

## **CHAPTER II - REMEDIAL PROCESS**

### **ROLE OF THE CLERK**

#### **Clerk of the Respondent Body**

If the clerk's governing body is the respondent to a complaint filed with the next higher governing body, the clerk of the respondent body has the following responsibilities.

1. Record the date a complaint was received, and notify the governing body that a complaint has been filed. Timelines begin with the receipt of the complaint.
2. In regard to a stay of enforcement sought by meeting the requirements of D-0.0103a (1) confer with the stated clerk of the governing body whose PJC will hear the case to verify that:
  - a. the request for stay has been signed by at least 1/3 of the members recorded as present when the governing body acted;
  - b. both clerks have received the complaint and the request for stay;
  - c. the request for stay and complaint have been received no later than 45 days after the action by the governing body;
  - d. jointly notify the parties that the stay has been received (secured).
3. In regard to a stay of enforcement sought by meeting the requirements of D-6.0103a(2), if the decision is a decision of the PJC of your governing body, verify that at least 1/3 of the members of the PJC have signed the request for the stay, and then notify the parties that a stay has been secured.
4. Initiate the process for the appointment of a committee of counsel. Advice concerning the appointment of members to a committee of counsel may be one of the clerk's most important functions. It is helpful for the clerk to maintain a list of Presbyterian attorneys experienced in litigation and acquainted with our polity as possible committee of counsel members. (D-6.0302)  
*Note:* neither the clerk nor the executive of a presbytery or synod may serve on a committee of counsel of that governing body. (D-6.0302b)
5. Refer the complaint to the committee of counsel.
6. Advise the committee of counsel of its need to file, within 45 days after receipt of the complaint, an answer to the complaint with the stated clerk of the governing body that will try the case with a copy to the complainant. (D-6.0303). The committee of counsel may also choose to file, within 45 days of the filing of a stay of enforcement, an objection to the stay of enforcement. (D-6.0103d)
7. Within 45 days after receipt of the complaint, the clerk shall provide all parties a written list of the papers and other materials pertaining to the case. Within 15 days, the complainant may request, in writing, the inclusion of additional minutes or papers pertaining to the case. (D-6.0307a-b)

8. On receiving notification from the clerk of the trial governing body that the case has been accepted, transmit to that clerk all the minutes and papers pertaining to the case along with the list of the record and any requests for additional papers which, if available, shall be included. (D-6.0307c)
9. Be available to the complainant and the committee of counsel, helping to interpret the “Rules of Discipline” (ROD) and to explain or to answer questions concerning the process. Refrain from making any judgment as to whether a specific action or decision was correct. You may need to remind all parties that the clerk cannot make any binding or authoritative interpretations of any part of The Constitution of the Presbyterian Church (U.S.A.). (G-13.0103r)
10. When a decision is received from the permanent judicial commission (PJC), the clerk shall report the decision to the governing body at the first opportunity and shall enter the full decision in the minutes of the governing body. (D-7.0701).

## **Clerk of the Trial Level Governing Body**

On receiving the written statement of a complaint against a lower governing body, the stated clerk of the next higher governing body has the following responsibilities.

1. Record the date the complaint was received; notify the lower governing body that a complaint has been received; and specify the time line for receiving respondent committee of counsel's answer to the complaint, and for receiving the list of the record. (D-6.0303)
2. In regard to a stay of enforcement sought by meeting the requirements of D-6.0103a(2), if the decision is a decision of the PJC of your governing body, verify that at least 1/3 of the members of the PJC have signed the request for the stay, and then notify the parties that a stay has been entered (secured).
3. In regard to a stay of enforcement sought by meeting the requirements of (D-6.0103a(3), transmit the Request for Stay of Enforcement along with the complaint, the short statement of the basis for challenging the action, and the short statement of the harm that will occur if the action is not stayed, to all members of the PJC. Advise the parties that a stay has been entered (secured) if three or more members of the PJC sign the Stay of Enforcement.
4. Upon receipt of the answer to the complaint from the committee of counsel, notify the parties that the complaint and answer have been transmitted to the PJC.
5. Receive notification from the PJC officers whether or not the case has been accepted following determination of the preliminary questions. (D-6.0305, D-6.0306)
6. Notify the officers of the PJC if a challenge to the findings is made within 30 days of determination of the preliminary questions by either a party to the case or by a member of the PJC. In that event a hearing on the preliminary questions will be held before the entire PJC.
7. If the case is accepted, assign a case number and notify the parties that the case has been accepted.
8. Notify the clerk of the respondent body that the case has been accepted. (D-6.0307c)
9. Receive from the clerk of the respondent body the minutes and papers pertaining to the case along with the list of the record and any requests for additional papers. (D-6.0307c)
10. Transmit the minutes and papers pertaining to the case to the PJC and send the parties an estimated date for trial. (D-6.0308)
11. When a decision is received from the PJC, the clerk shall report the decision to the governing body at the first possible opportunity and shall enter the full decision upon the minutes of the governing body. (D-6.0701)
12. Receive from the clerk of the PJC the record in the case and preserve it for at least 2 years. (D-7.0601e)

## **Clerk of the Complaining Body (if not an individual)**

If a complaint is being filed by a governing body, it must designate a committee of counsel to represent the governing body in the case until a final decision is reached.

1. Initiate the process for the appointment of a committee of counsel. Advice concerning the appointment of members to a committee of counsel may be one of the clerk's most important functions. It is helpful for the clerk to maintain a list of Presbyterian attorneys experienced in litigation and acquainted with our polity as possible committee of counsel members. (D-6.0302)
2. Note that neither the clerk nor the executive may serve on a committee of counsel of that governing body. (D-6.0302b)

# REMEDIAL PROCESS

## OVERVIEW

When a governing body fails to take an action believed to be necessary or takes an action believed to be incorrect, church discipline provides the means for addressing such omissions or errors. While most controversies, disputes and disagreements between individuals and governing bodies, or between governing bodies, are handled in non-judicial ways, correction of governing bodies may also be sought by engaging in remedial judicial process within the church courts. The resolution of a remedial case is by a trial conducted by the permanent judicial commission (PJC) of the next higher governing body.

