and after the passage or rejection of synodical resolutions individuals must be free to express their concerns, especially for their peers. Frank and

open discussion, carried on in a spirit of Christian love and forbearance, must be part of our life together in the Synod. It can be proper and salutary....It is within the context of the Synod—the forums, channels, and procedures which the Synod itself establishes—that differing viewpoints need to be discussed and an issue finally decided. Continuing dialogue beyond the point of decision must also be carried on within the same synodically agreed upon framework and in deference to the majority will. (Emphasis added)

More recently, the Commission’s Opinion 03-2328 also addressed the subject:

As a part of life together in the Synod, members have the responsibility to continually examine and reexamine their confession (symbols, doctrinal statements, and resolutions) to determine if they are faithful to the Holy Scriptures. Members have a never-ending task of testing everything that the Synod believes, teaches, and practices to see if they are in accordance with the Word of God. If there are issues that need to be readdressed or issues that are considered by the members of the Synod that have not yet been addressed, any action is to be governed by the procedures set forth in the Bylaws, particularly Bylaws 1.09 and 2.39 [now Bylaws 1.6, 1.7, and 1.8].

“The collective will of the Synod” (Bylaw 1.8.2) is established and expressed through the Synod in convention and not by individuals or groups within or outside of the Synod, nor through the courts or unofficial publications, letters, meetings, and conferences:

The delegate convention of the Synod is the legislative assembly that ultimately legislates policy, program, and financial direction to carry on the Synod’s work on behalf of and in support of the member congregations. (Bylaw 1.4.1)

[The convention] is the principal legislative assembly, which amends the Constitution and Bylaws, considers and takes action on reports and overtures, and handles appropriate appeals. It establishes general positions and policies of the Synod, provides overall program direction and priorities, and evaluates all such positions, programs, policies, directions, and priorities in order to provide responsible service for and on behalf of its members. (Bylaw 3.1.1)

Bylaw 3.1.6.2 sets forth how overtures may be submitted to the convention so that the collective will of the Synod can be established and expressed.

DISPUTE

In their agreement to live and work together in harmony (in harmony with the Constitution and Bylaws) the members of the Synod, when and where disputes exist, are required, subject to limited exceptions, to use the avenue provided by the Synod to settle disputes, as set forth in Bylaw section 1.10, “Dispute Resolution of the Synod,” which in part states:

The Holy Scriptures (1 Cor. 6:1-7) urge Christians to settle their differences by laying them before the “members of the brotherhood.” Therefore, the Synod in the spirit of 1 Corinthians 6 calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod’s system of reconciliation and conflict resolution. The use of the Synod’s conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. Fitness for ministry and other theological matters must be determined within the church. Parties are urged, in matters of

a doctrinal nature, to follow the procedures as outlined in Bylaw section 1.8. (Bylaw 1.10.1.1) (Emphasis added)

The procedure set forth in the Synod's dispute resolution process can involve or include as parties any member of the Synod, the Synod itself, a district or an organization owned and controlled by the Synod, persons involved in excommunication or lay members of congregations of the Synod holding positions with the Synod itself or with districts or other organizations owned and controlled by the Synod (Bylaw 1.10.2). Procedures for expulsion of membership under Article XIII of the Constitution are set forth in Bylaws 2.14–2.17.

Therefore, all members of the Synod are required to resolve all matters of dissent or all disputes by the avenues and structures available to them as set forth in the Constitution and Bylaws of the Synod without resorting to secular courts and without resorting to avenues, means, structures, or communications that are foreign or contrary to the synodical agreements and which are not in harmony with the polity of the Synod. “We appeal once again to all members of the Synod to use the channels which the Constitution, Bylaws, and resolutions of the Synod provide for resolving our differences without resorting to the organization and continuation of separate groups” (Opinion Ag. 484, 484A; November, 1973).

Question 2: Does the dissent process set forth in Bylaw 1.8 (Cf. Bylaw 1.6.2) and/or the dispute resolution process set forth in Bylaw 1.10 allow dissent or disputes regarding “syncretism and unionism,” “the role and authority of women in the church,” synodical governance issues (such as the use of Matthew 18:15 in Bylaws 1.10 and 2.14, the selection of floor committee members, the dispute process set forth in Bylaw 1.10, “close communion issues and practices,” and the “lay minister issue”)?

