MINUTES

COMMISSION ON CONSTITUTIONAL MATTERS
St. Louis Airport Crowne Plaza Hotel
August 10–12, 2012

146. Opening Devotions, Prayers, and Review of Agenda

After calling the meeting to order with all members of the commission present, Chairman Wilbert Sohns called on Daniel Lorenz (who served as devotion leader for the entire meeting) for an opening devotion. Chairman Sohns reviewed the agenda and provided an overview of the meeting.

147. Bylaws Section 2.16 *Standard Operating Procedures Manual*

The commission reviewed the changes to the Bylaws section 2.16 *Standard Operating Procedures Manual* and made a number of final minor changes of its own before Chairman Sohns declared the manual now ready for publication and use (a copy of the revised manual is attached to the protocol copy of these minutes).

148. Final Approval of District Bylaws Changes

The commission reviewed final versions of district Bylaws following adoption by district conventions. The following satisfactorily incorporated the input provided and received the commission's approval:

- English District Bylaws [11-2613 (C)]
- Northern Illinois District Bylaws [11-2622 (A)]
- Pacific Southwest District Bylaws [12-2637 (A)]

The following satisfactorily incorporated the input provided, also making additional change(s) pending the commission's approval, which was granted:

- Montana District Bylaws [11-2593 (B)]
- Southeastern District Bylaws [11-2601 (A)]
- Missouri District Bylaws [11-2608 (B)]
- Ohio District Bylaws [12-2630 (C)]

The following incorporated the input provided by the commission and received the commission's approval with further input to be addressed by the next district convention:

- New Jersey District Bylaws [12-2629] – Under district Bylaw 2.21, paragraph b, the provision of a ballot listing clergymen residing in the proper vice-presidential area does not honor the Synod's bylaw provision that all clergymen on the roster of the Synod are to be considered for nomination and election. Better wording would be "a listing of those clergymen who currently reside in their vice-presidential area," which would allow opportunity to inform the congregations of area clergymen without improperly restricting their consideration by printing only those clergymen on the ballot to be used for nominations. The district will want to give this paragraph further attention prior to its next convention, also in light of any changes that may be made by the 2013 Synod convention.

149. Review of Concordia University System Articles of Incorporation and Bylaws (11-2602)

In response to a May 8, 2012, emailed request, the interim Executive Director of Concordia University System provided the current Articles of Incorporation and Bylaws of Concordia University System for review. Upon review, the commission offers the following recommendations.

Regarding the Articles of Incorporation:

- Under Article Fourth, paragraph b: The final phrase should read, "…which are not contrary to the Constitution, Bylaws, and resolutions of the Synod, subject to the general policies of the Synod."
- Under Article Sixth: This paragraph must incorporate, if not the wording of 2004 Res. 4-11, then the spirit of said resolution.
- Under Article Eighth: In the first paragraph, the reference in the first line to the members of the corporation will need to be changed from "eleven" to "ten." Similarly in the third paragraph, the number of boards of regents will need to be changed from "ten" to "nine," due to the affiliation of Concordia University Ann Arbor with Concordia University Wisconsin.
- Under Article Ninth: The second paragraph must include reference to the requirement of Synod Bylaw 3.9.2.2.3 that the Commission on Constitutional Matters is to provide advance approval of any proposed changes to the Articles of Incorporation.

Regarding the Bylaws:

- Prior to Article I: The commission suggests consideration of the addition of a Preamble section to the Bylaws identifying the purpose of Concordia University System and its relationship to the Synod, giving consideration to the content of Synod Bylaw 3.6.6.
- Under Article I: In the first paragraph of Section 1, the reference in the first line to the members of the corporation will need to be changed from "eleven" to "ten." Similarly in the third paragraph, the number of boards of regents will need to be changed from "ten" to "nine."
- Under Article I: In the paragraph under Section 2, it will be helpful to clarify that the reference in the second sentence is to the "Concordia University System Board of Directors." In the same sentence, reference to "telegraphed" could be updated to reflect today's other forms of communication suitable for this purpose.
- Under Article I: In the paragraph under Section 3 and in accordance with the commission's earlier suggestion in opinion 06-2472, a statement might be added that will allow for the provision of notice regarding upcoming business meetings by email.
- Under Article II: In the first paragraph under Section 6, the number of colleges and universities must again be changed from "ten" to "nine." The same change will also be necessary in subparagraph g.
- Under Article V: As previously recommended in opinion 06-2472 and as already instructed under Article Ninth of the Articles of Incorporation above, the second paragraph must include reference to Synod Bylaw 3.9.2.2.3 and the responsibility of the Commission on Constitutional Matters to provide advance approval to proposed bylaw changes.

150. Request for Update of Guidelines for Congregations' Constitutions and Bylaws (12-2641)

In a letter dated April 26, 2012, the chairman of the Minnesota South District Constitution and Membership Committee reported that his committee had petitioned the Commission on Constitutional Matters to update its "Guidelines for Constitutions and Bylaws of Lutheran Congregations," specifically to amend guidelines 6.1, 6.2 and 10.0 to conform with Synod convention actions.

After initial review of the request, the commission acknowledges that guidelines 6.1 and 6.2 do require updating to reflect changes made to Synod Bylaw 2.5.2 by the 2010 convention. In addition, the terminology used in guideline 10.0 will be reexamined in light of the report of the special task force authorized by 2004 Res. 3-08A. These matters will be included in a comprehensive review of the guidelines by the commission in coming months.

151. Review of Concordia University Nebraska Articles of Incorporation, Bylaws, and Board Policy Manual (12-2642)

With a letter dated May 2, 2012, the president of Concordia University Nebraska submitted the university's Articles of Incorporation, Bylaws, and Board Policy Manual for review by the commission. Upon review, the commission brings the following to the attention of the board of regents.

Regarding the Articles of Incorporation:

- Article V, Purposes: The commission suggests additional language that also reflects the language of Synod Bylaw 3.6.6.5, especially paragraph (i).
- Article IX, Disposition of Assets Upon Dissolution: The commission calls the board's attention to 2004 Res. 4-11 and its expectations for language to protect the reversionary interests of the Synod.

