Musings on General or Common Parliamentary Law

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The meaning of "common parliamentary law" and "general parliamentary law"

There is much confusion about the meaning of the term *common parliamentary law.* A lot of the confusion is due to semantics, more than substance. AIP Opinion 2001-468 describes two different theories of *common parliamentary law* – one based on practice, one based on case law – and says that, ultimately, there is not much difference between the two. The author of this article was a member of the Opinions Committee that drafted Opinion 2001-468 and has continued to think about the issue of *common parliamentary law* as it affects parliamentary practice. The author suggests using refined and precisely defined terminology in order to avoid any ambiguity and confusion.

The confusion is caused by the differing definitions of *parliamentary law* in the parliamentary literature. As described in Opinion 2001-468, there are two schools as to what constitutes *common parliamentary law.* One school, the "parliamentary practice" school identified with Cushing, RONR, Demeter, Hills, and Oleck & Green, calls common parliamentary practice *common parliamentary law* or *parliamentary law. See* Cushing § 10;[1] Demeter pp. 4 ("[*P*]*arliamentary law* refers to the rules, laws or regulations of organizations, governing the orderly, expeditious and efficient transaction of business at meetings and conventions." (emphasis in original)), 204 ("Unless the organization prescribes the manner in which its meetings shall be conducted, the commonly accepted rules in use for deliberative bodies can be resorted to in considering the regularity of the proceedings ….");

Hills § 9.1 at 246-47 (referring to common parliamentary law), § 9.4 at pp. 256-57 ("*Preferred Rule – Common Parliamentary Law* In the case of a deliberative body which has not adopted special rules of procedure and is not bound by rules imposed by a higher authority, it is the preferred rule that meeting procedures will be governed by 'common-law rules' or by generally accepted parliamentary law which fits the attending circumstances." (title emphasized) (footnotes omitted)), § 9.5 at p. 259 ("A minority rule holds that an organization which has not adopted any procedures will not be presumed as a matter of law to be governed in its deliberations by commonly accepted parliamentary rules.""), § 10.7 at p. 317 ("[P]arliamentary principles and procedures, which have become commonly recognized and understood through many years of usage as basic to the maintenance of orderly procedure, will be accepted by the courts as the common law of meetings."), § 10.11 at 321 ("The courts have long recognized that parliamentary law is a branch of the common law consisting of rules, customs, and usages for the conduct of business by a deliberative assembly[, g]enerally known as common parliamentary law …."), § 11.1 at 328 (The common law of meetings, generally known as parliamentary law, is founded on ancient usage and custom."), § 11.7 at 339 ("Usage and custom are of major importance in considering matters related to the conduct and decorum of meetings …."); Mason's Manual § 4.5, pp. 15-16, § 35 at p. 30, § 37 at p. 32, § 39 at pp. 35-36, §§ 44-46 at pp. 40-42;[2] Oleck & Green § 11, pp. 19-20;[3] RONR p. 3 ("A deliberative assembly that has not adopted any rules is commonly understood to hold itself bound by the rules and customs of the *general parliamentary law* – or *common parliamentary law* …."). *See also* NAP, Questions & Answers II (1970), q. 444, p. 104 ("Our English and American jurisprudence follows the Common Law where it has not been modified by statutory law, so we have our Common Parliamentary Law."), q. 448, p. 105 ("Common Law under the old English judicial system was the unwritten law of the country based on custom, usage and judicial decisions. So common parliamentary law includes those established rules and customs … which are

entirely elementary but which everyone should know."); NAP, Questions & Answers III (1997), q. 738, p. 202 (response derived from RONR, pp. xxvi–xxviii).