Opinion: Members of the Synod in all those issues identified and in all areas of disagreement and dissent are bound by the provisions of Bylaw section 1.8. Similarly, members of the Synod in disputing such issues are bound by the provisions of Bylaw section 1.10.

The dispute resolution procedure as set forth in Bylaw section 1.10 may precisely be used in such disputes:

This procedure is established to resolve, in a God-pleasing manner, disputes that involve as parties, (1) members of the Synod, (2) the Synod itself, (3) a district or an organization owned and controlled by the Synod, (4) persons involved in excommunication, or (5) lay members of congregations of the Synod holding positions with the Synod itself or with districts or other organizations owned and controlled by the Synod. It shall be the exclusive remedy to resolve such disputes that involve theological, doctrinal, or ecclesiastical issues except those covered under Bylaw sections 2.14–2.17 and except as provided in Bylaw 1.10.3. It is applicable whether the dispute involves only a difference of opinion without personal animosity or is one that involves ill will and sin that requires repentance and forgiveness. (Bylaw 1.10.2)

Bylaw 1.10.3 does set forth some exceptions, none of which are applicable to the question asked, as follows:

This chapter provides evangelical procedures to remedy disputes only and does not set forth procedures for expulsion from membership (Constitution Art. XIII and Bylaw sections 2.14–2.17) nor does it set forth procedures for board of regents' supervision of faculty and administration as specified in Bylaws 3.8.2.7.5–3.8.2.7.9 and 3.8.3.8.5–3.8.3.8.9...this chapter does not provide an exclusive remedy for the following matters,

unless such matters involve theological, doctrinal, or ecclesiastical issues, including those arising under the divine call of a member of the Synod:

- (a) Disputes concerning property rights (e.g., real estate agreements, mortgages, fraud, or embezzlement); and
- (b) Disputes arising under contractual arrangements of all kinds (e.g., contracts for goods, services, or employment benefits).

It must be noted in regard to dissent and disputes in the Synod that the procedures set forth for brotherly dissent (Bylaw section 1.8) and dispute (Bylaw section 1.10) are for the purpose of carrying out the objectives of the Synod (Constitution Art. III), especially objectives 1 and 6:

1. Conserve and promote the unity of the true faith (Eph. 4:3 – 6; 1 Cor. 1.10), work through its official structure toward fellowship with other Christian church bodies, and provide a united defense against schism, sectarianism (Rom. 16:17) and heresy;
6. Aid congregations by providing a variety of resources and opportunities for recognizing, promoting, expressing, conserving, and defending their confessional unity in the true faith.

Question 3: Does the dispute resolution process set forth in Bylaw 1.10 allow disputes regarding any alleged wrongdoings by any officer, board, or commission of the Synod or allow disputes regarding an[y] alleged violations of the Synod’s Constitution and Bylaws by any officer, board, or commission?

Opinion: Bylaw 1.10 not only allows but requires all members to use the avenue provided by the Synod to settle disputes as set forth in Bylaw section 1.10, with the exceptions as set forth in Bylaw 1.10.3. See the answers to both questions one and two above.

Question 4: Do the provisions set forth in Bylaw 3.1 (National Conventions) allow for correction of any alleged irregularities or violations of the Synod’s Constitution and Bylaws by the Synod in convention itself, the convention floor committees, or by any officer, board, or commission?

Opinion: Any and all alleged irregularities or violations of the Synod’s Constitution and Bylaws committed by the Synod in convention itself, the convention floor committees, or by any officer, board, or commission can be addressed for correction by the Synod in convention. Bylaw 3.1.1 states:

The national convention of the Synod shall afford an opportunity for worship, nurture, inspiration, fellowship, and the communication of vital information. It is the principal legislative assembly, which amends the Constitution and Bylaws, considers and takes action on reports and overtures, and handles appropriate appeals. It establishes general positions and policies of the Synod, provides overall program direction and priorities, and evaluates all such positions, programs, policies, directions, and priorities in order to provide responsible service for and on behalf of its members...