Regarding the Bylaws:

- Article III states that the corporation "shall have no members," while Article X (middle of paragraph) speaks of "All Members of the corporation…."

Regarding the Policy Manual:

- Under 2.2: A reference to footnote #2 appears to be missing.
- Under 2.18: The commission questions the relationship of this policy and the referenced civil statutes to Synod Bylaws 1.5.7–1.5.7.1 in light of Synod Bylaw 1.5.7.2, suggesting that this relationship be addressed in footnote #35.
- In the footnotes under Chapter 2:
    - #16 should reference the 2010 *Handbook*, and the page reference should be pp. 32–33.
    - #17 should reference the 2010 *Handbook*, and the page reference should be p. 31.
    - #18 should reference the 2010 *Handbook*.
    - #30's Synod bylaw reference should be 3.10.5.2.
    - #40's Synod bylaw reference should be 3.2.4 (d).
    - #47 should also reference Synod Bylaw 3.10.5.6.9.
- Under 4.14: In order to reflect Article II, Section 6 of the CUS Bylaws, this paragraph should begin: "Ordinarily, the president will serve…." A reference to Synod Bylaw 3.6.6.3 and its mention of "one university president" would also be helpful.
- Under 5.4: Mention of Synod Bylaw 1.5.7 must be included as the process the Synod has provided for the removal of board members.
- Under 5.8, third last paragraph: Synod Bylaw 1.5.3 and its mention of Board of Directors policy governing "manner of meeting" must be included in the provisions provided.
- In the footnotes under Chapter 5:
    - #6 should also reference Synod Bylaws 3.9.2.2.3 and 1.5.7–1.5.7.2.
- In the footnotes under Chapter 7:
    - #1 should make clear that the Bylaws referenced are those of Concordia University Nebraska.

- Under 8.10: Consideration to Synod Bylaw 1.5.3.2 to properly track the language used by the bylaw.
- In Appendix B, under paragraph (f) (4): It should be clarified that it is the Synod's *Standard Operating Procedures Manual* and Bylaws that are being referenced.
- In Appendix B, under 2.382: Reference should be made to Synod Bylaws 1.5.6 and 1.5.6.1.
- In Appendix B, under 2.384: The word "allege" should read "alleged." Similarly, under 2.385, the paragraph beginning "Second," the word "report" should read "reports." And again, under 2.385 at the end of the paragraph beginning "Third,…." the word "if" in the final sentence should read "it."
- In Appendix B, under 2.385, the commission wonders whether no "specific time period" is given for a reason or whether a specific time period is intended to be provided.
- Under the Governance Committee Charter: The first sentence under the "Membership" section lacks a period at the end of the sentence.
- Under the Personnel Committee Charter: #10 under "Responsibilities" lacks a space between the words "or" and "external."

152. Prior Approval of CUS Theological Faculty (12-2643)

In a May 4, 2012, emailed letter, the interim executive director of the Board of Directors of Concordia University System indicated a problem and then asked two questions of the commission.

In accord with Bylaw 3.9.2.2 (b), the commission notified the boards of regents of the Synod's colleges and universities, the boards of regents of the seminaries, and the Synod President, allowing them to submit in writing information regarding the matters at issue. Prior to finalizing this opinion, the commission also consulted with the Commission on Handbook, given that commission's convention-mandated responsibility to participate in updating the 2010 *Handbook* (2010 Res. 8-12A) and to bring it into harmony with resolutions and changes adopted by the Synod's conventions (Bylaw 3.9.4.2 [b]).

Problem: Editions of the *Handbook* prior to 2010 contained the following statement:

> 3.8.3.4 In keeping with the objectives and the Constitution, Bylaws, and resolutions of the Synod, the Board for University Education shall…
> (f) Grant approval for initial appointments of theological faculty;….

This paragraph is not contained in the 2010 *Handbook*. However, the policy is stated in the section on faculty in older editions of the *Handbook* as well as the current edition.

Question 1: What is the correct text of the *Handbook* with regard to prior approval of theology faculty members?

Opinion: The following portion of Bylaw 3.10.5.6.3 should be stricken: "~~All initial appointments to college/university theology faculties shall require the prior approval of the Board of Directors of Concordia University System.~~" The following sentence should be amended to read: "All ~~other~~ initial full-time appointments to college/university faculties shall require prior approval of the board of regents and shall include a thorough theological review involving the district president and selected members of the boards of regents."

Prior to (and since) the 2010 Synod convention, the boards of regents of the Synod's colleges and universities as well as the Synod's seminaries had the responsibility to appoint all full-time members of the faculty, including theological faculty. Prior to the 2010 Synod convention, the Board for University

Education also had the responsibility to grant prior approval for initial appointment of theological faculty at the Synod's colleges and universities. Prior to the 2010 Synod convention, the Board for Pastoral Education had similar responsibility to grant prior approval for initial faculty at the Synod's seminaries.

Prior to the 2010 convention, the Blue Ribbon Task Force on Synod Structure and Governance made recommendations to the Synod, many of which were adopted by the 2010 convention, to restructure the national office around two mission offices. Res. 8-08A eliminated the Board for University Education and the Board for Pastoral Education. Some of the responsibilities of the eliminated Board for University Education were given to the boards of regents of the colleges and universities and some were revised into the responsibilities of the Board of Directors of Concordia University System. No board other than the seminary boards of regents was given responsibilities for the seminaries.

The responsibility to grant prior approval for initial appointments of seminary faculty members in any body other than the boards of regents of the seminaries was eliminated with the elimination of the Board for Pastoral Education (2007 "Handbook Convention Version," p. 263 of 2010 *Today's Business*). Prior to the changes of the 2010 convention, a parallel reference to the responsibility to grant prior approval of initial seminary faculties by the Board for Pastoral Education had also been placed in the bylaw section for seminary faculties (Bylaw 3.8.2.7.3, 2007 *Handbook*). This section was stricken in the 2007 "Handbook Convention Version" (p. 286 of 2010 *Today's Business*).