## WHAT IS A REMEDIAL CASE

A remedial case is one in which an irregularity or a delinquency of a lower governing body, the General Assembly Council, or an entity of the General Assembly may be corrected by a higher governing body. (D-2.0202)

An **irregularity** is an erroneous decision or action.

A **delinquency** is an omission or failure to act.

There are two parties in a remedial case:

The **complainant** is the party complaining against the governing body for either an irregularity or a delinquency.

The **respondent** is the governing body against whom the complaint is made.

## INITIATING A REMEDIAL COMPLAINT

The following persons and governing bodies may complain against a particular governing body for alleged delinquencies or irregularities by filing a complaint with the stated clerk of the immediately higher governing body.

### Against a Session:

- Members of the congregation may complain against their session by filing with the presbytery stated clerk. (D-6.0202b(1))
- A session may complain against another session in the same presbytery or against a session in a different presbytery. When complaining against a session, the complaint must be filed with the stated clerk of the presbytery having jurisdiction over the session being complained against. (D-6.0202a(5))
- A person who is an employee of a particular church who claims to have sustained injury or damage to person or property by the session or an entity of the session may file with the stated clerk of the presbytery. This person does not have to be a member of any Presbyterian Church (U.S.A) congregation. (D-6.0202b(4))

### **Against a Presbytery:**

- Sessions of congregations belonging to a presbytery may complain against their presbytery with the synod. (D-6.0202a(3))
- Enrolled elders in presbytery and minister members of presbytery may complain to the synod of irregularities or delinquencies of the presbytery occurring during their period of enrollment. (D-6.0202a(1))
- A presbytery may file a complaint against another presbytery with the stated clerk of the synod having jurisdiction over the presbytery being complained against. (D-6.0202a(5))
- A person who is an employee of a presbytery or an entity of a presbytery who claims to have sustained injury or damage to person or property by the governing body or entity may complain by filing with the synod. This person does not have to be a member of any Presbyterian Church (U.S.A.) congregation. (D-6.0202a(6))

### **Against a Synod:**

- Presbyteries may complain against their synod by filing with the General Assembly. (D-6.0202a(4))
- Enrolled minister and elder commissioners to a synod may complain to the General Assembly of alleged irregularities or delinquencies of the synod occurring during their period of enrollment. (D-6.0202a(2))
- A synod may complain against another synod with the stated clerk of the General Assembly. (D-6.0202a(5))
- A person who is an employee of a synod or an entity of a synod who claims to have sustained injury or damage to person or property by the governing body or entity may complain by filing with the General Assembly. This person does not have to be a member of any Presbyterian Church (U.S.A.) congregation. (D-6.0202a(6))

### **Against the General Assembly Council or General Assembly Entity:**

- A session, presbytery or synod may complain against the General Assembly Council or an entity of the General Assembly by filing with the General Assembly stated clerk. (D-6.0202b(2))
- A person who is an employee of the General Assembly or one of its entities who claims to have sustained injury or damage to person or property by the General Assembly Council or one of its employing entities may complain by filing with the General Assembly. This person does not have to be a member of any Presbyterian Church (U.S.A.) congregation. (D-6.0202b(3))

### **Filing a complaint (D-6.0202a, b)**

#### Of an irregularity:

Within 90 days after the alleged irregularity has occurred, the party wishing to complain files a complaint, by certified mail or personal service, with the stated clerk of the immediately higher governing body having jurisdiction over that alleged offending governing body.

The complainant must also submit, at the time of filing, a certification that the respondent has received a copy of the complaint. (D-6.0301f)

#### Of a delinquency:

Within 90 days after the failure or refusal of the respondent governing body to correct the alleged delinquency at its next meeting, provided that a written request to do so has been made prior to the meeting, the party wishing to complain files a complaint, by certified mail or personal service, with the stated clerk of the immediately higher governing body having jurisdiction over the respondent.

The complainant must also submit, at the time of filing, a certification that the respondent has received a copy of the complaint. (D-6.0301f)

#### **Content of the Complaint (D-6.0301)**

The complaint should state the following (D-6.0301):

1. Name of complainant and name of respondent.
2. Date, place and circumstances of the alleged irregularity, or the particular delinquency including the date of the written request to resolve the delinquency, and the date of the next meeting at which the governing body failed to respond. The complaint must state clearly whether it is about an irregularity or a delinquency. (Annotation on D-6.0301 in the *Annotated Book of Order*.)
3. The reason for the complaint, stated clearly and concisely. Appropriate constitutional provisions should be noted.
4. The interest or relationship of the complainant, showing why that party has a right to file the complaint.
5. The corrective action being requested. This relief must be within the jurisdiction and authority of the PJC to grant and must be provided for in the *Book of Order*. The corrective action requested may be different from the corrective action granted by the PJC after a hearing on the merits.
6. Certification that the respondent has received a copy of the complaint. (D-6.0301f)

#### ***Timeliness***

The ninety days for the complainant to file begins from the date the alleged irregularity or delinquency occurred and extends until the stated clerk receives in hand the complaint. The stated clerk may not refuse to accept the filing of a complaint. (Annotation on D-6.0305c in the *Annotated Book of Order*)

(See Forms 6 and 7 in Appendix A of the *Book of Order* for suggested wording of the complaint and certification of receipt.)