The other school, the "case law" school often identified with Keesey and TSC, accepts as *common parliamentary law* only those parliamentary practices that have been approved of in reported court cases. *See* Keesey p. 3 ("Mason defines *parliamentary law* as the rules and principles that the courts apply in judging a controversy growing out of the process of decision making.");[4] TSC pp. 2-3. TSC pp. 2-3 does not actually define the term *common parliamentary law.* It defines *parliamentary law,* which it refers to as a "code of rules and ethics for working together in groups. It has evolved through centuries out of the experience of individuals working together for a common purpose." TSC p. 2. This definition of *parliamentary law,* incorporating practice and experience, is essentially equivalent to the definitions of *common parliamentary law* applied by the "parliamentary practice" school. TSC also defines "[t]he common law of parliamentary procedure" as "the body of principles, rules, and usages that has developed from court decisions on parliamentary questions …. The common law of parliamentary procedure applies in all parliamentary situations except where a statutory law governs." TSC pp. 2-3. TSC then goes on to state, without defining the term *common parliamentary law*:

> Deliberative bodies … are subject to the principles of *common parliamentary law.* All profit and nonprofit corporations and associations and the boards, councils, commissions, and committees of government must observe *parliamentary law.* International and national parliaments, congresses, and state legislatures have developed complete sets of special rules to meet their own specialized needs, and most of these rules differ sharply from those of *common parliamentary law.* Therefore these bodies are not subject to *common parliamentary law.* [TSC p. 3 (emphasis added)]

TSC further says:

> The courts hold that all deliberative groups … must follow *general parliamentary law* whenever they are meeting to transact business. … Even a small group – for example a finance committee or a board of education – must observe *parliamentary law.* [TSC p. 4]

Thus, although TSC does not define *common parliamentary law,* it uses the term as synonymous with *parliamentary law* and *general parliamentary law,* both of which terms include practice and experience (or custom and common usage) in determining the proper parliamentary procedure to cover a situation arising in a group without an adopted parliamentary authority, or in a group with an adopted authority in regard to an issue on which the adopted authority and governing documents are silent. It is simply TSC's coining of the phrase *common law of parliamentary procedure* that gives the impression that TSC considers only judicial precedents, and not common customs and usages, to be binding on ordinary societies. In other words, the vast majority of parliamentary authorities appear to agree that deliberative assemblies are governed by longstanding parliamentary practice and usage, even without case law authority backing it up. The majority of authorities also appear to agree that such longstanding practice and usage may be called *parliamentary law, common parliamentary law,* or *general parliamentary law.*

As a practical matter, the distinction between "case law" school *common parliamentary law* and "parliamentary practice" *common parliamentary law* is not significant, as almost all aspects of parliamentary procedure have at one point or another, been the subject of reported cases somewhere. *See generally* Hills, Oleck & Green. One possible approach to this dichotomy is to use similar, but distinct, phrases. The author has used the phrase *common parliamentary law* to describe the customary (or *common*) law of parliamentary deliberations; in other words, parliamentary practice. Similarly, the author has used the adjectives in reverse order, *parliamentary common law,* to describe case law (common law) about parliamentary procedure.

That distinction based on inversion of adjectival order

using the same words is somewhat confusing, however, and the case law seems to use both terms interchangeably, and largely in relation to legislative procedure. *See, e.g., Opinion of the Justices,* 672 So.2d 1290, 1293 (Ala. 1996) ("common parliamentary law"); *People's Advocate, Inc. v. Superior Court,* 181 Cal. App. 3d 316, 322, 226 Cal. Rptr. 640, 642 (1986) ("parliamentary common law"); *Opinion of the Justices,* 331 Mass. 764, 769, 119 N.E.2d 385, 388 (1954) ("common parliamentary law"); *Lowe v. Summers,* 69 Mo.App. 637 (1897) ("parliamentary common law"); *In re Low,* 88 N.J.L. 28, 32, 95 A. 616, 618 (Sup. Ct. 1915) ("parliamentary common law"); *State ex rel. Robinson v. Fluent,* 30 Wash. 2d 194, 203–04 191 P.2d 241, 246 (1948) ("common parliamentary law").

RONR p. 3 equates the terms "common parliamentary law" and "general parliamentary law." The reported cases using the term "general parliamentary law" deal with voluntary organizations as well as governmental bodies. *See, e.g., National Council, Junior Order United American Mechanics v. State Council of the District of Columbia, Junior Order United American Mechanics,* 27 App. D.C. 1 (1906) (dispute in labor union); *State ex rel. Smith v. Kanawha County Court,* 78 W. Va. 168, 88 S.E. 662, 664–65 (1916) (dispute in political party organization).

