

Q & A with Bob Clifford



Dean Gregory Mark at Clifford Law Offices in Chicago, with principal and founder, Bob Clifford.

Chicago trial lawyer and principal at Clifford Law Offices Robert Clifford (BA '73, JD '76) is a familiar figure within the DePaul community. Clifford endowed the first chair on tort law and social policy at the College of Law in 1994, which provides support for faculty research and teaching and makes possible the celebrated annual Clifford Symposium. He also serves on the DePaul University Board of Trustees and on the advisory board to the International Aviation Law Institute. In December, Chicago Lawyer magazine named Clifford its Person of the Year.

Dialogue magazine and Dean Gregory Mark recently met with Clifford and discussed the value of intellectually open debate, the future of the legal profession, and Clifford's tireless efforts to parse ethical challenges in the field.

Q. Dean Mark: About 20 years ago you funded the first Clifford Symposium. It's been going strong for two decades, and I think it's fair to say there's nothing quite like it in the world for professional or academic reputation in the sphere of tort law and civil justice. What do you see for the next two decades?

Bob Clifford: I suspect that there will still be solid issues to analyze at the symposium; that the debates about the area of tort law and civil justice and jury performance and the Seventh Amendment are still going to be in the forefront of issues in the profession. There seems to be no shortage of that now.

The symposium began with my profound belief that the efficacy and propriety of citizens exercising their rights in the justice system and civil justice system were being unfairly attacked and skewed. What I saw in the actual operational litigation in the courthouse did not square up with the hyperbolic fear mongering that goes on in advertising. And I recall vividly that in the mid-'70s, I had to go to the library to research the meaning of tort reform because I didn't know what it was—an absolutely true story. Here we are in 2013, and I literally deal professionally with tort reform every day. There seems to be an endless source of mischief for people who benefit by taking away other people's rights. And if they're hard to catch, they're hard to bring to justice, and they're going to keep on doing it.

For example, there is a trial in Texas against a drug manufacturer and a hospital. The drug manufacturer posted a separate website that jurors clearly have access to, claiming that the lawsuit itself is only about lawyer greed; contesting research that claims the drug is defective, and challenging the defendant's position about the quality of the product. The question that first comes to mind is, well, is that improper jury tampering? Is that free speech protected by the First Amendment?

I had a few discussions with ethicists who said it's a clear violation of the Model Code 3.6 on Trial Publicity and also that it trumps the First Amendment from the perspective that you can't yell, "Fire!" in a crowded theater. That's free speech, too, but you can't do it. Then it struck me as a possible symposium topic, down the line.

We've actually started something new with DePaul that goes hand-in-hand with the symposium, and that's the Clifford Seminar on Ethics. Our last event was a roaring success. We had 3,000 people. We had people at the school, another 2,800 on the web and, knock on wood, glowing reviews.

So I would love to believe that the symposia and the ethics seminars are going to continue for 20 to 40 years to come. Of course, the sad truth behind this is that it means the skullduggery I'm trying to expose will still be taking place.

Q. I think it's fair to say that since you first had to look up the meaning of "tort reform" the profession in general—but especially for trial lawyers—has come under increasing attack. Do you think that trend is going to continue, especially with the legislative manifestations that take the form of so-called tort reform?

The direct answer to your question is yes, but the effectiveness has diminished dramatically. Nowadays people recognize that maybe tort reform isn't such a good thing, and one developing dynamic is that people realize they're not the ones who benefit from these reforms.

One impetus for me pushing for the symposium was that I wanted a fair debate on issues like this. And I'm anti-cap, for example, on noneconomic damages. I'd be willing to [defend this] if you told me that the benefit of the reduction in rights was going to get to the people that it's intended to help. But not only will they not guarantee that, if you go to the seminars that are put on by the insurance industry, they specifically tell you that if you pass caps tomorrow, they won't lower premiums.

So the value of the symposium, including the DePaul Law Review component that publishes symposia papers nationally and has distribution into the public domain, is that we're showing you can have an intellectually honest discussion and debate where somebody is wrong and somebody is right. And I'm not afraid of the answers. I want people to discuss these ideas with some rigor and to challenge one another.

