

Recollections of Cam DeVore, First Amendment Pioneer

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As Judge Sack reminds us [page 20], Cam DeVore became a commercial speech pioneer purely by happenstance. In the early 1970s, a pioneering group of First Amendment lawyers led by Jim Goodale instituted the Practising Law Institute's annual Communications Law seminars. When topic areas were divided up among the PLI seminar's founders, Cam, with grace, accepted the commercial speech portfolio.

Commercial speech was, as it remains to a major extent, the "stepchild of First Amendment jurisprudence," according to Judge Alex Kozinski and Professor Stuart Banner in a 1990 law review article. "Liberals," they said, "don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech." (As Kozinski and Banner noted in a 1993 article, the term "commercial speech" was a recent one. It had first appeared in a judicial opinion in 1971.)

At that time, the scope of First Amendment protections for commercial speech, Cam's chosen topic, did not offer much promise. The Supreme Court's holding in *Valentine v. Christensen* (1942) remained in place: the First Amendment, the Court held, imposed "no . . . restraint" on governmental restrictions on commercial advertising.

But Cam was a Montanan, born in Great Falls in 1932, and notwithstanding an education at such established institutions as Yale, Cambridge, and Harvard, probably still understood the important role of pioneers. Some lawyers who know Cam suggest that he

wanted to do commercial speech precisely because it was legal terra incognita. This is the same Cam DeVore, after all, who graduated from Harvard Law School in 1961 and then immediately headed to Seattle rather than an East Coast law practice. The analysis sounds accurate; I can hear some of Cam's voice when I read Huck Finn's comment: "But I reckon I got to light out for the Territory ahead of the rest . . ."

He leaped into the topic, and became not merely a casual commentator but also a nationally known advocate and legal evangelist. Cam quickly developed a consistent viewpoint about the inherent values of commercial speech and a vision of First Amendment policy which he pushed, in case after case, and which was eventually embraced by the U.S. Supreme Court. As a lawyer, he used every available forum to press these reforms, including a major treatise on commercial speech that he and Bob Sack co-authored in 1998.

One of Cam's earliest commercial speech cases, decided even before the Supreme Court's landmark decision in *Virginia Pharmacy Board v. Virginia Consumer Council* (1976), involved a Washington statute that made it unlawful to use any dairy terms in advertising margarine or other nondairy products. As a result of this peculiar rule, national margarine manufacturers had been forced to expunge all such references in any national advertising that was broadcast or published in Washington State.

In 1975, Cam persuaded the U.S. District Court in Seattle to toss out this restrictive law, with the court noting that, while the state could constitutionally restrict false or misleading advertising, the "proscriptions [of the statute] are so broad that even true, honest and nondeceiving comparative references to the dairy term 'butter' in informational advertisements . . . are made

criminal acts." (It was a sweet victory; two years earlier, in *State v. 28 Containers of Thick and Frosty*, Cam had failed to persuade the Washington Supreme Court that it was unconstitutional for the state to prohibit advertising a Bird's Eye high-protein drink as "thick and frosty," permitting dairy protectionist laws to limit such terminology to milk shakes.)

Cam spent the next two-plus decades deeply engaged with a series of U.S. Supreme Court cases that examined the scope of constitutional protections for commercial speech. He repeatedly urged the Court to develop a sensible and consistent commercial speech doctrine. Chapters in his treatise ("Age of Anxiety" and "Fits and Starts") aptly describe the Court's halting progress.

Cam was involved in several of these seminal cases, sometimes for the challenger (as in *Frank v. Minnesota Newspaper Association*, a 1989 decision concerning government attempts to crack down on news coverage and advertising about lotteries) but more often as attorney for media and advertising groups (as in *City of Cincinnati v. Discovery Network*, a 1993 case in which the Supreme Court struck down a municipal ban on commercial news racks, citing Cam's amicus argument) offering amicus briefs to the Court seeking to stabilize commercial speech law and promote free speech protections.