Using "general parliamentary law" for settled parliamentary practice might therefore be less confusing than using any variation including the term "common law." To avoid ambiguity and foster precision and clarity in parliamentary writing, the author would suggest using the term "general parliamentary law" to refer to commonly accepted parliamentary practice. The author would then suggest using a slight revision of TSC's precise terminology to refer to reported case law on parliamentary issues as "case law on parliamentary procedure," or "parliamentary procedure case law" for short.

Legal effect of general parliamentary law

Parliamentary practice can be called "general parliamentary *law,*" but what parliamentarians are interested in is whether

parliamentary practice has any legally enforceable effect. Several legal authors opine that, at least in the context of deliberative assemblies, general parliamentary law applies and can be enforced as law. "General parliamentary law," although based on practice as well as reported cases, is very much a form of law. *See* Hills, §§ 9.4, 10.7, 10.11, 11.1; Oleck & Green, § 11; Zechariah Chafee, Jr., *Internal Affairs of Associations Not for Profit,* 43 Harv. L. Rev. 993, 1015 (1930) ("Any gaps in the rules as to the procedure of the association … should be filled by the adoption of fair methods, with a reasonable regard to the generally accepted main principles of parliamentary law."); John Waldeck, *Legal Nature of Parliamentary Procedure,* 21 (1) Clev. St. L. Rev. 85, 85 (Jan. 1972) ("Parliamentary procedure is law. … Parliamentary procedure is common law, developed under the doctrine of stare decisis in the courts, precedents in the legislatures and by common usage and custom in non-legislative assemblies."); *id.* at 86 ("The courts have applied common parliamentary law in both legislative cases and non-legislative cases, and considered custom and usage in this country to determine what the common law rule is. The court test is the law, customs, and usages of similar bodies in like cases, or in analogy to them."). *See also* Mason, *Legal Side* p. 42 ("[P]arliamentary law is law …. *Parliamentary law consists of those rules of procedure which become applicable to every organization upon its organization, and which will be applied or enforced by the courts in any action taken to them.*" (emphasis in original)); TSC p. 3 (parliamentary practice "is logic and common sense crystallized into law, and is as much a part of the body of the law as is civil or criminal procedure.").

The common law (case law) recognizes many different forms of customary law and general parliamentary law is one of them, provable in court through expert witness testimony. Just because it is customary and has not yet appeared in a reported opinion does not mean that it is not law. The common parliamentary law of legislatures, for example, is sufficiently binding and authoritative that it can be used to enforce subpoenas and detentions, even though based largely on precedents set by

speakers and the assembly on appeal, rather than by courts. *See Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 506 (1975) (enforcing subpoena issued by a subcommittee granted authority to investigate by Congressional resolution); *Christoffel v. United States,* 338 U.S. 84, 88 (1949) (perjury conviction overturned when Congressional testimony given before committee without a quorum); *Kilbourn v. Thompson,* 103 U.S. 168, 189-90, 198-99 (1880) (Congress may imprison its own members to compel attendance or for violation of rules; ordinary citizen may be imprisoned for contempt of Congress only by action in court). *See Witherspoon v. State ex rel. West,* 138 Miss. 310, 103 So. 134 , 137 (1925) ("In the absence of special rules of procedure adopted by [a deliberative] assembly, or for it by an outside power having the right so to do, its procedure is governed by the general parliamentary law …."); *McCormick v. Board of Education,* 58 N.M. 648, 662, 274 P.2d 299, 307–08 (1954) ("In the absence of the adoption of rules of procedure and in the absence of statutory regulation, the generally accepted rules of parliamentary procedure would control."). Even the few cases generally dismissive of parliamentary procedure in the governmental context usually support basic principles, such as the right to appeal. *See, e.g., Hill v. Goodwin,* 56 N.H. 441 (1876) ("No doubt the ordinary rules of parliamentary law, as laid down in the manuals and books of authority, are a very convenient aid to the orderly transaction of business; but its rules are in many matters complicated, and the distinctions subtle and nice …. If [the moderator's] ruling is incorrect, any person who is dissatisfied may appeal to the meeting, and its decision, being not against the statute, is final and conclusive.").

