

# LCMS

## Commission on Constitutional Matters Minutes – 2006

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## MINUTES

### COMMISSION ON CONSTITUTIONAL MATTERS

January 31–February 1, 2006

St. Louis, Missouri

#### **117. Call to Order and Opening Prayer**

Chairman Albert Marcis called the meeting to order and asked Dan Lorenz to provide an opening prayer. The Commission reviewed the agenda for the meeting and noted additional items to be discussed, also instructing its secretary to send a letter to the Southern Illinois District secretary acknowledging receipt of his January 29, 2006 letter reporting bylaw revisions as suggested by the Commission in an earlier opinion (05-2450).

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

The Commission gave final attention to its revised draft of the “Guidelines for the Constitution and Bylaws of a Lutheran Congregation” in preparation for the meeting of the chairmen/ representatives of district constitution committees February 1–2, 2006. The meeting will provide opportunity for mutual discussion of the work of the district committees and for input regarding said guidelines prior to final revisions and publication by the Commission.

#### **119. Clarification of Bylaw 1.5.9 Term “Agency” (05-2426)**

In a memo to the Secretary of the Synod dated May 23, 2005, the Executive Director of the Synod’s Department of Human Resources asked the Commission for a clarification of Bylaw 1.5.9 and its use of the term “agency.”

Question: Bylaw 1.5.9 (2004 *Handbook*) reads: “Every agency of the Synod shall operate under the human resources policies of the Synod. Such policies may recognize the unique character of the operations of each.” This bylaw substitutes the word “agency” for the wording “board, commission, and synodwide corporate entity” of its predecessor Bylaw 3.69 e (2001 *Handbook*). Does this change represent an expanded meaning and applicability of this bylaw?

Opinion: Upon examination of the history of this bylaw, the recommendation of the *Pro Tem* Commission on Structure to the 2004 convention, and the action of the 2004 convention (Res. 7-04A), the Commission concludes that the word “agency” (as defined by paragraph (a) (1) of Bylaw 1.2.1) when used in the 2004 version of Bylaw 1.5.9, while it accurately reflects the verbiage of its predecessor bylaw (2001 Bylaw 3.69 e), fails to take into account the action taken by the 2004 convention of the Synod (Res. 7-04A) which adopted wording for this bylaw that is consistent with a prior application and understanding of Bylaw 3.69 e: “Every entity of corporate Synod and every synodwide corporate entity shall operate under synodical human resources policies. Such policies may recognize the unique character of the operations of each” (Res. 7-04A).

Recognizing that the term “agency” as defined in Bylaw 1.2.1 (a) (1) is broader than the intention of the 2004 convention for application of this bylaw, the Commission herewith opines that the current wording of Bylaw 1.5.9 and its use of the term “agency” be understood to be that of the intention of the 2004 convention, and that the term “agency” in the case of this bylaw alone be understood to have the meaning: “entity of corporate Synod and every synodwide corporate entity.” Further, the Commission requests that the Synod’s Commission on Structure give attention to the use of the word “agency” in the current Bylaw

1.5.9 and recommend an appropriate action to the 2007 convention of the Synod to clarify the bylaw's verbiage, taking into account the history of this bylaw, the recommendation of the *Pro Tem* Commission on Structure to the 2004 convention, the action of the 2004 convention, and this opinion of the Commission on Constitutional Matters.

#### **120. Human Resources Policies of the Synod (05-2430)**

The President of the Synod, in memoranda dated July 22 and August 15, 2005, submitted a series of questions relating to human resources policies of the Synod. He noted the receipt by the LCMS Board for Human Resources of a June 16, 2005 letter from the LCMS Board of Directors through the Office of the Secretary of the Synod that communicated the Board's perception that a recent decision of the Board for Human Resources was inappropriate. He stated that he recognized the desire of both boards to be responsible in all their decisions and actions but asked opinions of the Commission on the following questions.

Question 1: Are the policies of the Board for Human Resources, specifically policies 3.25 and 3.30 including the amendments in question, in harmony with the Constitution, Bylaws, and resolutions of the Synod, especially since such policies relate to, among other constitutional and bylaw references, Bylaws 1.5.9 and 3.11?

Opinion: In addition to the Commission's responsibility under Bylaw 3.9.2.2 generally to interpret the Synod's Constitution, Bylaws, and resolutions upon written request of a member, the question properly recognizes the Commission's additional responsibility and authority under Bylaw 3.9.2.2.4 which reads: "The Commission on Constitutional Matters shall 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."

The Board for Human Resources is certainly an agency of the Synod, and its guidelines 3.25 and 3.30 are therefore appropriately reviewable by the Commission to determine whether they are in fact in harmony with the Constitution, Bylaws, and resolutions of the Synod. In fulfilling its responsibility, the Commission must determine whether the governing documents of an agency of the Synod attempt to allow some activity proscribed by the Synod's governing documents or to prohibit some activity mandated by the governing documents of the Synod. In this case, the Board for Human Resources adopted policies which required that all candidates for Synod positions requiring a called minister be filled in consultation with and mutual concurrence of the President of the Synod, subject to all appropriate provisions of the Constitution, Bylaws, and other policies which apply. Human resources guideline 3.25 specifically applied to senior staff of program boards and commissions, and guideline 3.30 to Synod corporate agencies calling and appointing staff to positions requiring an ordained or commissioned minister of religion.

The Board for Human Resources of the Synod, although an agency of long standing referenced in various resolutions of the Synod, was an agency created by the Board of Directors of the Synod and not by action of the Synod in convention. Subsequent to the submission of this series of questions, the Board of Directors in its August, 2005 meeting (page 100 of the Board's minutes) dissolved the Board for Human Resources, and the amendments to the Board for Human Resources guidelines 3.25 and 3.30, which are the subject of the question submitted, were set aside to the extent that they require a concurrence of the President of the Synod of a list of candidates. Because of the actions of the Board of Directors, the question submitted is now no more than hypothetical. The Commission therefore believes that it would be inappropriate to answer further this question at this time.

Question 2: Are the pertinent sections (chapters) of the Board of Directors policies, specifically policies 3.2 and 4.8, in harmony with the Constitution, Bylaws, and resolutions of the Synod, especially as such policies relate to, among other constitutional and bylaw references, Bylaws 1.5.9 and 3.11?

Opinion: The Board of Directors policy manual section 3.2 which was supplied by the Secretary of the Synod includes a broad range of subjects identifying matters generally which require Board action. These areas include budgets, accounting, financial transactions, audits, property, human resources, administrative policies, and legal and governmental issues. The Board of Directors policy manual section 4.8 addresses the Board of Directors' executive limitation on human resources. These policies may be found on the Synod's Web page in the document found at: [http://www.lcms.org/graphics/assets/media/Board\\_of\\_Directors/Policyman05.pdf](http://www.lcms.org/graphics/assets/media/Board_of_Directors/Policyman05.pdf).

Given the scope particularly of Board of Directors policy 3.2, it is difficult to answer the question as broadly as it has been submitted. If there are particular details that need to be clarified, the Commission would request that the question be resubmitted with a more narrow focus. In general, Board of Directors policy section 4.8 places limitations on the Board for Human Resources. Since that entity has now been dissolved, as referenced above, presumably that policy will be eliminated.

Assuming that the question presented was intended to deal with human resources issues and not the other areas covered by board policy section 3.2, the Commission has examined specifically policy 3.2.6. Policy 3.2.6.1 addresses changes in salary classification and ranges for corporate Synod. That is certainly within the constitutional and bylaw authority of the Board of Directors. Policy 3.2.6.2 reserves to the Board consideration of changes in the salary of officers of the Synod and the Chief Administrative Officer of the Board. Again, that is within the authority of the Board of Directors. Finally, policy 3.2.6.3 addresses changes in the membership of the Board for Human Resources. As indicated above, the Board for Human Resources was a creation of the Board of Directors and not an entity created by the Synod itself. The Board of Directors is within its authority and responsibility to control the membership (and even the existence) of the Board for Human Resources.

Question 3: In the area of human resources issues, in the event of a conflict between the policies of an agency of the Synod and the policies of the Synod's Board for Human Resources, which policy takes precedence?

Opinion: In general, the policies of an agency of the Synod as well as the policies of the Board for Human Resources must both be consistent with the Constitution, Bylaws, and resolutions of the Synod. Because Bylaw 1.5.9 requires that every agency of the Synod operate under the human resources policies of the Synod, the Synod's Board for Human Resources, prior to its being disbanded by the Board of Directors in August, 2005, was tasked with responsibility to adopt the human resources policies of the Synod. To the extent that an applicable agency of the Synod (see Opinion 05-2426) had policies inconsistent with the human resources policies of the Synod, the human resources policies of the Synod would take precedence. To the extent that an applicable agency of the Synod has policies inconsistent with the human resources policies of the Synod now managed by the Board of Directors, the human resources policies of the Synod would take precedence.

Question 4: The Synod's 2004 convention Res. 7-04A (2004 *Proceedings*, p. 153) referenced the fact that the *Pro Tem* Commission on Structure had taken care to make no substantive change in the Bylaws of the Synod while reordering the content to make it user-friendly.

The 2001 *Handbook* in Bylaw 3.69 e states, "Every board, commission, and synodwide corporate entity shall operate under synodical human resources policies. Such policies may

recognize the unique character of the operations of each board, commission, and synodwide corporate entity. Every board, commission, and synodwide corporate entity may create officer and executive staff positions and fill the same in accordance with such policies” (emphasis added).

The 2004 *Handbook* in Bylaw 1.5.9 states, “Every agency of the Synod shall operate under the human resources policies of the Synod. Such policies may recognize the unique character of the operations of each. (a) Every agency may create officer and executive staff positions and fill the same in accordance with its policies” (emphasis added).

Since the underlined words above appear to be a significant change from the 2001 *Handbook* to the 2004 *Handbook* (which was to contain no substantive changes in its reordering), is not 2001 Bylaw 3.69 e, as underlined, still the bylaw in force rather than that amended part of 2004 *Handbook* Bylaw 1.5.9 (a)?

Opinion: As correctly pointed out, 2004 convention Res. 7-04A intended to make no substantive change to the Bylaws of the Synod, while reordering the content to make it user-friendly. The issues and standards for these revisions are more fully discussed in Opinion 05-2426, also issued today.

In 2004 *Handbook* Bylaw 1.5.9 (a), grammatically “its” must refer back to “every agency” at the start of that subparagraph, whereas in the 2001 *Handbook* Bylaw 3.69 e, the policies which every agency was required to follow in the creation of officer and executive staff positions, and the filling of the same, were clearly the human resources policies of the Synod as opposed to policies of each individual agency. Were an agency of the Synod able to avoid the human resources policies of the Synod, this would in fact be a significant change. However, since all agencies of the Synod must follow the Synod’s human resources policies, any human resources policies adopted by an individual agency by definition cannot violate the Synod’s policies. 2004 Res. 7-04A therefore allows the change, since it substantively preserves the requirements of the pre-existing bylaws.

Question 5: Does the President of the Synod have any responsibility to see to it that the policies of the boards and commissions of the Synod are in harmony with the Constitution, Bylaws, and resolutions of the Synod? Does the President of the Synod have any responsibility to see that such policies of boards and commissions are carried out? If so, under which specific constitutional article(s) and/or bylaw(s) are these responsibilities articulated?

Opinion: The President of the Synod does have responsibility to see to it that the policies of the boards and commissions of the Synod are in harmony with the Constitution, Bylaws, and resolutions of the Synod. Under Art. XI B of the Constitution, the President is tasked with supervision not only of the doctrine but also the administration of all officers of the Synod and all such as are employed by the Synod. The article expressly directs that it is the President’s duty to see to it that all the aforementioned act in accordance with the Synod 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. Subsection 4 further expressly directs the President to see to it that the resolutions of the Synod are carried out.

Bylaw 3.3.1 further details his responsibilities in these areas. The initial directive of Bylaw 3.3.1.2 requires: “The President shall oversee the activities of all officers, executives, and agencies of the Synod to see to it that they are acting in accordance with the Constitution, Bylaws, and resolutions of the Synod.”

Under Bylaw 1.2.1 (a), every board or commission created either by the Synod itself or by the Board of Directors is an agency of the Synod. The Synod has created a number of boards and commissions, tasking

each with particular duties and responsibilities. The Synod also provides direction to those boards and commissions by adopting resolutions. Where such boards and commissions adopt policies to carry out their delegated responsibilities under the Constitution, Bylaws, and resolutions of the Synod, fulfillment of the President's duties under Art. XI B and Bylaw 3.3.1.2 requires that he see to it that in adopting such policies they are acting in accordance with the Constitution, Bylaws, and resolutions of the Synod. Allowing the adoption of policies inconsistent with the Constitution, Bylaws, and resolutions of the Synod would be an abdication of these responsibilities.

The second question is more difficult to answer. While some policies derive from mandates or proscriptions contained in the Constitution, Bylaws, and resolutions of the Synod, others do not. To the extent that a policy is so derived, the President's duties include the responsibility to see that the policies are followed.

In the context of the series of questions posed, the Commission understands the issue to focus specifically on the President's duty to see to it that the agencies of the Synod follow the policies of the Board for Human Resources. Since Bylaw 1.5.9 requires that every applicable agency of the Synod operate under the human resources policies of the Synod, and, during its existence, the Board for Human Resources was the agency charged with the adoption of those policies, the President's duties did include the responsibility to see that those policies were followed.

