

**JUST SAY NO:  
SURVIVING AND THRIVING  
FOR SMALL FIRMS AND SOLOS  
IN THE 21<sup>ST</sup> CENTURY**

**DAN POZZA  
239 E. Commerce  
San Antonio, Texas 78205  
(210) 226-8888 – Phone  
(210) 222-8477 – Facsimile  
E-mail address: [danpozza@yahoo.com](mailto:danpozza@yahoo.com)**

**DAN POZZA**  
**239 East Commerce Street**  
**San Antonio, Texas 78205**  
**(210) 226.8888 (Phone)/(210) 222.8477 (Fax)**  
**danpozza@yahoo.com**

## **EDUCATION**

B.A., Philosophy, The University of Texas at Austin (1975)  
J.D., The University of Texas at Austin (1978)  
M.A., Philosophy, The University of Texas at Austin (2001)

## **PROFESSIONAL ACTIVITIES**

Sole Practitioner, San Antonio, Texas  
Board Certified, Texas Board of Legal Specialization:  
Civil Appellate Law, Civil Trial Law, Personal Injury Trial Law  
President, San Antonio Bar Association (1995-1996)  
Certificate of Merit, State Bar of Texas (2004)  
Sustaining Life Fellow, Texas Bar Foundation  
Texas Board of Law Examiners (2003-2013)  
Director, State Bar of Texas (1997-2000)  
Oversight Committee, State Bar of Texas, *Texas Pattern Jury Charges* (Chair 2003-2007, Member 2007-2013)  
State Bar of Texas, *Texas Pattern Jury Charges*, Vol. 3 Committee (1988-2003)  
Litigation Section, Litigation Council, State Bar of Texas (1989-1995)  
School Board, Antonian College Preparatory Catholic High School (1987-1990)  
Board of Directors, Bank of Leon Springs (1986-1990)

## **LEGAL PUBLICATIONS AND PRESENTATIONS**

*Responsible Third Parties: New Trends*, Advanced Personal Injury Law Course 2011, State Bar of Texas (August-November, 2011)  
*Proximate Cause Redefined: The Controversy Over "Substantial Factor"*, Webcast, State Bar of Texas (April 20, 2011)  
*Responsible Third Parties*, 23rd Annual Advanced Evidence and Discovery Course, State Bar of Texas (May, 2010)  
*Just Say No: Surviving and Thriving for Small Firms and Solos in The 21st Century*, State Bar College Summer School 2008 (July, 2008)  
*Surviving and Thriving: (Solo Practice and Small Firms)*, 24th Annual Advanced Personal Injury Law Course (July-August, 2008)  
*Top Ten Trial Tactics To Do or Not To Do*, Prosecuting or Defending a Trucking or Auto Accident Case (September, 2007)  
*Corporate Representative Depositions*, 20<sup>th</sup> Annual Advanced Evidence and Discovery Course (May, 2007)  
*PJC Plain Language Project*, San Antonio Appellate Practice Section (January, 2007)  
*The Rhetorical is Ethical: A Defense of Rhetoric and Lawyers*, 11<sup>th</sup> Annual UT Insurance Law Institute (December, 2006)  
*Jury Charge Perils and Dilemmas*, 30<sup>th</sup> Annual UT Page Keeton Civil Litigation Conference (October, 2006)  
*Course Director*, 2006 State Bar Advanced Personal Injury Law Course (Summer, 2006)  
*Jury Charge Perils and Dilemmas*, 16<sup>th</sup> Annual UT Conference on State and Federal Appeals (June, 2006)  
*Course Director*, 2005 State Bar Advanced Civil Trial Course (August–November, 2005)  
*Jury Charge – Back to the Future*, 28th Annual Advanced Civil Trial Course (August–November, 2005) (co-author, panel chair)  
*Methods & Mechanics of a Successful Mediation*, 21st Annual Advanced Personal Injury Course (July-August, 2005)  
*Dead on Arrival: Advising When They Don't Have a Cause of Action*, State Bar College (July, 2005)  
*The Rhetorical is Ethical: A Defense of Rhetoric and Lawyers*, 20th Annual Advanced Personal Injury Law Course (August, 2004)  
*Evidence and Discovery in the Summary Judgment Process*, Advanced Evidence and Discovery Course (March-May, 2002)  
*New Discovery Rules*, Panel Discussion, University of Texas School of Law (June, 1999)  
*Tort and DTPA Appeals*, Advanced Civil Appellate Practice Course, Panel Moderator (September, 1998)  
*Jury Charge: Preservation of Error, Submission Practice After Tort Reform and Inferential Rebuttal*, Practice Before the 4th and 13th Courts of Appeals (May, 1997)  
*Court's Charge Update*, 19th Annual Advanced Civil Trial Law Course (August, 1996)  
*Court's Charge Update*, 12th Annual Advanced Personal Injury Law Course (July, 1996)  
*Court's Charge Update*, 12th Annual Litigation Update Institute (January, 1996)  
*Court's Charge Update*, 11th Annual Advanced Personal Injury Law Course (June, 1995)  
*Court's Charge Update*, 11th Annual Litigation Update Institute (January 1995)  
*Court's Charge in Auto Collision Cases*, Preparing, Trying, and Settling Auto Collision Cases (October, 1992)  
*New Developments in the Pattern Jury Charge*, 8th Annual Advanced Personal Injury Law Course (July, 1992)