A number of state court precedents do, in fact, apply general parliamentary law to internal disputes in non-governmental membership assemblies in various forms of entity without adopted rules. *See, e.g., Johnson v. South Blue Hill Cemetery Ass'n,* 221 A.2d 280, 283 (Me. 1966) ("In the absence of written articles, constitution or by-laws, the government of unincorporated associations will be determined by common parliamentary rules

….”); *Mixed Local of Hotel and Restaurant Employees Union, Local No. 458 v. Hotel and Restaurant Employees Int’l Alliance,* 212 Minn. 587, 596, 4 N.W.2d 771, 776–77 (1942) (“Where the method of procedure is not regulated by the law of an association, the procedure should be analogous to ordinary parliamentary proceedings. Gaps in the rules of procedure of voluntary unincorporated associations should be filled by the adoption of fair methods according to accepted principles in similar cases.”); *Oestereich v. Schneider,* 187 S.W.2d 756 (Mo. App. 1945) (“‘[I]n the absence of all these [adopted rules and internal usages], resort may be had to the rules of parliamentary law in common use in all deliberative assemblies.’” (quoting 7 C.J.S., *Associations,* § 19, at 45)); *Egan v. Kelly,* 14 N.J. Super. 103, 107, 81 A.2d 413, 414 (1951) (“In the absence of any guide from statute, constitution or by-laws, the commonly recognized rules of parliamentary procedure govern.”); *Randolph v. Mt. Zion Baptist Church of Newark,* 139 N.J. Eq. 605, 608, 53 A.2d 206, 208 (Ch. 1947) (“In the absence of a specific regulation to the contrary, the ordinary rules of parliamentary law should be observed in the conduct of a meeting.”); *Ostrom v. Greene,* 161 N.Y. 353, 362, 55 N.E. 919, 922 (1900) (“Common parliamentary rules, in use by all deliberative assemblies in this country, may also be resorted to, in the absence of any made by the association itself, in considering the regularity of its proceedings.”); *Young v. Jebbett,* 213 App. Div. 774, 779, 211 N.Y.S. 61, 66 (1925) (“In the absence of express regulations by statute or by-law, the conduct of meetings, including the election of officers, is controlled largely by accepted usage and common practice.”); *In re Dollinger Corp.,* 51 Misc. 2d 802, 804, 274 N.Y.S.2d 285, 288 (Sup. Ct. 1966) (relying on *Robert’s Rules of Order Revised* for correct procedure; “The election of a chairman for the meeting by the shareholders was the logical action to be taken by that body under the circumstances [the chair’s unauthorized declaration of adjournment]. It conformed to ‘accepted usage and common practice.’”); *In re Davie,* 13 Misc.2d 1019, 1020, 178 N.Y.S.2d 740, 742 (Sup. Ct. 1958) (“Upon the death of the President and Chairman …, his duties, by the general

rules governing the conduct of associations and corporations, and *by common custom and usage*, fell upon the … First Vice-President ….” (emphasis added)); *In re Argus Printing Co.,* 1 N.D. 434, 48 N.W. 347, 353 (1891) (“‘The acts of a majority are not binding upon the company, unless the proceedings are conducted regularly, *and in accordance with general usage,* or in the manner prescribed by the charter and by-laws of the company.’” (emphasis added)); *Marvin v. Manash,* 175 Or. 311, 317-18, 153 P.2d 251, 254 (1944) (“[I]n the absence of any provision in the laws of an association prescribing the manner in which its meetings shall be conducted, common parliamentary principles in use by all deliberative assemblies may be resorted to in considering the regularity of the proceedings.”); *Commonwealth ex rel. Sheip v. Vandegrift,* 232 Pa. 53, 64, 81 A. 153, 156 (1911) (“The ordinary parliamentary usages apply to meetings of” shareholders).