Question 6: Given the provisions of LCMS Bylaw 3.8.5.2.3 (c), which lists the "Director of News and Information Services" as "executive editor of the Synod's official periodicals" (underlining added), which staffing provisions of Bylaws 1.4.6, 1.5.9, 3.11 and/or other bylaws, if any, are applicable to the "executive editor of the Synod's official periodicals" and/or any other staff position which occupant is charged or authorized by the Board for Communication Services with making significant executive decisions regarding the Synod's official periodicals? Specifically:

(a) How does Bylaw 1.5.9 (e) ("In the event of a vacancy, the appropriate governing board and the President of the Synod shall act expeditiously to fill the vacancy. The board shall present its list of candidates to the President.") apply to the vacant position of the Director of News and Information Services, who also serves as executive editor of the Synod's official periodicals or to any other staff person making executive decisions?

(b) How does Bylaw 1.5.9 (f) ("The slate of candidates for the initial appointment of the executive officer of an agency shall be selected by the board or commission in consultation and mutual concurrence with the President of the Synod.") apply in filling the vacant position of the Director of News and Information Services, who also serves as executive editor of the Synod's official periodicals or to any other staff person making executive decisions?

(c) How does Bylaw 1.5.9 (g) ("Any interim appointments of an executive officer shall be processed in a similar manner. Such appointee must be approved by the President of the Synod, may not serve more than 18 months without the concurrence of the President of the Synod, and shall be ineligible to serve on a permanent basis without the concurrence of the President of the Synod.") apply to the interim appointment of the Director of News and Information Services, who also serves as executive editor of the Synod's official periodicals or to any other staff person making executive decisions?

Opinion: The provisions of Bylaw 1.5.9 (e), (f), and (g) do not apply to the position of the Director of News and Information Services. The language of former Bylaw 3.69 e, now contained in Bylaw 1.5.9 (a)–(h), uses in different subsections the terms "officer," "executive officer," "executive staff," "chief executive," and "executive." Analyzing both the historical roots of the bylaw as well as the actual practice

of the Synod, it is clear that the terms “executive officer,” “chief executive,” and “executive” are used interchangeably and are distinct from the term “executive staff.” Even before the 1998 convention’s amendments to former Bylaw 3.69, which added former subsection (d) to impose a five-year term limit unless the governing board specifically continued the person in office, the Commission was asked in Opinion Ag. 2094 to interpret the former bylaw references and concluded that a board or commission, regardless of the titles applied to its staff, could only have one principal executive officer to which the provisions of the bylaw applied. The same interpretation and application were made in Opinion 00-2204, where term limit provisions were applied to a single executive of the hiring authority (board, commission, and synodwide corporate entity), including those already in office, referencing the similar treatment of college, university, and seminary presidents.

The position of Director of News and Information Services is a position created not by the Board for Communication Services but by the Synod itself in Bylaw 3.8.5.2.3. Subsection (c) of the bylaw describes the position and also directs the selection method of that person as follows: “The Director of News and Information Services, who also serves as executive editor of the Synod’s official periodicals, shall be appointed by the Board for Communication Services from a list prepared by the board and approved by the Council of Presidents.” In this instance, the Council of Presidents must approve the list. The President will be a part of the process of approving the list under Bylaw 3.8.5.2.3.

#### **121. Board of Directors/Board Chairman Communications re Convention Action (05-2432)**

A pastor of the Synod in a letter dated July 11, 2005, asked a series of questions regarding communications by the Board of Directors and the chairman of the Board of Directors regarding 2004 Res. 7-21 and its submission of a proposed constitutional amendment to the congregations of the Synod.

**Question 1:** Following the adoption of 2004 convention Res. 7-21, the matter was submitted pursuant to the bylaws for vote of the congregations of the Synod. During the period of the voting, the Board of Directors (or a subcommittee thereof) published a communication to the Synod which concluded with a recommendation that the constitutional amendment not be adopted. The communication concluded: “This is probably not the time for the congregations of the Synod to affirm a change to the Constitution of the Synod.” (See the letter, which remained at the time of submission of this question on the Synod’s Web page, at: <http://www.lcms.org/graphics/assets/media/boardofdirectors/kuhnletterdec.pdf>)

Is the Board of Directors, as an officer of the Synod, authorized to issue a communication which directly opposes the will of the Synod as expressed in a resolution adopted by the convention? If the answer is in the negative, does the President of the Synod have responsibility under Art. XI B of the Constitution to admonish those involved?

**Question 2:** Is such a communication a violation of the responsibilities of officers under Art. XI A 1 of the Constitution? If the answer is in the positive, does the President of the Synod have responsibility under Art. XI B of the Constitution to admonish those involved?

**Opinion:** Individual members of the Board of Directors are elected by the Synod in convention. They are expected to bring to the Board of Directors their individual points of view, talents, and insights in order that the Board of Directors as a whole might better serve the church.

The Board of Directors as a whole, however, is an officer of the Synod, as was discussed in Opinion 03-2376. As with any other officer, it is responsible to support and uphold the Constitution and Bylaws of the Synod, as well as its resolutions. While it might be permissible for an individual member of the Board of Directors, speaking in that individual’s capacity, to express an opinion contrary to the expressed will and

rule of the convention, the Board of Directors, as an officer of the Synod, must consider carefully its right to issue a communication which directly opposes the will of the Synod as expressed in a resolution adopted by the convention. Ultimately, the issue is more generally one of possible violation of duties to the Synod, initial consideration of which is first the responsibility of the President and not for consideration by the Commission on Constitutional Matters.

The Synod must ultimately look to its leaders to lead. The answer to the first question posed herein would be as applicable to a communication by any officer of the Synod, including the President of the Synod, as well as other boards, commissions, and agencies of the Synod. Resolutions adopted by one convention are subject to change or refinement at the next. Even the Constitution, Bylaws, and Articles of Incorporation may be changed. To suggest that officers of the Synod may never speak against such changes would deprive the Synod of the leadership it expects.

Where, as here, the Synod has spoken in convention, and the action of an officer of the Synod is in direct opposition to an action just adopted, the right of the Board of Directors or any other officer to speak in opposition is a much closer question. Those in attendance are representative of the member congregations, but only member congregations themselves may adopt amendments to the Synod's Constitution. The Synod, through the process of floor committees, reports, and consideration by the convention itself, adopted and chose a course of action. The Board of Directors, through the processes of the convention, had opportunity to provide their input and insight and to provide its leadership and input on the question. Whether the Board's communication was helpful and informative to the members or an attempt to circumvent the will of the convention is not an issue for the Commission's consideration. The Commission declines to opine that the communication was beyond the jurisdiction of the Board or a violation of its responsibilities under Bylaws 1.4.3 and 1.5.6 (a), but it strongly encourages the Board and other officers to carefully consider the appropriateness of communications directly opposing the expressed will of the Synod as stated in resolutions adopted at conventions recommending that congregations approve an amendment to the Synod's Constitution.

With respect to the President's responsibilities under Art. XI B 1, the President of the Synod has supervision regarding the doctrine and administration of all officers of the Synod, including the Board of Directors. As legal representative of the Synod, the Board is obligated to represent the will of the Synod as expressed in resolutions adopted at conventions of the Synod. While the Board is expected to provide leadership and guidance to the members of the Synod, it is not free to ignore the directives of the Synod. Therefore it has no authority under XI F 2 to act contrary to the will and directives of the Synod as stated in Synod convention-adopted resolutions. As an agent of the Synod, the Board is to conduct itself as directed by its superior, the Synod itself.

Art. XI B of the Constitution provides: "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." To the extent that the President of the Synod, in his supervisory role, believes that the Board of Directors or any other officer or agency of the Synod has usurped the will of the Synod as expressed in its Constitution, Bylaws, and resolutions, he has the responsibility under Art. XI B 2 to admonish those involved and, if such admonition is not heeded, to report such to the Synod.

Question 3: Dr. Kuhn, Chairman of the Board of Directors, was quoted in an address to a congregation earlier this year (with audio tape available as of the time of submission of this question at: [http://trinity-lutheran.com/files/kuhn\\_q\\_and\\_a.mp3](http://trinity-lutheran.com/files/kuhn_q_and_a.mp3), indicating "but when it comes to filing a suit, friendly suit, against the Synod in order to get a judge to make a decision that we would know where we are, I'm in a conundrum. I don't know what to do. I don't know if that answers your question totally, but that's about as far as I can go. If you want to pursue



it, go ahead.” May Dr. Kuhn continue to serve as a member or chairman of the Board of Directors while actively failing to affirm the will of the convention?

Opinion: It is unclear from the question as presented whether Dr. Kuhn was making a presentation as chairman of the Board of Directors or as an individual member of the Synod. As an individual member of the Synod, Dr. Kuhn is entitled to express his opinion regarding any issue. If his comments were made as a member (and particularly as the chairman) of the Board of Directors, the comments quoted would be highly inappropriate and would at least subject him to the admonition of the President. While the chairman, as with any member of the Board of Directors, is entitled and encouraged to speak his or her mind in the deliberations of the Board, under the Synod’s Constitution and Bylaws the Board as a whole, and all those speaking on its behalf, are bound to support the actions of the Synod and not to encourage litigation against it. Primary responsibility for determining the appropriate response to the actions described belongs to the Board of Directors itself and to the President. It is the President under Art. XI B 4 who is required to see to it that the resolutions of the Synod are carried out.

Question 4: Is the described conduct of Dr. Kuhn and the Board subject to either the dispute resolution process under Bylaw [sic 1.09] 1.10 or, based on repeated offensive conduct, the provisions of Bylaw 2.14?

Opinion: Bylaw 2.14 addresses the issue of expulsion of a congregation or individual from membership in the Synod and is therefore inapplicable to the Board of Directors as an officer of the Synod. Expulsion from the Synod is governed by Art. XIII of the Constitution and may occur only where a member acts contrary to the confession laid down in Art. II and the conditions of membership laid down in Art. VI or persists in offensive conduct. It is not the responsibility or authority of the Commission on Constitutional Matters but rather of the member’s ecclesiastical supervisor under Bylaw 2.14 to make an initial determination whether the fact scenario described would meet such standard, and only pursuant to the processes described in that bylaw.

With respect to the possible applicability of the dispute resolution process under Bylaw section 1.10, that bylaw section identifies the persons and issues which may be dealt with under that process. As a member of the Synod, Dr. Kuhn would be a person to whom the bylaw applies, and it would similarly apply to members of the Board of Directors either as individual members of the Synod or as lay members of a congregation of the Synod holding a position within the Synod (Bylaw 1.10.2). To the extent that the dispute involves theological, doctrinal, or ecclesiastical issues (other than expulsion) the bylaw is the exclusive remedy to resolve such dispute between members of the Synod. To the extent that there continues to be a dispute between Dr. Kuhn or other members of the Board of Directors and another qualifying party under Bylaw 1.10.2 that is based on theological, doctrinal, or ecclesiastical issues, the dispute resolution process contained in Bylaw section 1.10 would apply.

## **122. 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). After consideration, the secretary of the Commission was instructed to communicate with the pastor, noting that a number of issues may have been resolved by the Commission’s Opinion 05-2430 and inviting the pastor to resubmit any remaining questions.

## **123. Review of Ohio District Bylaws (05-2452)**

In a letter dated November 29, 2005, the President of the Ohio District forwarded a copy of the revised Bylaws of his district and requested the Commission’s review and approval. After review, the Commission offered the following response:

- In the interest of uniformity with the Constitution and Bylaws of the Synod, the district is encouraged to observe the same principles for capitalization and spelling that are used by the Synod in its *Handbook*.
- On page 7, the reference under section E should be to Art. XIII of the LCMS Constitution and Bylaw sections 2.14-2.17 of the LCMS Bylaws.
- On page 10, a more accurate title to section F might be “TERMS AND QUALIFICATIONS OF OFFICE,” better to reflect the content of the paragraphs that follow.
- On page 10, section F, paragraph 2, it would be helpful to clarify by adding the words “of the Ohio District” at the end of the paragraph.
- On page 12, section K, paragraph 2, the addition of the word “Officer” after “Financial” would complete the title.
- On page 15, section B, paragraph 6, it would be helpful to call attention to the requirement of the Synod that all elections require a majority vote.
- On page 17, section C, paragraph 2 j, the sentence should read “nominations from the floor.”
- On page 18, section C, paragraph 4 provides for an action, the election of delegates to conventions of the Synod, that is not the responsibility of a district convention. At the same time, no election process is provided for the election of the district’s representative on the Synod’s Committee for Convention Nominations as required by LCMS Bylaw 3.12.3.2 (p. 183 of 2004 LCMS *Handbook*).
- On page 19 under Article IX, paragraph E should also recognize the need for the financial books of the district to be open to the Synod.
- On page 20 under Article X, the list of board of directors members does not include the treasurer of the district. The Commission calls attention to LCMS Constitution Art. XII, paragraph 6, paragraph 3 e, and paragraph B 11, all of which speak favorably of the treasurer of a district being a member of the district’s board of directors.
- On page 23 under Article XI A 2, mention is made of an “executive staff member.” In paragraph 3 on page 24, mention is made of a “member of the professional staff.” Under section B on page 24, mention of made of “executive staff persons.” The Commission asks whether these terms represent different categories or if the terminology could be made more consistent.
- On page 51 under Article XIII, the second paragraph speaks of each congregation being represented at the Circuit Forum “at least” by its pastor and one voting member. This contradicts Bylaw 5.3.2 of the LCMS *Handbook* which limits representation to “a pastor of each congregation and one member of each congregation designated by the congregation.”
- On page 51 under Article XIII, the Commission suggests referencing LCMS Bylaw section 5.3 in the paragraph addressing circuit forums and LCMS Bylaw section 5.4 in the paragraph addressing circuit convocations.

