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Appellate Practice Defines Polsenberg

By Leonard Navarro
Special to the Daily Journal

LAS VEGAS — He's been called the King of appeals and, in the words of former Las Vegas Mayor Jan Jones, one of "the best appellate lawyers in Nevada." But Daniel Polsenberg, 43, who became president of the State Bar of Nevada this year, insists other facets of the law do appeal to him.

Among other things, he was lead defense counsel in a 1997 multiple-death trial over a crane accident in Laughlin in which he successfully argued to limit liability for the contractor responsible for guiding the equipment. The size of the award was so unexpected that a headline in the Las Vegas Sun declared, "Only One and a Half Million Dollars."

Polsenberg also won a decision allowing George Foreman to challenge Michael Moorer for the World Boxing Commission heavyweight title in 1994. The World Boxing Association, which had awarded Moorer its title, had opposed the bout, but a judge ruled that the World Boxing Association had to sanction the fight, and Foreman went on to win the title.

Polsenberg also defended Southwest Gas against a claim that it triggered an explosion that shattered the windows of homes in Henderson. A jury in the 1988 case absolved his client of any negligence.

He has litigated numerous workers' compensation issues and since 1998 has served as lead counsel in a series of Nevada cases suing pharmaceutical manufacturers over the use of "fen-phen," the combination of diet drugs suspected of causing heart problems.

He also has represented basketball coach Jerry Tarkanian in a dispute with the National Collegiate Athletic Association, argued judges' term limits, argued to uphold the state's shield law for journalists and

challenged the constitutionality of Nevada's ethics statutes.

Yet, while his trial and litigation experience has covered a variety of cases, including medical malpractice and pharmaceutical and product liability, arguing appeals pretty much defines who he is.

"I have a hard time convincing people I do anything else," said Polsenberg, who has argued 137 appeals since joining the Las Vegas firm of Beckley, Singleton, Jemison, Cobeaga & List in 1985.

Polsenberg, as partner and president of the firm, heads its special litigation unit, which concentrates on complex cases and appeals.

Franny Forsman hired Polsenberg to help create an appellate specialty in the firm. By the time she left in 1989 to become federal public defender for the District of Nevada, Polsenberg had distinguished himself as "one of the premiere appellate lawyers in the state," she said. For her, he epitomized what an appellate lawyer should be.

"It's not just his writing ability," Forsman, a former president of the State Bar, said. "It's a level of creativity, where you can take a record somebody else has created and pull out the kinds of things that will matter to an appellate court.

"It's not just a matter of regurgitating issues others have raised," she added. "It's a matter of recasting them."

Obsessiveness also helps.

"We'd go to lunch and Dan would take the slip opinions before they came out in published version," Forsman recalled. "If there were a gap in the conversation, he'd sit there and read them."

For Polsenberg, focus is at the heart of appellate law. Unlike trial practice, which sometimes requires improvisation — like "flying by the seat of your pants," as he puts it — arguing appeals takes patience and attention to detail.

PROFILE

Daniel F. Polsenberg

President State Bar of Nevada

Career highlights: Partner and president of Beckley, Singleton, Jemison, Cobeaga & List, 1985-present.

Law school: Boston College Law School, 1982

Age: 43

"Appeals go on for tens of thousands of pages, and I have to go through it all to figure out what happened," Polsenberg said. "A lot of people can think things through, but you have to have patience to go through the process."

Thinking things through is especially important when a case may have an effect on public policy, he said.

"When you're arguing a case that's going to make law [for an entire state], you have to think through how it's going to affect everybody," Polsenberg said.

That broader notion is what attracted Polsenberg to appellate practice in the first place.

Growing up in a middle-class Philadelphia family, his early inclination was toward politics. As an undergraduate at La Salle University, in his hometown, he worked for the Pennsylvania Senate as a legislative assistant and after graduation in 1979, he took off for Las Vegas, "a nice, small town that was growing," seeking opportunity.

After working in the civil division of the Clark County district attorney's office, then for some local attorneys, he decided to return east to enroll in Boston College Law School.

"Once I was in law school, I was hooked on the law," Polsenberg said.

After earning his law degree in 1982, he

went to work for Neil Galatz, the leading personal injury lawyer in Nevada. There, he attracted the attention of Forsman, who recruited him in 1985.

Appellate law was a good replacement for politics, Polsenberg said.

“In politics, you’re always fighting over public policy. Being an appellate lawyer, you’re dealing with public policy every day,” he said.

“There are two kinds of appeals,” he explained. “The first, you’re dealing with error, something wrong at trial and what to do with litigation to make it fair.

“In the other, huge issues are at stake. You’re helping to decide what the substantive law of the state should be. It’s a privilege to be involved in that kind of discussion.”

Typically, an appellate argument may take 15 to 20 minutes. Preparation, however, takes weeks. First, Polsenberg reads every brief connected with the case. Then, he begins thinking about questions anyone might ask. As he gets closer to the hearing date, he repeats his legal research and reviews the entire record.

“I’m loading my short-term memory with facts,” he said. “I almost never sleep the night before an argument.”

Polsenberg brings the same indefatigability to his volunteer work, according to Bob Dickerson, a partner in the Las Vegas firm of Dickerson Dickerson Consul and Pocker.”He puts in tons of hours,” Dickerson said. “When I met him, he was editor of the Clark County Bar Association’s newsletter, the *CommuniquØ*. He spent hours and hours and hours taking pictures, writing the stories, doing the typesetting.”

“The respect for Dan comes as a result of his intellect and industriousness,” Forsman said. “He’s pretty tireless when he gets on to an issue. Judges know if he’s going to raise something, he is not going to stop there.”

Call it a crusading ethic. Typical was his testing of Nevada’s workers’ compensation statutes, which did not cover certain heart problems claimed by county employees.

“I would represent those injured firefighters and widows of security guards who were told by everybody that they were not entitled to anything. If a poor person can’t get anything and it strikes you as fundamentally unfair, then it’s probably illegal as well,” said Polsenberg, whose challenge in the 1980s eventually changed the law.

Polsenberg — who has two daughters with wife, Adrienne, 41, who runs a personal concierge service — served as an adjunct professor at Clark Community College from 1985 to 1989 and lectures on appellate and civil practice issues. He also conducts seminars on how to conduct appeals and oral arguments. His main focus: How to keep an eye on the appellate court while trying a case.

While the practice of law in Nevada has been somewhat informal — “We all know each other,” Polsenberg said — that is changing.

Along with the rapid growth has come a certain degree of incivility, according to Polsenberg, who explained, “Lawyers don’t treat each other as well as they did a few years ago and certainly not as well as they should.”

The State Bar is looking at ways to improve behavior, mainly through professional and educational programs, and as bar president, Polsenberg has encouraged judges to reprimand and even take disciplinary action against attorneys for uncivil conduct.

“We can’t always make attorneys like each other, but they certainly should behave,” he said.