One frequently cited “exception” is actually much more limited in its holding. *Gipson v. Morris,* 31 Tex. Civ. App. 645, 73 S.W. 85 (1903). *Gipson* actually holds simply that parliamentary procedure cannot be proved entirely out of books; instead the proponent must produce witness testimony of standard parliamentary practice. 31 Tex. Civ. App. at 649, 73 S.W. at 87 (“[N]or is there any evidence as to what are the commonly understood or commonly accepted parliamentary rules governing deliberative bodies. In the absence of such evidence, the trial court could not assume that the church conference was governed by general parliamentary rules.”). *See Gipson v. Morris,* 36 Tex. Civ. App. 593, 598, 83 S.W. 226, 229 (1904) (on a subsequent appeal in the same case, “Independent of proof, the presumption would arise that the congregations of Baptist churches conducted themselves in an orderly and decent manner, and according to the rules, customs, and usages of all deliberative bodies.”); *Cranfill v. Hayden,* 22 Tex. Civ. App. 656, 668-69, 55 S.W. 805, 812 (1900) (“[C]ommon fairness would demand that the defendants be permitted to … show that the proceedings were regular and in compliance with the parliamentary rules and usages generally adopted by Baptists in their general bodies. … The witnesses who knew the facts and

testified to them, and who had qualified as expert parliamentarians, should have been permitted to express their opinions that the proceeding was regular and according to parliamentary usage." (citations omitted)).

Determining what practices constitute enforceable general parliamentary law

A court faced with a disputed procedural issue of sufficient importance to warrant judicial intervention (and one not covered by a rule of the organization or its adopted parliamentary authority, if any) will then need to determine the general parliamentary law applicable to the situation based on common custom and usage. Typically, this would be done through expert testimony. AIP Opinion 2001-468 discusses the tools an expert parliamentarian might use to determine the general parliamentary law covering a typical situation. The final section of this article discusses the law applicable to proving general parliamentary law as a form of custom and usage.

In determining the general parliamentary law based on common custom and usage when there is no applicable rule, parliamentarians should remember that Robert's manual is prescriptive (states what the author believed the correct rule should be) and not a descriptive statement of general parliamentary law. *See* AIP Opinion 2001-468. Robert largely based his book on settled practices, but provided his own rules overruling the settled practices when he felt he had a better rule. Carmack p. 32; Mason, *Legal Side* pp. 51-54. Sometimes he invented his own rule when there was no settled rule at all, either because of conflicting practices or because there wasno real practice to speak of, or when he thought that the settled rule was a poor one. For example, under Cushing and longstanding practice as of the 1870s, unless the adopted rules provided otherwise (and they often did), *suspend the rules* could only be adopted through unanimous consent. Cushing §§ 21, 164. Robert used a 2/3 vote, which may have been the case by adopted rule in many societies at the time, but was not

enforceable as general parliamentary law absent such a rule. RONR p. 253. *See* Mason, *Legal Side* p. 51-52. Some of Robert's "new" rules, like a 2/3 vote to suspend the rules, seem to come from relatively common adopted rules overriding the general parliamentary law, while others seem to be his own invention, like the 2/3 vote to rescind without prior notice.

Because general parliamentary law is an evolving concept, many of Robert's innovations, like the 2/3 vote to suspend the rules and the clear ranking of the subsidiary and privileged motions, seem to have been so widely adopted and used in other authorities and by the meeting-attending public at large that they have by now become general parliamentary law. *See* 12 Williston § 43:9, at 76 ("Over time, by means of a very gradual process, a usage or custom that is initially viewed as contradicting a settled principle may, by repeated applications by the courts, result in a new rule of law that is no longer considered to contradict any previously existing rule."); *Restatement* § 22 (1) (usage "may include a system of rules regularly observed even though particular rules are changed from time to time.").[5] Other of the General's innovations, like the 2/3 vote to rescind without notice, are probably not sufficiently widely adopted outside RONR circles to be considered part of the general parliamentary law. It is questionable whether other RONR innovations are sufficiently widespread to have become part of the general parliamentary law or not, such as requiring the motion to reconsider to be made by someone originally on the prevailing side. For example, both Demeter p. 153 n. and Town Meeting Time p. 80 say that the requirement of voting on the prevailing side is not part of the general parliamentary law.

