Contending with Obstruction Advocacy:
Dealing with Difficult and Sovereign Defendants
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Along the Gulf Coast, when speaking of hurricanes, we talk not about "if" but "when." The same applies to our individual opportunity to contend with an unreasonable or difficult defendant. If you hang around long enough, you will have to contend with one or more defendants who are unreasonable, difficult, or both.

What makes contending with a defendant difficult? It could be something as easy as unfamiliarity with the judicial system or something as difficult as anger management issues, an inability to understand the process, or an inability to understand and adhere to the required procedures. In the municipal court system, we encounter a large number of people that will necessarily include representation of all socio-economic groups, religions, political affiliations, and just about everything else you can think of. So, it is an eventuality that someone will appear who has an ideological objection to the judicial system.

We must remember that whether difficult, unreasonable, sovereign, or otherwise, a defendant is a defendant and, for prosecutors, our interactions with all defendants are governed by the Texas Disciplinary Rules of Professional Conduct. Rule 3.09 is of particular interest:

> The prosecutor in a criminal case shall:
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> (a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
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> (b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial, or post-trial rights;
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> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

> (e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Subparagraph (c) is of particular importance when dealing with a defendant who has a diminished capacity to understand either the procedures or the judicial system in general. Comment 4 to Rule 3.09 is instructive:

> Paragraph (c) does not apply to any person who has knowingly, intelligently, and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial, and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

Of particular importance are the words in the first sentence referencing "knowingly and intelligently," especially as applied to the few circumstances when conviction of a Class C misdemeanor may carry long term consequences (such as theft or assault–family violence). There is a fairly large body of law, both state and federal, weighing in on when, under a large number of factual variations, a defendant's action is knowing, intelligent, or voluntary.[i] Given the number of defendants a municipal prosecutor sees, it would not be difficult to unintentionally guide a defendant to a plea when the defendant cannot intelligently do so. In spite of the numbers, one should be diligent in assessing whether or not there are signs that a defendant may not have the capacity to make an intelligent decision.

Additionally, Article 45.201(d) of the Code of Criminal Procedure instructs that "it is the primary duty of a municipal prosecutor not to convict, but to see that justice is done." This applies to all defendants, no matter how irritating or even contentious that defendant might be.

That is the backdrop under which municipal court prosecutors must work, including when prosecuting difficult defendants.

Identifying Sovereign Defendants

So who is a "sovereign defendant" and from whence do these persons arise? First, unlike the defendant who either doesn't understand, or lacks capacity to understand, the sovereign defendant *usually does* understand both the procedures and the system. Moreover, the

sovereign defendant can be, and frequently is, both difficult and unreasonable. Knowing something, including a little history, about what makes a sovereign defendant helps in working through the issues that will invariably arise when you encounter one. Judge Frank Easterbrook, now the chief judge for the United States Court of Appeals for the Seventh Circuit, did an excellent job succinctly setting out who is a sovereign defendant when he opined that "[s]ome people believe with great fervor preposterous things that just happen to coincide with their self-interest."[ii]

In all likelihood, sovereignty issues have existed since the beginning of law—after all, if "the King can do no wrong," then why not attack the words and acts that confer jurisdiction over a person. *If I'm not your subject, then you have no jurisdiction to deal with me.* In the United States it took an act of Congress, followed by state ratification, to really begin the onslaught of fringe groups. It appears that upon the passage of the 16th Amendment, which allowed the establishment of an income tax, various "sovereign" and other related arguments began to take on an art form of their own. In fact, you may find that some of the contentions raised by various tax scofflaws are quite similar to what is presented in municipal courts in response to traffic citations. In Texas, and now elsewhere, we can also add those who believe that Texas was not properly annexed to the United States–although how this would legitimately affect adherence to traffic laws is a bit of a stretch. Then again, this is where Judge Easterbrook's words ring true.

This, then, is the decisive factor that sets out a sovereign defendant from one who is merely difficult. It is the adherence to an ideology, no matter how irrational, that is the determining factor. The nature of the ideology may not be important to municipal court proceedings, but early recognition may help avoid pitfalls as well as possibly signal the need for additional security.