In each of his briefs, Cam remained true to the original consumer activism that had prompted the modern commercial speech doctrine, by stressing the liberty values inherent in consumer sovereignty and by attacking the paternalist view that government, not consumers, should determine what truthful commercial information Americans should be permitted to receive. Each November, lecturing at the PLI conference in New York, Cam summarized

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PROTECTION OF COMMERCIAL SPEECH

The amici brief on behalf of the petitioners in *Greater New Orleans Broadcasting Association v. United States* called upon the Supreme Court to prohibit “the Government’s paternalistic efforts to use public ignorance as a means of influencing citizens’ thoughts and behavior” through control of commercial speech. An excerpt appears below¹:

“[P]rotection for commercial speech [is] an important part of the marketplace of ideas, providing an unimpeded flow of truthful, nonmisleading speech about lawful products. The media are a major link between speakers (including advertisers and the businesses they represent) and their audience (consumers), and the First Amendment was intended to foster the interests of both. *Amici*, therefore, support First Amendment protection of truthful and nonmisleading commercial speech concerning lawful products, services, and activities[.] The ability of advertisers to disclose and consumers to receive information about such activities is instrumental to making fully informed decisions. Governmental restrictions on the public availability of that information . . . undermine not only the market for a particular product or service but also the discussion about public policy issues concerning that product or service.

“The continuing efforts of government at all levels—federal, state, and local—to advance social policy goals by suppressing speech and keeping citizens in ignorance demand constant vigilance, not only from the courts but from those individuals and organizations . . . who inform and educate the public and monitor First Amendment protections. Restrictions on truthful and nonmisleading advertising . . . are directly contrary to the theory of unfettered access to information on which our society is based. *Amici* urge the Court to provide unambiguous, prescriptive guidance to both the lower courts and governmental entities that will effectively prohibit the Government’s paternalistic efforts to use public ignorance as a means of influencing citizens’ thoughts and behavior.”

1. 525 U.S. 1097 (1999), Br. Amici Curiae in Support of Pet’rs.

the progress of the case law and urged the Court to strengthen constitutional protection for commercial speech.

Of course, some members of the Court remained resistant, with Justice Rehnquist pouring scorn (in his opinion in *Carey v. Population Services International*) on the notion that Union soldiers had died at Shiloh, Gettysburg, and Cold Harbor so that condom makers could “peddle” products to “unmarried minors” visiting “the men’s room of truck stops.” In a 1988 law review article, Cam reacted to Chief

Justice Rehnquist’s restrictive approach to commercial speech rights, gently noting that “it continues to be obvious to me” that his “opponents have the better argument” and pointing out that his 1986 *Posadas* opinion for the Court, which sought to undermine the developing consensus in favor of free speech, “cannot be squared with” existing precedent. Cam observed that *Posadas* reflected “a time of turbulence for commercial speech.”

By the mid-1990s, after a series of strengthening decisions, victory was

at hand, and Cam celebrated. As Cam noted in his treatise, strong pro-expression opinions such as *Rubin* and *44 Liquormart* (where he had participated as attorney for amici) showed that commercial speech protections were now “an integral part of First Amendment jurisprudence,” and he commented that the tone of judicial opinions had become “openhanded rather than grudging.” By 1999, with the unanimous *Greater New Orleans Broadcasting* case (again, with Cam acting as attorney for amici), this position solidified. It was confirmed in 2001 with the *Lorillard* ruling, in which Cam’s amicus brief urged the Court to strike down Massachusetts restrictions on tobacco advertising, because “no matter how justified the end, speech restrictions can be used, if ever, only as the regulatory tool of last resort.”

Cam was also involved in many lower court rulings testing application of the Court’s decisions establishing First Amendment protections for commercial speech, including cases such as *Association of National Advertisers, Inc. v. Lungren* (a 1992 federal district court case involving environmental advertising claims), and *Anheuser-Busch, Inc. v. Schmoke* (a 1996 Fourth Circuit case involving a prohibition on outdoor advertising by alcohol companies).

It is rare for a practicing lawyer to become intimately and consistently involved with the development of a major constitutional doctrine, especially over the course of three decades and involving many clients. Cam cheerfully embraced the unpromising topic choice he had been handed by his fellow

PLI participants and, despite the apparent lack of First Amendment case law confirming protections for commercial speech, made the subject his cause.

Even from the sidelines, with repeated briefs, lectures, and articles, and eventually with the Sack-DeVore treatise, Cam became a First Amendment pioneer, as he worked to cajole the courts into acceptance of ample constitutional protections for advertising and commercial speech. ☐