James Goodale Passes the Torch at PLI Communications Law Conference

For 35 Years His Conference Set the Media Law Agenda and Created Our Media Law Bar

By Floyd Abrams

When James Goodale announced on November 12th that after chairing the yearly PLI seminar on Media Law for the past 35 years he would be passing the torch "to those younger than I" the sense of disbelief in the media bar was palpable. PLI without Goodale?

James Goodale

For 35 years, PLI was Goodale. He conceived of the notion of a yearly PLI session to explore the pressing issues in media law. He decided what subjects would be discussed, who would present an update on each, how long each subject would be discussed and every other issue relating to the yearly discussions.

In doing so, Goodale all but created new areas of law, played a major role in articulating what that law was and – most telling of all – created, for the first time in American history, a media bar.

Consider. From the first PLI Media Law session through the most recent one this year, one section was devoted to commercial speech. That was Goodale's call, initially made with respect to the first PLI Media Law meeting in 1973, a time when the only pronouncement of the United States Supreme Court about commercial speech was its laconic 1942 ruling in *Valentine v. Chrestenson* concluding that such expression received no First Amendment protection at all.

Two years after the 1973 PLI session, the Supreme Court in *Bigelow v. Virginia* granted for the first time First Amendment protection of such speech in the context of advertisements for abortions; a year later, the Court did so far more clearly in a purely commercial context, holding unconstitutional, in Virginia *Pharmacy Board v. Virginia Consumer Council*, a statute prohibiting pharmacists from advertising prescription drug prices.

No one could have predicted that result with any confidence in 1973. Even more surely, no one could have predicted then that issues relating to commercial speech would consume a greater part of the Supreme Court's docket in the 35 years that followed than any other First Amendment subject. Yet as early as 1973, without benefit of any Supreme Court precedent holding that commercial speech was protected under the First Amendment, Goodale knew--he really knew!--it was.

He spoke with the superb Seattle lawyer Cam DeVore about preparing an outline summarizing the then current state of commercial speech law and for years afterwards DeVore (soon joined by Robert Sack, then years away from the seat he graces on the United States Court of Appeals) presented to the growing assemblage of attendees at the yearly PLI seminars the clearest, most focused and most accurate statement of just where that ever-changing body of law stood.

Or consider Goodale's own contribution to the law with regard to the protection of confidential sources of journalists. The first PLI Media Law conferance began within a year of the United States Supreme Court ruling in *Branzburg v. Hayes* holding--well, what did it hold? Goodale had been involved in the case from the start. As General Counsel of the *New York Times*, he had overseen the *Times's* suport for its reporter Earl Caldwell, who was seeking to avoid being ordered to reveal his sources that had permitted him to observe meetings of the Black Panther Party and other black militant groups.

From the time the decision was released, Goodale read it as not as the defeat that a 5-4 ruling against the three journalists might have indicated, but as governed by the concurring opinion of Justice Lewis Powell who had (in an opinion acutely characterized by dissenting Justice Potter Stewart as "enigmatic") indicated that a case-by-case balancing process should be utilized by lower courts in determining when sources should be ordered revealed. The recent unearthing of Justice Powell's notes with respect to his ruling indicates that Goodale correctly articulated what Powell either had said or meant to say.

In any event, Goodale's formulation of the test that courts should utilize in such cases was first presented to PLI attendees, then cited by them to courts around the nation with a high level of success.

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In the last few years, that success has been more pronounced in civil than in criminal cases. Merits aside, however, it is difficult to imagine a presentation at a legal gathering designed to instruct lawyers about developments in the law that has had more pronounced impact on the substance of the law itself.

More important still, I think, than any single subject discussed at Goodale's PLI seminars was the impact it had on the bar, specifically the media bar. For not until Goodale began to gather the media bar together every year did anything exist that could be called a media bar. There were, to be sure, some lawyers that had handled, particularly in the years before much in the way of constitutional protection for the press had been established, libel cases, often with private detectives near at hand. But it was the yearly meeting at Goodale's seminars of media lawyers from around the nation that first created a media bar – people who found that their clients had much in common in terms of threats and the need for responses to them. That media lawyers also found their compatriots to be fun to be with made the yearly trek to the seminars even more attractive.

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Given all this, Goodale's decision to pass the PLI torch inevitably came as a shock. Not surprisingly, he chose well, asking two distinguished media lawyers, Bruce Keller and Lee Levine, to take the reins in the future. But before they do, it is well to express our appreciation for the irreplaceable and unforgettable contribution that Jim Goodale has made.

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