

MOUNTAIN STATES / 2015

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Appellate lawyer Daniel Polsenberg has one rule: Don't go in cannons blazing

ALSO

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# POLSENBERG'S CHARGE

## Appellate lawyer Dan Polsenberg gets 15 minutes of fame—250 times and counting

BY RJ SMITH PHOTOGRAPHY BY SQUARE SHOOTING

NOT MANY LAWYERS HAVE A COLLECTION of typewriters displayed in their office. Dan Polsenberg has 11, a tribute to his former days as a freelancer. He also displays a boxing glove signed by George Foreman, whom he represented when Foreman sued the World Boxing Association in order to fight Michael Moorer for the heavyweight championship in 1994.

And then there's a painting of Pickett's Charge, the fabled Confederate assault Robert E. Lee launched at Gettysburg. "It seems like so much litigation that I've seen," says Polsenberg. "Third day of the Battle of Gettysburg, when the Southern forces charged up the middle of the Union soldiers then just ... killed a lot of them because it seemed like a good idea at the time. But it was such a *stupid* idea. It reminds me to think things through before going barging into something."

Going in cannons blazing isn't the Polsenberg way. In fact, the appellate lawyer and partner at Lewis Roca Rothgerber is more likely to sit back, find the zen and come prepared with multiple battle plans instead.

"I always know when he shows up in my courtroom that something interesting is going to happen," says District Court Judge Betty Gonzalez, who also worked with Polsenberg at the firm formerly known as

Beckley Singleton. "He may come in with six or seven different versions of what he's trying to convince us to use."

Is that a good thing? "The more chances as a judge that I have to make the right decision, the happier I am," she says.

### PHILADELPHIA-BORN AND BRED,

Polsenberg had every reason to think he was heading for a career in politics. His mom worked for the state House of Representatives. His grandmother told him he'd be the mayor someday, then parked the 4-year-old on a kitchen chair, handed him a vacuum cleaner hose, and listened raptly to his mayoral speeches. Eventually he worked as a legislative assistant to the chairman of the Pennsylvania State Senate ethics committee: a job, he says, few wanted.

"Politics in Philly were brutal," he says. "Nobody wanted to be the guy blowing whistles on those who could contribute to your campaign." Law, he eventually decided, was a better means to enter the public policy process; particularly appellate law. "While you can make big policy changes in politics, it takes a lot longer on a case-by-case basis," he says. "The refinements you can make in justice aren't quite as possible in politics."

Although he's now lived in Las Vegas for 36 years, it took three rolls of the dice to

get him to stay. The first time, he was on summer break between college and law school. "It just seemed like a good idea at the time," he says. He took a bunch of odd jobs, including unloading trucks arriving at what was then the only Sears in town. It wasn't for him.

After his first year of law school at Boston College, he returned to Vegas to intern in the district attorney's office. The third time was during his second year of law school, when he scored an internship with legendary attorney Morton Galane. "I learned about the workings of the court and about having a good work ethic," Polsenberg says.

Throughout more than three decades in Vegas, he's seen the legal landscape shift from a wide-open wildcat frontier to something more systematic. "When I started in Vegas, it was a small town," he says. "Things were pretty rough and loose, and the major objection at trial was 'fundamental fairness.' 'Fundamental fairness!' a lawyer would shout. I never found that one in the evidence code. But now the practice of law in Vegas is a lot more sophisticated."

Sophisticated, but unsettled. "In Nevada, an appeal requires a high level of creativity," says Franny Forsman, former Nevada federal public defender. She notes that practicing in a jurisdiction in which the state Supreme

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**DAN POLSENBERG**

- PARTNER, LEWIS ROCA ROTHGERBER;  
LAS VEGAS
- APPELLATE
- MOUNTAIN STATES SUPER LAWYERS  
2007-2015; TOP 100: 2012; TOP 10: 2013-2015

Court—and not a state Court of Appeals—rules on thousands of appellate cases a year, and due to volume, only publishes opinions on about 100, means there’s plenty of law still being contested. (A newly formed Nevada Court of Appeals began in January.) “There’s still so much unsettled law that creativity really becomes handy in understanding the point. Dan is able to say not only why something is the rule, but why this is a *good rule*.”

Consider *Williams v. Eighth Judicial District Court*, which Polsenberg argued before the Nevada Supreme Court in March 2010. There had been an outbreak of hepatitis C at a Las Vegas endoscopy clinic, and plaintiffs had alleged that the outbreak was due to the reuse of contaminated vials of Propofol. Polsenberg argued on behalf of the drug’s manufacturer regarding the admissibility of two expert witnesses’ testimony. There were numerous parties on both sides.

Watching a video of Polsenberg presenting his argument, you’ll notice his voice: the clarity, the calm focus. “I don’t use my regular voice,” Polsenberg says. “[In court] I seem like two different people, and sometimes I wonder which is the real me.” He speaks in general strokes, each line advancing the point he is trying to make. Given what’s at stake and the finer points of the law, his words could get bogged down with detail and precedent. But at one point Polsenberg indicates what he’s saying is simply “common sense.”