#### **124. Review of Minnesota South District Bylaws (05-2453)**

In a January 20, 2006 letter, the president of the Minnesota South District submitted the Articles of Incorporation and Bylaws of his district for review by the Commission in light of a recent revision made by the district’s handbook committee. Upon review, the Commission offers the following response.

- On page 11, the explanatory material in the third column on the page for paragraphs f and g does not line up with the proposed wording in the second column. The wording adjacent to paragraph f pertains to paragraph g.
- The final third-column comment on page 13 regarding the ratification of advisory delegates for national conventions by the district convention and the proposed bylaw wording in the top paragraph of the center column requiring that the district “must approve the delegates” elected as advisory delegates to national conventions adds a requirement to the advisory delegate election process for national conventions that exceeds and therefore contradicts the requirements of the Synod’s Bylaws. The process for electing advisory delegates to national conventions pertains solely to national and not district conventions.

## **125. Congregational Hosting of Auxiliary’s Worship Service with Holy Communion (05-2454)**

In a letter addressed to the Commission dated December 13, 2005, an ordained minister of the Synod serving on the 2006 International Lutheran Laymen’s League (ILLL) convention committee asked a series of questions regarding how a former Commission on Constitutional Matters opinion concerning a circuit conference communion service (Ag. 1323, December, 1978) pertains to the authority of an auxiliary such as the ILLL.

**Question 1:** Does the board of governors have the authority to demand that communion be part of the international convention?

**Opinion:** Commission on Constitutional Matters Opinion Ag. 1323, issued December 8, 1978, addressed a similar issue. Thus, just as a circuit conference of the Synod can make no demand that a congregation celebrate Holy Communion for the conference and prescribe to the congregation who could or could not be admitted to that celebration (Ag. 1323), an auxiliary of the Synod (including its governing board) cannot make such a demand. Article VII of the Constitution of the Synod spells out the relation of the Synod to its members:

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.

**Question 2:** Let’s say that a couple of years before an ILLL convention a congregation agrees to host a communion worship service at a convention. The pastor is called elsewhere. A new pastor is called. The new pastor expresses reservations about the appropriateness of hosting such a communion worship service. Does the congregation have the freedom to remove communion from the service?

**Opinion:** Yes. See the answer to question #1 above. Should the ILLL no longer wish to have the congregation serve as host, it may respond accordingly.

**Question 3:** Is the ILLL telling the host congregation who can and who cannot be admitted to Communion?

**Opinion:** The Commission does not interpret what the ILLL might be communicating to a congregation. If the question is, “Can the ILLL tell the host congregation who can and who cannot be admitted to Communion?” the answer is “no.” See the answer to question #1 above.

Question 4: May a congregation host a communion worship service at a convention in another district without the district president's approval?

Opinion: There is no requirement that a congregation obtain approval from a district president before hosting worship with Holy Communion. The congregation as a member of the Synod will recognize, honor, and respect the Office of District President and the fact that the Synod has divided itself into districts and circuits especially for the sake of responsible ecclesiastical supervision by the appropriate ecclesiastical supervisors. For instance, a district president may exercise ecclesiastical supervision in regard to the activity of the local convention committee (which normally includes local pastors) occurring in his area of jurisdiction.

Question 5: Must the pastor from the host congregation be present for the hosted Communion worship service?

Opinion: The Commission suggests that this question be asked of the Commission on Theology and Church Relations.

Question 6: Must any other member of the host congregation be present for the hosted Communion worship service?

Opinion: The Commission suggests that this question be asked of the Commission on Theology and Church Relations.

Due to the theological implications in all of the above questions, the Commission suggests consulting with the Commission on Theology and Church Relations as well as its 1983 report, *Theology and Practice of the Lord's Supper*. In Res. 3-12, the 1983 convention of the Synod encouraged broad and comprehensive study of this document by the members of the Synod. On pages 23 and 24 of this document, the subject of "extracongregational services" is addressed.

#### **126. Interpretation of 1998 Res. 3-04A re Use of General Creeds (05-2455)**

In a letter dated December 20, 2005, a pastor of the Synod asked for clarification of the single resolve of 1998 convention Res. 3-04A ("To Maintain Use of General Creeds"): "That we beseech one another in the mercies of God not to substitute informal statements of faith for the regular use of the three general creeds of the church in our public worship services."

Question 1: By being adopted is Resolution 3-04A currently the official position of the LCMS?... Since the 1998 convention, has the Synod adopted any additional resolutions altering or rescinding Resolution 3-04A?

Opinion: By the adoption of Res. 3-04A, the Synod stated its position on the subject while respecting the autonomy of local congregations. Because there have been no subsequent resolutions adopted by the Synod on the subject addressed by Res. 3-04A, the stated position stands.

Question 2: Are "informal statements of faith" not to be used in any LCMS worship service?

Opinion: The wording of the resolution states that the members of the Synod are to "beseech one another in the mercies of God not to substitute informal statements of faith for the regular use of the three general creeds of the church" in public worship services. This is not the same as prohibiting the use of informal statements of faith.

**Question 3:** If such informal statements of faith are applicable, what would be the worship occasion? For example, in a congregational Contemporary or Praise Lutheran worship is it permissible to use a creedal statement other than one of the three general creeds? May district-sponsored worship services use alternate statements of faith?

**Opinion:** The resolution in question does not prohibit the use of informal statements of faith in public worship services, whatever their description or occasion. However, in its whereas section the resolution does caution that “informal statements of faith are subject to an imprecise and even erroneous confession of faith,” leading to the exhortation that the members of the Synod “beseech one another...for the regular use of the three general creeds.” This caution and exhortation is consistent with Article VI 4 of the Synod’s Constitution that calls for “exclusive use of doctrinally pure agenda, hymnbooks, and catechisms in church and school.”

### **127. Interpretation of Bylaw 3.12.3.7 (b) re Floor Nominations (05-2456)**

In a letter to the Secretary of the Synod dated December 23, 2005, the committee charged with the given responsibility in Res. 7-22 of the 2004 Synod convention asked the Commission for a clarification of Bylaw 3.12.3.7 (b).

**Question:** Please give us an opinion on Bylaw 3.12.3.7 (b): “Floor nominations shall be brought individually before the convention for approval before being added to the ballot.” Our question concerns the words “individually” and “approval.” Does this mean that every individual nomination from the floor has to be acted upon as it is presented? Does this require a simple majority vote of the convention for a name to be added to the ballot? Is this any different from past procedures?

**Opinion:** Bylaw 3.12.3.7 (b) sets forth how a convention may amend a slate by nominations from the floor. The bylaw provision for floor nominations is that each nomination must be brought before the convention for action and approved singularly in order to be added to the ballot. In other words, each floor nomination is to be acted upon separately by a convention vote. When the convention approves the receipt of each nomination, one by one, by an affirmative vote of the assembly according to accepted parliamentary rules (paragraph (i) (3) of Bylaw 3.1.9), this constitutes an amendment of the slate.

For the slate to be amended by nominations from the floor and/or for a nomination to be added to the ballot, bylaw provisions set forth in Bylaws 3.12.3.7 (b), (c), and (d) are also required.

Past procedures, which differed from Bylaw 3.12.3.7 (b), were based upon Bylaw 3.985 (2001 *Handbook*) which read:

The convention may amend the slate by nominations from the floor. Such floor nominations may only be made from the list of names which have previously been offered to the Committee for Convention Nominations prior to the final deadline established and published by the committee, unless the convention shall otherwise order by a simple majority vote. If the convention approves the receipt of such additional nominations, any delegate making such a nomination shall have secured prior written consent of the candidate being nominated and shall immediately submit it to the chairman of the Committee for Convention Nominations along with the written pertinent information concerning the nominee as detailed in Bylaw 3.983 e.

However, the above bylaw (2001 Bylaw 3.985) and the past procedures do not reflect the mandate of 1992 convention Res. 9-01, which was still in force for the 2004 convention:

WHEREAS, The LCMS *Handbook* clearly establishes a procedure for the timely submission of candidates for the various synodical offices, commissions, and Boards of Regents (Bylaw 3.945); and

WHEREAS, Floor nominations of persons *not* submitted per Bylaw 3.945 require convention approval and since Bylaw 3.949 a does not state whether this approval is *carte blanche* or requires approval for *each* candidate not previously submitted; and

WHEREAS, The floor nomination of candidates not previously submitted precludes the voting delegates from reviewing and evaluating candidate qualifications and experience; and

WHEREAS, *Carte blanche* approval or approval of board or commission by board or commission nominations would appear to undermine the intention of the delegates in adopting the provision contained in 3.949 a; therefore be it

*Resolved*, That *each* candidate nominated from the floor, whose name had not been previously submitted in accordance with Bylaw 3.945, requires the approval of the convention as well as the written consent of the nominee and pertinent written information concerning the person as designated in Bylaw 3.947 e.

#### **128. Review of Board for Communication Services Policy Manual (06-2457)**

With a letter dated January 10, 2006, the secretary of the Board for Communication Services provided a copy of the final draft of the board's policy manual "for perusal by the CCM to assure that it complies with the Synod's Constitution and Bylaws. The Commission agreed to give attention to the manual at the time of its next meeting.

#### **129. Review of Kansas District Handbook and Bylaws (06-2458)**

With a letter dated January 30, 2006, the president of the Kansas District submitted his district's revised handbook and bylaws for review and recommendations. The Commission agreed to give attention to this request at the time of its next meeting.

#### **130. Adjournment**

Following brief discussion of other matters of interest, receipt of an oral report regarding the work of the Blue Ribbon Task Force on Structure and Synodical Governance, and future meeting dates, the meeting was closed with prayer.

Raymond L. Hartwig, Secretary

## **MINUTES**

### **COMMISSION ON CONSTITUTIONAL MATTERS**

**March 17, 2006**

#### **Conference Call Meeting**

#### **131. Call to Order and Opening Prayer**

Chairman Albert Marcis called the meeting to order and asked Raymond Hartwig to provide an opening prayer. All members of the Commission participated in the conference call meeting. Sherri Strand of Thompson Coburn LLP, legal counsel of the Synod, also participated in the meeting.

#### **132. Briefing by Synod Legal Counsel**

Chairman Marcis noted that legal counsel had requested the meeting in order to brief the Commission regarding the status of the Anderson lawsuit and on-going resolution efforts. The remainder of the meeting was conducted in executive session.

#### **133. Adjournment**

After the Commission exited executive session, the meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

## **MINUTES**

### **COMMISSION ON CONSTITUTIONAL MATTERS**

**May 1–2, 2006**

**St. Louis**

#### **134. Call to Order and Opening Prayer**

Chairman Albert Marcis called the meeting to order and asked Raymond Hartwig to provide an opening devotion. All members of the Commission were present for the meeting.

#### **135. “Guidelines for the Constitution and Bylaws of a Lutheran Congregation” (04-2412)**

The Commission gave final attention to the revised “Guidelines for the Constitution and Bylaws of a Lutheran Congregation,” taking into consideration input received from its February 2–3, 2006 meeting with district constitution committee chairmen. The guidelines were approved as printed in Appendix A of these minutes.

After giving final attention to the guidelines and after further discussion, it was agreed that hard copies of the guidelines would be provided to district presidents and district constitution committee chairmen, after which the document will be made available via the internet and printed copies will be available from the office of the Secretary of the Synod. A letter of appreciation will also be sent to the district chairmen and constitution committee representatives who provided input for the review process.

#### **136. Board for Communication Services Policy Manual (06-2457)**

The secretary of the Board for Communications Services with a January 10, 2006 e-mailed letter forwarded a draft of the board’s Policy Manual for the Commission’s review. After brief discussion, the Commission agreed to give its attention to the manual during its next regular meeting.

Discussion continued regarding the implementation of Bylaw 3.9.2.2.4 and its requirement that the Commission on Constitutional Matters “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.” As an initial step in approaching this task, the Secretary was asked to send a letter to the program boards of the Synod requesting copies of their policy manuals.

#### **137. Review of Kansas District Bylaws (06-2458)**

With a January 30, 2006 e-mailed letter, the president of the Kansas District forwarded the proposed revised Handbook and Bylaws of his district to the Commission for review. The Commission asked the Secretary to communicate the results of its review to the district via letter (copy of letter attached to the protocol copy of these minutes).

#### **138. Minnesota North District Bylaws (06-2459)**

With a February 13, 2006 e-mailed letter, the secretary of the Minnesota North District forwarded a series of proposed changes to the district’s Bylaws for review by the Commission. The Secretary was asked to communicate the results of the Commission’s review to the district via letter (copy of letter attached to the protocol copy of these minutes).



### **139. Minnesota South District Articles of Incorporation (06-2460)**

With a February 14, 2006 letter, the president of the Minnesota South District forwarded a proposed amendment to his district's Articles of Incorporation for review by the Commission. The Secretary was asked to communicate the results of the Commission's review to the district via letter (copy of letter attached to the protocol copy of these minutes).

### **140. Voting Rights of Vacancy Pastors (06-2461)**

In a February 27, 2006 letter, a district president requested an opinion from the Commission regarding the right of vacancy pastors to serve as voting delegates for and otherwise officially represent the vacant congregations they are serving.

**Question:** Can an ordained minister, whether he is an "active member" (Bylaw 2.11.1) or and "inactive member" (Bylaws 2.11.2–2.11.2.3), serve as a voting delegate ("representing" the vacant congregation) to the circuit forum for the election of the circuit delegates to the convention of the Synod or serve as a voting delegate ("representing" the vacant congregation) to the district convention or be elected as the circuit delegate to a convention of the Synod?