The broader context of the Constitution and Bylaws also provides the foundation for the answer to the question asked. Example:

1. The officers of the Synod must assume only such rights as have been expressly conferred upon them by the Synod, and in everything pertaining to their rights and the performance of their duties they are responsible to the Synod.
 2. The Synod at all times has the right to call its officers to account and, if circumstances require it, to remove them from office in accordance with Christian procedure.
 3. The Synod reserves the right to abolish any office it has established. (Art. XI A) (Emphasis added)
2. It is the President's duty to see to it that all the aforementioned act in accordance with the Synod's Constitution, to admonish all who in any way depart from it, and, if such admonition is not heeded, to report such cases to the Synod. (Art. XI B) (Emphasis added)

The delegate convention of the Synod is the legislative assembly that ultimately legislates policy, program, and financial direction to carry on the Synod's work on behalf of and in support of the member congregations. It reserves to itself the right to give direction to all officers and agencies of the Synod. Consequently, all officers and agencies, unless otherwise specified in the Bylaws, shall be accountable to the Synod for all their actions, and any concerns regarding the decisions of such officers or agencies may be brought to the attention of the Synod in convention for appropriate action. (Bylaw 1.4.1) (Emphasis added)

Dissent from doctrinal resolutions and statements is to be expressed first within the fellowship of peers and then brought to the attention of the Commission on Theology and Church Relations before finding expression as an overture to the convention calling for revision or rescision... (Bylaw 1.8.2) (Emphasis added)

(c) He shall call up for review any action by an individual officer, executive, or agency that, in his view, may be in violation of the Constitution, Bylaws, and resolutions of the Synod.

- (1) If he deems appropriate, he shall request that such action be altered or reversed.
- (2) If the matter cannot be resolved, he shall refer it to the Board of Directors, the Commission on Constitutional Matters, and/or the Synod in convention as he deems appropriate for the issues and party/parties involved.
- (3) This provision in no way alters the President's constitutional duty to report to the Synod those who do not act in accordance with the Constitution and do not heed his admonition, as prescribed in Art. XI B 2 of the Constitution. (paragraph (c) of Bylaw 3.3.1.2) (Emphasis added)

Question 5: Is it in harmony with the Constitution and above Bylaws of the Synod for any member of the Synod to engage in dissenting (or promoting non-compliance) against the Synod by use of a lawsuit, when such members have not used the avenues of dissent as set forth in Bylaw 1.8 of the Synod?

Opinion: No. A lawsuit is not a legitimate avenue of dissent. In the agreement to live and work together, a member of the Synod is required to follow the avenue of dissent as set forth in Bylaw section 1.8, including honoring and upholding the resolutions of the Synod. While a lawsuit may be an appropriate

process in which to resolve a dispute in the secular world, members of the Synod are governed by Bylaw section 1.8 as the required, exclusive, and agreed-to avenue of dissent and Bylaw section 1.10 as the required, exclusive, and agreed-to method of dispute resolution. See the answers to questions 1 and 2 above.

Question 6: Is it in harmony with the Constitution and above Bylaws of the Synod for any member of the Synod to engage in dispute against the President of the Synod or the Synod itself by use of a lawsuit, when such members have not used the avenue of dispute as set forth in Bylaw 1.10 of the Synod?

Opinion: No. In the agreement to live and work together, a member of the Synod is required to rely exclusively and fully on the Synod's system of reconciliation and conflict resolution. Unless the dispute is one concerning property rights or contract arrangements under Bylaw 1.10.3 (a) or (b), such suit would be a gross violation of the process of Bylaw section 1.10 and the covenants which bind members together in the Synod. The use of the Synod's conflict resolution procedures is the exclusive and final remedy for those who are in dispute (Bylaw section 1.10). See the answers to questions 1, 2, and 5 above.

Question 7: If any of the above is not in harmony with the Constitution and Bylaws of the Synod, what remedy does the Constitution and Bylaws of the Synod provide?