Early on (pre 1960's), the anti-establishment groups tended to fall into one of two categories. First, there were those who believed they weren't citizens of the United States (or of a particular state), and thus were not subject to the laws of the state. Somehow these adherents did not believe that the 14th Amendment defined citizenship ("[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside").

The second group objected to jurisdiction based on religious or moral grounds. People have attempted to use the 1st Amendment to support a wide variety of arguments against various laws that they do not support. Even though the courts struggle with the contours of religious protection, they have been quite clear about use of the 1st Amendment to circumvent purely secular laws. Stymied on this front, those bent on gaming the system looked to other ideology.

Nevertheless, patriot arguments continue to be raised, frequently in a fashion that many would label as “paper terrorism”–acts of filing a barrage of motions, harassing lawsuits, and bogus documents generally accompanied by bizarre legal, or more accurately “pseudo legal,” language and argumentation. What you will see, as a common theme, is that a non-violent “refusal to participate”–coupled with just enough knowledge to muck things up–results in a frustrating series of interactions.

However, beginning in the late 1960s, a number of right-wing fringe groups formed that questioned the authority and nature of the federal government. Most grew out of a recently emergent right-wing tax-protest movement; arguments about the illegitimacy of income tax laws were easily expanded or altered to challenge the legitimacy of the government itself. The most important of these groups was the *Posse Comitatus*, which originated in Oregon and California around 1970.

Members of the *Posse Comitatus* believed that the county was the true seat of government in the United States. They did not deny the legal existence of federal or state governments, but rather claimed that the county level was the "highest authority of government in our Republic as it is closest to the people." The basic *Posse* manual stated that there had been "subtle subversion" of the Constitution by various arms and levels of government, especially the judiciary. There was, in fact, a "criminal conspiracy to obstruct justice, disfranchise citizens and liquidate the Constitutional Republic of these United States."

The Posse wanted to reverse this subversion and "restore" the Republic through (1) unilateral actions by the people (i.e., the *Posse*) and (2) actions by the county sheriff. The sheriff, they argued, was the only constitutional law enforcement officer. Moreover, his most important role was to protect the people from the unlawful acts of officials of governments, like judges and government agents. Should a sheriff refuse to carry out such duties, the people (i.e., the *Posse*) had the right to hang him. In fact, the two most prominent *Posse* symbols became a sheriff's badge and a hangman's noose.

This particular thinking, which was generally benign, mostly died out in the early 1980s. Some of the ideas, though, were reborn in varying groups who also took on a new style of protest involving paper terrorism–and in some cases even criminal terrorism. In the wake of Ruby Ridge (Idaho, 1992) and Waco (1993) there has been a resurgence of this alternative government movement.

Although the background details may not have been well publicized, everyone knows the fate of a couple of the recent adherents to such pseudo-legal ideology. In April 1992, an angry resident of Sanilac County, Michigan, wrote a letter to the Michigan Department of Natural Resources stating that he was no longer a “citizen of the corrupt political corporate State of

Michigan and the United States of America." He further stated that he was answerable only to the "common laws" and thus expressly revoked his signature on any hunting of fishing licenses, which he viewed as contracts that fraudulently bound him to the illegitimate government. This individual subscribed to an unusual right-wing anti-government ideology whose adherents are now increasingly plaguing public officials with a variety of tactics designed to attack the government and other forms of authority. They call themselves constitutionalists, freemen, preamble citizens, common law citizens, or non-foreign/non-resident aliens, but most commonly "sovereign citizens." Earlier it was mentioned that knowing who you are dealing with may have security implications. Well, the Michigan resident who adhered to this ideology was Terry Nichols. Unfortunately, he is not the only violent adherent to this anti-government ideology.

More recently, another adherent to the sovereign citizen ideology made the news. Sovereign citizen Jerry Kane, who frequently travelled the country with his son Joseph, holding seminars in which he would teach his anti-government conspiracies and pseudo-legal solutions, immediately exited his car at a traffic stop, opened fire, and killed two West Memphis police officers. An hour later, Kane and his son were killed in a Wal-Mart parking lot shoot-out. This was, perhaps, a culmination of the rise in sovereign citizen activity that occurred during 2009-2010. The problem has attracted the attention of the FBI who now lists some of these groups as terrorist organizations (anarchist extremism, sovereign citizen extremist movement, and various "militias"). Sovereign citizens (when in court, defendants) are not usually adherents to violence, but frequently are well versed in fraudulent techniques–and in this regard can cause concern for the court system.