**Opinion:** The Constitution of the Synod under Article V, Membership, states: "All organized congregations that have joined the Synod hold voting membership. At the meetings of the districts of the Synod every congregation or parish is entitled to two votes, one of which is to be cast by the pastor and the other by the lay delegate. At the meetings of the Synod a number of congregations shall form a group which shall be represented by two voting delegates, one a pastor and one a lay delegate." In this same article's designation of advisory members, the list includes "3. Ministers not in charge of congregations" (emphases added).

Article VI, Conditions of Membership, refers to the "regular call" of pastors. Bylaw 2.11.1 sets forth the requirements to be an active member, including "(a) An ordained minister serving a congregation of the Synod." The following Bylaw 2.11.2 sets forth the inactive members of the Synod as "advisory members of the Synod." These fall into the categories of emeritus, candidate, and non-candidate (emphases added).

Any ordained minister who is an "active member" of the Synod serving as vacancy (interim) pastor who does not have a "regular call" to that congregation is ineligible to serve as a voting pastoral delegate of that congregation to a district convention, Synod convention, or circuit forum (caucus). Any ordained minister who is an "inactive member" of the Synod and, as such, "advisory," and who is serving as a vacancy pastor, does not have a "regular call" to that congregation and is ineligible to serve as a voting pastoral delegate of that congregation to a district convention, Synod convention, or circuit forum (caucus).

This is consistent with previous Commission opinions:

- "When the Bylaws refer to the pastor of a congregation the reference is to the regularly called pastor whose installation had been authorized by the district president" (Ag. 366 – September, 1972).
- "On the basis of many previous rulings vacancy pastors were not permitted to serve as voting delegates to a convention" (Ag. 931; 932 – March, 1976).
- "A pastor's right to vote in a circuit meeting or at a district convention ceases when he has formally accepted a call to another parish, that from that point on he is strictly speaking serving as a vacancy pastor" (Ag. 1316 – September, 1978).

- “To be a ‘parish pastor’ in the constitutional sense, an individual must have a call” (Ag. 1371 – July, 1979).
- “Emeritus pastors have also been considered ineligible to vote since, as retired persons, they are not considered to be pastors in charge of congregations” (Ag. 1835 – May, 1988).
- “Emeritus status is inconsistent with being in charge of a congregation and thus inconsistent with exercising voting rights at a district or Synod convention or circuit forum” (Ag. 2078 A – July, 1997).
- “The phrase ‘serving a congregation of the Synod’ pertains exclusively to called positions. The words ‘regular basis’ in Bylaw 2.19 presume the existence of a regular call (Constitution, Art. VI 3) for a worker to be categorized under Bylaw 2.15...” (00-2192 – May, 2000).

Therefore, a vacancy pastor, not having a regular call from the vacant congregation he serves, is not eligible to be a voting representative of that congregation.

#### **141. Authority of President in the Hiring of Synod Employees (06-2462)**

In a March 4, 2006 letter to the Commission, the President of the Synod asked three questions regarding the authority of the President in the hiring of Synod employees:

Question 1: May an individual, whether or not an individual member of the Synod or a member of a congregation of the Synod, be called to, contracted for, or employed in a staff position of the corporate Synod or an agency of the Synod not requiring the mutual concurrence of the President, if such individual

- is an officer or member of a group whose theological position is contrary to that of the Synod;
- publicly subscribes to the theological positions of such a group; or
- has publicly taught, written, or spoken, without public retraction, contrary to the theological positions of the Synod?

Question 2: May an individual, whether or not an individual member of the Synod or a member of a congregation of the Synod, be called to, contracted for, or employed in a staff position of the corporate Synod or an agency of the Synod not requiring the mutual concurrence of the President, which position requires responsibility for upholding the Constitution, Bylaws, and/or resolutions of the Synod, if such individual

- is an officer or member of a group that publicly proclaims opposition to or criticism of portions of the Constitution, Bylaws, and/or resolutions of the Synod;
- publicly proclaims opposition to or criticism of any part of the Constitution, Bylaws, and/or resolutions of the Synod; or
- has publicly communicated, verbally or in writing, without public retraction, opposition to or criticism of any part of the Constitution, Bylaws, and/or resolutions of the Synod?

Question 3: What provisions under the Constitution and Bylaws of the Synod does the President have that enable him to provide supervision and oversight in order to “see to it” that the “resolutions of the Synod are carried out” by preventing the calling, contracting, or employing of an individual fitting the description in questions 1 and 2 above, especially when he has concerns

about whether the individual will uphold and honor the theological positions and the Constitution, Bylaws, and resolutions of the Synod?

Opinion: (A) Questions 1 and 2 can be answered together. In order to answer these questions, reference should be made to the appropriate bylaws. Bylaw 3.11.1 states: “Unless otherwise specified by the board of directors of the respective agency, all employees shall serve at the pleasure of the appointing authorities.” Furthermore, Bylaw 1.4.6 states: “Each staff develops procedures, recommends and reviews programs and ministries, manages programs, and recommends policy and program modifications. It implements decisions in accordance with approved policy. (a) It is responsible to the Synod at the national or district level in accordance with the Constitution and Bylaws of the Synod at the national or district level, resolutions of the respective convention, and the policies of a district or any other agency to which it is responsible...(c) A staff at the national level through its executive officer shall...(5) make day-to-day operating decisions in the administration of adopted programs in accordance with approved policies...(12) propose staffing levels and review staff performance....” Furthermore, Bylaw 1.4.6 (d) states: “Each executive officer shall report on staff activities and recommendations to the national Synod, district, or agency to which that officer is responsible and, as requested, to the president of the district or of the Synod.” There is no specific directive of the Synod dealing with the Bylaws requiring the mutual concurrence of the President for a staff position appointment with the exception of the chief executive officer.

Based upon the above, it is clear that the calling, contracting, or employing of staff is the responsibility of the respective Synod agency. There is no provision in the Constitution or Bylaws prohibiting the calling, contracting, or employing of an individual relating to his prior activities, including group membership, or prior proclamations or teachings.

While agencies may offer contracts or calls to individuals regardless of their histories, it should be pointed out that prior to acceptance of a position, potential staff members will be required to sign statements that they have received, understand, and agree to abide by the conflict of interest provisions of Bylaw 1.5.12.1 (see Bylaw 1.5.12.2). Presumably individuals as identified in the questions, in order to fulfill their responsibilities in a manner reflecting the highest degree of integrity and honesty consistent with the Scriptures and in order not to enter into activities detrimental to the interests of the Synod, will have determined, in advance of acceptance, no longer to associate with groups whose theological positions are contrary to the Synod, to publicly subscribe to theological positions of such groups, or to publicly speak, teach, or write in a manner inconsistent with the theological positions of the Synod or to take any other actions which may be detrimental to the interests of the Synod or its agencies. If inappropriate activity continues, the position must be vacated pursuant to Bylaw 1.5.12.1 (b) (5).

(B) In answering question 3, reference should be made to the appropriate constitution and bylaw provisions, together with prior opinions of the Commission on Constitutional Matters. Please note the following constitutional provisions that are applicable:

- Constitution, Art. XI A 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.”
- Constitution, Art. XI B: “1. The President has the supervision regarding the doctrine and the administration of...b. All such as are employed by the Synod;...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. 4. The President shall see to it that the resolutions of the Synod are carried out....”

Reference should also be made to appropriate sections of the Bylaws:

- Bylaw 3.3.1.1: “As the chief ecclesiastical officer of the Synod, the President shall supervise the resolutions of the Synod...(c) He shall call up for review any action by an individual officer, doctrine taught and practiced in the Synod, including all synodwide corporate entities.”
- Bylaw 3.3.1.1.1: “The President of the Synod has ecclesiastical supervision of all officers of the Synod and its agencies....”
- Bylaw 3.3.1.2: “The President shall oversee the activities of all officers, executives, and agencies of the Synod to see to it that they are acting in accordance with the Constitution, Bylaws, and 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 Synod’s Board of Directors, the Commission on Constitutional Matters, and/or the Synod in convention as he deems appropriate to the issues and party/parties involved.”
- Bylaw 3.3.1.3: “The President shall have powers and duties that are both ecclesiastical and administrative...(j) He shall exercise executive power when the affairs of the Synod demand it and when he has been expressly invested with such power by the Synod in convention. (k) He shall be authorized, in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power after consultation with the vice-presidents, the Board of Directors of the Synod, or the Council of Presidents, whichever in his judgment is most appropriate. Any member of the Synod shall have the right to appeal such action to the Commission on Constitutional Matters and/or the Synod in convention, whichever is appropriate....”

In discussing the authority of the President to act, the Commission on Constitutional Matters has rendered a number of prior opinions. In discussing presidential authority, the Commission in September of 1972, in dealing with an issue regarding the President’s authority to affect a decision of a board of the Synod, stated:

(1) That it is the opinion of the Commission on Constitutional Matters that the Constitution and the Bylaws of The Lutheran Church—Missouri Synod give to the President of the Synod exceptionally broad responsibilities and correspondingly broad authority. (2) That while the ordinary day to day responsibility not only for administration but also for doctrine rests also with other officials, boards, and commissions created in the course of time by the Synod, the Synod has never repealed the broad responsibility and authority vested in the presidential office, but instead the Synod appears to have increased those powers from time to time. It is therefore conceivable that the President, acting in accordance with the appropriate articles of the Constitution and Bylaws of The Lutheran Church—Missouri Synod, may exercise his pastoral judgment to intervene in situations which, in his estimation, are so important that the exercise of his ultimate constitutional responsibility is required. (3) That when a synodical President feels impelled to exercise that responsibility, it is clearly understood that his action is always subject not only to the regular appeals procedures involving the commissions of adjudication and Board of Appeals, but also to the approval or disapproval, to ratification or rescission, by the convention of the Synod. (Ag. 330, 340, *et.al.*)

In dealing with presidential power as it relates to censorship of printed material, the Commission stated the following in a June 25, 1977 opinion:

Specific enabling language mandates presidential authority in the areas of doctrine and practice. He has authority over administration of the officers and employees of the Synod. He is expressly identified as the CEO of the Synod. The President is mandated to be responsible to the Synod for the supervision of doctrine. While a President is prohibited from exercising powers that have not been expressly conferred upon him, he may exercise executive powers within framework provided by the Constitution and Bylaws. The President may, for example, exercise broad power under the express language granting him responsibility for doctrinal supervision. The Bylaws need not articulate every heresy, or aberrant doctrine that might trigger executive action. It is implicit in the express grant of authority in the Constitution and Bylaws to supervise doctrine....Prohibiting or directing items for publication in the official periodicals of the Synod should be done by the President of the Synod only in exceptional circumstances...Bylaw 12.01 indicates what the Synod expects of its official periodicals. Any limitation on such expectations through an exercise of executive power should be done only on those occasions when the affairs of the Synod so require....(Ag. 2073, A, B, C, D, E, F)

See also Opinion 02-2259, which in reference to the above opinion further explains:

[This] opinion found authority for actions which might be considered censorship on the part of the President, but recognized extreme limitations on that authority. The Commission found that, to the extent that such authority exists, it flows from his general authority under Article XI B 1 which indicates “the President has the supervision regarding the doctrine and administration...” and Bylaw 3.101 c 11 which authorizes the exercise of executive power where there is no specific directive of the Synod and action is required. As applied to the issue of censorship, the opinion observed that “prohibiting or directing items for publication in the official periodicals of the Synod should be done by the President of the Synod only in exceptional circumstances.”

The Constitution and Bylaws as interpreted by the Commission on Constitutional Matters confirm that the President of the Synod has at least the following responsibilities and authority:

- (1) The President supervises the doctrine and administration of all Synod employees (Constitution, Art. XI B 1);
- (2) The President is responsible to see that all Synod employees act in accordance with the Constitution of the Synod (Constitution, Art. XI B 2);
- (3) The President is to admonish all employees who act in a manner that is inconsistent with the Constitution and to report to the Synod if an employee refuses to alter his conduct as advised by the President (Constitution, Art. XI B 2);
- (4) The President may “advise, admonish, and reprove” all employees that in his opinion are acting in an improper manner especially regarding doctrine (Constitution, Art. XI B 3 (Also, Bylaw 3.3.1.1.1 provides that the President has ecclesiastical supervision over all officers and agencies of the Synod and as defined in Bylaw definition 1.2.1 (f) may in exercising supervision visit, encourage, support, care, protect, counsel, advise, admonish and when necessary take appropriate disciplinary measures to ensure that the Constitution, Bylaws, and resolutions of the Synod are implemented.);
- (5) The President is responsible to see to it that Synod employees carry out Synod resolutions (Constitution, Art. XI B 4) and may advise, admonish, or reprove those acting in a manner inconsistent with the same;
- (6) The President may request the appropriate executive officer to report on particular staff activities (Bylaw 1.4.6 [d]);

- (7) The President may request that an officer, executive, or agency reverse a decision that he believes violates the Constitution, Bylaws, or resolutions of the Synod (Bylaw 3.3.1.2 [c] [2]);
- (8) The President may refer to the Synod's Board of Directors, Commission on Constitutional Matters, and/or the Synod in convention any situation where an officer, executive, or agency refuses to alter/reverse an action that he believes violates the Constitution, Bylaws, or resolutions of the Synod (Bylaw 3.3.1.2 [c] [2]);
- (9) The President has executive power to act if specifically given such power by a Synod convention if affairs of the Synod require it (Bylaw 3.3.1.3 [j]);
- (10) The President may exercise executive power in the absence of a specific directive of the Synod should affairs of the Synod require it in his opinion after appropriate consultation with the vice-presidents, Board of Directors, or Council of Presidents of the Synod (Bylaw 3.3.1.3 [k]).

