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CLIFFORD LAW OFFICES

SHOWDOWN ON GROUND ZERO

At the center of a huge 9/11 lawsuit—a \$1.2 billion property damage case—is the Chicagoan Robert Clifford, one of the top aviation lawyers in the nation



SITTING AT A TABLE IN A HOTEL conference room in Portland, Maine, the Chicago personal injury attorney Robert Clifford studied the man who had once famously—or infamously—stared into the eyes of the devil.

On this day in November 2006, Clifford was deposing Michael Touhey, a former US Airways ticket taker who had checked in Mohamed Atta and a second al-Qaeda terrorist in the early morning of September 11, 2001. Hours later, Atta piloted a connecting flight into the World Trade Center. Questioned by Clifford, Touhey recounted how the two terrorists approached his counter in a rush to catch the 6 a.m. flight to Boston. The ticket agent recalled having a bad feeling. Atta had the eyes of a killer—the devil—Touhey said. And there were other red flags: The two men arrived just minutes before departure, and they had \$2,500 one-way first-class tickets, though business travelers typically fly roundtrip.

A 37-year airline veteran, Touhey insisted that he wanted to stop the two from boarding, but he did nothing. He

told Clifford that he convinced himself that these were just harried businessmen, not terrorists, and singling them out would have been inappropriate.

Touhey said he later learned that terrorism warnings had been conveyed to the highest levels of government and to the airlines and their security providers. No one, however, had instructed him to be more vigilant. Had he been alerted, he told Clifford, he would have acted differently—notifying security and ordering a search of the men's carryon luggage. Agents might have found suspicious items, including a hand-held electronic flight computer and a suicide note. The attacks, Touhey concluded, could have—should have—been prevented.

Clifford knew that this testimony could be useful evidence in the complicated insurance lawsuit that he was leading against the airlines and the security firms that screened the hijackers. Even though after 9/11 Touhey had hit the talk-show circuit to tell his story, Clifford needed him to repeat it under oath. Though not necessarily a

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“When I see a wrong, I want to right it,” says Clifford, pictured in the conference room of his Loop law office.

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smoking gun, Touhey's testimony could send a strong message to the jury: The defendants might have prevented the hijackers from boarding the planes and thus stopped the attacks before they started.

But because of constant objections by the defense lawyers, Touhey's deposition turned into a halting exercise that Clifford worried would be ineffective in court. And because of a legal complication, he couldn't subpoena Touhey to appear in person at the actual trial. By law, all 9/11-related civil cases had to be filed in Manhattan, in the U.S. District Court for the Southern District of New York, and by long-standing court rules, subpoenas could be issued only to someone living within that judicial district or within 100 miles of the courthouse. "The lawyers for the defense knew that," says Clifford. "No question, it was part of their strategy."

Clifford knew he had one choice: He had to get the law changed. Armed with some legal research, he called a friend—Joe Biden, then still in the Senate—to get the legislative ball rolling. Clifford also spoke to other influential politicians he calls friends: Dick Durbin, Barack Obama, Rahm Emanuel, and Patrick Leahy, a senator from Vermont and the chairman of the influential Judiciary Committee. Before long, Biden's office drafted a bill that amended federal law to give 9/11 litigants—both plaintiffs and defendants—the ability to serve subpoenas nationwide. It sailed through the House and Senate before the airline lobby could block it. "I just kept it real quiet," recalls Clifford. "I knew that if the airline industry found out about it, they'd do everything they could to kill it." President Bush signed the measure into law on November 8, 2007.

The revised law turned out to be "a big game changer" in the case, according to Clifford. "The defense was operating on the premise that we, the claimants, could never effectively put a trial on in front of a jury because of the [subpoena] handicap. But that handicap was removed, and they knew the playing field was now level."

Even the lawyers for the defense—who aren't so quick to acknowledge the broadened subpoena power as a turning point—admit that Clifford's move was a clever ploy. "It was nice strategy on Bob's part," says one attorney for the defense, who requested anonymity because he did not have his client's permission to discuss the case. "But ultimately, the government witnesses who testified were extremely favorable to the defendants and hurt the plaintiffs' case tremendously."

