

The Professional Parliamentarian as Expert Witness, Part I

W. Craig Henry, PRP

Recently, I was engaged in a non-legal setting as an expert witness for a local constituent division of a national organization. The question at hand was whether the constituent division had followed all proper rules to maintain their affiliation with the national organization. After reviewing the bylaws, rules and minutes of both organizations, I appeared at a hearing in front of approximately 30 persons. Not only was I able to demonstrate that the constituent organization had (mostly) followed the rules, the parent organization had (mostly) not followed their own rules. Based on my statement and other witnesses' statements, the constituent division was allowed to retain its membership connection, and the national organization went back and began work on their rules, methods of meetings and minutes taking.

As parliamentarians, we have developed expertise in a very specific area: parliamentary procedure. On occasion, you might be solicited to analyze a governance or procedural situation as to its specific correctness by a) rendering a written opinion concerning the situation; b) providing a deposition regarding what occurred; c) testifying during a hearing or in a court of law; d) serv-

ing as a non-testifying expert consultant to the legal team; or e) any or all of the aforementioned. Being contacted by a high-priced law firm as a potential expert can be lucrative and also be impressive on a resume. Parliamentary procedure experts are fairly few in number, and the field fairly narrow, so lawyers tend to call on an "expert" to explain compliance with common parliamentary practices as well as parliamentary standards such as *Robert's Rules of Order Newly Revised* and the *Standard Code of Parliamentary Procedure*.



W. Craig Henry

Are you an expert?

Before agreeing to become an expert witness, there are several questions that you should ask yourself to determine whether you're cut out for the responsibility. Are you qualified? This requires more than just selling yourself to the lawyers. To act as an expert witness requires strictly following the NAP/AIP jointly adopted Code of Ethics for Parliamentarians (2001), especially the following items:

- 3.1 Not misrepresent credentials, education, or experience to a client.
- 3.5 Decline any appointment that the parliamentarian is not competent to handle.
- 3.6 Decline any appointment in which the parliamentarian is

likely to be unduly restricted in the exercise of independent professional judgment.

You cannot stretch your expertise. First, it is unethical and, if found out, it can cause ethics charges to be brought up. Secondly, in legal settings, it at least can invalidate your testimony and at worst bring you up under a charge of perjury. Furthermore, even if you legally qualify as an expert, the other side's lawyers will actively dig through your published past looking for anything that might minimize your authority on the subject. Any little exaggeration will come back to bite you. This is one engagement where "faking it" can cost you more than you may ever earn as a professional parliamentarian.

Do you have the time?

Not only will you need to devote many hours to analyzing the background information and evidence placed before you, but you'll probably have a tight schedule to meet. When persons come looking for an expert, it is normally at the last minute.

Courts generally specify deadlines for the introduction of expert testimony, and moving those deadlines can be difficult if not impossible. If you'll be required to testify in court, then you'll have to keep potential court dates free on your schedule—and deal with the inevitable continuances. You may

have competing issues with your other clients as well.

Do you have any conflict of interest?

If you have any interest in the case's outcome, your objectivity of your testimony might be questionable. That doesn't mean, however, that any prior relationship with the litigants will automatically disqualify you. Even your political affiliation may be construed as a conflict of interest. On the contrary, you may have testified in one or more cases in which one of the parties was either a former client, or a customer of one of your clients. All you must do is disclose that prior relationship up front, and clearly demonstrate that your methods of evaluation will not be influenced by the desire for any particular result. Then let the client decide whether to engage you.

Can you keep a secret?

Your ability to discuss the case details (outside your sworn testimony) with anyone except the lawyers for the side that hired you will be severely curtailed. As a consultant, you might be accustomed to working under a Non-Disclosure Agreement (NDA), but those agreements generally don't prevent you from discussing the nature of things you're working on in general terms. Even if the court doesn't direct total silence on your part, your client's lawyers will likely require it, at least until

the case is settled or decided and all appeals are exhausted.