**TABLE OF CONTENTS**

I. THE MOST IMPORTANT WORD IN YOUR LAW PRACTICE: NO ..... 1

II. BEWARE THE CLIENT WHO CLAIMS TO WANT ONLY JUSTICE ..... 1

III. ANECDOTAL SURVEY ABOUT CLIENTS FROM TEXAS LAWYERS - CLIENTS TO AVOID...2

IV. BEWARE OF THESE CLAIMS AND CAUSES OF ACTION ..... 3

    A. Texas Tort Claims Act ..... 3

    B. Intentional Infliction of Emotional Distress (The “Gap-Filler” Tort).....5

    C. Negligence in the Emergency Department.....5

    D. Malicious Credentialing in the Hospital Setting .....6

    E. Defamation Torts.....6

V. ANECDOTAL SURVEY ABOUT CASES FROM TEXAS LAWYERS ..... 7

    A. Cases to be Avoided.....7

    B. Cases Not to be Avoided.....7

VI. ARBITRATION (THE *OTHER* CIVIL JUSTICE SYSTEM) ..... 7

## **I. THE MOST IMPORTANT WORD IN YOUR LAW PRACTICE: NO**

It is no easy thing to tell a potential client “no;” that you do not accept employment in their case when the rent’s coming due and the phone hasn’t been ringing. But as we all know, and probably continue to learn, taking another bad case is no path to success. It is not unlike the contractor who keeps underbidding and losing money on jobs. When asked what he’s going to do to turn things around, says “I guess I’ll make it up in volume.” Taking bad cases also violates the Rule of Holes: When you find yourself in a hole, don’t keep digging.

So as counter-intuitive as it might seem, the most productive and moneymaking word in your law practice is actually the word “No.”! You will never be productive with unproductive work.

Good Complaints:

- I am very busy, but I am making money or
- I’m not making any money, but I have a lot of free time

Bad Complaint:

- I’m overwhelmed by work **and** I’m not making money

Before I discuss particular causes of action which are often non-productive, let’s discuss the type of client who is often non-productive regardless of how good the facts and law are pertaining to his or her particular claims.

## **II. BEWARE THE CLIENT WHO CLAIMS TO WANT ONLY JUSTICE**

A lawyer with any social skills whatsoever will immediately recognize the client who is future trouble. Remember: any client who is willing to hire a lawyer to file a lawsuit is willing to hire a lawyer to file a lawsuit against his or her former lawyer. In other words, one practices defensively. You must remember a plaintiff’s lawyer is always the defendant of last resort. There are a number of clients who do not mind employing that last resort.

An early indication of trouble is the client who comes into your office and swears all they want is justice. They may say they want only justice while pounding their fists on your desk. They may mumble they want only justice as they sit weeping in your client chair. It is not the method of the delivery of the statement that is the problem, but rather the attitude that comes with such a statement.