#### **Stay of Enforcement (D-6.0103)**

As of July 3, 2004, comprehensive changes to the Rules of Discipline regarding the procedures for obtaining a Stay of Enforcement in Remedial cases and in Appeals became effective. There are several challenges of interpretation around the new procedures that will require review and

discretion on the part of the individuals who are approached to sign a request for a Stay of Enforcement.

A Stay of Enforcement is now defined as a written instruction that orders a delay of the implementation [by a governing body] of a decision or action until a complaint or appeal is finally determined. See II – Remedial Process – Stay of Enforcement, page II - 23.

### **Representation by Committees of Counsel (D-6.0302)**

When a governing body, the General Assembly Council or one of its entities, becomes either a complainant or a respondent, it shall appoint at least three persons to represent that governing body throughout the remedial judicial process until a final decision is reached in the highest governing body to which the case is appealed. The method for designating a committee of counsel should be included in the governing body's bylaws or standing rules so that it is not necessary to call a special meeting of the governing body to appoint one, should a complaint be filed. It is not necessary for all members of the committee of counsel to participate in the trial. A committee of counsel may be represented by legal counsel.

### **Answer to the Complaint (D-6.0303, D-6.0305)**

Within 45 days of receiving the complaint the respondent committee of counsel shall file with the stated clerk of the higher governing body a concise answer which shall:

1. admit those facts alleged in the complaint that are true;
2. deny those allegations that are not true or are mistakenly stated;
3. present other facts that may explain the situation identified as an irregularity or delinquency;
4. Address any of the preliminary questions which may support a motion to dismiss:
  - Does the governing body have jurisdiction?
  - Does the complainant have standing to file the complaint?
  - Was the complaint timely filed?
  - Does the complaint state a claim upon which relief can be granted?

This is the respondent's opportunity to enter facts that it hopes the PJC will consider in reaching a decision. It should be complete enough to give the PJC a picture from the respondent's perspective. The answer should never include personal attacks against the complainant. A copy of the answer must also be furnished to the complainant.

## **PRETRIAL PROCEEDINGS**

### **Hearings on Preliminary Questions (D-6.0306)**

Upon receiving the complaint and the respondent's answer to the complaint, the moderator and clerk of the PJC shall examine them to determine if the preliminary questions have been answered affirmatively. They shall report their findings to all parties and other members of the PJC. If a challenge is made by either party or a PJC member within thirty days after receipt of those findings, a hearing shall be held by the full PJC to settle the finding(s) in question. The

parties shall be invited to submit, prior to the hearing, written briefs outlining the arguments to be presented that support or refute the findings.

If the PJC ultimately determines that any of the preliminary questions have not been answered affirmatively, it shall dismiss the case. (D-6.0306c)

The PJC may not dismiss a case if all the preliminary questions have been answered affirmatively.

### **Pretrial Conference (D-6.0310)**

At any time after a case is received by the PJC, it may hold a pretrial conference with the parties or their counsel to:

- seek agreement on any of the disputed issues in the case,
  - exchange documents and other evidence,
  - take other action which might reasonably and impartially narrow the dispute and expedite its resolution.
- or
- explore settlement possibilities that would resolve the dispute and avoid a trial.

The PJC moderator or another person such as a trained mediator designated by the PJC may facilitate such alternative resolutions.

### **Right to Counsel (D-7.0301)**

Each of the parties in a remedial case may be represented by counsel during the pretrial proceedings and the trial, provided that no person shall act as counsel who is not a member of the Presbyterian Church (U.S.A). Such counsel need not be a paid representative or an attorney-at-law. (Note: D-6.0310 implies that counsel may be active prior to trial.)

### **The Records of the Case (D-6.0307)**

Within 45 days after the receipt of the complaint, the clerk of the respondent governing body shall provide all parties with a list of all the papers and other materials pertaining the case. The complainant then has 15 days to request in writing that the respondent include additional papers. It is inappropriate to request materials which are not within the jurisdiction of the governing body or to “turn the clerk into a research assistant.”

Upon notice that the PJC will try the case, it becomes the responsibility of the respondent session clerk or stated clerk to file all the documents (listed above), including the written list and any requests for additional papers, with the stated clerk of the higher governing body who will transmit them to the PJC that will try the case.

The PJC may require either party to file a trial brief outlining the evidence to be presented and the theory upon which the evidence is considered to be relevant. (D-6.0309)

## **TRYING THE CASE (D-7.0400)**

Both the complainant and the respondent and/or their counsel shall have the opportunity to present their supporting arguments on why the complaint should or should not be sustained. Evidence as deemed necessary or proper, and in accordance with the rules of evidence in D-14.000, shall be presented. If, following deliberation, the PJC determines that no irregularities or delinquencies were committed by the respondent, the complaint shall not be sustained. If the complaint is sustained either in whole or in part, the PJC shall either order such action as is appropriate or direct the lower governing body to conduct further proceedings in the matter.

Written decisions are promptly prepared and sent by certified delivery or personal service to all parties to the case. (D-7.0402)

## **OUTLINE AND TIMELINE OF THE REMEDIAL PROCESS**

All participants involved in a remedial case should review carefully the outline with accompanying timeline and flowchart following this overview to ensure that all matters are handled within the limits and constraints of the process.