If no specific parliamentary authority, including the widely adopted RONR, states general parliamentary law, it must instead be determined by the legal standards applicable to demonstrating "custom and usage." Custom and usage regarding parliamentary procedure at deliberative meetings may be considered implicit terms of the bylaws and other organizational rules, which constitute a contract among the members in a membership

corporation or unincorporated voluntary association. 6 Am. Jur. 2d *Associations and Clubs* § 5 (2008); 18A Am. Jur. 2d *Corporations* § 270 (2008). The legal rules used to construe contracts are typically applied when interpreting corporate bylaws, with the rules used to construe statutes also used as a supplement. 18 Am. Jur. 2d *Corporations* § 17 (2008). Even if nonprofit internal governance could not be conceived of as a subset of contract law, custom would be important determining general parliamentary law applicable when no explicit organizational rule covers a situation because custom can supplement statute and case law in any field of law. 12 Williston § 34:2, at 13. *See Whelton v. Daly,* 93 N.H. 150, 37 A.2d 1 (1944) (basing ruling on effectiveness of a notarial seal on "general professional understanding"; "Common practice has always made common law."). Of course, custom (and thus common parliamentary law) will not override an explicit bylaw provision, adopted rule, or rule included in an adopted parliamentary authority. 12 Williston § 34:1, at pp. 8-9 ("Any term established as part of a contract by custom and usage must not be inconsistent with other contract terms, must be well-settled, and must be acted upon uniformly").

The most significant question for the parliamentarian, then, is how common a practice must be before it becomes custom and usage. If the practice rises to that level, it will be treated in effect as an implicit term of the bylaws, amplifying and supplementing the written terms. The common law standard is that, to be recognized by the courts, a custom must be established by clear and convincing evidence to be ancient (or at least long-established), certain, continuous, uniform, general, notorious, reasonable, and not in contravention of law. 12 Williston § 34:12, at pp. 92–94, 97. Thus, by enshrining common custom and usage as enforceable principles of general parliamentary law, the courts do not mean that any old procedural practice out there, even a relatively common one, is inherently an implicit part of every set of bylaws. Common custom and usage means the accumulated body of settled practices. Only settled practice is enforceable in a court of law in case of dispute because it is deemed to be included in the bylaws.

12 Williston §§ 34:15, at p. 127, 34:18, at p. 133.

To be uniform, the custom does not need to be observed absolutely everywhere by everyone in exactly the same way. Rather, it should be "so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates, and who exercises reasonable care, would be ignorant of it …." *Chicago M. & St. P. Ry. Co. v. Lindeman,* 143 F. 946, 949 (8th Cir. 1906). *See* 12 Williston § 34:15, at p. 126. Similarly, to be general and universal at common law, a custom should be sufficiently common that knowledge of the custom may be presumed on the part of the affected parties. 12 Williston § 34:14, at pp. 108, § 34:15, at pp. 119, 120-21. *See Restatement* § 221 ("An agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party know *or has reason to know* of the usage …." (emphasis added)); *id.* Comment b ("The more general and well-established a usage is, the stronger is the inference that a party knew or had reason to know of it."). Under the *Restatement* standard, separate proof of reasonableness is typically unnecessary. *See Restatement* § 222 Comment b ("[R]egular observance makes out a prima facie case that a usage of trade is reasonable.").

Similarly, at common law *universal* and *uniform* do not necessarily mean adhered to in every instance. "Uniformity and universality (*though, with the tolerance of an occasional omission*) and general notoriety and acquiescence must characterize the actions upon which a custom or practice is predicated." *McComb v. C.A. Swanson & Sons,* 77 F. Supp. 716, 734 (D. Neb. 1948) (emphasis added). *See Morgan v. United States Mortgage & Trust Co.,* 208 N.Y. 218, 224, 101 N.E. 871, 873 (1913) (enforcing "practically universal" custom). If the practice is sufficiently well known to be recognized legally as a custom, the participants do not have to be familiar with the custom themselves in order to be bound by it. *Austrian v. Springer,* 94 Mich. 343, 351, 54 N.W. 50, 53 (1892) ("[T]he custom must be one so well settled and notorious as to raise the presumption that it was known to buyer and seller. This presumption [can] not, therefore, [be] rebutted by

defendant's testimony that he was not aware of such custom …." (citation omitted)). *See* 12 Williston § 34:15, at p. 124. Moreover, when the custom constitutes a system of rules, as with parliamentary procedure, "the parties need not be aware of a particular rule if they know or have reason to know the system and the particular rule is within the scheme of the system." *Restatement* § 222 Comment b.