In my experience I have found that those clients who claim to want only justice naturally believe that they have been deprived of justice. They feel victimized. They are inevitably angry (manifested passively, aggressively or both as the situation warrants). They believe that something (perhaps a lot of things) is due them. They are frustrated that the world at large does

not seem to appreciate the extent of their deprivation and their obvious entitlement to restitution or other redress.

Now as my first mentor used to say: a very bad client can have a very good lawsuit. Although this is true, one needs to be careful in balancing the quality of the client's case with the lack of quality of the client. I think it truer still that a deserving client can do more for his or her lawsuit than almost any other fact about the case. A jury will empathize with the deserving client. Justice-seekers rarely come across as deserving.

Occasionally justice-seekers can be reached through appropriate consultation with their lawyer. When they give you the line that all they want is justice, you need to give them a practical and reasonable definition of justice. I tell such potential clients that in wanting justice they may be more right than they know. I tell them that justice is a two-way street. That justice is something that is deserved, rather than given.

There are things one must do to entitle one to justice; it is not just handed to a person (e.g., the obligation to mitigate one's damages). I also tell the clients -- that in this world at least -- there may be very few of us who qualify as having done the kinds of things that must be done in order to entitle us to receive justice. Justice is a very difficult standard and, more often than not, a desire for mercy is the better attitude to possess.

I also tell them the good news is that the other side must meet the same standard in order for it to prevail and thus obtain justice. That in the midst of the adversarial ocean into which the potential client is about to jump, it will be my obligation to ensure that the other side proves its entitlement to justice. In the mixing and matching that goes on from there, perhaps a reasonable recovery can be obtained.

If the potential client is really with the program at this point and if that potential client has a good case, it may be reasonable to take on that case and that client. If, on the other hand, the potential client is clearly not with the program, rejecting the client (and potentially that client's really good case) is the right thing to do. Now if it is a really terrific case, you may want to increase your liability limits and go ahead and take the plunge yourself.

### **III. ANECDOTAL SURVEY ABOUT CLIENTS FROM TEXAS LAWYERS - CLIENTS TO AVOID**

- Anyone who comes across as "entitled."
- Google your client.
- Find out what the client's expectations are from you.
- What are the client's goals? How will the client know you were successful with their case?

- Does the client have clean hands? Ask the client what the other side might claim. Tell the client: I can deal with most things, so long as you are totally candid with me so that I am not surprised. Surprises kill cases.
- Ask about prior lawsuits, and then find out how the client's experience was with that attorney.
- How does the client treat your staff? Make sure the client understands the roles your staff will play and that other people may handle certain functions.
- If the client complains about prior attorneys, it is a major red flag.
- If the client knows too much law (or thinks he/she does).
- If the client seem unstable in any way. A hard lesson to be learned is that you've got to pay attention to the client's relationships with others. Does the client have a controlling partner, friend, or relative? People break up. Don't depend on the client's partner for your case.
- Anyone you get "a bad vibe" from, almost regardless to the strength of his or her claim. Trust your gut.

#### **IV. BEWARE OF THESE CLAIMS AND CAUSES OF ACTION**

##### **A. Texas Tort Claims Act**

Is there anything more difficult than suing the Government? For a good general description of just how confusing and difficult it is, I direct you to Rhodes, *Principles of Governmental Immunity in Texas*, comment, 27 St. Mary's Law Journal 679 (1996).

Tort claims against the State of Texas, its agencies and political subdivisions are found in Title 5 of the Civil Practice & Remedies Code beginning at Chapter 101. The limitations are numerous.

A governmental unit in the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
  - (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
  - (B) the employee would be personally liable to the claimant according to Texas law; and

- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. Section 101.021.

If the claim is a premises defect, the governmental unit has further protections than the private citizen.

#### Duty Owed: Premise and Special Defects

- (a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
- (b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060. Section 101.022.

There are damage caps:

- (a) Liability of the state government under this chapter is limited to money damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.
- (b) Except as provided by Subsection (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.
- (c) Liability of a municipality under this chapter is limited to money damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.
- (d) Except as provided by Section 78.001, liability of an emergency service organization under this chapter is limited to money damages in a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

And there is no authorization for exemplary damages and the governmental unit it still immune to sue unless such immunity is specifically waived and abolished by statute.