Q. You and a number of others transformed the field of tort law a number of years ago. That is, not only through the symposium, but also through your actions, you raised the level of discourse that surrounds what tort law means in this country. Where do you see your part of the profession going over the coming years?

I think that there will be an endless supply of participation in the communities' affairs by the trial bar.

Currently I'm in the middle of some new litigation against the food industry. It's a hot button in America for our obesity epidemic and for diabetes, and the list goes on. Yet the industry's defense thus far is not that "we're not doing it," but more like, "well, they would have bought it anyway." No harm, no foul.

So it's almost like the early stages of the tobacco litigation. They had these problems trying to sort out the damage model. But where the rubber meets the road is when the federal government steps in, because if you look at the Medicare and Medicaid expenditures throughout America, many of them are tied to these companies. The government will start stepping in and saying, "This is our money now, we, the people." And, frankly, that's kind of what I'm hoping for.

One of the companies we're investigating advertises a big foundation with a high-level of philanthropy that our investigators have been looking into—all they're doing is buying themselves BMWs. This behavior goes on, and there's a role for lawyers to be [investigating] that.

I must say, though, anecdotally, if you look at the tort litigation business across America, it's down. There are a lot of phenomena associated with that. When I started as a lawyer, there were a lot of cases involving anesthesia. And at one point, the American College of Anesthesiologists sat down, grabbed the detail on every single case in America against an anesthesiologist, and they determined the commonalities. They figured out these errors are all identical, and they started training around those things. And the number of anesthesia cases precipitously dropped. The same is true in OB/GYN.

So the point is that tort law has certainly been the instrument that has led to greater changes in safety and consumer protection, but it's also putting itself out of business.

And that's okay. I tell my lawyers there's always going to be a place for good lawyers who bring scholarship and determination to their work. If anything, the lawyers who were trail blazers in our business raised the bar on preparation and scholarship.

In this office, for example, we deal with some of the most sophisticated legal issues being debated in the courthouses today, and I'm very proud of that. There is a lot of really great writing going on here.

Q. You were known, and are still known, as a tort lawyer who deals with individuals largely. But this is a move to a class action environment. How did you make that choice?

I have deliberately built my career to be fairly multifaceted. I've tried cases involving medical malpractice, involving grain elevator explosions, airplane crashes, good old-fashioned car crashes, some product liability work. I did all of those things because I really don't want to do just one thing. So to me, one of the extensions of that mentality is to get involved in other areas such as qui tam or whistleblowing. I have gotten involved in those cases because I think that's a burgeoning area of business.



The misbranding book of business is a different cat as well—where they're saying that the FDA has exclusive regulatory power over whether we do or we do not properly label a product. But there are ways of having state law claims that are not in contradiction to the FDA regulations, and so that's how that litigation is allowed to occur.

A month or so ago, I was in Washington meeting with the head Medicare fraud representative at the Justice Department, trying to persuade him to intervene in a case that we have filed under seal. Now, what they'd rather do is allow private lawyers to litigate those cases and then once you're almost ready for trial, they say, "Okay, we'll step in now."

You get paid for that ultimately, and that's okay, but there's no question that there's a conflict. You've heard it for years and you're going to continue to hear about it, especially in this Obama administration Congress conflict: the business community feels that they're overregulated, and the consumers and the purchasers feel that they are not overregulated. And that's a democracy at work.

But there's a void in there somewhere that lawyers can fill, and I'm trying to step into those little gaps.

Q. Is that one of the issues that troubles you most in the juridical world that we're in right now, or are there other things that are more at the top of your concerns?

I'll tell you what's troubling me more than anything just from a systemic perspective is the vanishing trial. I think that's a problem for us as a society. Everything gets settled, and I'm not persuaded that that's a good thing. In the absence of a transparent jury trial system where there are known outcomes, there's no comparative ability for people to have for subsequent cases. There's no known ceiling.

Who does know those things? The payors and the insurers. So the minute you have secret settlements and you take the courts out of the equation, then you shift knowledge into the hands of the companies, and they use that against the consumers.

I can't tell you how many times, for example, I'll go to a mediation, and I'll make a settlement demand. The claims guy on the other side will say, "Well, we can't find one case out there that has that kind of money being paid on it."