Another qualification is that uniformity and universality do not require identical practice nationwide, but rather identical practice in similarly situated groups, which may be confined either to a particular type of meeting or to a particular locality. 12 Williston § 34:14, at p. 112; *Restatement* § 222 Comment c. *See Harrison v. Floyd,* 26 N.J. Super. 333, 347, 97 A.2d 761, 768 (Ch. 1953) (moderator should "conduct the meetings in accordance with the rules of order generally accepted as governing Baptist meetings"); *Randolph v. Mt. Zion Baptist Church,* 139 N.J. Eq. 605, 609, 53 A.2d 206, 209 (Ch. 1947) ("a presumption that the [specific church] follows the practices commonly found in such churches"). Customary parliamentary practice could be demonstrated, for example, among Baptist churches generally, among Baptist churches in greater Cleveland, or even among Baptist church boards of deacons in greater Cleveland.

Those states that have adopted the *Restatement* have somewhat modified the common law standard for proving custom, described above, by collapsing custom into usage, requiring only "commercial acceptance by regular observance" to prove a *usage of trade,* and dispensing with the universality and notoriety requirements. *Restatement* § 222 Comment b. *See* 12 Williston §§ 34:2, at p. 16, 34:12, at p. 99. (12 Williston § 34:2 discusses in detail the technical distinctions between *custom* and *usage.*) The "trade," in this case, would be entities that act through deliberative assemblies. Even if a court determined that a deliberative assembly was not a trade *per se,* it might well utilize the standards of evidence applicable usages of trade to decide that the parliamentary practice in question met the standard for acceptance as a customary rule.

A parliamentarian testifying as an expert witness about general parliamentary law will likely be most persuasive as a fact witness, discussing his or her personal observations about how similar situations have been addressed in the past. 21A Am. Jur. 2d *Customs and Usages* § 49 ("Relevant customs and usages may be established by the testimony of witnesses who have had experience in the transactions involved and who can testify to the facts constituting the alleged custom or usage. … Expert evidence of general usage is admissible when the issue is not within the common knowledge of the jury and the testimony is necessary in order that they may understand it." (citations omitted)). *See Gipson v. Morris,* 36 Tex. Civ. App. 593, 597, 83 S.W. 226, 229 (1904) (describing testimony of fact witness to longstanding parliamentary practice). *See also Briscoe v. Williams,* 192 S.W.2d 643, 646 (Mo. App. 1946) (credence given to "[t]he only witness, not a member of the belligerent factions, with no direct interest except as a sincere peacemaker, and who showed himself well versed from experience and as a scholar of the Baptist faith, and the usages and customs of the church, [who] testif[ied] from his own knowledge and from Hiscox's Church Directory, which he identified as a general guide for Baptist churches.").

When a parliamentarian serves as a witness to parliamentary practice as a matter of custom, he or she "must have full knowledge and long experience on the subject about which he or she speaks." 21A Am. Jur. 2d *Customs and Usages* § 50. *See id.* § 52. Typically, custom must be proved by numerous instances of actual practice and not by an ordinary witness's opinion testimony. *Id.* § 51. Because parliamentary procedure constitutes a recognized customary law system (see *Restatement* § 222 (1)), however, expert opinion should be admissible to demonstrate how the principles underlying the system would apply, by analogy, to novel situations or circumstances outside the personal observation of the parliamentarian.

Standard parliamentary practice therefore constitutes more than simply a useful way of handling procedural questions as they come up in a deliberative meeting. It is an enforceable system of

customary law. Many, if not most, of the principles and basic procedures of the parliamentary system have already received approval through reported case law. Parliamentary expert witnesses will undoubtedly fill in many of the remaining gaps in the future by elucidating customary parliamentary procedures in court. New circumstances seem to come up regularly calling for the application of longstanding parliamentary principles in novel ways. Experienced parliamentarians will always have a role explaining how the rules of the parliamentary system apply in new situations as meeting practices evolve through time.

