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You're ready to be a business tort lawyer

Think handling business torts will be dry and boring? Fighting for the rights of small-business owners has its share of excitement—and it lets you flex your hard-won trial skills for a worthy cause.

[Matthew A. Cartwright](#)

Handling garden-variety personal injury torts and handling business torts are different in a few key ways. For one thing, business tort cases give you much better opportunities to display the full range of your trial advocacy skills because of the much wider range of factual disputes that can be involved. The drama inherent to these cases can captivate a jury's attention, since they commonly involve not just negligence but actual underhanded, intentional misconduct. And your opponents—who specialize in "business litigation"—probably have less jury trial experience than you do.

In business trials, talented and experienced civil trial lawyers can use their skills to help a different type of client—the small-business owner—get justice after being wronged.

You may be thinking, "But I don't want to represent companies. I want to represent people." You like representing the injured and the forgotten against the rich and powerful. Of course: That's the calling and the rallying cry of every trial lawyer. What you may be ignoring, however, is that business tort cases are often about the same thing.

Consider the statistics. The table below shows data collected by the U.S. Census Bureau. It lists the numbers of American businesses, large and small.¹

Employment size of enterprise Firms

Firms with 1-4 employees	2,734,133
Firms with 5-9 employees	1,025,497
Firms with 10 -19 employees	620,387
Firms with 500+ employees	16,926

Notice that there are a lot of small businesses. In fact, there are more than 4.3 million U.S. companies that have fewer than 20 employees. That is 250 times the number of big companies that have more than 500 employees.

The 16,926 big companies already have lawyers. These are banks, brokerage firms, utilities, heavy manufacturers, and auditing firms. They're the ones committing the torts against the small businesses—and renegeing on promises to them.

The ones that need you are the 4.3 million small-business owners. These are the people routinely harmed by the big companies, which are defrauding them, illegally pricing them out of business, competing unfairly with them, breaching contracts and fiduciary duties, and infringing on their patents.

The small-business owners cannot afford your opponents' hourly rates. They are comfortable with the hybrid contingent fee/hourly rate contract you suggest, and with the knowledge that your firm will advance litigation expenses.² Small-business owners tend to be risk-takers. They like you in part because they understand risk—and they know you are taking a risk when you take their case.

What kinds of cases would you expect to handle for these clients? The spectrum is wide. It ranges from simple breach-of-contract matters to claims of unfair competition, business defamation, and accounting and auditing malpractice. Cases can be about acts that are tantamount to criminal conduct, like fraud, forgery, and property theft. Civil conspiracy and racketeering claims show up often in these cases.

Any of these cases can be a natural “fit” for you. You win them by thorough discovery and skillful handling of witnesses and documentary evidence.

Showcase your skills

Knowing how to get key concepts across to a jury is critical in any trial. Master trial lawyers realize that this is often as important as knowing the law or the merits of the case.

Think about what you already know about trying cases: how to identify adverse jurors; what themes will resonate with a jury; how to present compelling demonstrative evidence; how to handle judges, from the helpful to the hostile; how to make jurors feel empowered to award full justice; how to cross-examine witnesses, and—perhaps most important—when to stop talking.

What you may not realize is how your versatility and the trial skills you’ve been developing for years will be assets in almost any business case.

Business tort trials forbid any formulaic or cookie-cutter approaches. Certainly, each personal injury case is different, but the difference between one business tort case and the next is much starker. Business cases require lawyers who are versatile, who can adapt to the unique challenges these cases present. Can you be this kind of lawyer?

You already are. You have the skills. You have the versatility, moving easily from an admitted-liability trial to one where fault is hotly contested. You have the adaptability, knowing how to parry a defense attack, whether it is a motion for summary judgment or a closing argument aimed at your client’s credibility.

What’s central to both personal injury and business tort cases is that common form of evidence: witnesses. And working with witnesses is one of your greatest skills. Your ability to sense which witnesses a jury will like and trust is a natural advantage. Your ability to convert that sense into a winning trial strategy is a powerful weapon in any business trial.

Use what you know

With injury cases, a great deal of the drama arises from the injury itself and the horrific way it happened. In business trials, the harm done is economic in nature and usually does not evoke the kinds of emotions that a severe and lasting injury does. The drama you create through your advocacy skills assumes a greater comparative significance. And there is plenty of drama to be had in business tort trials. It’s found in the conduct of the defendants.

There are two important things you figured out a long time ago about jury trials. The first is that jurors’ justifiable anger over a defendant’s unscrupulous practices is often reflected in their verdict. A defendant’s greed, dishonesty, callous indifference to others’ needs, and failure to accept responsibility strongly influence juror decision-making. Jurors also tend to react negatively to bad behavior by defense counsel at trial.³

All of these apply to business tort cases, since they usually involve intentional misconduct. Often, the merits of the case are based on the defendant’s greed, dishonesty, and callousness. You can point out instances of fraud: “So, when you wrote this internal e-mail about planning to break the contract, that was before you ever even signed it, wasn’t it?”⁴ Or highlight dishonesty and greed in a case of lender liability: “When you decided to call that loan and foreclose, you knew that the company had been in the plaintiff’s family for close to 100 years, didn’t you?”⁵

In most business tort trials, you can prove much more reprehensible conduct than in simple negligence cases.⁶ Consider two examples—a routine traffic accident case and a typical lender liability trial. Which defendant would make a jury angrier: a motorist who was momentarily distracted and rear-ended another driver, or a loan officer who deliberately decided to call in the financing on a company, knowing full well that doing so would destroy a family business that took decades to build?