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LAST MARCH, THE CASE—IN WHICH CLIFFORD was the lead plaintiff's attorney—settled for \$1.2 billion, an agreement that will enable a group of insurance companies to recover some of the property damage claims they paid as a result of the 9/11 attacks. The story of the litigation sheds light on the background of the terrorist disaster—though many of the details are still classified. But it also offers a picture of the style and tactics of Bob Clifford, the compact, no-nonsense Chicagoan who has made himself into arguably one of the top aviation litigators in the nation.

“I learned a long time ago that persuasion is fact based,” he says. “I can show you dozens of lawyers who think that they can get by with their silver tongues, and they lose all the time to someone who’s better prepared and works harder.”

At 59, Clifford has represented families against the airlines in every major crash over the past three decades, winning (or settling) them all. Year after year, his 20-lawyer office is at or near the top of *Chicago Lawyer* magazine's survey of Illinois firms that won the most settlements above \$1 million.

Coming from a working-class background, Clifford views himself as a little guy battling corporate wrongdoers and their high-paid legal defenders—the white-shoe corporate bar who went to the best law schools in the country and probably

wouldn't have hired Clifford as a paralegal when he graduated from DePaul. At around five feet seven, he's not a physically commanding presence, and his speaking style can lapse into the "dese, dem, dose" idiom. Strip away his tailor-made suits, cuff links, and polished wingtips, and you'll find a scrappy South Side Irish kid spoiling for a fight.

Juries empathize with that regular-guy image, says Thomas Demetrio, one of Clifford's close friends and a friendly rival at the firm Corboy & Demetrio. "Bob's way about him is real—it's not pretend, it's not acting. What you see in Bob is the way he is in the courtroom," says Demetrio.

Clifford himself has a characteristically straightforward explanation for his success: "I learned a long time ago that persuasion is fact based," he says. "I can show you dozens of lawyers who think that they can get by with their silver tongues, and they lose all the time to someone who's better prepared and works harder."

Preparing for the damages trial of Rachel Barton Pine, the acclaimed violinist who lost her left leg in a 1995 Metra train accident, Clifford got transcripts of opening and closing statements made by his opposing counsel, C. Barry Montgomery, at other trials. As Clifford studied the dozens of transcripts, he found that Montgomery often used the same catch phrases and stock lines. So Clifford used them in his opening argument while Montgomery watched in surprise. Clifford wound up winning a \$30 million jury verdict. Recalls Montgomery: "When I was sitting there listening to Clifford's opening statement, I thought it was me up there talking."

In 2005, after a Southwest Airlines jet skidded off a snowy runway at Midway Airport and crushed a car parked at a street intersection, killing six-year-old Joshua Woods, of Leroy, Indiana, Clifford devised an ingenious legal argument to get the case out of federal court and into state court, his preferred venue. He convinced a judge that the plane's pilot had broken state and city laws—not federal laws—because the pilot was driving on Central Avenue and 55th Street without a valid driver's license or city vehicle sticker. Clifford settled the case for an undisclosed sum "in the millions," he says.

But in Clifford's long and impressive docket of cases, the 9/11 litigation on behalf of the insurance companies stands as one of his most significant. In legalese, the matter is known as a subrogation case. Put simply: If, say, a driver runs a red light and crashes

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into your car and your insurance pays for the repairs, your insurer can sue the careless driver to recoup (presumably from his insurer) the money it paid on your behalf. Over time, Clifford's case grew from a technical fight over insurance reimbursements into a broader battle over whether the airlines and the security companies should have been more vigilant in thwarting the terrorists. Clifford maintains that the plaintiffs unearthed facts about security failures on September 11th that were missed by the blue-ribbon 9/11 Commission and by Congress in its investigations. "9/11 was not only foreseeable, it was preventable," says Clifford. "Think about it—19 out of 19 terrorists got through that day. Actually, it was 21 out of 19, because two of 'em got through twice. Don't you think one of them would've been stopped?"

For now, the trove of materials remains under seal; the airline defendants and the government argue that the information, if released to the public, could help potential terrorists. But Clifford says he hopes that one day the full story will come out. "I think in many sectors of America, corporations escape accountability because there's no transparency," he says. "The more transparency we have, the greater accountability it breeds."