# REMEDIAL PROCESS

## OUTLINE

Action	Timing
1. Complainant writes a letter asking the governing body to cure a delinquency. If the governing body fails or refuses to correct the delinquency, a complaint may be filed with the stated clerk of the next higher governing body. <b>OR</b>	Within 90 days of failure or refusal to correct the delinquency.
1. Complainant files a complaint with the stated clerk of the next higher governing body alleging irregularity in a decision or action. (D-6.0202a)	Within 90 days after the alleged irregularity occurred.
2. Complainant may file a stay of enforcement to halt the implementation of a decision or action until a complaint or appeal is finally determined. (D-6.0302)	Within 45 days after the action or decision.
3. The clerk of session or stated clerk advises the governing body (the respondent) to form a committee of counsel to defend the governing body. (D-6.0302)	Immediately
4. The respondent, through the committee of counsel, files a concise answer to the complaint with the stated clerk of the higher governing body. (D-6.0303)	Within 45 days after the filing of the complaint.
5. Upon receipt of the complaint and the answer to the complaint, the stated clerk of the higher governing body transmits them to the officers of the permanent judicial commission (PJC). (d-6.0304)	Immediately
6. The moderator and clerk of the PJC decide the preliminary questions (D-6.0305) and communicate their findings to the parties and the full PJC.	In a timely manner.
If any of the preliminary questions are answered in the negative, either unchallenged or after a hearing on the issue, the case is dismissed.	
7. A challenge to the findings may be made by either party or by a member of the PJC.	Within 30 days of receipt findings.
8. If a challenge is made the findings, a hearing on the finding at issue is held. (D-6.0306a)	
9. The PJC notifies the stated clerk of its governing body that the case has been accepted. (D-6.0307c)	

## Action

## Timing

10. The stated clerk of the higher governing body notifies the clerk of session or the stated clerk of the lower governing body that the case has been accepted. (D-6.0307c)

11. The clerk of the respondent body lists in writing to the parties all the papers and other material pertaining to the case. (D-6.0307a)

12. The complainant may request in writing that the respondent file additional minutes or papers pertaining to the case (D-6.0307b)

13. The clerk of the respondent body transmits to the stated clerk of the higher governing body the minutes and papers pertaining to the case, along with the list of the record and any requests for additional papers which, if available, shall be included. (D-6.0307c)

14. The stated clerk of the higher governing body transmits the minutes and papers to the PJC, and gives notice to the parties of an estimated date for trial. (D-6.0308)

15. The moderator and clerk of the PJC may schedule a pretrial conference with the parties to explore settlement possibilities, to seek agreement on facts and disputed issues, to exchange documents and other evidence, and to take other actions which may narrow the dispute and expedite its resolution. (D-6.0310)

16. The PJC may require either party to file a trial brief outlining the evidence to be produced and the theory upon which the evidence is considered to be relevant.

17. The moderator and clerk of the PJC schedule a trial

18. Citations to appear at trial for the parties and such witnesses as either party may request are signed by the PJC moderator or clerk. (D-7.0200).

19. The trial is conducted in a neutral setting with proper decorum. The PJC is in charge of the proceedings and makes all decisions about the trial issues and proceedings. (D-7.010)

A verbatim recording of all testimony and oral proceedings is required.

Within 45 days after receipt of the complaint.

Within 15 days after receipt of the list of the record.

On receipt of notification that the case has been accepted (see 8. above), transmit the material without delay.

Immediately upon receiving the materials.

Any time after the case is accepted.

The trial may be no sooner than 30 days after any hearing resulting from a challenge to the initial finding on the preliminary questions unless there is a compelling reason to do so. (See 6. above and D-6.0306b)

## **Action**

## **Timing**

20. The trial is conducted in accordance with Chapter VII of the “Rules of Discipline.” After all evidence is presented and final statements made, the PJC meets privately to deliberate and vote on the complaint.

21. A written decision stating the judgment on each irregularity or delinquency assigned in the complaint is prepared while in session. (D-7.0402a)

22. If the complaint is sustained either in part or in full, the PJC shall either order such action as is appropriate or direct the lower governing body to conduct further proceedings in the matter. (D-7.0402b)

23. A signed copy of the decision is delivered to each party in the case.

Immediately.

24. A signed copy of the decision is delivered to the stated clerk of the governing body that appointed the PJC. (D-7.0402d)

Within 30 days after the conclusion of the trial.

25. Either party may appeal the decision to the PJC of the next higher governing body if there is a belief the decision was reached as a result of one of the errors listed in D-8.0105. (D-7.0500, D-8.0201)

Within 45 days of receipt of a copy of the decision

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# REMEDIAL PROCESS

## THE PERMANENT JUDICIAL COMMISSION'S ROLE

### OVERVIEW

In a remedial case, the complainant is seeking to have an action of a governing body, which the complainant feels is either irregular or delinquent, corrected by a decision of the next higher governing body's permanent judicial commission (PJC). The PJC that tries the case will determine whether to sustain the complaint or not. If sustained in whole or in part, based on a preponderance of the evidence, the PJC orders whatever corrective action it decides or directs the lower governing body to conduct further proceedings in the matter. If the complaint is not sustained the case is dismissed.

#### **Preliminary Questions**

The moderator and clerk of the PJC have a major responsibility on receiving a complaint and the respondent's written answer to the complaint. They are to examine the papers promptly to determine if the preliminary questions of jurisdiction, standing, timeliness and states a claim upon which relief can be granted can be answered affirmatively. (D-6.0305)

1. **Jurisdiction:** Has the complaint been filed with the appropriate higher governing body? (i.e., If the complaint is against a presbytery, is the presbytery a member of the synod in which the complaint was filed?) Presbyteries have jurisdiction over all the sessions within their membership, synods have jurisdiction over all the presbyteries within their membership. When a governing body complains against another governing body of the same level, the complaint must be filed with the immediately higher governing body to which the respondent governing body is subject. (D-3.0000)
2. **Standing:** Does the person or governing body have a right to complain against the particular respondent governing body? Are/were persons properly enrolled in the governing body when the delinquency or irregularity occurred? Is the complainant governing body at the same or lower level than the respondent governing body? (D-6.0202a, b)
3. **Timeliness:** Has the complaint been filed within the allowed 90 days following the occurrence of the alleged irregularity or within the allowed 90 days after the failure of the governing body to cure a delinquency? A previous decision by the General Assembly PJC has determined that "To file" is interpreted to mean "in the hands of..." Therefore, the ninety days for the complainant to file begins on the date the alleged irregularity or delinquency occurred and extends until the stated clerk receives in hand the complaint. Postmarked dates are not determinative. The stated clerk may not refuse to accept the filing of a complaint. (D-6.0202a, b)
4. **States a claim upon which relief can be granted:** Is the corrective action that the complainant is asking the PJC to provide within the jurisdiction and authority of the commission to grant and is it consistent with the provisions of the *Book of Order*? Does the complaint state clearly whether it is about an irregularity or delinquency, and does the remedy request the appropriate relief? Whatever corrective action the PJC might order must be within its authority as the representative of a specific governing body and

consistent with the *Constitution*. The corrective action ordered by the PJC, if the complaint is upheld, may or may not be the same as the relief requested. (D-7.0402b)