The responsibility to grant approval of initial theological faculty to the Synod's colleges and universities was stricken from the text of the responsibilities transferred from what had been the Board for University Education to the Board of Directors of Concordia University System (2007 "Handbook Convention Version," p. 256 of 2010 *Today's Business*). This responsibility for prior approval of initial theological faculty at the Synod's colleges and universities was then not included in the bylaws delineating the responsibilities of the Board of Directors of Concordia University System (Bylaw 3.6.6.5, 2010 *Handbook*). Prior to the changes of the 2010 convention, a parallel reference to the responsibility to grant prior approval of initial theological faculty by the Board for University Education had been placed in the bylaw section for college and university faculties (Bylaw 3.8.3.8.3, 2007 *Handbook*). This section (renumbered as 3.10.5.6.3 in the 2010 *Handbook*) did not get stricken in the 2007 "Handbook Convention Version," (p. 297 of 2010 *Today's Business*) and remains in the 2010 *Handbook*, with the exception that the reference to the Board for University Education was changed to the Board of Directors of Concordia University System.

The responsibility to revise the *Handbook* of the Synod after a convention is that of the Commission on Handbook and the Commission on Constitutional Matters. Bylaw 3.9.4.2 (b) indicates: "In consultation with the Commission on Constitutional Matters, [the Commission on Handbook] shall revise the *Handbook* of the Synod immediately after each convention to bring it into harmony with the resolutions and changes adopted by the convention."

After the 2010 convention, the Commission on Handbook and the Commission on Constitutional Matters worked diligently to make sure the extensive changes made by the convention would be reflected in the 2010 *Handbook*. The problem brought to the Commission on Constitutional Matters by the Board of Directors of Concordia University System which had not been noted by the 2010 convention itself could have, indeed should have, been noted by one or both of those two commissions. It was not. Had it been, the inconsistency created by the two places in the Bylaws indicating the responsibility for prior approval of initial theological faculty at the Synod's colleges and universities by the Board of Directors of Concordia University System could have been resolved earlier. Now that the inconsistency between the two references has been brought to the attention of this commission, this commission and the Commission on Handbook have the responsibility to resolve the inconsistency.

In researching the background for this matter, the commission determined that the focus of the attention of the Blue Ribbon Task Force on Synod Structure and Governance, Floor Committee 8 of the 2010 convention, and the delegates of the 2010 convention for what responsibilities of the Board for University Education would be transferred to the Board of Directors of Concordia University System was on Bylaw 3.8.3.8.3, the listed responsibilities of the Board of Directors of Concordia University System. This reference to prior approval was clearly stricken. The parallel responsibility for "prior approval" in the bylaw section for college and university faculties was changed as all other references to the Board for University Education which had not been eliminated from the bylaws were changed to the Board of Directors of Concordia University System, as the Board for University Education no longer existed.

Further examination of what responsibilities were transferred from the Board for University Education to the Board of Directors of Concordia University System support this conclusion. The responsibilities of the Board of Directors of Concordia University System for the colleges and universities of The Lutheran Church—Missouri Synod under Bylaw 3.6.6.5 include policy development, coordination of planning, and general oversight. Responsibilities for day-to-day management and operations of the institutions were given to the boards of regents of the colleges and universities by the 2010 convention. Besides the responsibility to grant approval for initial appointments of theological faculty, other responsibilities given to the boards of regents of the colleges and universities include: approve capital projects in relation to campus property management agreements and institutional mater plans; visit institutions periodically to identify strengths and weaknesses based upon professional standards; monitor recognized service organization standards and follow up in cases of inadequacy; and establish and maintain a system of colloquy and certification of commissioned ministers (see 2007 "Handbook Convention Version," pp. 256–257 of 2010 *Today's Business*).

The Synod has had throughout its history significant concern for the recruiting and training of pastors, teachers, and other professional church workers for the Synod. Appointments to the faculties of the Synod's seminaries as well as to the theological faculties (indeed to all the other faculties as well) of the Synod's colleges and universities are of vital importance to the Synod. For decades, while boards of regents of colleges and universities as well as seminaries have been given the responsibility to appoint members of their faculties, prior approval of Synod boards were also required for initial appointments of faculty members of the seminaries and also for initial appointments of theological faculty members of the Synod's colleges and universities.[1] Recognizing that history, and continuing to encourage and even enhance the Synod's significant concern for recruiting and training pastors, teachers, and other professional church workers for the Synod, the 2010 convention eliminated the responsibility for approving the appointment of fully qualified members of the seminary faculty from any board other than the boards of regents for the seminaries and placed that responsibility squarely with the seminaries' boards of regents. The 2010 convention decided that the responsibility to ensure qualified faculty for the Synod is with the seminaries themselves. Likewise the 2010 convention decided that the responsibility to ensure qualified theological faculty as well as all other faculty for the colleges and universities is with the colleges and universities themselves and their boards of regents. It would have been inconsistent for the Synod to eliminate prior approval for seminary faculties by a second board and not reflect the same for theological faculties of colleges and universities.

The conclusion of the commission is also consistent with the Articles of Incorporation and Bylaws of Concordia University System. These governing documents of Concordia University System, while

[1] The commission was informed by the CUS Board of Directors that "since the Board for Higher Education was formed in 1938, the national Synod has always had the privilege of approving theological faculty at the colleges and seminaries."

covering many other responsibilities of the Concordia University System, include no reference to carrying out responsibilities for prior approval of initial theological faculty members of the Synod's colleges and universities.

Question 2: If the correct text cannot be established until the next Synod convention, what policy regarding prior approval should the CUS Board operate under until then?

Opinion: The correct text can be established. The Board of Directors of Concordia University System does not have prior approval of initial appointments of college/university theological faculty members and does not need to establish such a policy.

153. Circuit Counselor's Manual Review (12-2647)

With a May 29, 2012, email, the chairman of the Clergy Call and Roster Committee of the Council of Presidents submitted his committee's final draft of the Circuit Counselor's Manual for review by the commission. Upon review, the commission returned a marked copy of the manual showing a number of recommendations for final changes (attached to the protocol copy of these minutes).

154. District Convention Registration Fees (12-2649)

With an emailed June 2, 2012 letter, a pastor of the Synod submitted a series of questions and supplemental information regarding a district's requirement that convention fees be paid prior to the registration and accreditation of delegates.