Opinion: The Constitution and Bylaws of the Synod provide disciplinary measures against any member who violates the Constitution and Bylaws of the Synod. Such provisions include Bylaw section 1.10, "Dispute Resolution of the Synod": "The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute" (Bylaw 1.10.1) and Article XIII of the Constitution, "Expulsion from the Synod," and its procedures as set forth in Bylaw sections 2.13–2.16:

The only remedy available to the Synod in response to improper activities in the life of such a member of the Synod is, as is true with respect to violations of other conditions of membership or is otherwise appropriate under the Constitution or these Bylaws, and following the procedures set forth in these Bylaws, to take such action as may lead to termination of that membership and the attendant rights and privileges. (Bylaw 2.13.2)

The ecclesiastical supervisors (the President of the Synod and the district presidents) have disciplinary responsibilities such as stated in Articles XI B and XII of the Constitution:

2. It is the President's duty to see to it that all the aforementioned act in accordance with the Synod's Constitution, to admonish all who in any way depart from it, and, if such admonition is not heeded, to report such cases to the Synod.
3. The President has and always shall have the power to advise, admonish, and reprove. He shall conscientiously use all means at his command to promote and maintain unity of doctrine and practice in all the districts of the Synod. (Art. XI B)
7. The district presidents shall, moreover, especially exercise supervision over the doctrine, life, and administration of office of the ordained and commissioned ministers of their district and acquaint themselves with the religious conditions of the congregations of their district. To this end they shall visit and, according as they deem it necessary, hold investigations in the congregations. Their assistants in this work are the circuit counselors, who therefore shall regularly make their reports to the district president.

8. District presidents are empowered to suspend from membership ordained and commissioned ministers for persistently adhering to false doctrine or for having given offense by an ungodly life, in accordance with such procedure as shall be set forth in the Bylaws of the Synod. (Art. XII)

The ecclesiastical and administrative powers and duties of the President of the Synod provide remedy for the matter as set forth in Bylaws 3.3.1.1, 3.3.1.2, and 3.3.1.3, as do the duties of the district president as set forth especially in Bylaws 4.4.4–4.4.6.

110. New Jersey District Bylaws (05-2448)

The president of the New Jersey District forwarded the proposed amended Bylaws of his district for review by the Commission prior to their submission for convention action. Upon careful review of the entire document and the proposed amendments, the Commission offers the following in response.

- For the sake of uniformity, the Commission recommends that care be taken to follow the same principles for capitalization etc., in district documents that are used by the Synod in its *Handbook*, e.g., reserving capitalization for proper nouns. References to documents such as the *Handbook of The Lutheran Church—Missouri Synod* should also be uniform.
- It is unclear how the district will develop and approve its budget if the proposed amendments are approved. Synod Bylaw 4.5.1 (c) requires district boards of directors to be guided by the functions of the Synod’s Board of Directors, which includes the responsibility for adopting an annual budget (paragraph (b) (2) of Bylaw 3.3.5.5). Synod Bylaw 4.5.1 (d) requires district boards to “allocate necessary funds for the support of the national and district budgets.”
- The district should consider including in its Bylaws a paragraph under section I “District Organization” that states that the Constitution and primary Bylaws of the district are the Constitution and Bylaws of The Lutheran Church—Missouri Synod.
- Under 2.01, it would be helpful to identify The Lutheran Church—Missouri Synod by its full name.
- Under 2.02, clarification that the “voting members” referred to are the voting congregations of the district will be helpful.
- Under 2.03, paragraph a is unclear when applied to multiple congregation parishes and does not specify that only the administrative pastor or an associate pastor may serve as a delegate.
- The title line of 3.11 should include reference to the district president for uniformity with the other title lines in this section.
- Under 3.11, the reference to the president carrying out his supervisory responsibilities through the district board of directors should be clarified to refer to his administrative duties and not his ecclesiastical supervisory responsibilities.
- Under 3.13, the positions listed are not defined elsewhere in the Bylaws. In addition, the appointments of council members by the president is not listed.
- Under 3.22, the second sentence would better read: “The remaining vacancy shall be filled from the nominees left after the previous election.”
- Under 3.40, is it possible for the district treasurer personally to “keep an exact record of all moneys received and expended” or does he rather assume responsibility that this is done?