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GOING ON NEARLY TEN YEARS, THE CONSEQUENCES of the attacks on September 11, 2001, are still reverberating in Manhattan. Beyond ground zero itself, the wounds have perhaps resounded most loudly in the Manhattan courtroom of Alvin K. Hellerstein, the federal judge who has overseen the collection of lawsuits arising from 9/11. The cases—many now settled—cover a wide landscape. Some were wrongful death actions filed by families who didn't participate in the September 11th Victims Compensation Fund but who lost relatives in the attacks. Some were suits by ground zero workers who claimed they developed respiratory and other illnesses during the recovery efforts. And some were subrogation claims against the airlines and the airport security firms to recover property damage losses from the destruction of the twin towers and nearby buildings.

That's where Clifford came in. As it happens, he was well positioned to become a slice of 9/11 history even before he found himself in the eye of the subrogation storm. Shortly after the attacks, Clifford was recruited to head the American Bar Association's special task force on terrorism and the law. In the ensuing months, the task

force weighed in on the USA Patriot Act, the Victim Compensation Fund, and various 9/11-related laws enacted by Congress.

Sometime in mid-2004, Clifford got a call from a top legal executive at Industrial Risk Insurers, which had insured the 7 World Trade Center Building for Silverstein Properties. After the structure was destroyed in the attacks, IRI paid Larry Silverstein, its leaseholder, more than \$860 million to settle claims on the property. Now IRI wanted to recover some of that money by suing the airlines and their security firms.

Clifford wasn't sure he wanted to get involved. A subrogation suit would be big and

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complex. Litigation this massive would cost his firm millions of dollars and take years to resolve. But the payout could be huge. (Like other top trial lawyers, Clifford works on a contingency-fee basis. Clients pay no money up front but give the firm a percentage of any award in a settlement or verdict, usually one-fourth to one-third.) The case was risky, but ultimately Clifford couldn't refuse.

He filed suit on September 10, 2004, and not long after, the other lawyers for the plaintiffs picked him to lead the court battle. Why Clifford? Mainly because he was a personal injury lawyer with a long track record of bringing the airline companies to their knees. "At the end of the day, this was an aviation case—an aviation case involving property damage," says Steven Badger, a Dallas attorney whose firm, Zelle Hofmann, was among the principal firms representing the plaintiff insurers.

To make their case, Clifford and his legal team had to establish that the airlines and their security companies could have anticipated the attacks—an allegation they had always denied. Originally, even Clifford doubted the terrorists could have been spotted. A week after the attacks, he told the *Chicago Sun-Times*, "There's no evidence that the weapons brought on board were anything other than those allowed under FAA regulations. You may never have proof of actual negligence here." That, more or less, was the defense argument in the case: The airlines and airport security couldn't possibly have foreseen that planes would be used as missiles. "Let's face facts," says the defense attorney who asked to remain anonymous. "This was 2001. Nobody saw this coming."

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THE LAWSUIT PROCEEDED—SLOWLY. For years, Clifford's team was stymied because the defendants—and the government—were unwilling to turn over documents as part of discovery, saying that the material was "security-sensitive information," or SSI. "The airlines had even argued that some of the 9/11 Commission report was SSI, even though it had been translated into six, seven languages and published all around the world," recalls Jim Warden, of the Kansas City firm Warden Grier, another lead lawyer on the case.

Clifford was denied a copy of surveillance footage taken at the security checkpoint at Dulles Airport on the morning of September 11th that showed one of the terrorists being screened with a hand-held metal detector. In fact, the video had already been shown on TV news programs. No matter, the Justice Department said, the tape was SSI. Clifford had wanted to show the clip on a split screen with footage from a security company's training video that demonstrated the proper slow, deliberate process for screening passengers with hand-held wands. In the Dulles footage, according to Clifford, the security agents used hurried, herky-jerky motions. "If you saw the training film and put it next to the [footage of the] terrorists being wanded at Dulles, you'd puke," he says.