Question 1: May a district charge a registration fee to delegates of a district convention?

Opinion: There is no provision in the *Handbook* of the Synod that addresses the subject of charging a registration fee to delegates to conventions. It is, however, common practice in the Synod for districts to request payment of convention registration fees by district congregations in order to offset the operating costs of the district convention. This practice resembles (but is not identical to) the national Synod's practice of offsetting convention costs by various means including a "district levy per communicant member" (Bylaw 3.1.9 [d]).

Question 2: May attendance at such district convention be contingent upon payment of a registration fee?

Opinion: Past commissions have already issued two opinions on this issue. In its March 13, 1992 opinion (Ag. 1928), in response to an inquiry regarding a proposed change to a district bylaw ("Only those congregations that have paid their convention registration fee by the opening of the convention shall have their delegates seated"), the commission opined:

> In responding to this question, the commission notes that Bylaw 4.23 accrediting of delegates [see 2010 Bylaw 4.2.2 (a)] deals with the accreditation of such delegates at the district convention. It states, "The delegates of a voting congregation shall stand accredited and entitled to vote upon presenting to the secretary at the opening of the convention the proper credentials provided by the district secretary and signed by two of the congregation's officers…." The commission notes that at neither the synodical nor the district level does certification involve finances as one of the requirements for certification. While the congregation can rightly be expected to pay the assessment, that payment cannot be required for the certification and seating of delegates. Such accreditation cannot be conditioned on the payment of money.

The commission would note that the concept of a synod, of which the district is a part, involves that of walking together. This is reflected in Bylaw 2.39 b [2010 Bylaw 1.7.2], which states:

> The Synod expects every member congregation to respect its resolutions and to consider them of binding force if they are in accordance with the Word of God and if they appear applicable as far as the condition of the congregation is concerned. The Synod, being an advisory body, recognizes the right of the congregation to be the judge of the applicability of the resolution to its local condition. However, in exercising such judgment, a congregation must not act arbitrarily but in accordance with the principles of Christian love and charity.

In view of this, the district, which is a part of the Synod, can rightly expect its congregations to conform to the Bylaws of the district unless a requirement does not "appear applicable as far as the condition of the congregation is concerned." The congregation which does not pay its assessment can rightly be expected to demonstrate that its local condition makes the assessment requirement inapplicable for them. It would seem that congregations not paying the assessment for convention expenses should be dealt with evangelically with the understanding that ultimately its continued membership in the Synod through the district might be involved.

At its November 1994 meeting, the commission responded to a similar question from a pastor whose congregation was refusing to pay because of "extreme financial hardship." The commission responded by quoting from its 1992 opinion, as quoted above. The same response also answers the current question, also in the negative: delegate attendance at a district convention cannot be contingent upon payment of a registration fee.

Question 3: If the answers to the preceding questions are in the negative, what recourse does a congregation or its voting delegates have if they have been improperly denied the opportunity to attend and vote at the convention?

Opinion: The Constitution and Bylaws of the Synod provide no recourse following the convention, should a congregation be denied voting delegate representation. The time for contesting seating would have been at the time of the convention and according to rules established for that purpose.

Question 4: Also, if a congregation has been denied the right to send delegates to the district convention, what recourse does that congregation have regarding the election for President of the Synod? Are they to be denied the right to vote for president because they have been unjustly barred from attendance at a district convention?

Opinion: As is the case with all congregations of the Synod whose voting delegates are prevented from attending their district conventions for any reason, the Bylaws of the Synod provide no recourse that would allow participation in the presidential election. Bylaw 3.12.2.3 clearly reserves that right to the voting delegates who were in attendance at the prior year's district convention.

Question 5: But if the convention was not convoked (that is, called together) according to the Constitution, would the convention be a legal convention, capable of transacting business?

Opinion: As the previous questions indicate the questioner's concern is for district conventions, the commission responds to this question about "the convention" in regard to district conventions.

Article XII 14 of the Constitution states: "For the legal holding of the sessions of the districts, a constitutional convocation of such sessions and the presence of at least one-third of the voting members represented by at least one of their respective representatives (pastor or lay delegate) are required."

A properly called district convention requires satisfying two stipulations: it must be properly convoked ("a constitutional convocation of such sessions") and there must be sufficient delegate representation ("at least one-third of the voting members represented by at least one of their respective representatives").

155. Questions re Ecclesiastical Supervisor's Responsibilities during Expulsion Proceedings (12-2650)

A member of the Synod, with a June 9, 2012 email, submitted a series of "issues" regarding a district president's responsibilities during Bylaws section 2.17 expulsion proceedings. Noting that the answers to the questions submitted also generally pertain to Bylaws section 2.14 proceedings, the commission responded as follows:

Question 1: Under Bylaw 2.17, should a District President, who has the sole responsibility to commence expulsion proceedings, take no further action when he has determined during the consultation phase [Bylaw 2.17.3] that the information or facts, even if accepted as true, could not lead to expulsion.

Opinion: First, it should be noted that, during the consultation phase described in Bylaw 2.17.3, the accuser may consult with any appropriate ecclesiastical supervisor. That person may well not be the ecclesiastical supervisor of the accused, who alone is able under Bylaw 2.17.4 actually to initiate an expulsion process.

It is a consultation that occurs under Bylaw 2.17.3, and not a determination regarding the merits of the case or whether a formal proceeding should be initiated. It is only under Bylaw 2.17.4, if a district president determines that there is no factual basis to initiate expulsion proceedings under that bylaw, that the Bylaw 2.17 matter is concluded as provided by Bylaw 2.17.5.3

Whether made by the district president or the Referral Panel, if the determination is not to initiate formal proceedings, the district president shall in writing so inform the accuser, any other district president involved, and the involved member, which shall terminate the matter.

While the Bylaw 2.17 matter may have been terminated, a district president as ecclesiastical supervisor continues to have the right and the responsibility to take other actions as he may determine to be warranted by information he has learned prior to the termination of that process. A fact situation not rising to the level of expulsion may well still require counsel, admonishment, correction, or advice. Under some circumstances, it may be appropriate to consider the issues under the Bylaw 2.14 process or to submit the matter to a Bylaw 1.10 proceeding instead, as recognized in Bylaw 2.17.3 (b).