Therefore, under specific directives of the Constitution and Bylaws of the Synod, the President has authority to advise/request that an agency or staff executive not appoint someone he believes would not serve the best interests of the Synod. He may also ask that an agency or executive reverse a decision he believes to be improper if made. Beyond these authorized avenues of action, the President of the Synod, after appropriate consultation, has innate executive power to act in areas of doctrine and administration if he believes that the affairs of the Synod require it (Bylaw 3.3.1.3 [k]). As the Commission has advised in a prior opinion, such an "ultimate constitutional responsibility" in situations where the day to day administration rests with other staff or agencies of the Synod should only be exercised if a matter is "so important" that action is "required" for the health, welfare, and integrity of the Synod (Ag. 330, quoted above). As in the exercise of censorship, such exercise of executive power should be done "only in exceptional circumstances...on those occasions when the affairs of the Synod so require..." (Ag. 2073, quoted above).

#### **142. Authority of the Board of Directors (06-2463)**

In a March 6, 2006 letter, a parish pastor asked questions related to the "litigation process which is now taking place in our Synod at this time," explaining that such questions are "a matter of great concern to me and many others in The Lutheran Church—Missouri Synod."

Question 1: Does the Synod's Board of Directors, as legal representative of the Synod, have the authority to enter into a legal agreement to vacate the election of the President, Vice-President, or any other office elected by the Synod in its 2004 convention?

Opinion: No. The duties and responsibilities of the Board of Directors of the Synod are as outlined in Article XI F of the Constitution and Bylaws 1.4.4 and 3.3.5. As with all officers of the Synod, the Board of Directors as a whole, according to Constitution Art. XI A 1, "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." Under Bylaw 3.3.5.4, the Board of Directors has been authorized to take, on behalf of the Synod, actions related to the business and legal affairs of the Synod which have not been expressly delegated by the Constitution, Bylaws, and resolutions of the Synod to other officers or agencies of the Synod.

The conduct of the convention, including the election of the President, Vice-President, and all other offices subject to election at the convention, is governed by the Bylaws. That responsibility and authority has been retained by the Synod in convention and has not been delegated to the Board of Directors. It would be beyond the authority of the Board of Directors to enter into an agreement or take such steps as would cause the overturning or vacating of the elections conducted by the Synod in convention.

The processes for delegate selection have also been determined by the Synod in its Bylaws, particularly Bylaw 3.1.2. Challenges to delegate selection and certification, including challenges to delegates from circuits approved under the process provided by Bylaw 3.1.2 (b), are handled ultimately by the convention itself. Any challenge to the exceptions granted by the President as to delegates seated at the 2004 convention had to have been made at that time, and no such challenge was made. Subject to the Synod's governing documents, the conduct of the convention is ultimately within the control of the delegates themselves, subject to the Constitution and Bylaws of the Synod.

Question 2: Does the Synod's Board of Directors, as legal representative of the Synod, have the authority to enter into a settlement of litigation in a civil court, the effect of which would be to amend the Bylaws of the Synod, to vacate or render of no effect opinions of the Commission which were not vacated by a convention of the Synod, or would affect the method of selection of the ecclesiastical leaders of the Synod?

Opinion: No. The powers of the Board of Directors are those granted by the Synod, as discussed above. Amendments to the Constitution of the Synod are governed by Constitution Art. XIV. The exclusive method to amend the Constitution requires consideration and referral by the Synod assembled in convention and ratification by a vote submitted to each voting congregation of the Synod on an official ballot following the process contained in the Constitution.

Amendments to the Bylaws of the Synod are governed by Chapter 7 of the Bylaws. Two methods are provided. In the first, amendments may be made by the Synod itself in convention. The process for such an amendment is contained in Bylaw 7.1.1. The Bylaws also provide for amendments made by two-thirds majority of the Board of Directors under Bylaw 7.1.2, which reads:

7.1.2 In exceptional circumstances and upon the express direction of a convention of the Synod, amendments may be made by a two-thirds majority of the Board of Directors.

(a) Such amendments to the Bylaws shall be necessary to implement resolutions adopted by a convention of the Synod.

(b) Such Amendments shall be drafted by the Secretary of the Synod and shall be reviewed by the Commission on Constitutional Matters.

In order for the Board of Directors to have authority under Bylaw 7.1.2, the Board of Directors must have express, prior direction from a convention of the Synod to make the amendments proposed. Such amendments to the Bylaws can only be made when necessary to implement resolutions adopted by a convention of the Synod. Such amendments must be drafted by the Secretary of the Synod and must be reviewed by the Commission on Constitutional Matters prior to implementation.

With respect to opinions of the Commission on Constitutional Matters, the Synod has delegated to the Commission certain authority and responsibility as set forth in Bylaw 3.9.2. The opinions of the Commission are binding under Bylaw 3.9.2.2 (b) unless and until overturned by the Synod itself in convention. Various opinions have been challenged in the past, as also occurred at the 2004 convention. Overtures were submitted seeking to overturn specific opinions during the last triennium. The convention did not approve any such overtures. The Board of Directors is not authorized to take any action, including settlement of civil litigation, the effect of which would be the overturning of opinions which only the Synod itself may do, or the amendment of Bylaw 3.9.2.2 (b), without the processes provided in Bylaw 7.1.2 having been followed.

The Synod as a church body has determined the governance structure it believes, consistent with the Scriptures, is most appropriate for carrying out the work of the church. The identification and selection of

its ecclesiastical leaders is perhaps one of the most critical components of that structure. Only the Synod itself, pursuant to the processes under Bylaw 7.1.2, can effect any change in the selection of the ecclesiastical leaders of the Synod.

#### **143. Overture to District Convention Advocating Division of the Synod (06-2464)**

A district president in a letter dated March 9, 2006, provided a copy of an overture submitted to his district convention advocating a “respectful separation” because of factions within the Synod. The overture advocates that the district “affirm the desire to seek and promote a respectful and fair separation” of the Synod and the appointment of a “bipartisan” committee to investigate the possibility of such a separation.

**Question:** Is it in violation of the Constitution and Bylaws of The Lutheran Church—Missouri Synod for a district in convention to consider a memorial that deals with the division of the Synod, including the division of the Synod’s properties and assets as indicated by the attached memorial?

**Opinion:** According to Constitution Art. XII B 12: “12. The districts are independent in the administration of affairs which concern their district only, it being understood, however, that such administration shall always serve the interests of the Synod.” In addition, Bylaw 4.1.5 states: “Jurisdiction with respect to everything that is administered by or for the entire Synod resides in the national Synod itself.” Therefore, it is in violation of the Constitution and Bylaws of The Lutheran Church—Missouri Synod for a district in convention to consider a memorial that promotes a division of the Synod, given the synodwide consequence of such a proposal.

#### **144. Authority of the President of the Synod (06-2465)**

In a letter received on March 13, 2006, the Board for Communication Services asked a series of nine questions regarding the authority of the President of the Synod relating to Bylaw 3.3.1.3 (k). The questions have been modified by the Commission to facilitate a response.

**Question 1:** Does the President of the Synod have the authority under Bylaw 3.3.1.3 (k) to direct an agency of the Synod to hold in abeyance or to refrain from taking action until certain questions are answered by the Commission on Constitutional Matters?

**Opinion:** Yes. Under Bylaw 3.3.1.3 (k) and its requirements, the President of the Synod has the authority to direct an agency of the Synod to hold in abeyance or to refrain from taking action until certain questions are answered by the Commission.

The President of the Synod is authorized by the Synod to exercise executive power when, in his judgment, the affairs of the Synod require the exercise of executive power and for a purpose for which there is no specific directive of the Synod. Such power, however, cannot be exercised until after consultation with the vice-presidents, the Board of Directors of the Synod, or the Council of Presidents, whichever in his judgment is most appropriate. Bylaw 3.3.1.3 (k) states:

(k) He shall be authorized, in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power after consultation with the vice-presidents, the Board of Directors of the Synod, or the Council of Presidents, whichever in his judgment is most appropriate. Any member of the Synod shall have the right to appeal such action to the Commission



on Constitutional Matters and/or the Synod in convention, whichever is appropriate. The Lutheran Church Extension Fund—Missouri Synod is exempt from this bylaw.

Question 2: Does the Commission on Constitutional Matters have the authority to determine the conditions under which an agency's policies may recognize the unique character of that agency's action in creating staff positions which are below the executive officer and executive staff level, or does that determination lie solely with the Synod's Board of Directors?

Opinion: The Synod has charged the Commission on Constitutional Matters with the responsibility for interpreting the Synod's Constitution, Bylaws, and resolutions as its primary responsibility (Bylaws 3.9.2 to 3.9.2.2.4), such as interpreting Bylaws 1.4.6, 3.11.1, and 1.5.9, including the phrase, "Every agency may create officer and executive staff positions and fill the same in accordance with its policies."

Concerning the authority to "determine the conditions," Bylaw 1.5.9 does not use that phrase. However, the authority of the Commission does not include "recognizing," as the question suggests, "the unique character of the operations of each [agency]." That authority is given to the Board of Directors, which approves the human resources policies of the Synod (Bylaw 1.5.9).

Question 3: If an appeal is made to the Commission on Constitutional Matters under Bylaw 3.3.1.3 (k) of the President's exercise of his executive powers, asserting that he has overstepped his constitutional authority, is the Commission's function during such an appeal limited to the interpretation of the Synod's Constitution, Bylaws, and resolutions as stipulated in Bylaw 3.9.2.2? Or is there some stipulation in the *Handbook* of the Synod that authorizes the Commission to determine whether or not a situation actually required the exercise of executive power or to determine whether the use of executive power was justified?

Opinion: The authority of the Commission on Constitutional Matters is limited to the provisions set forth in Bylaw 3.9.2 to 3.9.2.2.4. If and when questions concerning "executive power" and "constitutional authority" are within the purview of the Commission, it must carry out its responsibility given by the Synod.

Question 4: If an appeal is made to the Synod in convention under Bylaw 3.3.1.3 (k), does the "right to appeal" mean that the member or agency of the Synod has the right to have the appeal presented to the convention, or can the appeal be dismissed or impeded from being presented to the convention?

Opinion: The national convention "is the principal legislative assembly, which amends the Constitution and Bylaws, considers and takes action on reports and overtures, and handles appropriate appeals" (Bylaw 3.1.1). Appeals are presented to a convention or handled by means of an overture to a convention of the Synod. The provisions for overtures must comply with Bylaw 3.1.6.2, which sets forth who may submit overtures as well as the form of an overture (3.1.6.2 [a]) and its limitations (3.1.6.2 [b] and [c]). It is only on the basis of Bylaw 3.1.6.2 (b) and (c) that an overture (including an overture that is an appeal) will not be accepted for convention consideration or will be withdrawn from convention consideration (note that the bylaw does not use the term "dismiss").

All overtures that are accepted by the President in accordance with Bylaw 3.1.6.2 must also be referred by him to convention committees (Bylaw 3.1.7). The convention itself retains ultimate control of the conduct and business of the convention.

Question 5: Does any article of the Synod's Constitution or its Bylaws give authority to the President of the Synod to interfere with an authorized, solemn and divine call that has been properly issued?

Opinion: Various agencies of the Synod have been authorized to issue divine calls on behalf of the Synod. Bylaw 3.11.1 (c) requires that all positions of the Synod requiring called ministers shall be filled in consultation with the President of the Synod.

It is the Synod that has commanded the President to carry out such authority (Constitution Art. XI B 1-4):

1. The President has the supervision regarding the doctrine and the administration of
  - a. All officers of the Synod;
  - b. All such as are employed by the Synod;
  - c. The individual districts of the Synod;
  - d. All district presidents.
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.
4. The President shall see to it that the resolutions of the Synod are carried out.

Since the Synod has given the President such authority and such supervisory powers in the Constitution, as well as the authority of ecclesiastical and administrative powers and duties in the Bylaws (3.3.1–3.3.1.3), including Bylaw 3.3.1.3 (k) cited above under question 1, the President has the authority to intervene in the official duties and functions of all officers of the Synod, all such as are employed by the Synod, all district presidents, and all agencies of the Synod.

In September, 1972, the Commission on Constitutional Matters issued an opinion on “Presidential Authority” (Ag. 330, 340, *et al.*) which applies to the current questions being asked of the Commission. The 1972 opinion states:

1. That it is the opinion of the Commission on Constitutional Matters that the Constitution and Bylaws of The Lutheran Church—Missouri Synod give to the President of the Synod exceptionally broad responsibilities and correspondingly broad authority.
2. That while the ordinary day to day responsibility not only for administration but also for doctrine rests also with other officials, boards, and commissions created in the course of time by the Synod, the Synod has never repealed the broad responsibility and authority vested in the presidential office, but instead the Synod appears to have increased those powers from time to time. It is therefore conceivable that the President, acting in accordance with the appropriate articles of the Constitution and Bylaws of The Lutheran Church—Missouri Synod, may exercise his pastoral judgment to intervene in situations which, in his estimation, are so important that the exercise of his ultimate constitutional responsibility is required (emphasis added).
3. That when a synodical President feels impelled to exercise that responsibility it is clearly understood that his action is always subject not only to the regular appeals procedures

involving the commissions of adjudication and the Board of Appeals, but also to approval or disapproval, to ratification or rescission, by the convention of the Synod.

Question 6: When there is a specific directive of the Synod or the Synod's Board of Directors—and when that specific directive has been assigned to a program board—has not Synod determined that the authority of the President of the Synod is limited?