This is often the most difficult of the preliminary questions to determine if answered affirmatively. It should be answered without consideration of the merits of the case. (See the annotations of D-6.0305d in the Annotated *Book of Order* for assistance in clarifying this question.)

*Note:* Sometimes the preliminary questions are referred to as "threshold issues" or "jurisdictional questions."

The PJC moderator and clerk shall then report their findings to all parties and the other members of the PJC, allowing, within thirty days, challenges to their findings. In the event there is a challenge, a hearing shall be held by the full PJC to settle the finding(s) in question. The parties shall be invited to submit, prior to the hearing, written briefs outlining the arguments that support or refute the finding(s). (D-6.0306a, b)

If the PJC ultimately determines that any of the preliminary questions have not been answered affirmatively, it shall dismiss the case. (D-6.0306c)

The PJC may not dismiss a case if all the preliminary questions have been answered affirmatively.

### **Pretrial Conference (D-6.0310)**

Although discretionary, it may be helpful for the PJC, at any time after it has received a case, to hold a pretrial conference with the parties or their counsel to:

- seek agreement on any of the disputed issues in the case,
- exchange documents and other evidence,
- take other action which might reasonably and impartially narrow the dispute and expedite its resolution.

or

- explore settlement possibilities that would resolve the dispute and avoid a trial. The PJC moderator or another person such as a trained mediator may facilitate such alternative resolutions.

### **Constitutional Interpretation Issues**

In many cases, an interpretation of the Constitution is at issue. Parties have included in their briefs arguments about the Constitution's meaning and application. Some considerations for the PJC hearing the case are:

1. Have the parties omitted relevant provisions?
2. Do the provisions cited really apply to this case?
3. Has General Assembly's PJC or the General Assembly itself given an interpretation of the provisions?
4. What do the grammar and punctuation of the provision imply as to its meaning?

## **ORGANIZATIONAL AND PROCEDURAL CHALLENGES**

### **Maintaining Neutrality**

It is important that members of the PJC avoid all possible appearances of bias or prejudice when trying a case, and limit deliberations to only those facts that are presented in the records, presentations, and testimony during trial. No materials of any kind, from any party to the case or from any other person, regarding the case should be considered by a commission member. Only the records provided by the stated clerk, the moderator and clerk of the PJC, or during the trial should be considered. (D-7.0302) Ex parte information which includes informal conversations concerning the case with anyone other than PJC members during the trial deliberation, is to be avoided.

Furthermore, a member of the PJC is disqualified from participating in a case if the member is personally interested (involved) in the case, is related by blood or marriage to any party, or has been active for or against any party. (D-7.0401b[1]). Church or governing body membership may also serve to disqualify a PJC member if that person's membership is in the church, lower governing body or another church in that governing body which is party to the case. (D-5.0205)

### **Procedural Challenges**

It is not uncommon for both parties or their counsel to make challenges during the proceedings of a trial. Since there are few grounds for challenges mentioned in the "Rules of Discipline" (ROD), and even less guidance as to how these challenges should be answered by the PJC through its moderator, the clerk may decide to identify all challenges in the minutes of the PJC, including an explanation for its ruling. This documentation may be helpful if such a ruling is challenged on appeal. (D-7.0303a; D-7.0401c)

The complainant is permitted to amend the complaint at the time of the trial, provided that the amendment does not change the substance of the complaint or prejudice the respondent. (D-7.0401d)

## **CONDUCTING THE TRIAL OF A REMEDIAL CASE**

### **Setting:**

Trials should be conducted in a neutral setting with proper decorum. A neutral setting is one which would have no real or perceived advantage or disadvantage to any party. (D-7.0102)

### **Open or Closed Proceedings:**

Except during deliberations, trials are ordinarily open. However, at the request of any party, or on its own initiative, the PJC may, at any stage of the proceedings, by a vote of the members present, decide to remove any person to the end that proper dignity and decorum shall be maintained. (D-7.0303) It should be noted, however, that removal of the parties or their counsel could create a problem. (D-11.0306 is specific that in a trial in a disciplinary case, the parties and their counsel may not be excluded.). Closing proceedings to some persons does not require closing it to all persons. This means it is not an all or nothing closing of the trial. Certainly a PJC may choose to close the proceedings to the press

At the request of either party, witnesses may be excluded during the examination of other witnesses. Unless otherwise determined by the PJC, witnesses may remain once they have completed their testimony.

#### **The Moderator begins the trial by (D-7.0401)**

- reading the first two paragraphs of Preamble to ROD;
- enjoining the members to "recollect their high character as judges of a governing body of the Church of Jesus Christ and the solemn duties they are about to undertake" (D-7.0401);
- offering opportunity for either party to challenge the organization and jurisdiction of the PJC, which, if it occurs, shall be determined by the rest of the PJC;
- explaining the procedure of the trial, including the order for presentations, examining and cross examining witnesses, etc.
- opening the trial with prayer.