Also, because business trials tend to be document-intensive, there is a greater possibility that a defendant has destroyed evidence. With lingering memories of Enron in the public mind, this intentional misconduct continues to be a reliable touchstone for juror anger.⁷

The second important thing you already know about trials is subtler but no less important: You know that jurors are affected by “availability bias.” This is the idea that the more time jurors spend listening to evidence about one party, the more time they will spend focused on the propriety of that party’s conduct, and the more likely it is that they will find fault in that conduct.⁸

For example, imagine you’re handling a trucking case where a tractor-trailer rear-ended your client’s vehicle. The defense lawyer rushes to your office with an offer to admit liability because he or she knows the resulting trial will be all about your client—not the defendant. Questions will be raised about whether the plaintiff had existing injuries before the crash, is exaggerating current complaints, or is a smoker and therefore likely to have health problems

unrelated to the crash.

It will be your client, not the trucking company, that the jury scrutinizes. Jurors might think, "I wouldn't have done that," about, say, your client's failure to show up for physical therapy appointments. They think less about the trucking company that encouraged its employees to finish their trip, even if it meant driving drowsy. You know all this, so you reject the offer to stipulate to liability (which you can do because punitive damages are at issue), and you keep the jurors' focus on the company.

In many ways, availability bias favors the business case. You can spend a great deal of time going over the actions of an opposing company officer. There is usually a lengthy chronology—and a correspondingly lengthy paper trail.

One caveat about availability bias is that your own client's conduct is often a key issue as well. Keep this in mind as you decide whether to take the case.

On one hand, the matter may be a simple breach-of-contract case where the only aspect of your client's conduct that will be scrutinized is whether he or she created some justification for the breach. On the other hand, if your claim is that the defendant's conduct destroyed your client's company, you can expect an intense inspection of every business mistake your client ever made, coupled with an impressive array of business experts to testify for the defense that your client was a terrible businessperson and never would have succeeded, regardless of the defendant's conduct. In such cases, you need to make an early and frank assessment of your client's ability to withstand this level of scrutiny, and be ready to make the judgment on whether to go forward with certain, or any, claims.

Don't fear the 'specialists'

None of your formidable trial skills would give you an advantage if your opponents had the same abilities in the courtroom. In most cases, they don't. Your opponents may be "business litigation specialists," but they are not necessarily trial experts.

By definition, lawyers who concentrate on business litigation spend their careers working for businesspeople. This has two profound effects. First, these lawyers have to speak their clients' language, read the business journals they read, and generally do the things that will endear themselves to their corporate clients. Because of this, they are often utterly at a loss when it comes to connecting with the people—not business or corporate executives, but ordinary people—who serve on juries.

Second, corporate lawyers are far less likely to have tried as many cases as you have. That's because their clients are rational decision-makers who are generally conservative in outlook and temperament and averse to risk. Fighting does not come naturally to them, but negotiation does. To most businesspeople, there is no risk as unreasonable and unnecessary as a jury trial when there is any prospect of settlement.

If you have extensive experience trying injury cases, you may find that you are light-years ahead of defense counsel in a business tort trial. Your opponent is likely to make courtroom errors that you stopped making years ago, and you can capitalize on them. This kind of advantage is impossible to measure.

Business tort clients are like any other victims of wrongdoing. They need strong, skilled advocates to defend their rights against powerful interests. They deserve the chance to have their stories told in court, on an even footing with the big corporations.

When someone else's intentional misconduct takes away their livelihood or their life savings, you should take the case.

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Notes

1. U.S. Census Bureau, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, Table 2A, Employment Size of Employer and Nonemployer Firms, 2003, at www.census.gov/epcd/www/smallbus.html.
2. See *In re Central Ice Cream Co.*, 114 B.R. 956, 958 (N.D. Ill. 1989) (noting that while the plaintiff, a bankrupt small business, borrowed funds to cover most of the litigation expenses, the plaintiff's counsel also advanced sums to make up for shortfalls).
3. David Ball, *David Ball on Damages: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases* 7 (NITA Press 2001).

4. See *Ebeling & Reuss, Ltd. v. Swarovski Intl. Trading Corp.*, 1992 WL 211554 (E.D. Pa. Aug. 24, 1992) (jury award of damages for fraud in not intending to comply with the terms of a contract at its inception).
5. See *Corestates Bank, N.A. v. Levy Bros. Co.*, 2006 WL 3478942 (Pa., Lackawanna Co. Com. Pl. Sept. 29, 2006) (jury award on lender liability claims sounding in breach of fiduciary duty and misrepresentation).
6. Because the reprehensible conduct is usually intentional, and at least recklessly indifferent to the plight of your client, punitive damages are usually in play in these cases.
7. *E.g. Lawrence Ins. Group, Inc. v. KPMG Peat Marwick, LLP*, 773 N.Y.S.2d 164 (N.Y. App. Div. 2004) (affirming denial of summary judgment in auditing malpractice case; defendant's destruction of work papers despite sudden and unexplained \$35 million reversal in company's financial position created jury question).
8. See David A. Wenner & Gregory S. Cusimano, *Combating Juror Bias*, TRIAL 30, 38 (June 2000).

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