Opinion: Bylaw 3.3.1.3 (k) reads, “[The President] shall be authorized, in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power (emphasis added). Note that the Synod's Board of Directors is not included in the bylaw phrase “specific directive of the Synod” (emphasis added).

For the answer to this question see also section B of the Commission's Opinion 06-2462, also issued on this date.

Question 7: If the President of the Synod elects to use his executive power and that, in turn, has the effect of interfering with the ability of an entity of the Synod to carry out its legitimate and specific directives, does that not constitute an improper use of his executive power or an improper interference with the rights and responsibilities that an agency of the Synod has to carry out its duties in a faithful and timely manner?

Opinion: If and when the President, in his judgment, elects to use his executive power, and such use is in compliance with the Constitution and Bylaws, including Bylaw 3.3.1.3 (k), it is a proper use of his executive power unless determined otherwise through the appeal processes provided.

Question 8: If the Board for Communication Services is not directly answerable to the President in facilitating his communications responsibilities—which facilitation includes content, media, and personnel, does not then any attempt to cause the Board for Communications Services to hold anything in abeyance or to refrain from taking action represent a disregard of the limitations placed upon the President of the Synod and constitute an illegitimate use of executive power and a direct contravention of Opinion 02-2259 of the Commission on Constitutional Matters?

Opinion: The Board for Communication Services is directly responsible to the Synod in convention. However, the President has supervisory responsibilities as set forth in Bylaws 3.3.1–3.3.1.3.

To the first part of this question, “does not then any attempt to cause the Board for Communications Services to hold anything in abeyance or to refrain from taking action represent a disregard of the limitations placed upon the President of the Synod and constitute an illegitimate use of executive power,” the answer is “no” as long as the action(s) of the President is consistent with the Constitution and Bylaws of the Synod.

To the second part of this question, “constitute...a direct contravention of Opinion 02-2259 of the Commission on Constitutional Matters,” the answer also is “no.” Opinion 02-2259 correctly states:

...the Board for Communication Services is an independent board not directly answerable to the Board of Directors. Similarly, while the President influences the Board for Communication Services through his ecclesiastical role and as a primary recipient of the services of the Board for Communication Services in facilitating his communication responsibilities, the Board for Communication Services is not directly answerable to the President.

But the opinion also refers to the authority of the President under Constitution Art. XI B and Bylaw 3.101 (2004 *Handbook* Bylaws 3.3.1 – 3.3.1.3). The Constitution and Bylaws of the Synod define the duties of the President and impose on and grant to him the ecclesiastical supervision of the Synod. No board, including the Board of Directors, may control his ecclesiastical purposes or restrict his ecclesiastical power (Cf. Opinion 02-2259).

Question 9: What is the relationship between Bylaw 3.3.1.2 (c), which authorizes the President of the Synod to call up for review any action by an individual officer (requesting that such action be altered or reversed and reporting it to the Synod if necessary) and Bylaws 3.3.1.3 (j) and 3.3.1.3 (k), which authorize the President of the Synod to exercise power when the affairs of the Synod demand and require it?

Opinion: Each of these bylaws provides a means (together with other bylaws) for the President to carry out his constitutional duties (Constitution Art. XI B). Bylaw 3.3.1.2 (c) does not limit or restrict the exercise of Bylaws 3.3.1.3 (j) and 3.3.1.3 (k) and these two bylaws do not limit or restrict the exercise of Bylaw 3.3.1.2 (c).

Bylaw 3.3.1.2 (c) states: “He shall call up for review any action by an individual officer, executive, or agency that, in his view, may be a violation of the Constitution, Bylaws, and resolutions of the Synod.” The title given to this bylaw is “Powers and Duties—Administrative,” with the lead sentence of the section stating, “The President shall oversee the activities of all officers, executives, and agencies of the Synod to see to it that they are acting in accordance with the Constitution, Bylaws, and resolutions of the Synod.” The President’s authority, with which this bylaw specifically deals, pertains to actions or activities that in the President’s view may be in violation of the Constitution, Bylaws, and resolutions of the Synod.

The title given to Bylaw 3.3.1.3 is “Powers and Duties—Ecclesiastical and Administrative,” with the lead sentence stating: “The President shall have powers and duties that are both ecclesiastical and administrative.” Whether ecclesiastical or administrative, the President is also authorized to exercise executive power under the limitations imposed in paragraphs (j) and (k) of Bylaw 3.3.1.3. These paragraphs may be exercised regardless of whether or not Bylaw 3.3.1.2 (c) is exercised and may very well be in addition to the exercise of Bylaw 3.3.1.2 (c).

The provision in Bylaw 3.3.1.3 (j) which is a basis for the President’s judgment is “when the affairs of the Synod demand it and when he has been expressly invested with such power by the Synod in convention.” And the provision in Bylaw 3.3.1.3 (k) which is a basis for the President’s judgment is “in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power after consultation with the vice-presidents, the Board of Directors of the Synod, or the Council of Presidents, whichever in his judgment is most appropriate.”

Concerning the executive power of the President of the Synod, Opinion 03-2376 of the Commission on Constitutional Matters, rendered on January 28, 2004, is also helpful. The summary paragraph of the opinion states:

Were all eventualities and potential problems foreseeable, the Synod could adopt bylaws and policies to address all issues in advance, and the question posed could be answered with greater specificity. However, the Synod has recognized that there are circumstances that it may not have foreseen or for which it may not have made direct provision. For those reasons, the Synod has therefore invested the President with very broad powers to

address those circumstances that it did not foresee or for which it made no other provision. For the same reason, the Commission cannot define in advance the ultimate boundaries of that power.

The Commission also calls attention to Opinion 06-2462 issued on this date.

**145. Review of Board for University Education Standard Operating Procedures Manual for Dispute Resolution (06-2466)**

With a memo dated March 14, 2006, the executive director of the Board for University Education forwarded for review by the Commission his board's initial draft of the *Standard Operating Procedures Manual* required by Bylaw 3.8.3.8.9 (j). The Commission agreed to complete its review at its next regular meeting.

**146. Conflicts of Interest (06-2467)**

A pastor of the Synod in a letter received March 20, 2006, asked a series of questions regarding conflicts of interest, introducing his questions with the following background information:

Background Part A:

A board of the Synod is managing a legal defense against a lawsuit—making decisions about a relevant legal strategy and even now is involved with mediation towards a resolution. The plaintiffs of the lawsuit are members of the Synod, and a few just so happen to be also family members, relatives, pastors, congregations, acquaintances, and friends of members of that particular board. Also, members of that board introduced and a few even voted for (Yes) in supporting a lawsuit against the Synod and months later are now defending the Synod against the same lawsuit. Possible and numerous potential “conflicts of interest” may be present in this situation?

Background Part B:

Bylaw 1.5.12 states: “Every board, commission...shall avoid conflicts of interest as described in this bylaw.” These are then specifically mentioned in Bylaw 1.5.12.1 (a) (1) and (2). In addition, Bylaw 1.5.12.1 mentions that each governing board “shall maintain and monitor a conflict-of-interest policy” that includes the provisions that follow, including that of Bylaw 1.5.12.1 (a): “Each board or commission shall disclose to the chairman...any potential conflicts of interest. Each chairman...shall disclose personal potential conflicts of interest to the governing board.” Is it the intent of the Bylaws that just a narrow range of specific “conflicts of interest” are to be avoided, or is the intent for there to be a much broader range of “any potential conflicts of interest” to be avoided?

**Question 1:** Is the intent of the Bylaws that every board, commission, officer, and staff member of the Synod “avoid conflicts of interest as described in this bylaw” as the only ones mentioned in Bylaw 1.5.12 [then specifically detailed in Bylaw 1.5.12.1 (a) (1) and (2)], or is the intent that they should avoid a much broader range of “any potential conflicts of interest” as found in the phrasing of Bylaw 1.5.12.1 (a)?

**Opinion:** First, it should be noted that by repeating the factual background asserted by the questioner, the Commission on Constitutional Matters is not making a judgment as to the correctness or completeness of

the facts asserted. However, in order that the questions presented can be kept in context, the background asserted as a predicate to the questions has been repeated.

Bylaw 1.5.12 regarding conflict of interest reads as follows:

**Disclosure of Conflict of Interest**

1.5.12 Every board, commission, officer, and staff member of the Synod and every agency of the Synod shall avoid conflicts of interest as described in this bylaw.

1.5.12.1 Each governing board shall maintain and monitor a conflict-of-interest policy which shall be applicable to the boards, commissions, officers, and executive staff operating under the respective agency. Each policy shall include the following provisions:

(a) Each board or commission member shall disclose to the chairman of the agency and each staff person shall disclose to the executive officer of the agency any potential conflicts of interest. Each chairman or executive officer shall disclose personal potential conflicts of interest to the governing board.

(1) Such disclosures shall include board membership on, a substantial interest in, or employment of the individual or a relative by any organization doing business with the Synod or any of its agencies.

(2) Board members or staff persons who receive honoraria or payments for any sales or services rendered to the Synod or its agencies shall disclose such information.

(3) All such disclosures shall be reported to the respective board or commission or its designated representative(s), who shall determine whether an inappropriate interest exists.

(b) Responsibilities shall be conducted in a manner reflecting the highest degree of integrity and honesty consistent with the Scriptures, the Lutheran Confessions, the *Handbook* of the Synod, board policies, and civil laws.

(1) Activities shall not be entered into which may be detrimental to the interests of the Synod and its agencies.

(2) Information acquired in the course of carrying out duties of the Synod shall not knowingly be used in any way that would be detrimental to the welfare of the Synod and its agencies.

(3) No board or commission member and/or staff or executive officer of the Synod or its agencies shall vote on any transaction in which the individual shall receive a direct or indirect financial gain.

(4) Gifts, entertainment, or favors in excess of \$100 per person per year from any individual or outside concern which does or is seeking to do business with the Synod or its agencies shall not be accepted.

(5) Any inappropriate activity shall cease or the position will be vacated.

1.5.12.2 Individuals, prior to accepting elected or appointed office or staff positions, shall sign statements that they have received, understand, and agree to abide by this bylaw and the conflict of interest policy of the respective corporation. Each shall also sign annually a "Statement of Compliance" with the bylaw and policy.

While one can attempt to delineate at great length the activities which are not to occur, the spirit and essence of the bylaw is contained in Bylaw 1.5.12.1 (b) as follows: “Responsibilities shall be conducted in a manner reflecting the highest degree of integrity and honesty consistent with the Scriptures, the Lutheran Confessions, the *Handbook* of the Synod, board policies, and civil laws.”

The bylaw does not prohibit an individual from service based on a potential conflict of interest, but rather requires that all potential conflicts of interest be disclosed to the chairman, executive officer, or governing board, as may be appropriate. The advance disclosure is intended to assist the member and the entity of the Synod in avoiding actual conflicts of interest, and in striving to reflect the integrity and honesty expected of God’s servants. For example, a prospective member of the Concordia Publishing House Board of Directors who owns, or whose family owns, a business supplying ink to the publishing house would want to disclose that relationship as a potential conflict of interest, but would not be precluded from serving on the Concordia Publishing House board. Should the publishing house board consider a contract involving supplies that might come from that member’s company, however, that member certainly would not participate in discussions or vote.

Question 2: What is meant by the phrase “any potential conflicts of interest” as found in Bylaw 1.5.12.1 (a)? Does it mean to include avoiding in discussions and/or deciding resolutions involving family relationships, relatives, acquaintances, congregational membership, etc.? Does it mean to include avoiding in participating in the defense of the Synod against a lawsuit when members of that respective board either introduced and/or supported a resolution to file a like-minded lawsuit earlier?

Opinion: A potential conflict of interest exists when one may be influenced by factors other than service to the Synod in the deliberative or decision-making process. While attention is often given to the conflict created by financial considerations, other factors interfering with independent judgment are also capable of creating a conflict of interest (see Bylaw 1.5.4). Prior opinions of the Commission on Constitutional Matters have referenced discussions of conflicts not only involving financial issues, but also those arising from serving on a board responsible for supervision of one’s employer (becoming both master and servant) and voluntary recusals based upon an appearance of conflict. The primary focus, again, is to conduct the Synod’s business in a manner reflecting the highest degree of integrity and honesty. In doing so, those who serve the Synod are expected to avoid conflicts and improprieties, and even the appearance of impropriety should be avoided. The likelihood that an actual conflict of interest exists is certainly magnified by discussions or resolutions involving family relationships, relatives, acquaintances, congregational membership, and such other relationships as may influence the independent judgment of a member.

Members of the Board of Directors have a fiduciary responsibility to the Synod and an obligation to follow the directions of their superior, the Synod itself acting in convention. Without further facts, the last sub-question is too vague to allow any other appropriate response.

Question 3: After a board or commission member discloses a “conflict of interest” to the chairman of a board or commission, should he alone make a decision whether a conflict of interest exists or not? Or, should that chairman report the “conflict of interest” to the respective board and then the whole board should determine by a vote whether an inappropriate interest exists or not?

Opinion: As discussed above, the existence of a potential conflict of interest must be disclosed to the chairman. Should either the member or the chairman have concern that the potential conflict is an actual conflict or raises the appearance of impropriety, that issue should be brought to the attention of the governing board as a whole. If the member individually, or the board or commission as a whole,

determines that there is an actual conflict, the member should not participate as to the issue for which the conflict exists. All potential conflict disclosures are to be reported to the respective board or commission under Bylaw 1.5.12.1 (a) (3), which further indicates that it is the entire board or commission that shall determine whether an inappropriate interest exists and, if the member has not voluntarily recused himself, that a concern still exists.

Question 4: What is meant by the phrase “whether an inappropriate interest exists” as found in Bylaw 1.5.12.1 (a) (3)?