#### **Presentations by the Parties**

Parties shall be given the opportunity to make both opening statements and closing statements, with the complainant having the right of making opening and closing argument in both presentations. (D-7.0401e, h)

Presentations by the complainant and respondent should focus on the significant points they want the PJC to consider.

#### **Evidence**

Evidence shall be presented and witnesses examined in accordance with the provisions of Chapter XIV of the ROD "Evidence in Remedial or Disciplinary Cases." These are the only rules of evidence that are applicable to judicial process.

All questions concerning the credibility of a witness or the admissibility of evidence are determined by the PJC at the time such testimony or evidence is offered.

- Credibility means the degree of belief that may be given to the testimony of a witness. The PJC may consider any matter that bears on the accuracy or truthfulness of the testimony in determining a witness's credibility. (D-14.0205)
- The PJC should analyze proposed evidence on the basis of its reliability, its relevance, and its integrity.
  1. The PJC needs to decide questions about the sources of evidence and may need to exclude evidence if obtained by unethical or illegal means. (See *Presbytery of Central Florida v. Herrero Minutes 1995*, p.132)
  2. The PJC should consider whether the admission of the evidence obtained illegally violates the ROD, "to honor God and correct wrong doing." (D-1.0101)
  3. Evidence obtained in a questionable manner may denigrate the moral leadership the church should be exhibiting.

## **Guidelines for Admission of Evidence**

1. No distinction should be made between direct and circumstantial evidence as to the degree of proof required. (D-14.0101)
2. The ROD provide little guidance about admissibility of evidence, but PJC's should not apply some secular standard by default. Rather the PJC should apply rules of evidence in the "spirit" of the Preamble to the ROD.

## **Hearsay evidence**

1. Hearsay evidence is evidence that is essentially second-hand information. Because the person giving it (or the document purporting something) is not the original speaker or writer that person is not available to verify or dispute what is said. It is usually excluded in secular courts largely because it is thought to be unreliable (unverifiable), not because it is not true. The ROD do not specifically prohibit hearsay evidence. Therefore, it may be admitted, if a PJC decides to do so. In making that determination, there are at least three approaches that a PJC may take, all of which are permissible under the ROD:
  - a. to hold it as unreliable and not admissible;
  - b. to exclude all hearsay evidence unless an exception applies. If this choice is made, before trial, the PJC should determine and announce what its exceptions will be;
  - c. to allow hearsay evidence and let each PJC member factor the weight of this evidence when the decision is being made.

## **Testimony by deposition**

1. D-14.0304 describes the process for taking testimony in the form of a deposition.
2. Depositions are generally only used for those witnesses who are unable to be present at the trial.
3. The 214th General Assembly (2002) adopted the following authoritative interpretation of the Constitution: "The session or permanent judicial commission conducting a case has the sole power and discretion to allow depositions or to decline to enable them. There is not a free, unlimited opportunity for parties in a case to conduct depositions of any and all potential witnesses. Weighing fairness, expense, legitimacy, validity, and practicality the session or commission may or may not exercise its power to appoint persons to take and record testimony. The party making application for depositions to be held may be required to show the necessity of recording testimony in this form."

## **Electronic evidence**

1. Tape recording. Tape recordings as evidence are subject to all the criteria of valid evidence: how obtained, etc. Many PJC's have established policies that require transcripts to be presented as evidence rather than listening to a tape which may or may not be of sufficient quality for all members of the commission to hear adequately.

2. Video recording. Video recordings as evidence are subject to all the criteria of valid evidence. If a video is accepted as evidence, it must be possible for all members of the PJC as well as the parties to view it at the same time. This will usually require several monitors of adequate size.
3. Computer images and e-mail correspondence. Where possible, printed copies of the purported evidence should be used rather than an electronic file or computer itself. All such evidence is subject to all the criteria of valid evidence.

### **PJC Members Asking Questions During the Trial**

Following the presentation and final statements, members of the PJC may ask questions of both parties, usually after their presentations have been made. This is not a time to argue with one or both parties. It is not a time to ask for new evidence. It is a time to make sure PJC members understand the arguments being presented.

### **Deliberations and Decisions**

Immediately following the public portion of the proceeding, the PJC meets privately to deliberate the complaint and issues raised in the trial. After careful deliberation, the commission votes on each irregularity or delinquency raised in the complaint and records the vote on each in its minutes. No complaint in a remedial case shall be sustained unless it has been proved by a preponderance of the evidence. Preponderance means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. (D-7.0402a)

If the complaint is sustained either in whole or in part, the PJC shall either order such action as is appropriate or direct the lower governing body to conduct further proceedings in the matter. (D-7.0402b)

### **Writing the Decision**

A small group of PJC members may be assigned to draft the initial decision that is then revised, refined and adopted by vote of all PJC members sitting for this trial while in session. Sufficient time must be allowed to complete the entire process. Support services such as secretarial services can be especially helpful during this phase of the proceedings. Persons providing such services should not be present for discussion and voting by the PJC, but should have access to word processing and printing to provide the PJC with drafts and revisions as it does its work. (D-7.0402c)

Although an explanation of the PJC decision does not have to be included, such an explanation could be helpful to the parties in understanding the decision, important in the consideration of any appeal to a higher PJC, and provide historic or procedural value in future cases.

See the sample forms, pages II - 29 and II - 31, for samples of a written decision and certification of delivery.

# **REMEDIAL PROCESS**

## **STAY OF ENFORCEMENT**

### **(D-6.0103)**

The action of a governing body or certain General Assembly agencies (D-6.0202b), or the decision of the permanent judicial commission (PJC) of a governing body may be suspended by a stay of enforcement.

#### **A Stay of Enforcement Defined**

A stay of enforcement is a written instruction that orders a delay of implementation of an action or decision be delayed until a complaint or appeal concerning that action or decision is finally determined. D-6.0103.