By coincidence, at the same time Clifford was battling for access to SSI materials, the trial of Zacarias Moussaoui, the so-called 20th hijacker, had just started in Virginia. Clifford sent several paralegals from his firm to monitor the proceedings. One day, he recalls, a paralegal phoned. "You're not going to believe what's going on," he told Clifford. "The tape that [the govern-

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ment] is telling you is SSI, they just played it on the TV screens here.”

Clifford went to Judge Hellerstein. “I argued that what’s public in Virginia cannot be a national secret in New York,” says Clifford. “And Judge Hellerstein agreed. The next thing you know, the government says, ‘Okay, we’ll approve it.’”

The Dulles video was just the tip of the iceberg. From then on, the plaintiffs got access to loads of SSI materials. Clifford—and a few other designees who were granted special security clearance—could go to an unmarked building with no address near the courthouse in Manhattan and peruse SSI documents. “That was huge, because for years we were stuck,” says Badger. “Once we got past the SSI issue because of Bob’s work, we were able to conduct discovery, and discovery is key.”

The Clifford team’s intelligence-gathering operation turned up mountains of materials—literally millions of documents from the airlines, security companies, and the government—that helped give new detail to the security lapses that may have allowed the attacks to occur. “We spent an enormous amount of time looking into checkpoint security—how the people employed at the security companies were trained, how they were briefed on what to look out for, how much rigor was put into keeping them alert and vigilant,” says Clifford.

The materials remain largely confidential. But Clifford says his side was prepared to prove that, prior to 9/11, the airlines and security companies essentially ignored the growing terrorist threats and tried to provide security on the cheap.

Again, not true, says the defense. The airlines and their security companies followed all of the government-mandated security procedures that were in place at the time. As the defense put it in one of their briefs: “Federal law assigned to the FAA and other federal agencies, not to the Aviation Defendants, the responsibility for assessing the threat of terrorism to civil aviation and for determining appropriate countermeasures.” In other words, they were doing as much as they were told to do.

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WITH THE LARGE NUMBER OF LITIGANTS, lawyers, and philosophies thrown into the mix, the subrogation case moved at a glacial pace. Part of Clifford’s role was to manage the 20-plus attorneys on his side, many of whom—Clifford included—have puffy egos. “It was hard to fit all the egos in, say, the island of Manhattan,” says Gregory Joseph, a veteran New York litigator whom Clifford

brought on as his co-counsel.

Meanwhile, the defense dug in its heels. The airlines felt strongly that they were 9/11 victims, too. They had lost planes, they had lost employees, and they had lost millions of dollars from air travel disruptions. Still, at a hearing in December 2006, Desmond Barry, the lead defense counsel, told the judge that although the defendants weren’t to blame for what had happened, they were ready to settle the wrongful death cases. “For obvious reasons, it’s the right thing to do,” he said. But Barry argued that the subrogation litigation, the insurance cases headed by Clifford, was insulting, even unpatriotic: “To have the property cases pending against these defendants resulting from an attack against the United States of America, I must tell you, sticks right in the craw of [the airlines and their insurers]. And . . . they



Clifford compared airport surveillance video of the 9/11 hijackers (above) with a training video showing proper screening procedures. If you were to watch the two videos side by side, he says, “you’d puke.”

are not going to settle these cases.”

Led by Barry, a partner at Condon & Forsyth in New York, the defense lawyers fought Clifford’s side on almost every point of law. “This case was a war,” recalls Joseph. “Fortunately for us, none of the knockout punches the defense tried to land hit.”

On the other hand, the plaintiffs thought that their two big punches—winning access to the security-sensitive materials and, soon afterward, getting nationwide subpoena powers—had landed. With the limits removed on subpoenas, Clifford ended up deposing 180 witnesses from all over the world—including airline and security personnel, corporate executives, and government safety experts. He issued his first subpoena to James Woods, the actor. A month before the attacks, Woods had flown from Boston to Los Angeles, sitting in first class with four Middle Eastern men, since identified as 9/11 hijackers. Clifford says that, by Woods’s account, the men never spoke—only whispered—during the six-hour flight, and they didn’t eat, drink, or sleep. Alarmed by their strange behavior, Woods told a flight

attendant, the pilots, and, later, the authorities about his suspicions. Turns out, the flight was a practice run for September 11th. Subpoenaing the famous actor first, explains Clifford, was a way to catch the defense’s attention: “It was a message to the other side, saying, ‘Game on. Get ready, we’re coming.’”