Obstruction Advocacy: Designing Procedures to Contend With Those Who Practice Such Tactics

If there is one thing that a sovereign defendant, particularly one that practices "paper terrorism," can successfully accomplish it is to find and exploit any kink or hole in municipal court procedures. The smoother the system runs, the less likely it is that some difficult or sovereign defendant can successfully exploit the system to his advantage. Many of these sovereign defendants are familiar enough with the system to work it, especially using both discovery requests and open records requests to create additional work.

In real estate, everyone has heard the mantra that value is based on location, location, location. In dealing with difficult defendants, especially the sovereign defendant, the mantra should be communication, communication, communication. The Judge, the clerk, and the prosecutor all need to be critically aware of the situation–to the extent allowed under ethical guidelines (i.e., without case specific *ex parte* communication). Although a sovereign defendant may be a "crackpot" or any other ideological epithet we can think of, in order to avoid problems we need

to critically, rather than dismissively, address their spurious motions and pleadings. The reason behind the last statement is that no matter how off the wall the pleadings appear on the surface, there are frequently a few nuggets that need to be properly addressed. If not addressed, then the court might appear biased and a legitimate basis for a complaint may arise (and sovereign defendants have a penchant for filing complaints with the State Bar).

From the prosecution standpoint this is essential. You may be flooded with motions, several at a time, some of which appear–and for the most part are–preposterous on their face. That does not mean, however, that such motions can be ignored. One tactic that I have seen is to include, within several motions, the same requests for relief. For example, one sovereign defendant filed a Demand for a Court of Record (this was filed in a non-record municipal court) along with a Motion for Fair and Impartial Trial. Looking at the two motions, both by title and first page, one would think that the Demand for Court of Record should be denied and the other for Fair and Impartial Trial, granted. In this case, if that had been done, the Court would have denied a demand for a court of record in one motion but granted it in the other (as the request appeared in both motions). The lesson is that, as a prosecutor, you *must* read all motions and respond appropriately.

An appropriate response could be written or oral, depending on the court and its procedures. Appropriate response does not necessarily mean crafting a response to every little issue raised in each motion (and I frequently combine motions in a single response, as they generally raise closely related arguments). The purpose of a response is to assist the court in getting to a plea (or trial, if the defendant refuses to plea, which is not at all unusual). Responding to motions filed by sovereign defendants is a balancing act, particularly during a hearing where you are balancing the needs of the court with the potential anger and frustration of the defendant. Over-litigating can be as detrimental as being under-responsive. Just remember, you are dealing with a defendant who does not see the facts in a realistic setting; in other words, you are dealing with someone who firmly believes that one plus one does not equal two. That person can't be convinced otherwise, so there is no use in trying.

Sovereign defendants also seem to have a penchant for challenging the authority of various court officers to perform their duties. This is particularly so with regard to prosecutors.

Before delving into challenges to prosecutorial authority, let us first look at our ethical duties, as lawyers, to the judicial system and those served by it, even those who challenge the very right to be brought before the court. The Preamble to the Texas Rules of Disciplinary Procedure states, in relevant part:

> (1) A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as

> guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.
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> (4) A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

So when a sovereign defendant files a motion stating that you, as prosecutor, don't have the authority to prosecute and you are committing a "fraud on the court," how will you respond? With anger and indignation? Or will you address the legal issues and move on? What if the judge agrees with the defendant and finds that you don't have the authority (and this is remotely possible, particularly under hired-counsel practice)? How will you conduct yourself?

When it comes to prosecutorial authority, or for that matter the authority of the judge or clerks, sovereign defendants frequently file open records requests for the current oath of office for all court personnel. Without indulging in the argument as to when an oath is required, (and with respect to prosecutors there is some room for argument as to if, under certain circumstances, one is required at all) this is an easy fix, before it becomes an issue. To have new oaths for each court term, and for each new employee, is easy–and there is no harm in having one in cases where one is not required. I haven't met a mayor yet that balked at issuing an oath–it's just one of those ceremonial duties that mayors love to perform. Once given, file it with the City Secretary, and the issue is over. More importantly, even if the judge's oath was not current, it can be cured at any time before final judgment.[iii]