- Under 5.01, the first sentence would better read: “The board of directors shall be elected by a convention of the district.”
- Under 5.12, it is unclear whether the vacancies to be filled by the Board of Directors are vacancies to be elected, appointed, or staff positions. The paragraph also does not contain any direction regarding how suggestions are received.
- Under 5.14, it would be helpful to include at least a reference to the LCMS *Handbook* provision for holding more than one office if the principle is not articulated in the bylaw.
- Under 6.01, it is assumed that the reference in the final sentence is to “councils.”
- Under 6.21 and 6.31, it should be clarified who decides regarding “appropriate district staff” to serve on these councils.
- Under 6.41, none of the positions mentioned as members of the District Operations Council are defined in the Bylaws.

111. Clarification of Bylaw 1.10.2, “Involved in Excommunication” (05-2449)

In a letter dated October 14, 2005, a district president requested an opinion concerning the phrase “persons involved in excommunication” in Bylaw 1.10.2. He explained that the phrase is understood by some to entitle individual members of congregations to invoke the Synod’s dispute resolution process “at some point before the final vote of the assembly.”

Question: At what stage of discipline is an individual non-member of the Synod sufficiently “involved in excommunication” to invoke the Synod’s process of dispute resolution contained in Bylaw 1.10?

Opinion: While Bylaw 1.10.1.2 does make a reference to church discipline involving a congregation, that bylaw and Bylaw 1.10.2 do not address the congregation’s process of church discipline or the stages of discipline or at what stage a person is sufficiently “involved in excommunication” to invoke the Synod’s process for dispute resolution.

It is implied in the questioner’s letter that the Commission is being asked to interpret “persons involved in excommunication.” Bylaw 1.10.2 in part states, “This procedure is established to resolve, in a God-pleasing manner, disputes that involve as parties...(4) persons involved in excommunication...” The Commission opines that such “persons” in fact occupy or are in possession of the circumstance, condition, or consequence of “excommunication.” This means that the congregation has in fact already made its judgment or given its verdict of excommunication after which one may invoke the Synod’s dispute resolution process.

However, it must be noted that prior to invoking the formal dispute resolution process of the Synod, the party in dispute must first seek to settle the dispute face-to-face with the congregation. This attempt may include the informal use of a district reconciler. Bylaw 1.10.5 sets forth the process: “Before any matter is submitted to the formal reconciliation process, the parties involved in a dispute must meet together, face-to-face, in a good faith attempt to settle their dispute according to the scriptural mandate of Matthew 18:15 and may involve the informal use of a reconciler.” (Emphasis added)

It must also be noted that only “procedural questions involved in excommunication cases” can be addressed by the Synod’s dispute resolution process under Bylaw section 1.10. “Relative to... ‘persons involved in excommunication,’ Bylaw 8.13 b 1 [current Bylaw 1.10.10.2 (a)] limits the dispute resolution process to procedural questions involved in excommunication cases. Therefore, the process can be

utilized to question the procedure followed in an excommunication matter; it cannot be used to review the facts, which serve as the basis of the excommunication....” (Opinion 99-2157, September 14, 1999).

If there is a controversy or unresolved problem concerning the matter at issue in the congregation prior to the verdict of excommunication, Bylaw 4.4.6 sets forth a procedure for the district president to arrange for a visit or an investigation in a congregation: “The district president, even without formal request therefor, may through the proper channels arrange for an official visit or investigation when a controversy arises in a congregation or between two or more congregations of the district or when there is evidence of a continuing unresolved problem in doctrine or practice.”

112. Southern Illinois District Bylaws (05-2450)

In a November 1, 2005 e-mailed letter and in a subsequent letter, the secretary of the Southern Illinois District forwarded the proposed amended Bylaws of his district for review by the Commission prior to their submission for district convention action. Upon careful review of the document and the proposed amendments, the Commission offers the following in response.