Question 2: During the phases under Bylaw 2.17.3 or 2.17.4, is it inconsistent with or otherwise violate the Eighth Commandment, Bylaw 2.17.3(d), or Standard Operating Procedure I.F., G., I.(6), N.; II.D., F., G., I., or Q for an ecclesiastical supervisor to give status updates, engage in on-going communications, or to otherwise communicate with anyone other than the accuser, the accused or those with whom the ecclesiastical supervisor may consult (Bylaw 2.17.3[a])?

Opinion: It is not within the authority of the CCM to issue opinions regarding biblical interpretation, including the Eighth Commandment. During any potential expulsion process, the involved ecclesiastical supervisors must be free to gather all information necessary to consider the issues. With respect to the balance of the question, during the investigative phase of a Bylaw 2.17 matter, Bylaw 2.17.3(a) authorizes the involved ecclesiastical supervisor to "consult with any others as considered appropriate under the circumstances." A district president under Bylaw 2.17.4 may also seek facts by speaking with anyone

believed to have relevant information in order to reach the decision as to whether to commence a formal action and to prosecute that action effectively if the decision is made to do so. The district president would also have the ability to discuss issues with an investigation committee under 2.17.4 (a) or a referral panel under Bylaw 2.17.5.

In fulfilling his responsibilities, he must with any communications also keep in mind the provisions and requirements of Bylaw 2.17.7.8, requiring compliance with Bylaw 2.14.7.8 (a)–(j), subsection (g) of which states:

> While the matter is still undecided or while an appeal is contemplated or pending, publicity shall not be given to the issues in the matter by any of the persons involved during any part of the procedures outlined in this bylaw. However, at his discretion and as the needs dictate in order to "promote and maintain unity of doctrine and practice" (Constitution, Art. XI B 3) and in order to provide counsel, care, and protection for all the members of the Synod (Article III 8, 9), the President of the Synod or the district president in consultation with the President of the Synod, as the case may be, may properly advise or inform the involved congregation(s) and/or the district or the Synod.

Question 3: During the phases under Bylaw 2.17.3 or 2.17.4, is it inconsistent with or otherwise violate the Eighth Commandment, Bylaw 2.17.3 (d), or Standard Operating Procedure I F., G., I. (6), N.; II D., F., G., I., or Q FOR AN ECCLESIASTICAL SUPERVISOR to share any information or status updates with alleged witnesses?

Opinion: See answer to Question 2.

156. Questions re "Actual Partiality or the Appearance Thereof" (12-2651)

In a June 25, 2012 emailed letter, a member of the Synod involved in the Bylaws section 2.14 expulsion process asked a series of questions of the commission.

Background: After an appeal to a Final Hearing Panel in a Bylaws section 2.14 matter, each party selected a district president for the panel. The remaining panel member and the hearing facilitator were selected by blind draw. After providing general information regarding the matter and identifying the persons involved in the matter in order to uncover potential conflict of interest concerns with the parties to the matter, the administrator asked all selected panel members to consider whether the standard of disqualification ("actual partiality or the appearance thereof") applied to them in this case. All three replied they did not think the standard applied to them and did not disqualify themselves. After the parties to the matter were informed of the panel members selected, the district president who imposed the suspended status then challenged the objectivity of two of the panel members: the district president selected by the accused (because of possible involvement in the matter) and the lay reconciler member of the panel (who resides in the same district as the district president chosen by the accused). The two challenged panel members were then asked by the administrator of the process to consider whether the standard for disqualification provided in the *Standard Operating Procedures Manual* (*SOPM*) for Bylaw section 2.14 ("actual partiality or the appearance thereof") applied to them in this case, noting particularly the stated objections to the chosen district president (for possible prior involvement in the matter) and to the lay member (not for partiality toward any party, but rather for residing in the same district as the district president selected for the panel by the accused). Both replied that they did not think the standard applied to them and therefore did not disqualify themselves.

Paragraph "N" of the "General Regulations for Bylaws Section 2.14" (p. 10 of the *SOPM*) provides that under these circumstances "the question shall be decided by a panel of three district presidents not involved in the case, selected by blind draw by the Secretary of the Synod for this purpose."

This special panel concluded that the district president selected by the accused did not have a conflict of interest and could be a member of the Final Hearing Panel. The panel also concluded that the lay reconciler member of the Final Hearing Panel should be disqualified because of residence in the same district as the district president chosen by the accused. The panel indicated that this decision "in no way reflects upon the qualifications, gifts, or impartiality possessed by lay reconciler in fulfilling an effective role on the final hearing panel," but that two members from the same district serving on a Final Hearing Panel, even when one is chosen by blind draw, "may give the appearance of partiality."

The accused asked a series of questions of the commission regarding procedures associated with the formation of a Final Hearing Panel.

Question 1: *SOPM* guidelines state: "The standard for disqualification is actual partiality or the appearance thereof…." (*SOPM*, p. 9). What is the proper definition of the phrase "actual partiality or the appearance thereof"?

Opinion: Neither the Bylaws nor the *Standard Operating Procedures Manual* (*SOPM*) for Bylaws section 2.14 provides a definition of "actual partiality or the appearance thereof." Oxford Dictionary defines "partiality" as "unfair bias in favor of one thing or person compared with another; favoritism." Such partiality can exist as a result of a personal relationship, a predilection or inclination to one decision or outcome rather than to others, or the holding of a firm opinion on a question before it is presented for consideration. Every tribunal that has to determine facts is concerned with the issue of partiality, because fairness and the appearance of fairness are basic for trust and integrity in the process and the final decision. The concept of partiality is used commonly in courts of law and in arbitration cases, where the burden of proof is on the party alleging that the arbitrator or judge is impermissibly biased. An assertion of partiality requires evidence of facts upon which to base the claim. In such cases an arbitrator or judge is required to make full disclosure of possible conflicts of interest to the parties before the commencement of the proceedings, revealing any relationship or transaction that he/she has had with the parties as well as any other fact which would suggest to a reasonable person that the arbitrator or judge is biased and interested in the outcome of the matter or which might reasonably support the inference of partiality.