“Sometimes people think a lawyer should talk and write in fancy language with complex briefs,” says Forsman. “But really good lawyers like Dan communicate in plain language.”

Even when he recites statutes or carefully recounts a previous Supreme Court ruling, noting what a series of justices said in sequence, he doesn’t come off as tedious or professorial. It is conversational. Polsenberg worked that day without notes, and when an impressed former partner said, “All you had was a pen,” Polsenberg corrected him: He didn’t have one.

“When you start [a presentation] you’re thinking, ‘OK, what do I do now?’ But if you can get to that higher state of zen, to that detachment—you do a lot more service for your client and a better job for the court.”

The Supreme Court partially accepted Polsenberg’s argument, and eventually, a confidential settlement was brokered between the plaintiffs and the drug

company. Polsenberg can’t talk about it, but he can say this: “Man, I was *on*.”

He’s worked his fair share of trials, too. He once spent five weeks before a jury pondering why a crane toppled over. It happened in 1997, and three bystanders were killed in a Laughlin casino parking lot after the machinery fell.

“Nobody ever did figure it out,” he says. “Those trials are like mysteries. You can watch a mystery and wonder how it’s all going to turn out. But when you do an appeal, it’s something so much more than a mystery—it’s the rules by which we live our lives.”

#### **POLSENBERG GOT HIS START WORKING**

for attorney Neil Galatz and then with Rex Jemison, the legendary co-founding partner of Beckley Singleton, which merged with Lewis Roca Rothgerber in 2007. Right now, it’s a good time to be Polsenberg. For starters, this spring, the newly formed State of Nevada Appeals Court began hearing the first oral arguments in cases. Previously, the Nevada Supreme Court ruled on numerous appeals—over 2,200 in the 2014 fiscal year with a backlog of nearly 2,000 additional pending cases—but rarely had the time to write opinions.

He also recently notched his 250th oral argument in an appeal. And while those 15 minutes before the court may be the peak experience of an appellate lawyer, Polsenberg is also an authority and cheerleader for a sometimes-undervalued part of the job: making the record. Litigators are familiar in principle with the notion that issues must be raised in district court or else they won’t be allowed on appeal. But few in Nevada take the preparation as far as Polsenberg, who is regularly hired by litigators in civil cases to sit in and quietly feed issues, file motions and make appeals to thus preserve the record. “You might not even know that he’s there, because he’s quietly been helping the trial lawyer to preserve the issues, making sure the appropriate motions or objections are being filed,” says Forsman.

He makes time for pro bono work, too. Consider client Kenneth Bergstedt, a 31-year-old quadriplegic who had been on a respirator for 20 years. In 1990, he petitioned Nevada for the right to die. “I’ll take positions in a pro bono case that I would never take for money,” he says. “I didn’t totally agree with Bergstedt—I never expressed that, but I think I would have preferred to stay

alive. But here’s a client in a devastating situation who would not have had access to the courts.” Bergstedt died before the state Supreme Court could rule on his appeal; the subsequent decision said non-terminally ill patients had a right to refuse life support under certain circumstances.

Polsenberg loves pro bono cases, to the point that judges will often tease him, asking if he’s working for a paying customer on any given day. Sometimes the judges do more than tease: When he handled the appeal of a homeless man denied welfare because the state said he wasn’t disabled, a justice asked him why he didn’t just solve the problem by having his firm hire his client. Polsenberg responded that hiring him would hardly address the societal problem at the base of the appeal. When the ruling came in, Polsenberg’s argument prevailed and the state’s welfare regulations were declared illegal under state statute.

**POLSENBERG LIKES TO PAINT.** He doesn’t do it nearly as much as before, but painting has long been a metaphor he returns to repeatedly. “Law is less painful than art,” he says.

Judge Gonzalez thinks back to the days when she worked with Polsenberg. “Dan is a very interesting person to get along with,” she says, laughing. “He’s intelligent and creative. He is also hard to manage as a partner. I don’t know if you’ve ever worked with someone who is only concerned with the creative aspect of what they are doing, but sometimes, they can forget about the business aspects. ... He can focus on a project to the exclusion of other things—which is a good thing if he’s your lawyer.”

Polsenberg tries to keep it fresh. “I make a point to change the way I do things,” he says. “I use different techniques when I’m painting. I don’t want to get too content or satisfied.”

Does he have 250 more oral arguments in him?

“Took me 30 years,” he says. He mentions a case where he made history: He presented the first argument for the brand-new Nevada Court of Appeals in late March. “They were a good court; they were really on top of things. I actually enjoyed it. And I’ll tell you I don’t enjoy them all.” He pauses. “Sometimes you feel like you’re at the peak of the profession. And sometimes, it’s like you’re the fly, and the judges are pulling the wings off.” 