- In the Articles of Incorporation under Article II Objectives, the reference to “teachers” would better refer to “commissioned ministers.”
- In the Articles of Incorporation under the Purpose Statement for the Southern Illinois District, the introductory paragraph references the objectives of the Synod, but the list of objectives provided includes objectives that are not included in the objectives of the Synod listed in Article III of its Constitution.
- In the Bylaws under 1.09 c (*et al.*), Synod Bylaws references would be more clear if they included the word “Bylaw” and if they accurately duplicated the Synod’s numbering system, e.g., “Bylaw 2.3.1 (a).”
- Under Bylaw 1.15, better bylaw language would be to replace “has” with “shall have.”
- Bylaw 1.21 would benefit from clarification of the identity of the pastoral delegate in such cases as multi-congregation parishes or congregations with more than one pastor.
- Under Section K, Nomination and Election of Officers and Board, no mention is made of the election of the district member of the Synod’s Committee for Convention Nominations at every other district convention.
- Under Bylaw 3.03, the list of commissioned ministers is not up to date and does not include those categories more recently added by the Synod to its “commissioned ministers” roster.
- Under Bylaw 3.03, replace “should” with “shall” to properly reflect Synod Bylaw 2.5.1.
- Under Bylaw 4.01, replace “chapter” with “section” to reflect the terminology used by the Synod.
- Under Bylaws 9.01 and 9.13, further editorial changes will be necessary to properly incorporate the changes being made.
- Under Bylaw 10.01, the proper name for the women’s auxiliary organization is the International Lutheran Women’s Missionary League.
- Under Bylaw 11.01, in paragraph a, include reference to the Synod’s Bylaws as well as its Constitution.
- Under Bylaw 11.01, in paragraph c, to require approval by the Synod’s Commission on Constitutional Matters “prior to the convention” would be a helpful addition.

113. Procedure for Dissent (05-2451)

In a letter dated November 7, 2005, a series of questions were addressed to the Commission by a district president of the Synod regarding how an individual should proceed with issues of dissent after he has discussed the matter with his peers and forwarded them on to the Commission on Theology and Church Relations.

Question 1: Is a pastor in the process of dissent according to Bylaw 1.8 of the 2004 *Handbook* of The Lutheran Church—Missouri Synod required to wait for a response from the Commission on Theology and Church Relations before developing an overture with his congregation to be presented at a convention of the Synod?

Opinion: No. Bylaw 1.8.2 states:

Dissent from doctrinal resolutions and statements is to be expressed first within the fellowship of peers and then brought to the attention of the Commission on Theology and Church Relations before finding expression as an overture to the convention called for revision or rescision. While the conscience of the dissenter shall be respected, the consciences of others, as well as the collective will of the Synod, shall also be respected.

There is no requirement in the Bylaws that requires a pastor to wait for a response from the Commission on Theology and Church Relations before proceeding to develop an overture with his congregation. The only requirement in the Bylaws is that, before an overture is submitted to the convention calling for revision or rescision, the dissent will have previously been brought to the attention of the Commission on Theology and Church Relations.

Question 2: When a pastor is in the process of dissent from doctrinal resolutions and statements, what are the bylaw provisions for a pastor to submit “an overture to the convention calling for revision or rescision? (Bylaw 1.8.2)

Bylaw 3.1.6.2 states:

Overtures to a convention of the Synod may be submitted only by a member congregation of the Synod; a convention or board of directors of a district; an official district conference of ordained and/or commissioned ministers; the faculty of an educational institution of the Synod; the Board of Directors of the Synod; a board or commission of the Synod listed in Bylaws 3.2.2, 3.2.2.1, 3.2.3, and 3.2.3.1; a committee established by a prior convention; or a forum of a circuit.

There are no bylaw provisions allowing a pastor or a circuit pastoral conference to submit an overture to a convention. Only entities identified in Bylaw 3.1.6.2 are allowed to submit overtures to a convention. While under Bylaw section 1.8 any member of the Synod may express dissent from doctrinal resolutions and statements in a manner prescribed by Bylaw 1.8.2, only those entities listed in Bylaw 3.1.6.2 may present an overture to a convention of the Synod.

Question 3: Is a pastor who is in the process of dissent according to Bylaw 1.8 of the 2004 *Handbook* of The Lutheran Church—Missouri Synod in conflict with the Constitution of The Lutheran Church—Missouri Synod if he discusses his issues of dissent with anyone except his peers? If it is in violation of the Constitution to do so, how does he discuss this matter with his congregation to encourage them to write an overture to present to the floor committee of the

district or Synod for the purpose of it becoming a resolution? If it is not in violation, how is it appropriate for him to discuss this matter with his congregation and still be in compliance with Bylaw 1.7 of the *Handbook*?