There are additional limitations found in the Texas Tort Claims Act which make the possibility of successfully suing and recovering against a governmental unit questionable under almost all circumstances.

Prior to the 2003 Tort Reform Amendments, it was possible to be quite successful suing individual state employee physicians for their acts of negligence within the scope of their employment for a governmental unit. In that context, one would never sue the governmental unit where there were use and nonuse limitations, damage caps and notice requirements. Instead, one would sue the physician individually just as one would if the physician were in private practice. As importantly, in order to have qualified physicians on staff, the governmental unit would typically purchase large insurance policies for these physicians. Unless the physician was engaged in a discretionary act, that physician's acts and omissions concerning medical treatment provided by the physician were subject to the same standards as physicians engaged in private practice. We will see whether that that avenue of success is now foreclosed with the amendments reflected in Section 101.106, Election of Remedies. If only the governmental unit can be sued and thus all the limitations and defenses associated with having a defendant who is a governmental unit apply, this may effectively end this cause of action.

#### **B. Intentional Infliction of Emotional Distress (The “Gap-Filler” Tort)**

The Texas Supreme Court recognized the independent tort of intentional infliction of emotional distress, adopting Restatement (Second) of Torts, Section 46, (1965). To recover under Section 46 a plaintiff must prove: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Tiller v. McClure*, 121 S.W.2d 709, 713 (Tex. 2003) *per curium*.

But the Supreme Court has continued to remind us that intentional infliction of emotional distress is a “gap-filler” tort never intended to supplant or duplicate existing statutory or common-law remedies. *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004). Although it is a purported cause of action, it is almost impossible to win.

In *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814 (Tex. 2005), in reversing and rendering judgment in that case of intentional infliction of emotional distress, the Supreme Court noted that “for the tenth time in little more than six years, we must reverse an intentional infliction of emotional distress claim for failing to meet the exacting requirements of that tort.” *Id.* at 815. One can hear the exasperation in Justice Brister's voice as once more the court must reverse and render on a case involving the exacting requirements of that tort.

#### **C. Negligence in the Emergency Department**

One of the changes brought about by House Bill 4 in the healthcare liability context was a radical change to the standard of proof in cases involving emergency medical care. If your claim involves healthcare by a physician or hospital rendered in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a



patient in a hospital emergency department, the claimant must show by preponderance of the evidence that the physician or healthcare provider, acted **with willful and wanton negligence**.

Since we all know what the Supreme Court has done with punitive damage cases and with upholding gross negligence findings, and if this statute is constitutional, then effectively there is no cause of action for cases involving emergency medical care as defined under the statute. Texas Civil Practice & Remedies Code, Section 74.153 and 74.154.

#### **D. Malicious Credentialing in the Hospital Setting**

In Texas, by statute (Tex. Occ. Cod. Section 160.010(b)), a hospital is not liable for improperly credentialing a physician through its peer review process unless the hospital acts with malice. “Proof of malice is made more difficult in this setting because peer review communications and proceedings are generally privileged from disclosure. Since the Rules of Evidence prohibit drawing any inference from a claim of privilege in a civil case, a plaintiff must prove that a hospital acted maliciously without access to evidence of what happened, or did not happen, in the credentialing process.” *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212 (Tex. 2005). In *Romero*, the Supreme Court clarified that to prove malicious credentialing, one need only prove it by a preponderance of the evidence (although to recover exemplary damages based on that liability finding, those exemplary damages must be based upon clear and convincing evidence). The Romeros made the mistake of asking the judge for the higher burden on the liability question and (i.e., that the jury find malicious credentialing by clear and convincing evidence in order to establish liability). The trial judge tried to point out the distinction to the Romeros, but to no avail. Part of the problem for the Romeros, unfortunately, was that they held themselves to a higher standard than is required under the law and the Supreme Court was left with no choice but to review the evidence based on this higher standard.