Historically in the LCMS, the phrase "actual partiality or the appearance thereof" began to be used when the 1992 Synod convention moved away from the "adjudication" and "appeal" process in the Synod and initiated the dispute resolution process. The phrase became part of Bylaw 8.17 in the 1992 *Handbook* and remained unchanged through the 2001 *Handbook*. In 2004 the *Handbook* was revised and reordered and this section, unchanged from Bylaw 8.17, became Bylaw 1.10.16 and has remained unchanged ever since. When the 2004 Synod convention established the present expulsion-from-membership bylaws (2.14–2.17), the phrase used in the dispute resolution bylaws (Bylaw 1.10.16) was not carried over into the expulsion-from-membership bylaws; however, the Commission on Constitutional Matters was then given the responsibility for developing standard operating procedure manuals for each of these bylaw sections. When providing a disqualification process for each of these bylaw sections, the commission intentionally followed the process established for Bylaws section 1.10 dispute resolution matters, and the phrase "actual partiality or the appearance thereof" has been used in each of those manuals since that time as a guideline for disqualifications.

General Regulation "N" for Bylaws section 2.14 provides clarity to the meaning of "actual partiality or the appearance thereof" as it describes the process to be followed by the district president or the Secretary

of the Synod (as administrator for the process) in uncovering potential conflict of interest concerns. The first paragraph of "N" reads:

> N. ***Disqualification of Ecclesiastical Supervisors or Panel Members***: The standard for disqualification is actual partiality or the appearance thereof. When identified by blind draw, potential panel members shall be contacted personally by the district president or the Secretary of the Synod to discuss their availability to serve. The district president or Secretary of the Synod shall provide general information regarding the matter and identify the persons involved in the matter in order to uncover potential conflict of interest concerns. Any ecclesiastical supervisor or panel member may disqualify himself/herself from service. Circumstances that are thought to or are likely to affect performance of duties and the outcome of a formal process shall be disclosed to the district president or the Secretary of the Synod, as appropriate.

General information regarding the matter and parties involved is revealed by the administrator to the panel member "in order to uncover potential conflict of interest concerns." If any is uncovered, the panel member "may disqualify himself/herself from service. Circumstances that are thought to or are likely to affect performance of duties and the outcome of a formal process shall be disclosed" to the administrator. "N" then continues:

> If a hearing facilitator or panel member concludes that he/she has personal knowledge of one or other of the parties to the dispute, he/she shall, upon becoming aware of the same, disclose to the administrator the knowledge and nature thereof and his/her assessment that such will not adversely affect his/her service. The administrator shall share this information with the parties to the dispute. Undue familiarity with the party to the dispute must not be demonstrated in any manner during the panel hearing.

The standard for disqualification is "actual partiality or the appearance thereof" and thus emphasizes some "act" or "action" to create or evidence the proscribed partiality. Actual partiality thus may result from a personal relationship, prior substantive contact with any of the persons involved regarding the substance of the matter, or personal involvement in the matter itself. Such personal relationship or prior involvement in the matter might cause a panel member to disqualify himself/herself from service, or result in disqualification. Such personal relationship or prior involvement in the matter, even if not determined by a panel member to be sufficient to disqualify himself/herself from service must be revealed by the panel member to the administrator who is then required to share that information with the parties to the dispute. The parties to the dispute, once so informed, would have opportunity to challenge the decision of the panel member.

Beyond "actual partiality," the standard for disqualification includes the "appearance thereof." The phrase "the appearance thereof" modifies "actual partiality" and so requires the appearance of some "act" or "action" to create and evidence partiality such as described above. Even where no actual partiality exists as a result of non-substantive contacts with one or more of the involved persons or non-substantive involvement in the issues to be considered, where such relationship or involvement would lead a reasonable person to believe that partiality likely exists, disqualification should occur. It should be remembered that membership on the Council of Presidents, the relationship among district presidents which results from such membership, and contact and discussion that takes place between district presidents while carrying out ecclesiastical supervisory responsibilities (not including discussion of the parties to the matter or the substance of the matter) is not the type of personal relationship or contact which inherently creates or even implies actual partiality or the appearance thereof. Bylaw 2.14.2 (c) defines "Conflict of Interest": "Representation of two opposing interests. Carrying out the responsibility of ecclesiastical supervision does not give rise to conflict of interest." By design, the Bylaws require the selection of members of the Council of Presidents for the formation of many different panels, including Final Hearing Panels. That people active in the Synod are acquainted with each other or have had contact with each other alone is not sufficiently substantive to constitute "actual partiality or the appearance thereof." As stated above, any such contact, action, or relationship may cause a panel member to

"disqualify himself/herself from service" and, even if not sufficient to cause the panel member to choose disqualification, must be disclosed to the administrator, which can be challenged by the parties to the dispute, once they are so informed.

Question 2: Can a panel member be removed from participation in the formation of a Final Hearing Panel merely on the basis of having the same district affiliation as another panel member?

Opinion: No. Having the same district affiliation as another panel member alone is not enough to remove a panel member from participation in the formation of a Final Hearing Panel. Neither the Bylaws nor the *SOPM* for Bylaws section 2.14 (or any other of the *SOPMs* for sections 2.15–2.17 and section 1.10) gives indication that having the same district affiliation as another panel member would cause and evidence actual partiality or the appearance thereof. Nothing in the bylaws or *SOPM* speaks to "actual partiality of the appearance thereof" in the relationship between members of the panel. The concern of partiality appropriately focuses on the relationship between the panel members and either of the parties to the matter. The administrator is to provide to potential panel members "general information regarding the matter and identify the persons involved in the matter in order to uncover potential conflict of interest concerns."