But the defense was not ready to concede a thing. Despite the gap between the two sides, Judge Hellerstein vigorously pushed the litigants to the bargaining table. He asked the parties to deal with damages—the billions of dollars in dispute—before confronting the liability issues, in the hope, he said, that the sides could use the figures as a road map toward settlement. Hellerstein also appointed John Martin, a respected former federal judge, to mediate the proceedings. In November 2009, the mediation talks opened, initiating a process that Clifford describes as “slow and grinding.” Badger says that when he vented to Clifford about the pace, the Chicago lawyer answered with a catch phrase from the old TV show *Kung Fu*: “Patience, young grasshopper.”

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OVER THE YEARS, CLIFFORD HAS WORKED out a system for dealing with big, sprawling tort cases. He persuades his fellow plaintiff lawyers to agree to a bottom line—the minimum amounts their clients will accept. Then he shares those amounts with the mediator. “There comes a time when you have to stop the bluff because there’s always bluffing in negotiation,” explains Clifford. He says as much to the opposing lawyers. “If that number is too much,” he tells them, “we’ll break this off and we’ll get going on with a trial.”

Clifford presented that number to the defense going into the mediation process. (Under a confidentiality agreement between the parties, he can’t say what the number was, though the plaintiffs had originally sought more than \$6 billion total in damages.) The defense responded with a much lower number. Then, with the liability issues put aside, the lawyers and their clients began the nitty-gritty of settling on the damages—accounting for everything from the fair market values of the destroyed buildings to the business interruption claims and the replacement values of thousands of smaller items, such as office desks and chairs.

Over stretches of several days in November and December 2009, the lawyers and top company executives from both sides met for intensive mediation sessions. As the talks proceeded, the discussions grew more technical and obscure—if also more tenuous. “An

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hour before it settled, I thought it would fall apart," recalls Martin, the mediator. But after seven long sessions, the parties finally had an agreement in principle in early January 2010, which became a done deal in March. For \$1.2 billion—and no admissions of liability by the defendants—case closed. The specific amounts awarded to each of the insurers—not to mention the fees for Clifford and the other plaintiff attorneys—remain under seal. "Ultimately, I gave them a number as a recommendation and they accepted it," says Martin. "They split the baby."

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WITH SETTLEMENTS IN THE SUBROGATION case, as well as in the mass claim filed by thousands of ground zero workers, and in all but one of the 95 civil wrongful death suits, the seemingly endless civil litigation stemming from the 9/11 attacks finally appears to be nearing an end. (The final holdout in the wrongful death cases is the family of Mark Bavis, a passenger on the second plane to strike the World Trade Center. Bavis's family has sued United Airlines and Boeing, the plane's manufacturer, as well as the security firm that ran the checkpoints at Logan Airport in Boston, where the flight originated. The trial is scheduled for June 13th in New York.)

Clifford, meanwhile, has yet to collect his substantial fee and probably won't for a while. Larry Silverstein is contesting the proposed settlement, arguing that his company—not the insurers—is entitled to what's left of the insurance proceeds. Lawyers for Silverstein failed to get Judge Hellerstein to reconsider the settlement, and the matter is now before the Second Circuit Court of Appeals, which is likely to hand down a ruling this spring. (Both sides of the subrogation case predict that the appeals court will reject Silverstein's argument.)

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TODAY, CLIFFORD ACKNOWLEDGES THAT his 9/11 case didn't radically break new legal ground. "In the most cynical sense, these were just a bunch of insurance companies trading dollars," he says, seated in a comfortable armchair in his Loop office, a spacious 31st-floor suite with nice views of Chicago's skyline and the lake. The litigation was remarkable, Clifford says, mainly

WHAT ABOUT BOB?

