

Impeachment Redux: Lessons From Getting Beat Up

Nathan Nickolaus' article from the March/April 2018 edition of The Missouri Municipal Review, "Impeachment: How Not To Get Beat Up On The Process," provides an excellent overview of the steps involved in removing an elected official from municipal office. As a city attorney who has been in the thick of three impeachment efforts, and having gotten beat up significantly in one, I have learned a few lessons that may prove valuable to other municipal attorneys.

Lesson One: It's An Elected Official

When considering impeachment, council members and city attorneys naturally are concerned with the "wrongs" perpetrated by the wayward member and the manner by which those wrongs might be righted. This may be especially true if the attorney and council have been in office for some time, and the wayward member is disrupting the council's customs and practices. However, ultimately in most cases, a majority of the city's voters have decided to put that member in office. Impeachment, while a lawful tool, strikes at the heart of this democratic process; it allows a select few to undo that which has been done by the many. It is a very serious step to take, and it should be approached cautiously, without passion or prejudice, and for the right reasons.

Lesson Two: What Are The Right Reasons?

"Without passion or prejudice" essentially means moving forward



as objectively as possible. A council should not be allowed to undermine the electorate's will simply because of differing personalities or adverse politics. It is critical, at the outset, to objectively assess whether the offending member's behavior presents actionable grounds for impeachment.

As Nickolaus noted in his article, Missouri case law provides guidance in assessing the grounds for impeachment, but the law is helpful only in the abstract. The go-to impeachment case in Missouri, *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52 (Mo. App. 1990), establishes parameters for assessing the grounds for impeachment in a third-class city. These same parameters would apply to fourth-class cities, and

they would also serve to inform the process for charter cities, although a city's charter may specify differen

According to Fitzgerald, the grounds for impeachment must:

- specifically relate to and affect the administration of the office;
- be of a substantial nature that directly affects the rights and interests of the public;
- be limited to objective reasons that reasonable people, regardless of their politics, can agree would render the office holder's performance ineffective; and
- constitute acts of misfeasance (the improper performance of a lawful act), malfeasance (the performance of an act outside of the actor's lawful authority), or nonfeasance (the failure to perform a required duty) in office.

In theory, these parameters make perfect sense. In practice, they must be applied to the facts of each particular case. In some cases, the

acts of complaint may have been committed in a purely private context, or before the actor was elected. Such acts are not related to the office itself or its performance, and they cannot serve as grounds for impeachment. In other cases, the offensive act may be so extreme that impeachment is the obvious remedy such as using the office to embezzle public funds. In many, and, perhaps, most cases, the suspect council member's actions may be offensive, disruptive, ineffective or in violation of the council's established protocol, but do they satisfy the legal criteria for removal from office? To answer that question, outside help is required.

Lesson Three: Hire A Special Prosecutor

To make an informed, dispassionate choice on whether to move forward with an impeachment, at least in the hard cases, an independent lawyer is needed. Your city attorney is more than capable of calling the balls and strikes

on the easy cases, but there are several reasons to hire outside counsel for the hard ones.

To start, your city attorney may have a conflict. The city attorney works closely with the mayor, council and staff, and those relationships may well predispose the attorney to the perspective and will of these city officials at the cost of an independent, dispassionate assessment of the situation. Also, since the attorney presumably experiences the same or similar difficulties as others in dealing with the contrary council member, the attorney could be a witness at the impeachment hearing. These circumstances can lead to flawed judgments, or at least, questions of partiality.

City attorneys, beware! You may be utterly convinced in the rightness of the decision to impeach, and your loyalty to a city council and staff may be admirably deep. You may be aware of the financial cost of a contested impeachment using outside help and

confident in your own ability to see the process through. However, these virtues can turn to vices easily enough if you permit them to invade your decision-making. The attorney who spearheads an impeachment can be confronted with challenges unknown and unlooked for, and the attorney must respond to those challenges within the factual and legal context of the proceedings without concern for personal desires or sensitivities or those of others. To do otherwise risks your own reputation as well as the successful prosecution of the case.