The other challenge to authority that I have seen arises from a parsing of the Code of Criminal Procedure. In these cases the sovereign defendant reads Articles 2.01 and 2.02 to say that only a district or county attorney can prosecute criminal cases. This reading ignores Article 45.201 that specifically refers to prosecution in municipal courts.[iv] And with respect to appeals taken to the County Court, "the appellate court lacked jurisdiction over defendant's challenge to his speeding conviction based upon his assertion that the *city attorney* should not have prosecuted his case instead of a county attorney based upon the wording in [Article V, Section 21 of the Texas Constitution] where defendant's fine was less than the jurisdictional amount and his constitutional challenge was not based upon the substantive law violated as required by [Article 4.03 of the Code of Criminal Procedure or Section 30.073(a) of the Government Code]."[v]

If dealing with spurious and obstructive motions is not enough, there may be other times where the prosecutor's awareness may be critical, or where other court personnel may request your assistance. There exists a wide array of websites, seminars, and other activities geared to assist sovereign defendants in their activities. With the advent of cheap, high quality, color laser printers and access to a variety of equipment that can manufacture (fairly inexpensively) anything from a license plate or a vehicle registration certificate to a driver's license, you can expect to occasionally see documents that are not what they appear to be.

Other areas of municipal work can be affected by adherents to various sovereign citizen theories. Some have been known to move into vacant houses, both as squatters and also with filing fraudulent law suits to attempt a gain ownership. Some still file fraudulent liens against municipal employees (e.g., judge, prosecutor, police chief, mayor), particularly after an unsuccessful trial in municipal court. These situations can create problems for the city, police department, and their legal counsel.

Sovereign defendants, in spite of the fact that such behavior has been criminalized, file liens and bogus lawsuits against prosecutors, judges, mayors, council members, and other city officials. So when you think a case is over, it may not be; years later you may be dissolving bogus liens–but at least the law has made this much easier to accomplish.

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For more information, especially a good listing of "idiot legal arguments" along with case law, visit:

www.adl.org/mwd/suss1.asp

and for a list of cases to use against sovereign citizen arguments, visit:
www.adl.org/mwd/useful.asp.

If you want to follow the "latest" on some of these groups, a couple of which are now officially considered domestic terrorists, see:

www.fbi.gov/news/stories/2010/april/sovereigncitizens_041310

www.fbi.gov/stats-services/publications/law-enforcement-bulletin/september-2011/sovereign-citizens

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[i] See, e.g., *Williams v. State*, 252 S.W.3d 353 (Tex. Crim. App. 2008).
[ii] *Coleman v. Commissioner*, 791 F.2d 68, 69 (7th Cir. 1986).

[iii] *Ex parte Dorsett*, 2006 Tex. App. LEXIS 8134 (Tex. App.−Fort Worth Sept. 14 2006) (The court held that a defendant was not entitled to habeas relief from a conviction and fine by a municipal court for a traffic violation; although the municipal judge did not have a current oath of office on file when a pretrial hearing was set, the final judgment was not void because the judge took a new oath before signing it). With respect to the prosecutor, the San Antonio Court of Appeals has held that the State's notice of appeal invoked the court's jurisdiction even though a "special prosecutor," rather than a district attorney signed it, and although the order of appointment said "special prosecutor," the prosecutor was, in substance, an attorney pro tem with all the powers and duties of the regular prosecuting attorney. Cases in which trial judges failed to timely file their anti-bribery statement supported the view that the prosecutor's delay in filing the oath with the trial court clerk was a mere irregularity that did not deprive the prosecutor of his authority to act as attorney pro tem. *State v. Ford*, 2004 Tex. App. LEXIS 6178 (Tex. App.−San Antonio July 14 2004), opinion withdrawn by, substituted opinion at 158 S.W.3d 574 (Tex. App.−San Antonio 2005).

[iv] City attorney or his deputy may represent the State in a criminal proceeding in municipal court without violating either Article V, Section 21 of the Texas Constitution or Section 44.157 of the Government Code. *Redwine v. State*, 2000 Tex. App. LEXIS 2494 (Tex. App.−Dallas April 17, 2000).

[v] *Aaronson v. State*, 779 S.W.2d 472 (Tex. App.−El Paso 1989).