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Notes

[1] "Every deliberative assembly, by the mere fact of its being

assembled and constituted, does thereby necessarily adopt and become subject to those rules and forms of proceeding, without which it would be impossible for it to accomplish the purposes of its creation. … [E]very such body … [may] adopt also certain special rules for the regulation of its proceedings. … [T]hese latter supersede the ordinary parliamentary rules, in reference to all points to which they relate; … leaving what may be called the *common parliamentary law* in full force in all other respects." [emphasis added]

[2] "The term 'parliamentary law' is sometimes used in two different senses. It applies to rules having two different priorities. Certain indispensable basic principles, such as the requirement of a meeting, a quorum, or a majority vote, apply to all groups, in all instances and without adoption, superseding adopted rules and statutes, while other rules, sometimes also called parliamentary law, are mere custom and give way to adopted rules and apply only when the assembly has not adopted any contrary rule or practice. It is often necessary to determine in which sense the term is used." [§ 4.5, pp. 15-16]

"(3) The common law of parliamentary procedure is founded upon well-established and reasonable usage. It does not rest upon mere custom but upon reasonable and equitable custom. 'What is not reason is not law' may be said with reference to the common law of order in deliberative assemblies, as well as to the common law of the land. (4) The parliamentary law is the rule of action for all deliberative bodies governing the introduction, modification, discussion and decision of propositions." [§ 30, at p. 30]

"When special rules of procedure have been adopted by a deliberative body, its procedure is controlled by such rules only insofar as those rules apply; otherwise, the body is governed by general parliamentary law." [§ 37 (3), at p. 32]

"The precedents of other deliberative bodies of the same type and character are, in general, to be given more weight than the precedents of deliberative bodies of a different character. The

precedents of deliberative bodies of a different type and character are to be given weight in the proportion that the conditions of the other deliberative body are similar to the deliberative body where the precedent is to be applied." [§ 39 (5), at pp. 35-36]

"(1) Parliamentary law is a part of the common law. … Parliamentary law developed precedent by precedent as decisions were made in legislative bodies and in courts in the same manner as common law developed through judicial precedents. … (2) Parliamentary law differs somewhat from the other branches of common law in that it is based in an important measure upon precedents of legislative and administrative bodies." [§ 44, at pp. 40-41]

"Parliamentary law, while developed primarily in legislative bodies, applies to all groups of persons meeting as equals to study questions or make decisions." [§ 46 (1), at pp. 41-42]

[3] "The procedure of meetings is governed by statutes, articles of incorporation, bylaws, rules, or a parliamentary guide adopted in the bylaws or at a particular meeting. If none of the foregoing is applicable, then such meetings will be governed by the accepted customs and usage of parliamentary procedure, although not necessarily as found in any one particular manual.

…

"When the parliamentary manual itself does not govern the situation presented, a court may look to the following sources, in the order of precedence listed: … f. Parliamentary law; g. Customs and usages; h. Judicial decisions. … An accepted parliamentary guide may be used as a source in determining what constitutes the ordinary usages of parliamentary procedure. A custom must be based on a continuous course of conduct and may not be established by a few acts alone." [footnotes omitted]

[4] Keesey quotes an article authored by Paul Mason for this proposition. Paul Mason, *The Law and Parliamentary Procedures,* 5 Adult Leadership (December 1956), at pp. 188-190. The current

edition of Mason's parliamentary authority, as quoted above, differs in treating custom and usage, even if not enshrined in court opinion, as *parliamentary law.* Therefore, Keesey's source is somewhat questionable as support for his position.

[5] The Restatements of the Law constitute a series of volumes published by the American Law Institute meant to describe the state of the common law in regard to a particular area, based on an academic review of the often conflicting case law of multiple jurisdictions. As the law evolves, new editions of the Restatements are issued. Not all state high courts, when faced with a novel legal controversy in that state, choose to adopt a cutting-edge position included in the latest Restatement.

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