THOUGH PERSONAL INJURY LAWYERS

have sometimes been a target of outrage—for winning huge jury awards for supposedly minor mishaps, for example—Bob Clifford argues that certain cases have the potential to bring about needed changes. One example that he likes to cite: In 1987, he represented the family of a woman who died in a high-rise blaze at One Illinois Center because it took firefighters several hours to find her building's vanity address, despite her frantic calls to 911. As part of a settlement, Chicago agreed to revamp its 911 emergency response system to include vanity addresses. "Not every case lends itself to a public-policy or social-policy goal that's at issue," says Clifford. "Somebody blows a red light because he happens to be tweeting at the time—that is what it is. But there are certain cases that come our way where there's an identified public policy that needs to be pursued, and I do that better than anyone in this town."

The son of a carpenter and a housewife, Clifford grew up on the Far Southwest Side, in the blue-collar neighborhood known as Mudville—a rough-and-ready place, he remembers, "filled with cops, firemen, and smalltime politicians." One of only a handful of kids from his neighborhood to go to college, he enrolled at DePaul. He stayed there for law school but felt rudderless going into his second year. That changed after Philip

Corboy, the dean of Chicago personal injury lawyers, visited Clifford's class one day as a guest lecturer. "You could tell he had a passion for the law," recalls Clifford. "That's how I felt about it."

After class, Clifford asked his professor, "How do you get a job with a guy like that?" His professor answered, "You don't—he doesn't hire kids from here." Undeterred, Clifford marched over to Corboy's office the next day to ask for himself. Corboy appreciated the law student's moxie and hired him. Clifford started as a law clerk in 1974 and remained at Corboy's firm for the next ten years.

In 1984, at 33, Clifford struck out on his own. Though he quickly collected a cascade of car accident, medical mishap, and unsafe product cases, the 1989 United Airlines crash in Sioux City, Iowa, turned out to be a game changer. Representing the families of five victims, Clifford won two multimillion-dollar verdicts, and he even got General Electric, the manufacturer of the plane's engine, to admit responsibility. "After Sioux City, I got a reputation," he says.

Today, plane crashes make up about 20 percent of Clifford's firm's overall business but half of Clifford's personal caseload. He gets dozens of prospective new cases, of which about 10 percent are aviation cases, a week. Still, he argues that airline travel is safer than it used to be, in part because of the passenger-jet disaster cases that he and other aviation litigators have brought. "When I see a wrong, I want to right it," says Clifford. "It's just who I am."

because it was 9/11: "The emotion that surrounds this case has just been staggering."

Still, he argues that the lawsuit gave the airlines an incentive to aggressively address the problem of security, even though the lion's share of airport security is now handled by the federal government's Transportation Security Administration. "Without these 9/11 cases pushing the corporate entities to do a better job, I'm just not persuaded that they would."

Not surprisingly, the defense sees things differently: The case was nothing more than a family squabble among insurers, and the decision to settle came down to strictly brass-tacks business, not the legal arguments. Explains the defense attorney quoted earlier: "The insurance underwriters decided, 'Hey, we're taking a lot of our money out of one of our pockets and putting it in the other and paying a lot of legal fees. Let's see if we can settle this.'" The

plaintiffs, he says, had initially sought more than \$6 billion in damages. The defense team calculated that the other side could realistically put up a claim for maybe \$4 billion. In the end, the parties settled for \$1.2 billion—"about 25 cents on the dollar"—with no trial.

Still, it was a tough pill for the defendants to swallow. In an e-mail, a spokesman for American Airlines wrote: "Our insurers have agreed to settle the claims. American Airlines strongly disagrees with this decision, but our insurers have made the business decision to settle over American's objections." A spokeswoman for United Airlines echoed that stance.

Though clearly important to him, the 9/11 case, Clifford says, amounts to just another chapter in his long and varied career—not its capstone. "I'm not done," he says. "I don't want to say it's the most important case of my career. That case is coming." ●



CLIFFORD LAW OFFICES

120 NORTH LASALLE STREET 31ST FLOOR
CHICAGO, ILLINOIS 60602
TELEPHONE (312) 899-9090 FAX (312) 251-1160
WEB SITE: www.CliffordLaw.com
www.CliffordAviation.com