Opinion: A pastor who is in the process of dissent according to Bylaw section 1.8 is not in conflict with the Synod's Constitution and Bylaws if he discusses his issues of dissent with his congregation. The formal process of dissent should be considered separate and distinct from the right or privilege to discuss different viewpoints with his congregation. As stated in the October 16, 1969 opinion of the Commission on Constitutional Matters, "An Opinion Regarding Dissenting Groups and Activities Within the Synod":

Christians as well as non-Christians expect differences of opinion and judgment to arise when people walk together. The Synod has provided for forums in which such differences can be discussed and evaluated beyond the confines of the local congregation...When the majority has been determined it must be respected. Otherwise life together (synod) becomes all but impossible. Discussion may indeed continue; but it needs to be carried on with full respect for the majority will and within the forums established by the Synod for the preservation of synodical unity...In this opinion the Commission is not attempting to limit the right of individuals to speak their own minds. Before and after the passage or rejection of synodical resolutions individuals must be free to express their concerns, especially to their peers. Frank and open discussion carried on in a spirit of Christian love and forbearance must be a part of our life together in the Synod... (Emphasis added)

Opinion 03-2328 of the Commission states in addition:

As part of life together in the Synod, members have the responsibility to continually examine and reexamine their confession (symbols, doctrinal statements, and resolutions) to determine if they are faithful to Holy Scriptures. Members have a never-ending task of testing everything that the Synod believes, teaches, and practices to see if they are in accordance with the Word of God. If there are issues that need to be addressed or issues that are considered by the members of the Synod that have not yet been addressed, any action is to be governed by the procedures set forth in the Bylaws, particularly Bylaws 1.09 and 2.39 [current Bylaws 1.6, 1.7, 1.8].

Therefore, a pastor in the process of doctrinal dissent does not violate his obligation to "honor and uphold the resolutions of the Synod" (Bylaw 1.8.1) by discussing a doctrinal issue with members of his congregation in preparation of an overture to be submitted to a convention. While a dissenter is not "free to teach the dissenting view..." (see Opinion Ag. 2048, October 23, 1996), he is free to "have frank and open discussions and to always examine and review all positions and resolutions of the Synod" (see Opinion 05-2444), especially with members of his congregation. There is a distinction between discussion of doctrinal issues and the teaching of doctrine contrary to the position of the Synod. While there is freedom to discuss doctrinal issues, "[a] member dissenting...must follow the doctrine of the Synod and its doctrinal resolutions pending the outcome of the process...A member who dissents according to the procedures outlined...may not be charged with false doctrine while such procedures are being followed" (see Opinion 00-2203).

And further, while it is appropriate and responsible for a pastor to discuss the issues or the matter with his congregation as well as together consider, prepare, and submit an overture to the convention of the Synod, it is expected that, in doing so, both the pastor and the congregation "honor and uphold the resolutions of the Synod," respect the "consciences of others," and respect the "collective will of the Synod" in word

and deed, in keeping with Bylaw sections 1.7 and 1.8. In this regard, see also Opinion 05-2444, also rendered at the time of this opinion.

114. Letter to Legal Counsel

A letter clarifying the nature of the input desired from legal counsel when consulted according to Bylaw 3.9.2.2 (b) was drafted, discussed, and adopted, the letter to be sent over the signature of the chairman of the Commission (copy of letter attached to protocol copy of these minutes).

115. Other Matters

The Secretary shared a letter addressed to the Commission from a party involved in a dispute resolution case that expressed concern with the tardiness of the dispute resolution panel in providing a decision. The Secretary informed the Commission that he will look into the matter to determine the cause of the delay.

A brief report was provided to the Commission regarding the initial activities of the special task force on structure appointed by the President of the Synod. The Commission discussed a questionnaire from the task force inviting input from the Commission and was asked to provide to the chairman their suggestions for response.

116. Adjournment

The meeting was closed with words of benediction by Chairman Albert Marcis.

Raymond L. Hartwig, Secretary