While the Bylaws in some circumstances disqualify multiple representatives from a single district (e.g., in order to assure geographic representation), such provisions do not address "actual partiality or the appearance thereof" in a Bylaws section 2.14 matter. Bylaw 2.14 and its *SOPM* contain no provision concerning a challenge based on the relationship between panel members. Although the relationship between panel members (not with a party to the matter) is not addressed in Bylaw section 2.14 or its *SOPM*, if a party challenges the eligibility of a panel member to serve on the basis of relationship with another panel member, such as having the same district affiliation as another panel member, the challenged panel member is given opportunity to disqualify himself/herself from service after being provided with the challenge to his/her objectivity on the basis of relationship with another panel member. If the challenged panel member does not disqualify himself/herself, but is aware of facts implicating "actual partiality or the appearance thereof," he/she is required to disclose such facts to the administrator. If the panel member has given indication of such facts in regard to his/her relationship with the other panel member from the same district besides the fact of residence in the district, the administrator is to inform both parties to the matter about any such information provided by the panel member. This process, however, in no way precludes a party from challenging the eligibility of a panel member to serve on a panel if the party has knowledge believed to constitute "actual partiality or the appearance thereof," including or apart from the information volunteered by the panel member.

As noted above, a district president will have personal knowledge of and a personal relationship with other district presidents. As indicated in the answer to question 1, this factor alone is considered by Bylaw section 2.14 and *SOPM* to be non-substantive and does not constitute "actual partiality or the appearance thereof." Thus a district president is not prohibited from service on the same panel (indeed, such is often required) with another district president. Additional factors would be required to create such "actual partiality or the appearance thereof" as would become sufficiently substantive to prohibit such service. The same is the case for any two members of a panel. Any two panel members may have personal knowledge of and a personal relationship with other panel members. As with district presidents, this factor alone is considered by Bylaws section 2.14 and its *SOPM* to be non-substantive and does not constitute "actual partiality or the appearance thereof." Thus, any two members of a panel are not prohibited from service on a panel solely because of personal knowledge of and a personal relationship with other panel members or for simply having the same district affiliation. And as General Regulation "N" for Bylaw section 2.14 provides: "Circumstances that are thought to or are likely to affect performance of duties and the outcome of a formal process shall be disclosed" to the administrator, who

"shall share this information with the parties to the dispute." "N" continues, where the relationship between panel members is challenged, "the question shall be decided by a special panel of three district presidents not involved in the case, selected by blind draw by the Secretary of the Synod for this purpose." The panel selected to determine such a challenge must consider these matters addressed in this opinion in making its conclusion.

Concerns regarding an appearance of fairness or the independence of panel members are different from the question of partiality. If the Synod believes that two panel members coming from the same district leads to the appearance of unfairness or the potential for undue influence between panel members, the Synod ought to address this in convention.

Question 3: Can panel members be removed from their participation in the formation of a final hearing panel beyond the scope of "actual partiality or the appearance thereof"?

Opinion: No. See answers to Questions 1 and 2 above.

Question 4: Can Final Hearing Panels and/or special panels formed to hear special issues/concerns make up rules and/or extend the rules of the hearing panel process when the rules are silent on a specific issue or do not presently exist?

Opinion: Panels are required to function to the best of their ability and judgment under the provisions of the pertinent bylaws and procedures manuals, to the extent they are applicable. While at the time of the commission's opinion 02-2303, the Synod had not yet established standard operating procedure manuals (which must be followed by all panels), that opinion gives guidance to a disqualification panel in regard to procedures to follow to make an informed decision. See also answers to Questions 1, 2 and 5.

Question 5: If a panel member was removed based on the improper use of the rules and procedures, thus creating a material violation of the hearing panel process, should and/or must that panel member be reinstated?

Opinion: The Bylaws contain no provision for an appeal following the removal of a panel member. However, paragraph "U" of the "General Regulations for Bylaws Section 2.14" of the *SOPM* states:

> U. ***Right to Object***: If any party learns that any provision of this *Standard Operating Procedures Manual* has not been complied with and fails to object in writing within three (3) days after learning that the provision has not been complied with, the party shall be deemed to have waived the right to object. Issues raised in a timely manner shall be considered and resolved by the appropriate panel (Bylaw 2.14.9.2).

In an opinion regarding a Dispute Resolution Panel (DRP), the commission addressed this issue on June 23, 1998, in Ag. 2109, in answer therein to Question 7:

> 7. Do Bylaw 3.905 d and Bylaw 8.21 i require a CCM opinion to be implemented by a DRP and require a DRP to change, modify, or otherwise revise its decision in accord with a CCM ruling?
>
> Bylaw 3.905 d states that a function of the Commission on Constitutional Matters (CCM) is to "interpret the Synod's Constitution, Bylaws and resolutions..." It further states that "An opinion rendered by the commission shall be binding on the question decided unless and until it is overruled by a synodical convention."
>
> Accordingly an opinion rendered by the CCM must be implemented by a DRP and, further, a decision by a DRP must be changed, modified, or otherwise revised to bring it into accord with an opinion of the CCM.

> Bylaw 8.21 i does set forth a procedure to secure a CCM opinion during the dispute resolution process and it concludes with the sentence: "Any opinion received from the Commission on Constitutional Matters must be followed by the Dispute Resolution Panel or Review Panel."

While Ag. 2109 applies to a Dispute Resolution Panel, it also applies to a special panel to determine eligibility of a challenged panel member to serve on a 2.14 Final Hearing Panel. Thus, if an error regarding disqualification has occurred and timely objection has been made, the error must be corrected.

157. <u>Service of District Presidents in Dispute Resolution and Expulsion Processes</u> (12-2652)

In a July 11, 2012 email, the Secretary of the Synod submitted a question to the commission, offering the following by way of preface:

> During the district convention year of the Synod's triennial cycle, it is possible that a dispute resolution or expulsion process will be underway at the time that a new district president is elected. It will be helpful to me as administrator of these processes to receive the commission's response to the following question.

<u>Question</u>: If a new district president is elected while the current/outgoing district president is involved in a Bylaw section 1.10 dispute resolution process or a Bylaw section 2.14–2.17 expulsion process, does the outgoing president see the matter through to its completion even after leaving office, or does the incoming president assume responsibility for completing the process immediately upon taking office?

<u>Opinion</u>: A review of the processes referenced discloses that the responsibilities placed upon a district president therein are upon the office and not upon the man. Consequently, when the process has not been concluded before an individual leaves the office of district president (for whatever reason), the responsibility for concluding the process still needs to be fulfilled by a district president.