Opinion: An inappropriate interest exists when there is an actual conflict of interest.

Question 5: If a member feels that he/she has a “conflict of interest,” or if the respective board has determined that “an inappropriate interest exists,” what action(s) should then be taken?

Opinion: If a member feels that he or she has a conflict of interest or believes that participation in a particular matter would raise an appearance of impropriety or conflict inconsistent with the Synod’s expectation that the member reflect the highest degree of integrity and honesty, that member should volunteer to recuse himself or herself from further consideration of the issues involved in the conflict. If the board or commission has determined that an inappropriate interest exists, contrary to the position of the member, the member will not be allowed to participate in the consideration of that issue for which the conflict exists in any event.

It should be noted that in order to maintain the high degree of integrity and honesty expected of members of the Synod, including the avoidance of an appearance of impropriety, there are many examples of individuals declining to participate in consideration of particular matters simply to maintain that integrity and to assure not only actual propriety but also the appearance of propriety. For example, in the February 1, 1985 minutes of the Commission (Ag. 107), the Secretary of the Synod refrained from voting on all matters relating to questions involving Concordia Theological Seminary, Fort Wayne because of “a possible conflict of interest.”

In 1998 Opinion Ag. 2119, the Commission discussed the importance of avoiding potential conflicts of interest or the appearance of impropriety and steps which could be taken to effect that goal. The reader may also wish to refer back to the Commission’s more recent Opinion 02-2313.

#### **147. Eastern District Governance Documents (06-2468)**

With a March 30, 2006 e-mailed memorandum, the Eastern District Board of Directors forwarded for review by the Commission the proposed revisions to the district’s regulations. The Commission reviewed the documents and offered suggestions, to be communicated to the district board orally.

#### **148. Clarification of Bylaw 3.2.5 re Process for Filling Vacancies (06-2469)**

Following a challenge to the list of candidates submitted for filling a vacancy on the Board of Directors, the secretary of the Committee for Convention Nominations submitted on behalf of the committee the following question regarding the process involved in filling a vacancy on the Synod’s Board of Directors.

Question: Since the Committee for Convention Nominations is a creation for the triennium, can the committee consider for its deliberation and submission all nominations for a given position submitted from throughout the Synod?

Opinion: Vacancies on the Synod’s Board of Directors are to be filled pursuant to Bylaw 3.2.5 (a) and (b), which read as follows:



(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.

Although there are currently two vacancies, the process for filling each vacancy is independent of the other, and separate lists of candidates must be generated as described above as to each position.

Not all persons originally nominated for the now vacant position would have been on the list of candidates submitted to the convention, or added by the convention pursuant to Bylaw 3.12.3.7. The slate of candidates from the previous convention are those who were identified by the Committee for Convention Nominations under Bylaw 3.12.3.6 (b) for the position now to be filled, together with nominations added to the slate from the floor of the convention pursuant to Bylaw 3.12.3.7 (a). If a person was not on the convention's slate of candidates for the vacant position (in this instance the Synod's Board of Directors), a name may not be considered for the vacancy unless, within 90 days of notice of the vacancy, the name was submitted by the Synod's Board of Directors, the President of the Synod, or one of the districts' boards of directors.

Following the gathering of the list of nominees for the vacancy, Bylaw 3.2.5 (b) requires the narrowing of the list of possible nominees from the four sources listed to create a list of three to five candidates. If a candidate has been proposed who fails to meet this process, those charged to submit the list of candidates for the vacancy should determine whether to add a replacement name to the list, or, if at least three candidates remain, to resubmit the existing list with the remaining names.

#### **149. Adjournment**

After discussion of dates for the next meeting of the Commission, this meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

## MINUTES

### COMMISSION ON CONSTITUTIONAL MATTERS

September 7–8, 2006

Saint Louis, Missouri

#### **150. Opening Prayer**

Chairman Albert Marcis called the meeting to order. Wilbert Sohns provided an opening devotion based upon 1 Peter 2:9–10, emphasizing the importance of the doctrine of the priesthood of all believers and the identity that this passage and doctrine give to all Christians regardless of station in life.

#### **151. Board for Communication Services Policy Manual (06-2457)**

The Commission began its review of the Board for Communication Services Policy Manual and discussed the purpose of such reviews in light of its duties described in Bylaws 3.9.2 and 3.9.2.2.4. The policy manual review process will be continued at the time of the Commission's next meeting.

#### **152. *Standard Operating Procedures Manual for Concordia University System Complaint Procedure* (06-2466).**

Bylaw 3.8.3.8.9 (j) requires the Board for University Education to maintain a *Standard Operating Procedures Manual* to serve as a comprehensive procedures manual for the complaint procedure provided in Bylaws 3.8.3.8.5 and 3.8.3.8.9, the development and any amending of the manual to be done in consultation with the Commission on Constitutional Matters. The same requirements exist for the Board for Pastoral Education under Bylaws 3.8.2.7.5 and 3.8.2.7.9.

The Commission discussed a draft of the *Standard Operating Procedures Manual* submitted by the executive director of the Board for University Education and asked the Secretary to encourage further refinement of the document, also addressing issues surfaced by the Commission's discussion.

#### **153. Iowa District West Bylaw Changes (06-2470)**

Amendments to the Bylaws of the Iowa West District were submitted for review by the secretary of the district prior to their incorporation into the district's *Handbook*. Upon review of the amendments and the Bylaws of the district, the Commission offered the following observations and suggestions:

- The reference to Synod Bylaw 4.7.3 in district Bylaw 9.29 f should reflect the terminology used by the Synod *Handbook*, in which the word "section" is reserved for larger sections of bylaw material such as "4.7," etc.
- Because districts are the Synod in that place, it is helpful if district handbooks utilize the same principles of capitalization and grammar that are used for the *Handbook* of the Synod.
- Paragraph b of district Bylaw 2.03 should be updated to make mention of all of the categories of ministers of religion—commissioned as listed under Article V B of the Synod's Constitution.
- The listing under district Bylaw 2.13 should not include a circuit pastoral conference as an entity eligible to submit overtures to a district convention (see Synod Bylaw 3.1.6.2).

- District Bylaw 2.31 which establishes a statute of limitations on district convention actions introduces a concept that is foreign to the Constitution and Bylaws and the practice of the Synod.
- District Bylaw 3.13 appears to be inconsistent with Bylaw 4.5.1 of the Synod governing the filling of vacancies on committees and commissions.
- Whereas Bylaw 4.1.1.2 (b) does not specify when changes to the Bylaws of a district should be submitted to the Commission on Constitutional Matters for review and approval, districts are well advised to submit proposed changes to the Commission in advance of their consideration by the district convention.

#### **154. Board Policy Manuals (06-2471; 06-2472; 06-2473; 06-2474; 06-2475; and 06-2476)**

In light of the Commission's review and discussion earlier in the meeting of the policy manual of another of the Synod's program boards (see #151 above), the Commission set aside further review of the board policy manuals it has received (Board for Pastoral Education; Board for University Education; Board for Black Ministry Services; Board for Human Care Ministries; Board for Mission Services; and Board for District and Congregational Services) until its next meeting.

#### **155. District Convention Resolution re CCM "Guidelines" (06-2477)**

In a letter dated July 2, 2006, a district president questioned the validity of a district convention resolution in light of the Constitution and Bylaws of the Synod.

Question: Can a district of the LCMS, meeting in convention, instruct the district's Constitution Committee to ignore the *Guidelines for the Constitution and Bylaws of a Lutheran Congregation* prepared for all districts to follow or to work contrary to such guidelines. The resolves in the district convention resolution read as follows:

RESOLVED, That the Committee on Constitutions of the PSW District cease altogether forcing congregations, new or old, to refrain from using descriptive, orthodox words regarding Scripture, such as "inspired," "inerrant," or "revealed" in the "Confessional Subscription" section of their constitutions; and be it further

RESOLVED, That the Committee on Constitutions of the PSW District joyfully encourage congregations of our district to retain said language; and be it further

RESOLVED, That the PSW District make public this misunderstanding and its correction in order to ensure no lingering ill effects;...

Opinion: District constitution committees are created by the Bylaws of the Synod (Bylaws 2.2.1 [a]; 2.4.1 [b]) and not by action of districts. A district convention does not have the authority, therefore, to instruct that district's constitution committee to ignore the duties and responsibilities imposed upon them by the Synod.

It is the Constitution and Bylaws of the Synod that authorize and instruct a district's constitution committee and board of directors concerning the matter of the constitutions and bylaws of district congregations (membership eligibility and continuing eligibility of congregations). A district constitution committee is required by the Bylaws of the Synod to examine new or revised constitutions and bylaws of congregations to ascertain "that they are in harmony with Holy Scripture, the Confessions, and the teachings and practices of the Synod in order that any necessary changes may be made by the congregation before the application is acted upon" (Bylaws 2.2.1 [b]; see also 2.4.1 [b]). District boards of directors are authorized to act upon and approve new constitutions and bylaws (application for

membership in the Synod) or to determine if revised constitutions and bylaws are acceptable to the Synod (Bylaws 2.2.1 [c] and 2.4.1 [c]).

The *Guidelines for Constitutions and Bylaws of Lutheran Congregations*, which is provided by the Commission on Constitutional Matters of the Synod as an aid and service to congregations and district constitution committees and which may be used at their discretion, must also be in harmony with Holy Scripture, the Confessions, and the teachings and practices of the Synod. The *Guidelines* recognize that differences exist between congregations and that, for the most part, the organization of a congregation is a matter of self-determination. However, the *Guidelines* also set forth the basic principles and/or requirements for the constitutions and bylaws of a congregation and therefore provide a valuable resource for the users.

One such requirement of the constitution and bylaws of congregations, reflected in the *Guidelines*, is an article on “confessional subscription.” In enumerating conditions of membership in the Synod, Article VI of the Synod’s Constitution states: “Conditions for acquiring and holding membership in the Synod are the following: 1. Acceptance of the confessional basis of Article II.” Referring to the confessional position of the Synod, Bylaw 1.6.1 states: “The confessional position of the Synod is set forth in Article II of its Constitution, to which all who wish to be and remain members of the Synod shall subscribe.” Accordingly, Bylaw 1.7.1 states: “The Constitution, Bylaws, and all other rules and regulations of the Synod apply to all congregational and individual members of the Synod.” And both Article II and Article VI are referenced in Article XIII: “1. Members who act contrary to the confession laid down in Article II and to the conditions of membership laid down in Article VI or persist in an offensive conduct, shall, after previous futile admonition, be expelled from the Synod.” Therefore, *Guidelines for Constitutions and Bylaws of Lutheran Congregations* states (emphasis added): “A congregation’s confessional standard must not go beyond that of the Synod” (CCM opinions 04-2412; 98-2135).

Prior CCM opinions refer to this requirement. In an October 26–28, 1966 opinion, the CCM opined “that congregations are not permitted to include subscription to the *Brief Statement* in an obligatory article of their constitution,” and in a March 7–8, 1968 opinion the CCM stated: “The Commission on Constitutional Matters holds that Article VI, 1 ‘Conditions of Membership’ of the Synod’s Constitution requires nothing more and nothing less than the acceptance of the confessional basis of Article II,” also stating in reference to the 1966 opinion, “The Commission holds the same opinion in regard to any other doctrinal statement not listed in Article II of the Synod’s Constitution.” In a more recent August 15–16, 2003 opinion (03-2352), the Commission opined:

Members of the Synod are required to accept without reservation and subscribe to the Synod’s confessional position as set forth in Article II of its Constitution (Bylaw 1.03 [1.6.1]). Although the Synod has provided for itself the right to adopt doctrinal resolutions and statements (Bylaw 1.09 [1.6.2]), even these are not to be regarded as additions to the confessional basis for membership provided in Article II. Accordingly, individuals or congregations may not add to or remove items from Article II....

In joining the Synod, members willingly obligate themselves to fulfill the membership requirements of Article VI and agree to accept without reservation the confessional position of the Synod as described in Article II. Accordingly, individual members or congregational members of the Synod may not add to or remove items from Article II. As noted above, other confessional statements, confessions of faith, or common confessions may in fact be correct interpretations of our Lord’s teaching and may be used for a variety of purposes, but such other confessions may not be used as a condition for acquiring and holding membership in the Synod (emphasis added).

In evaluating the constitutions and bylaws of congregations, it is the responsibility of district constitution committees to judge whether the documents are in harmony with Holy Scripture, the Confessions, and the teachings and practices of the Synod. If a district board of directors has denied an application for membership and the congregation has asked for reconsideration, only then does a district convention have authority. Such authority is limited only to granting the application or affirming the denial (Bylaw 2.3.1 [c]). In doing either, however, the district convention must not violate the Constitution and Bylaws of the Synod (cf. Art. XII 2). This appeal provision in the Synod's Bylaws (2.3.1) does not apply to revisions of constitutions and bylaws of congregations.

#### **156. Southeastern District Bylaw Changes (06-2478)**

The President of the Southeastern District, along with a July 19, 2006 letter, submitted the Bylaws of his district as revised by its May, 2006 convention for review by the Commission. After initial review and discussion, the Secretary was asked to write a letter to the district president requesting that the changes made to the Bylaws be more clearly identified within the text of the district's Bylaws to facilitate the Commission's review.

#### **157. CCM Report to the Convention (06-2479)**

The Commission discussed the content of its report to the 2007 convention in light of the report submitted three years ago to the 2004 convention.