#### **Facts Concerning a Stay of Enforcement**

The following is a list of some of the facts concerning a stay of enforcement.

1. A stay of enforcement applies to remedial cases.
2. Any person or governing body qualified to file a complaint or remedial appeal may request a stay of enforcement of a decision or action by completing the necessary steps.
3. A stay of enforcement may be entered after the filing of a complaint or appeal, but no later than **45 days of the complained about irregular or delinquent action or the decision** being appealed.
4. In order to enter the stay, the actual signatures (not just the request for signatures) must be received by the appropriate stated clerk within the 45 day deadline.

#### **Obtaining the Stay of Enforcement**

The process for seeking a stay of enforcement varies depending upon whether the action was taken by the governing body itself, or by its permanent judicial commission. If the action was taken by the governing body, there are two options available, seeking signatures of those members present when the action was taken, or seeking the requisite number of signatures from the members of the permanent judicial commission that will hear the complaint or appeal. If the action was taken by a permanent judicial commission, there are also two options available, seeking the signatures of one-third of the members of the permanent judicial commission that decided the case, or seeking the signatures of at least three members of the permanent judicial commission having jurisdiction to hear the complaint or appeal.

- 1. The action of a governing body may be stayed with the concurrence of the governing body that made the decision. D-6.0103a (1)**

This is achieved by gathering the signatures of one third of the members of the governing body recorded as present when the decision or action was made by the governing body. These signatures requesting a stay of enforcement must be filed concurrently with a remedial complaint signed by an entity or person(s) who have standing to file the complaint no later than 45 days after the complained about decision or action taken by the governing body.

The complaint and the requisite signatures must be filed with both the Clerk of the governing body whose action it seeks to stay and the Clerk of the governing body whose permanent judicial commission has jurisdiction. The Clerk of the governing body whose action is sought to be stayed should verify that the requisite number of signatures have been obtained from members recorded as present when the action was taken. (See Remedial Case 215-12 for GAPJC comments on verification process for signatures to require a special meeting.) Both clerks should verify that the complaint and signatures have been received within 45 days of the action by the governing body and they should notify the parties whether or not the stay has been entered (secured).

**2. The decision of a permanent judicial commission in a remedial case may be stayed with the signatures of at least one third of the members of the permanent judicial commission who decided the case. D-6.0103a(3)**

The request for the signatures of the permanent judicial commission members who decided the case must be directed to the commission through the clerk of the permanent judicial commission or the stated clerk of the governing body of that permanent judicial commission. If one third of the members of the permanent judicial commission sign the stay of enforcement, and the signatures are secured within 45 days of the decision, the stated clerk of the governing body should notify the parties that the stay has been entered (secured).

**3. The action of a governing body or the decision of a permanent judicial commission may be stayed by securing the signatures and certification of three of the members of the permanent judicial commission having jurisdiction to hear the remedial complaint or appeal. D-6.0103a3cd**

The request for a stay of enforcement must be filed with the Stated Clerk of the governing body whose PJC has jurisdiction to hear the case. The request must include a short statement of the basis for challenging the decision or action, a short statement of the harm that will occur if the decision or action is not stayed, and a list of telephone numbers and addresses for the complainant or appellant and the opposing party or governing body. The request for stay of enforcement should be filed concurrently with a timely remedial complaint or notice of appeal.

The members of the permanent judicial commission that has jurisdiction must determine two items before they may sign the stay:

- a. The member must certify that in his/her judgment probable grounds exist for finding the decision or action erroneous. This is difficult because the PJC member will only have the complaint or notice of appeal. The response of the committee of counsel of respondent will not yet be available.
- b. The member must certify that in his/her judgment, the complainants or appellants will suffer harm if the decision or action is not stayed. There will be no opportunity for an answer or challenge from the responding governing body prior to the initial signatory decision by the members, making it difficult to weigh harm to the complainants versus harm to the responding governing body.

If three members of the PJC certify that in their judgment probable grounds exist for finding the decision or action erroneous and that the requesting entity will suffer harm if the decision or

action is not stayed and return those certifications to the stated clerk within 45 days of the alleged irregular or delinquent action or decision, the stated clerk should notify the parties that a stay has been entered (secured).

See Revised forms 3, 4, 5 and 5A in the Appendix A of the *Book of Order*.

### **Effect of the Stay of Enforcement**

The body whose action or decision is stayed must comply with the stay or face further judicial action.

### **Objection to the Stay of Enforcement**

The respondent / appellee may file (opposing party), with the PJC of the body that has jurisdiction to try the complaint or hear the appeal, an objection to the stay of enforcement within 45 days, and thereby secure a hearing on the matter of the stay.

1. No fewer than three members of the PJC hearing the case shall conduct a hearing on the matters related to the stay;
2. At the hearing, the stay may be modified, terminated, or continued until the decision on the merits of the case is made by the PJC.
3. The members of the PJC conducting the hearing are not automatically disqualified from deciding the case when it comes to trial/hearing, but are subject to challenge as is any member of the PJC.

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# REMEDIAL PROCESS

## TRAINING A PERMANENT JUDICIAL COMMISSION

The person ordinarily responsible for completing or arranging the training of a permanent judicial commission (PJC) is the stated clerk of the governing body. The stated clerk may also invite others with experience in judicial process within the Presbyterian Church (U.S.A.), including other clerks, or the staff of the Office of the General Assembly, Department of Constitutional Services, to assist with the training.

Prepare for the training by reading carefully all the material in this chapter of the Handbook for Judicial Process as well as Chapters VI and VII of the "Rules of Discipline" (ROD). If this is the first meeting of a new PJC, it will be important to present the information in D-5.0200 for the benefit of the new members. Have copies of the *Book of Order* available for each member. You may also wish to copy relevant sections concerning remedial process from the Annotated *Book of Order* for use during the training. The following outline may assist you in determining what material should be covered.