Hire an outside lawyer as special prosecutor, with a fresh set of eyes and ears and an independent mind, to investigate the alleged bad acts; to apply the law to the known facts; to assess the legal propriety of an impeachment; and to recommend to the city council whether the impeachment of the suspect offender is legally justified. After receiving that recommendation information, the council can then choose to abandon

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any further proceedings or to direct the special prosecutor to draw up and move forward with articles of impeachment.

Lesson Four: Do Not Hide The Ball

If you are confronted with a colleague's bad acts, you likely will speak with your fellow council members, and perhaps your city attorney, outside of the public eye. Impeachment, after all, is a drastic step, and a council member would understandably want to be on sure ground, both legally and politically, before going public. The desire for secrecy may be further fueled by the electoral popularity of the offending member. While there is nothing illegal about these preliminary conversations, provided they do not violate the Missouri's Sunshine Law, take care to address concerns publicly.

This is not to say that you should not meet in closed session with your lawyer(s) for legal advice, but having resolved to consider the possibility of impeachment, you must inform the public of the problem and allow the public to be heard on the question. The council must be open to the public's input and have an open discussion about moving forward. Without a public process, the suspect member can claim to be the victim of a conspiracy, and the member's supporters may lash out at the council for "railroading" the member. Such claims inevitably distract everyone from the central question of whether the member's actions merit impeachment; and they can be used to attack the fairness of the process, regardless of its legality.

Lesson Five: It Is Okay To Have An Opinion; It Is Not Okay To Have A Closed Mind

A note about fairness: the council's decision to levy impeachment charges against a member, and then try the member at an impeachment hearing, naturally raises the question of council bias. The suspect member, or his or her supporters or the media, may very well claim that the process is a sham, because

the council has already made up its collective mind. But the law recognizes that the act of bringing impeachment charges does not disqualify a council member from sitting in judgment on those charges.

It is a simple truth that the elected officials who judge the merits of an impeachment are often the very people most intimately aware of an offending member's behavior. Naturally they will have some familiarity with, and may have even come to a preliminary conclusion about the guilt of the charged member. The law still permits these people to sit in judgment, provided they have not reached an unalterable conclusion that the charged member has committed the acts in question and should be removed from office. If a member of the board of impeachment is incapable of fairly weighing the evidence at the hearing, that member must be disqualified from participating in the process. Absent disqualification for bias, a council member can sit on the board of impeachment, regardless of his or her preliminary conclusions.

It is also important to understand that the process does not end with the impeachment hearing. The charged member, if removed from office, may appeal to the circuit court, and the issues raised before the court may include whether a particular member or members should have been disqualified for bias and whether the evidence presented at the hearing supports the impeachment decision. In other words, if convincing evidence of disqualifying bias exists, or if the record facts do not support the impeachment charges, the circuit court can reverse the impeachment and restore the impeached member to office.

While the court's protections can lead to frustrating delays and considerable expense, they remain available to an impeached official. The impeachment process is thus designed to provide a charged member with a full and fair opportunity to be heard, even in the face of preliminary conclusions of guilt by the members of the board of impeachment.

Lesson Six: Hire A Hearing Officer

A capable hearing officer can advise and guide the council through the thicket of issues that can arise when sitting as a board of impeachment. The officer can rule on discovery and other preliminary pre-hearing matters; preside over the impeachment hearing; rule on procedural and evidentiary issues during the hearing; document all motions and corresponding decisions; and ensure that the record of the impeachment hearing is properly preserved in case of an appeal to the circuit court. In sum, an experienced hearing officer is an essential and critical role in the impeachment process.

Conclusion

The impeachment of an elected official is a serious and complicated business, made only more so when the charges are not capable of obvious resolution and when the targeted official has popular support among the electorate. To wade through this process, consider hiring an independent special prosecutor and an independent hearing officer to guide the council, sitting as a board of impeachment, through the factual and legal morass. Always remember that an impeachment should be pursued openly, and with appreciation for the seriousness of the action – the removal by a few of one who was elected by the many. Good luck! 🍀

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