#### **158. Participation in Legal Actions by Members of the Board of Directors (06-2480; 06-2480A)**

A pastor of the Synod in an e-mailed letter dated August 17, 2006, submitted questions regarding actions of members of the Board of Directors of the Synod in relation to a recent lawsuit and regarding the vacating of positions on the Board of Directors by implementation of Bylaws 1.5.12.1 (b) (1) and (5) and 3.3.1.3 (k). In a subsequent e-mailed letter received August 18, 2006, the pastor recalled his questions. These letters were followed by an August 20 e-mailed letter from another pastor of the Synod, who submitted similar questions regarding the implementation of Bylaw 1.5.12.1 (b) (1) and (5).

After discussion, the Commission instructed the Secretary, although there is no clear requirement to do so, to draft letters to legal counsel and to the Board of Directors to inform them of the questions that have been submitted and to provide opportunity for input prior to the Commission's response to the questions.

#### **159. District Resolution re Dispute Resolution Process (06-2481)**

The secretary of a district of the Synod brought to the attention of the Commission a resolution adopted at his district convention which in part asks the Commission to address concerns and make necessary improvements to the process of ecclesiastical supervision and dispute resolution and to present recommended changes to the 2007 convention of the Synod relating to: (1) whether the requirement for a face-to-face meeting in instances of "public offense" is contrary to paragraph 284 of the Large Catechism; and (2) the provision in the dispute resolution process allowing for the removal of the ecclesiastical supervisor during the process, to be replaced by an individual unfamiliar with the issue at hand and who bears no responsibility for the member involved in the dispute.

Synod Bylaw 3.9.2 states: "The Commission on Constitutional Matters exists to interpret the Constitution, Bylaws, and resolutions of the Synod and ensure that the governing instruments of the Synod and its agencies are in accord with the Constitution and Bylaws of the Synod." Furthermore, Bylaw 3.9.2.2.1 states: "The Commission on Constitutional Matters shall examine all reports and overtures to the Synod asking for amendments to the Constitution and Bylaws of the Synod or which in

any manner affect the Constitution and Bylaws, to determine their agreement in content and language with the Constitution and Bylaws of the Synod.”

The question posed by the district resolution as presented goes beyond the authority of the Commission on Constitutional Matters as defined in the bylaws cited above. The question does not involve either the interpretation of Synod bylaws or examination of reports or overtures to the Synod relating to their content or agreement with the Constitution and Bylaws. Whether the dispute resolution process violates portions of the *Large Catechism* would appear to be an appropriate topic for review by the Commission on Theology and Church Relations. Whether the dispute resolution process should be revised would appear to be an appropriate topic for the Commission on Structure.

#### **160. Use of Dispute Resolution Process When Expressing Dissent (06-2482)**

In an August 24, 2006 e-mailed letter, a pastor of the Synod, after quoting Synod Bylaw 1.10.1.1, submitted a series of questions regarding the availability and use of the Synod’s dispute resolution process by members of the Board of Directors of the Synod when dissenting to a resolution of the Synod. After brief discussion, a member of the Commission was asked to provide a draft response for consideration by the Commission at its next meeting.

#### **161. Questions Regarding Circuit Forum Delegate Election Process (06-2483)**

In a memorandum dated September 8, 2006, the Secretary of the Synod requested a response from the Commission to questions that repeatedly surface regarding the conduct of circuit forums to elect delegates to a Synod convention.

**Question 1:** Who may represent a congregation at a circuit forum? May a non-rostered “lay minister” or a “licensed deacon” serve as a congregation’s lay or pastoral delegate to a circuit forum or an elected delegate to the Synod convention? May a retired ordained or commissioned minister resign from the roster of the Synod in order to serve as a lay delegate and then reapply for roster membership after the convention?

**Opinion:** Circuit forums are to consist of “a pastor of each congregation and one member of each congregation designated from each congregation” (Bylaw 5.3.2). They shall have been “selected in a manner prescribed by the congregation” (Bylaw 3.1.2.1 [c]). Congregations with more than one called pastor must decide which of their pastors will represent them. Pastors serving congregations on other than a called basis may not represent the congregation as its “pastor” (see also CCM Opinion 06-2461). By providing that congregations may select their representatives to a circuit forum in the manner prescribed by the congregation, the Synod does not impose any restrictions for lay representatives of congregations.

All persons not rostered by the Synod as ordained or commissioned ministers are regarded as lay persons and may represent their congregation as such at circuit forums. They may also be elected to serve as lay delegates to conventions of the Synod. This includes lay ministers and licensed deacons insofar as they are not rostered by the Synod. Also, although they may conduct Word and Sacrament ministries, lay ministers and licensed deacons may not be considered for delegate positions requiring a pastor because they are not rostered as such.

Rostered emeritus pastors and other rostered church workers may not be regarded as lay persons. While it may technically be possible for an emeritus church worker to resign from the roster of the Synod in order to serve as a lay representative or delegate with the intention of returning to the roster afterwards, this is not advisable (application for reinstatement requires a 75% favorable vote of the Council of Presidents) nor does it ring true to a spirit of honest representation at conventions of the Synod.

Question 2: What constitutes a quorum for a circuit forum? Is it appropriate for a circuit forum to be conducted in any other manner than by a face-to-face meeting of the representatives of the congregations of the circuit?

Opinion: The Bylaws of the Synod are silent regarding a quorum requirement for circuit forum meetings. Therefore those physically present constitute a quorum. Bylaw 3.1.2.1 (a) only requires that circuits “shall meet at the call of the counselor(s).” It behooves circuit counselors, therefore, to exercise care in selecting dates and to clearly announce circuit forums well in advance to allow for the greatest possible participation.

While modern technology might make possible any number of alternative methods for circuit forums to meet and conduct elections of delegates (e.g., E-mail, conference calls) and while local conditions may favor other manner of meetings or voting processes (e.g., separate meetings in different locations, proxy or absentia ballots), no such provisions exist in the current Bylaws of the Synod. The Bylaws speak of the circuit forum as a “group” (Bylaw 5.3.1) that “meet[s]” (Bylaw 5.3.3) for the purposes stated in Bylaw section 5.3 of the *Handbook*, including the election of circuit delegates to the national convention.

These issues regarding quorum requirements and possible alternative methods for circuit forums to meet are herewith referred by the Commission on Constitutional Matters to the Commission on Structure for review and possible recommendations for change.

Question 3: How does a circuit forum proceed if there are insufficient nominations of laypersons by circuit congregations for lay delegate positions? What constitutes a proper election by a circuit forum?

Opinion: Bylaw 3.1.2.1 makes clear that “each congregation may nominate one layperson, either from its congregation or from the circuit” for the lay delegate and alternate positions, these names to “be submitted to the circuit counselor prior to the day of the circuit meeting.” They alone “shall constitute the slate of candidates.” If insufficient nominations are submitted in a timely manner by circuit congregations, these positions cannot be filled. Furthermore, the Bylaws of the Synod include no provision for filling these positions in another manner. In the absence of a proper election, the circuit will not be represented by a lay delegate, since Bylaw 3.1.2.1 (j) applies only to positions already properly filled.

The process for proper elections at circuit meetings is outlined in detail in paragraph (d) of Bylaw 3.1.2.1, including the use of written ballots (voice votes are not valid) and a requirement of a majority vote of all votes cast. Circuit counselors are well advised to review the entire delegate election process to assure compliance with the bylaw process and to correct any deficiencies before the final deadline for delegate selection. Failure to follow the appropriate bylaw provisions for selection of delegates may result, if challenged, in an invalidation of the circuit’s elections, causing the circuit to have no representation at the Synod convention.

[Note: Due to the time-sensitive and urgent nature of this opinion, the Secretary was asked to provide electronic copies to all district presidents immediately and to prepare sufficient printed copies for distribution to all attending the National Circuit Counselors Conference the following week.]

## **162. Other Matters**

During the meeting, the Commission received reports from its members regarding the work of other groups of the Synod:

- Raymond Hartwig provided a report on the status of the dismissal of the Anderson Lawsuit brought against the President and First Vice-President and the Synod by a group of members of the Synod, including the withdrawal of a Motion to Intervene in the lawsuit by four members of the Board of Directors.
- Albert Marcis reported on the work of the Resolution 7-22 Committee, charged by the 2004 convention with bringing recommendations for improvement of the convention elections process.
- Wilbert Sohns provided a report on the work of the Blue Ribbon Task Force on the Structure and Governance of the Synod, noting plans for members of the task force to visit all district boards of directors by the end of the calendar year to obtain input, and anticipating that the task force will be providing only an initial report to the 2007 convention and a full report to the 2010 convention.
- Raymond Hartwig reported on the work of the convention-mandated Resolution 7-02A Committee and, upon request of the committee, invited the Commission's response to the question of the receipt by the Board of Directors of all legal opinions received by the Synod and its agencies.
- Wilbert Sohns reported on the work of the Commission on Structure and specific attention being given by the Commission to Bylaw section 1.5 and the inclusion of a section on the removal of board members.

### **163. Adjournment**

After dates for a next meeting of the Commission were determined, the meeting was adjourned with words of benediction by Wilbert Sohns.

Raymond L. Hartwig, Secretary



## **MINUTES**

### **COMMISSION ON CONSTITUTIONAL MATTERS Telephone Conference Call December 18, 2006**

#### **164. Call to Order and Opening Prayer**

Chairman Albert Marcis called the meeting to order, provided an opening prayer, and reviewed the agenda for the meeting. All members of the Commission participated in the conference call meeting.

#### **165. Resolution 7-02A Committee Chairman Request**

Chairman Marcis called attention to the December 8, 2006 E-mailed letter from Mr. Walter Tesch, chairman of the Resolution 7-02A Committee, requesting opportunity to meet with the Commission “to discuss some of the issues before the Committee and to receive comments from the CCM.”

Resolution 7-02A of the 2004 convention resolved “That the convention consider this action as resolving the current difficulty but directs the President and Board of Directors jointly to appoint a committee to address the matter and report to the 2007 convention” (see also the resolution’s WHEREAS paragraphs, *2004 Convention Proceedings*, pp. 152–153).

After discussion, the Commission agreed to grant the request and to invite Mr. Tesch to its next regular meeting at a time on the agenda suitable to him and the chairman of the Commission. In addition, Mr. Tesch will be asked to provide in advance of the meeting any pertinent materials, documents, or legal opinions in the possession of the Resolution 7-02A Committee, to allow the Commission time and opportunity to prepare responsible and significant comments.

#### **166. Board of Directors Request**

Chairman Marcis called attention to the December 8, 2006 E-mailed letter from Mr. David Hawk of the Board of Directors of the Synod communicating an invitation to meet informally with a committee of the Board “to discuss and seek clarification regarding any existing CCM opinion that might appear to be in conflict with Missouri state law.”

In a November 17, 2006 action, Board of Directors requested this meeting in order “to foster understanding and collaboration regarding alignment of board responsibility and authority between the Board of Directors and the Commission on Constitutional Matters.” The Board also committed itself “to engaging in dialogue with the CCM regarding this issue, with the goal of arriving at a God-pleasing mutual understanding of the respective authority and responsibilities of both groups.”

The Commission noted that precedent for such joint meetings exists. The Commission and the Board met in August of 2003, joint meetings of the Board of Directors and the Council of Presidents are held periodically, and a joint meeting of the Commission and representatives of the Board under the leadership and chairmanship of the President of the Synod took place on January 5, 2004, the latter to discuss the Board’s November, 2003 declaration of several Commission opinions to be “of no effect.”

During ensuing discussion of the request, the Commission committed itself to continued dialogue with the Board of Directors and the goal of arriving at a God-pleasing mutual understanding of the respective authority and responsibilities of both groups. However, in response to the invitation communicated by

Mr. Hawk for a meeting with Board representatives, the Commission opted to request a joint meeting with the full Board of Directors in order to engage in the fullest dialogue possible and to reach a mutual understanding that will involve the participation of all members of the Board and the Commission.

The Commission also agreed to request that such a joint meeting take place, if feasible, at a mutually acceptable time in conjunction with the February meeting of the Board of Directors, the meeting to be conducted under the leadership and chairmanship of the President of the Synod, and also respectfully to request that the Board provide to the Commission a copy of the Armstrong Teasdale legal opinion referenced in the October 30, 2006 minutes of the Board (agenda item #162) prior to the requested joint meeting.

Finally, the Commission agreed to request that the Board, by resolution of the full Board, provide prior to the requested joint meeting any specific “existing CCM opinion that might appear to be in conflict with Missouri state law,” and clarify the resolve in its November 17, 2006 action “to discuss and seek clarification regarding any existing CCM opinion that might appear to be in conflict with Missouri state law.”

#### **167. Participation in Legal Actions by Members of the Board of Directors (06-2480; 06-2480A)**

A pastor of the Synod in an August 18, 2006 E-mailed letter submitted questions regarding actions of members of the Board of Directors of the Synod in relation to a recent lawsuit and regarding the vacating of Board positions by implementation of Bylaw 1.5.12.1 (b) (1) and (5). After brief discussion regarding input received from legal counsel and input to be received from the Board of Directors, it was agreed to postpone final discussion until the Commission’s next regular meeting.

The Commission also discussed a breach of confidentiality resulting in the publication in a non-LCMS Web site of the question submitted, which question had been submitted to the Board of Directors for input pursuant to Bylaw 3.9.2.2 (b). The chairman of the Commission was asked to contact the chairman of the Board of Directors to bring to his attention the seriousness of such a breach and to be assured that appropriate procedures are implemented by the Board to avoid such breaches in the future. He will also contact legal counsel regarding this concern.

#### **168. Adjournment**

All business to come before the Commission having been attended to, Chairman Marcis closed the meeting with words of benediction.

Raymond L. Hartwig, Secretary