Synod Bylaw 2.14.1(b) indicates that "[t]he action to commence expulsion of a congregation or individual member from membership in the Synod is the sole responsibility of the district president who has the responsibility for ecclesiastical supervision of such member." When an individual who has been elected district president ceases for whatever reason to be a district president, he no longer has "responsibility for ecclesiastical supervision of such member." To "commence an expulsion" procedure does not mean that the individual who, as district president, started the process is irrevocably tied to it until its conclusion. Rather, it is only a "district president" who has been authorized to act under the provision of this process.

Similarly, under the provisions for dispute resolution (Synod Bylaw section 1.10, *et seq*.), in every reference in which a district president is called to act, such action is not dependent upon the specific individual holding the office but is tied to the office itself as the basis for authority to act. It is true that there are occasions within both processes where an individual has a right to select a district president to act within the process[2]; however, it is the fact that the person selected is a district president that makes them eligible to serve in the process.

[2] See, for example, Synod Bylaw 1.10.14(a), wherein the complainant and the respondent both have a right to a select a district president to serve on an appeal panel; and see Synod Bylaw 2.14.7.2, where both the accused and the district president who placed the accused on suspended status may choose a district president to serve on the hearing panel. See also a similar procedure in Synod Bylaw 2.13.3.2(a), wherein a hearing panel is selected to consider removal of restricted status for an individual member of Synod.

Although these dispute resolution and expulsion processes do not speak specifically to the circumstance wherein a district president so chosen to serve may cease to be a district president prior to the final resolution of the matter, the right to have a district president chosen by the individual in the process remains inviolate. Where a district president so chosen ceases to be in that office, the individual who selected him still has the right to have a district president of his/her selection serving in this regard and has the right make a replacement selection, who would serve to the conclusion of the process.

158. District Failure to Elect Member of Committee for Convention Nominations (12-2653)

On July 19, 2012, the Secretary of the Synod submitted a question to the Commission on Constitutional Matters with this background: Bylaws 3.12.3.1–3.12.3.3 provide for the election of a Committee for Convention Nominations prior to conventions of the Synod. Districts are required to elect members of the nominations committee (and alternates) according to the schedule provided by these bylaws, using the "regular election procedures at the district convention."

Question: If a district fails to elect a member of the Synod's Committee for Convention Nominations while its convention is in session, what (if any) is the process to be used to fill that position following the district convention?

Opinion**:** When a district convention fails to elect a member of the Synod's Committee for Convention Nominations, that position must be filled by the Board of Directors of the District in order to fulfill the District's obligation to the Synod.

159. "Close" vs. "Closed" Communion (12-2654)

In a letter received July 24, 2012, a pastor of the Synod asked a series of questions related to the use of the term "closed communion." After brief discussion, the commission decided that it would request copies of the resolutions to which reference is made by the questioner before taking up the matter.

160. Articles of Incorporation Review Assistance

The commission has delayed its review of the following Articles of Incorporation documents while it considers developing and supplying materials to Synod corporations to facilitate a review of these documents. It will consider this matter again during its November meeting.

161. Other Matters

During the meeting the commission also heard reports and briefly discussed the following items on its agenda for the meeting:

- Chairman Sohns led an extensive discussion of issues to come before the commission's November meeting with the Commission on Handbook and the President of the Synod and his staff and the individual presentations to be made by the members of the commission.
- Secretary Hartwig reported briefly on the successful conclusion of document preparations for the affiliation of Concordia University Ann Arbor with Concordia University Wisconsin.
- Chairman Sohns reported briefly from the recent initial meeting of the Resolution 8-07 task force at the International Center.

162. Remaining on the Agenda for the November Meeting

The following outstanding matters and issues will again appear on the agenda of the commission as it prepares for its November 2–4, 2012 meeting:

- *Standard Operating Procedures Manual* for Colleges and Universities
- *Standard Operating Procedures Manual* for Seminaries
- Review of Concordia Historical Institute Policy Manual (08-2523)
- Article VI and Heterodox Congregations (09-2544)
- Women's Service in Congregations (11-2596)
- Review of Southern District Church Extension Fund Operations Manual (11-2605 [C])
- Review of Indiana District Articles of Incorporation (11-2619 [B])
- Mid-South District Articles of Incorporation and Policies (11-2624 [B])
- Review of English District Operations Manual and Employees Handbook (11-2613 [B])
- Review of Montana District Policies (12-2632)
- Review of New England District Articles of Incorporation (12-2633 [A])
- Review of Pacific Southwest District Articles of Incorporation (12-2637 [B])
- Review of Texas District Articles of Incorporation (12-2640 [A])
- Review of "Guidelines for Constitutions and Bylaws of Lutheran Congregations" (12-2641)
- Review of Texas District Policy Manuals (12-2648)

The following matters in general or anticipated will also appear on the November 2–4 meeting agenda:

- Meeting with Commission on Handbook, Office of the President re Structure/*Handbook* Issues
- Commission on Handbook Report
- Res. 8-07 Task Force Report
- 2010 *Handbook* "Errors Report"
- Review of Council of Presidents Policy Manual
- Review of LCMS CCM Website
- Review of CCM Internal Governing Documents
- Review of "Frequently Observed Aberrations and Concerns" Document
- Consideration of Articles of Incorporation Templates/Check List
- Review of Guidelines for
- Review of Status of Agency Governing Documents Review Process and Files
- Review of Historical Resource Availability
- Review of 2012 District Convention Overtures to 2013 Synod Convention

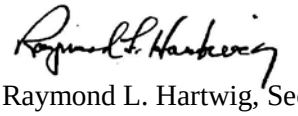
163. <u>Future Meetings</u>

The commission has established the dates of its regular meetings for the remainder of the triennium:

- November 2–4, 2012
- February 1–3, 2013
- May 16–20, 2013 (In conjunction with 2013 convention's Floor Committee Weekend)
- July 18–25, 2013 (In conjunction with the 2013 Synod convention)
- August 9–11, 2013
- November 8–10, 2013

164. <u>Close of Meeting</u>

Available time having expired, the meeting was closed with prayer.



Raymond L. Hartwig, Secretary