Do you like working with lawyers?

Lawyers are trained in a very specific way to develop theories as to what has taken place during the case. You'll inevitably find yourself torn between absolute objectivity and the hunt for the evidence that the lawyers hope you'll find to support their hypothesis. You may have to back out of an engagement if you cannot freely examine information and develop objective opinions, whether or not they lead to a specific result. Lawyers can be very persuasive and you'll often feel like the very people who are paying you for your responses are interrogating you. However, if you can maintain your objectivity under that type of pressure, you will have no problems working with legal counsel.

Where may parliamentary expert testimony be given?

Almost all parliamentary expert testimony arises from procedural or governance situations. You may be retained to help in one of the following situations:

Opinion Writing. Although not usually thought of as expert testimony, writing an opinion may lead to later admission to arbitration, hearings or court cases. You may even be required to testify to the statements made in the opinion.

Discovery. Discovery is a fact-

finding process that takes place after a lawsuit has been filed and before trial in the matter, in order to allow the parties in the case to prepare for settlement or trial. It is based upon the belief that a free exchange of information is more likely to help uncover the truth regarding the facts in issue. You may consult with the attorneys during discovery to ensure the proper procedural documents are available to support your client's case. Some counsel overlook something as simple as including "all board minutes for the past ten years." This is when all documents you may need to formulate your testimony are made available.

Deposition. While each side in a case has many discovery methods, depositions are one of the most common ways to gather information in a case. Depositions unearth the facts, the events, strengths and weaknesses of both sides' cases as well as additional information required. This inquiry can judge the demeanor of witnesses and determine how "good" the testimony is that they are bringing to the case and the method of questioning to be used on the witness.

Arbitration. Arbitration is an alternative form of dispute resolution outside of the courtroom where the parties submit their claims and associated evidence to an independent, unbiased third party. Typi-

cally, if parties go to arbitration, the finding of the arbiter is binding upon the parties. The expert parliamentarian can provide testimonial evidence to the arbiter.

Hearing. Proceedings before governmental, legal or other decision-making bodies are another way that expert opinions can be introduced. Legal hearings are different from a trial—due to their brevity compared to a trial and typical coverage of only one (or a few) topics—and are used to either dismiss or provide a summary judgment in lieu of (continuing) a trial. Again, the expert parliamentarian can provide expertise before and testimony during a hearing.

Trial. For a professional parliamentarian to present procedural facts and expert opinions during trial is both exhilarating and exhausting. Not only are your credentials and knowledge laid bare before the public, you get to see all manner of legal maneuvering and cajoling to try to elicit a contradiction or inconsistency from you. Fortunately, most court cases where parliamentary expert witnesses are used determine civil, rather than criminal, outcomes.

Legal's Expert. An expert witness may be asked to sit in and observe the deposition/hearing/trial in order to gain a better understanding of the case and to provide ongoing assistance to counsel.

"Lock You Away." Once I was hired as an expert witness to "do nothing." My client told me after the trial that they didn't want to allow my knowledge into the opposing side's case, so they retained me to be on their side and "know nothing about the case." To this day I still do not know many of the particulars of the case, nor do I care to know. This is not the typical way for an expert to be used, but it meets the expert witness engagement criteria.

As you can see there is a great deal to consider if you are asked to be an expert witness. Your qualifications and your ability to work with attorneys are important parts of an overall process of evidence discovery and testimony. In part 2, Preparation as a Parliamentary Expert Witness, we will investigate the work involved in preparing to provide testimony, especially under cross-examination by opposing legal counsel. ★

W. Craig Henry, PRP, CPP-T, has been active as a consultant, meeting facilitator, coach and trainer for over 35 years. He has served as a trustee of the NAP Educational Foundation, is a Past President of the Oklahoma State Association of Parliamentarians and has been a member of a number of NAP committees. He also is the author of Parliamentary Parallels: A Comparison of Parliamentary Sources.