1. Begin with the Preamble (chapter I) of the ROD.
2. Distribute copies of the pages from this Handbook entitled "Remedial Process: Overview" and review them as a way of assisting the members of the PJC to understand the remedial process. Of particular importance to the PJC are the sections on "Stay of Enforcement" and "Pretrial Proceedings."
3. Distribute "Remedial Process: Outline" and "Remedial Process: Flowchart of Process." Use these handouts to reinforce the sequence and importance of following the required time limits.
4. Distribute the handout from this Handbook that is titled "Remedial Process: The Permanent Judicial Commission's Role."
  - Spend some time on "Preliminary Questions" and refer to the Annotated *Book of Order* in regard to D-6.0305, Examination of the Questions.
  - Make certain that the PJC understands the difference between a hearing on the preliminary questions and the pretrial conference.
  - Highlight the section on evidence, and remind PJC members that rules of evidence which attorneys may be familiar with from civil or criminal procedures do not apply.
  - Stress the importance of maintaining neutrality, and explain that the participation of any member of the PJC can be challenged. PJC members should avoid discussion of the case and should not receive information or materials related to the case, except those that are the records provided by the stated clerk or the moderator or clerk of the PJC.
  - Reinforce the requirement that the decision must be written and adopted by the PJC while it is still in session.
5. Emphasize that the rules which apply to judicial process in the church are to be

found in the *Book of Order*, particularly in the ROD. Some members of the PJC may bring a background from the legal profession and will be inclined to assume that those rules apply. They do not. A remedial trial is an ecclesiastical process.

6. Remind the PJC that it has the right and responsibility to control the conduct of the trial.
7. Discuss the meaning and significance of making a decision on the preponderance of the evidence, using the definition in D-7.0402.
8. Discuss the difference between ordering "such action as is appropriate" and directing "the lower governing body to conduct further proceedings in the matter."
9. After a time of training, you may find it helpful to use "PJC Training #1" and "PJC Training #2" found in Chapter V of this Handbook. (See pages V - 15 to V - 20). Use "PJC Training #1" as a quiz on judicial terminology. The answer guide follows the quiz. "PJC Training #2" deals with understanding the preliminary questions, and has suggested answers. ("PJC Training #3" deals with disciplinary cases.)
10. Remind the PJC that the stated clerk should be considered an advisor on process issues, and will serve as a resource person during the trial. The stated clerk is normally present during the trial up to the point of deliberation.

**REMEDIAL PROCESS - SAMPLE DECISION FORMAT**

THE PERMANENT JUDICIAL COMMISSION

*of*

THE PRESBYTERY/SYNOD OF \_\_\_\_\_

*of*

THE PRESBYTERIAN CHURCH (U.S.A.)

\_\_\_\_\_

DECISION

\_\_\_\_\_

[Name(s)],	)	
Complainant(s)	)	
	)	
v.	)	[case number]
	)	
[Name(s)],	)	
Respondent	)	

----- [ ARRIVAL STATEMENT ] -----

This is a remedial case which has come before this Permanent Judicial Commission as a result of a complaint filed by the above named complainant(s) against the Presbytery of \_\_\_\_\_, respondent.

--- [ JURISDICTION STATEMENT, see D-6.0305 ] ---

The Permanent Judicial Commission finds that it has jurisdiction, that the complainant has standing to complain, that the complaint was properly and timely filed, and that the complaint states a claim upon which relief can be granted.

----- HISTORY -----

---[ text of the history ] ---

----- SPECIFIC IRREGULARITIES OR DELINQUENCIES -----

---- [state the alleged irregularities or delinquencies and the PJC's decision to sustain or not ] ----

-

----- ORDER -----

IT IS THEREFORE ORDERED that:

---- [state what is to be done and who is to do it] ----

IT IS FURTHER ORDERED that the Stated Clerk of (the Presbytery of \_\_\_\_\_) report



**REMEDIAL PROCESS - SAMPLE CERTIFICATION  
AND TRANSMITTAL FORM**

CERTIFICATES

We certify that the foregoing is a full and correct copy of the decision of the Permanent Judicial Commission of the Presbytery/Synod of \_\_\_\_\_, Presbyterian Church (U.S.A.), in Remedial Case No. \_\_\_\_\_, \_\_\_\_\_ v. \_\_\_\_\_, made and announced at \_\_\_\_\_ [place], on \_\_\_\_\_ [date].

\_\_\_\_\_  
[typed name], Moderator, Permanent Judicial Commission  
of the Presbytery/Synod of \_\_\_\_\_

\_\_\_\_\_  
[typed name ], Clerk, Permanent Judicial Commission  
of the Presbytery/Synod of \_\_\_\_\_

I certify that I did transmit a certified copy of the foregoing to the following persons by certified mail, return receipt requested, depositing it in the United States mail at \_\_\_\_\_ [place] on \_\_\_\_\_ [date]:

[ typed name: ] \_\_\_\_\_  
[position title in case:] \_\_\_\_\_

[ typed name: ] \_\_\_\_\_  
[position title in case:] \_\_\_\_\_

[ typed name: ] \_\_\_\_\_  
[position title in case:] \_\_\_\_\_

[ typed name: ] \_\_\_\_\_  
[position title in case:] \_\_\_\_\_

[ typed name: ] \_\_\_\_\_  
[position title in case:] \_\_\_\_\_

I further certify that I did transmit a certified copy of the foregoing to the Stated Clerk of the Presbytery/Synod of \_\_\_\_\_, Presbyterian Church (U.S.A.), by delivering it in person, on \_\_\_\_\_ [date].

\_\_\_\_\_  
[ typed name ], Clerk, Permanent Judicial Commission  
of the Presbytery/Synod of \_\_\_\_\_

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