In her concurring opinion, Justice O’Neill agreed that the “peer-review privilege prevented the Romeros from knowing actions the hospital took or failed to take to protect the public from a physician whose own former chief of staff, a member of the credentialing committee, thought was a menace to patients.” She writes separately to show that she is “deeply troubled by the head-in-the-sand approach the various hospitals and health-care professionals in this case appear to take in dealing with a drug-impaired physician. Unless health-care institutions and providers are in fact, rather than theory, vigilant and proactive in performing the critical competence analysis that the peer-review privilege was intended to promote, the purposes that prompted the privilege’s creation will prove to be illusory. Clearly, the privilege’s purposes were not served in this case.” *Id.*

#### **E. Defamation Torts**

For a private individual to prevail on a defamation claim, the plaintiff must prove that the defendant: (1) published a statement (2) that was defamatory about the plaintiff (3) while acting with negligence regarding the truth of the statement. The statements are subject to a conditional or qualified privilege. A conditional or qualified privilege is defeated when the privilege is abused, such as when the person making the defamatory statement knows the statement is false or acts for some purpose other than protecting the privileged interest. The law presumes good

faith and want of malice where a party has a qualified privilege. Summary judgments are granted all the time in defamation cases and there are few cases which ever get to a jury trial and that those that do are almost always reversed. *See Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847 (Tex. 2005).

## **V. ANECDOTAL SURVEY ABOUT CASES FROM TEXAS LAWYERS**

### **A. Cases to be Avoided**

- Any case which is subject to interlocutory review (e.g., cases where an alleged foreign defendant will see review of the ruling on its special appearance, class action, cases involving alleged governmental immunity, cases where one party alleges an applicable arbitration clause, medical malpractice cases where the report may be challenged, cases involving the appointment of a trustee or receiver, defamation cases against the media, etc.).
- Why avoid these cases? Regardless of whether the appeal is supposedly “accelerated” or not, the intermediate appellate courts and, especially, the Texas Supreme Court, have seen an exponential increase in the time it takes to handle their dockets and so an interlocutory review in the middle of a case quite often leads to a multi-year stay in the middle of the case.
- Dental malpractice cases are almost never financially feasible, even under the old law. The first thing to do is evaluate your damages. Do you have economic damages of at least \$50,000.00? Do you have future economic losses of at least \$50,000.00? Few dental malpractice cases meet this threshold. If you don’t have the damages, you might think about turning down the case. The cost in time and expense will make the case a loser to you financially.

### **B. Cases Not to be Avoided**

- Fraud and breach of fiduciary duty cases.
- Why not to avoid these cases? Many jurors, especially including many younger jurors, are strongly inclined to judge intentional misconduct much more harshly than negligent misconduct. These cases lend themselves to pursuing in a prosecutorial model and give rise to punitive damages, as well as actual damages.

## **VI. ARBITRATION (THE *OTHER* CIVIL JUSTICE SYSTEM)**

It becomes clear with each passing year that arbitration is here to stay and that it constitutes, in effect, an alternative justice system. Whether good or bad, you must be fully apprised of the extent to which arbitration is permitted to properly advise your clients on whether they have causes of action within the traditional civil justice system.

We have found out that your client may be required to arbitrate even though he or she did not sign the contractual documents which contain the arbitration clause. *In re AdvancePCS*

*Health, L.P.*, 172 S.W.3d 603 (Tex. 2005). The court said that neither the federal arbitration act nor Texas law requires that arbitration clauses be signed, so long as they are written and agreed to by the parties.

We have found out a house purchaser's adult child who brought a personal injury lawsuit against a builder to recover for asthma allegedly caused by dust from house repairs, would be compelled to arbitrate even though the plaintiff was not a party to the contract. *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005). While plaintiff "never based her personal injury claim on the contract, her prior exercise of other contractual rights and her equitable entitlement to other contractual benefits prevents her from avoiding the arbitration clause here." The list goes on, but I won't.

Arbitration is rapidly expanding into many of the contractual relationships that your clients will find themselves engaged in such as:

- the purchase of a home
- home improvements
- credit cards
- employment relationships

One might ask whether when you add up tort reform and arbitration, what significant rights remain to be resolved by a jury of your peers? At a minimum, arbitration, as it continues to expand in scope, diminishes the role of our courts and juries. One might ask how the community sets the standards when that community (our juries) is removed from disputes involving our contractual, employment and societal relationships. What happens to development of the common law? What happens to procedural fairness (e.g., rules of discovery and evidence)? **And here is an ethical question for lawyers who feel this way: Do you put arbitration clauses in your client contracts?**