And I say, 'No, you can't, because you keep them all secret.' But we happen to know about them.

Q. That is a very troubling aspect. How do you think that we as a legal community ought to approach that

We ought to ban confidentiality. Once you file an action, you cannot make it confidential. You take advantage of our courthouse. Those are our people's resources. It's the community resource. The minute you invoke the people's resources, all bets are off. Everything is transparent.

Q. There is another aspect to what you're saying, which is the topic of this year's symposium. The financing of litigation has become, I think it's reasonable to say, far more complicated over the past few decades. What are your thoughts on litigation finance?

Well, as a practical matter, I am strongly opposed to litigation finance. I'm certainly not opposed to a law firm borrowing money from a bank to finance their operations. That's not what I'm referring to. What I'm referring to is the fairly new phenomenon of companies in business trying to partner with law firms on the financing of their cases and taking a cut of the settlement. That's one category.

And the other is the cottage industry that started some time ago, where companies seek out individuals with a lawsuit or a structured settlement, offer to lend money against recovery and charge usurious rates. That is outright wrong and we do our best here to discourage that. There is a bill in Springfield to limit the interest rates on this type of loan. As you know, the Code of Professional Responsibility does not allow lawyers to loan money to clients.

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But there are banks that will meet with a client. They'll take a look at their cases. They'll take a look at what the client really needs, and they will give them nonrecourse loans at commercially reasonable, sensible rates. There aren't a lot of banks out there, but they are out there, and that's certainly something that we encourage.

People who are going to come into money are going to need an established banking relationship, and that's one of the things we're trying to foster.

Q. You and I have talked about what law students ought to do to prepare for their future. Specifically, I remember you suggesting that Evidence ought to be required. But in the environment that we're in right now, what kinds of innovative things should potential lawyers, our students, be doing to prepare for the future?

Well, I certainly still believe in that Evidence component, because without it, you don't know how to guide yourself through what is or what is not relevant. Lawyers, in exercising judgment, need to evaluate relevance, and certainly mastering the Rules of Evidence helps you do that, and it's a skill that's transferable to many components of the decision-making process.

The second thing, of course, is that to the extent that we can inject some business components into the curriculum, I know there's a trend to do that in some schools, and I certainly endorse that. We see now that the job market for practicing lawyers is weak, and yet I'm a firm believer, as I think you are, that a law degree is an incredible asset no matter where you get to use it. It would help for those people who are going to be looking to nontraditional legal work to have some business background that is useful to them.

Even the notion of the psychological component of the practice is very valuable. Whether you're in business making judgmental decisions or you're in a courtroom, you're oftentimes dealing with people who are looking to you because their own minds are not anchored or stable; they're into the emotional moment. They need somebody who is anchored and who is strong and can help them get through something. So understanding the psychology of decision-making is a valuable asset.

Q. Chicago Lawyer recently named you Person of the Year. What I found particularly heartwarming in that issue was the letter you wrote to your daughter, who is a graduate of our law school. I enjoyed this not only at the personal level because we share daughters of roughly the same age, but also at the professional level because of your endorsement of the profession under fire without self-aggrandizing it.

What do you say to those who predict that our field will splinter apart, that huge amounts of work will disappear into electronic databases and abroad, and what's left will become increasingly stratified? It's not a pretty picture for a profession that's been the architect of what's good about this country for 200 years.

What you say is so true. If you look at the founders of our great nation, the signatories to the Bill of Rights, for example, so many of them were lawyers.

So certainly there are changes taking place in the profession, and I am stunned by exponential change in the litigation arena and the impact and import of technology in such a short period of time. Yesterday I dealt with a law firm that doesn't have legal assistants. Every lawyer types at least 80 words per minute, if not more. They do all of their own documents. They do all of their own electronic filings. And that's where the business component comes in, because this technology is changing the world.

But there will always be a need for the legal mind, and there is in fact a value to that legal mind. The students that are going to survive are the ones that are led by sharp guys, like you and Father Holschneider, who are going to have a way of figuring out how to make it work because it's a challenge.

I don't claim to have the answers, so I'm just doing my little part with the symposium. And I'm very pleased with the product. There is an endless flow of topics to discuss. We're not going anywhere. 