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The Italian mathematician Fibonacci established that there is a substantial correlation between the world of mathematics and the universe of music. Howard Kirshbaum has established that there is a substantial correlation between the harmony of the string quartet and the collegiality of an appellate court. He has also demonstrated that a multifaceted and diverse legal career is exceptionally good grounding for a trial and appellate judge.

I first met Howard Kirshbaum when we were both students at Harvard Law School, class of 1965. In our second year, we both worked with the Harvard Civil Liberties—Civil Rights Research Bureau. In a time of great social concern, with the 1964 Civil Rights Act then pending before Congress and great ferment in the Nation, many law students regarded their duties to the community as co-extensive with their attempts to master the intricacies of the Uniform Commercial Code or the Internal Revenue Code. These community-related efforts made courses such as constitutional law and civil procedure come alive in a way that was more meaningful and less threatening than the Socratic method so in vogue at Harvard.

I remember that in 1965, Howard and I were due to take the bar exam together. That was the summer of the great South Platte Flood in Denver, and Howard spent a day or two at my apartment downtown before being able to return to Golden. That was probably the only time he has been deflected, even temporarily, from his course.

I don't know where Howard clerked that summer, but after graduation in 1965, he worked for the United States Office of Education, and then came to Denver and clerked for Federal District (now Tenth Circuit) Judge William E. Doyle. Judge Doyle has always combined intellect with compassion and has a natural understanding of human nature. During the year 1965-1966, Howard Kirshbaum worked with Judge Doyle on a great variety of cases, and also observed many leading trial lawyers in that court. Judge Doyle describes Kirshbaum as extremely conscientious and a perfectionist.

Howard joined a small firm, Tweedy, Mosely, Aley & Young, and thereafter joined Anthony Zarlengo, a noted trial lawyer, in practice. He concentrated on general civil litigation. In his private civil practice, Howard handled constitutional cases, including one which challenged the constitutionality of the Colorado annexation statute. He also partici-

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pated in cases with such notables as George Creamer, Fred Winner and John Kane.

Sometime in the late 1960's, I discovered that Howard was a first-class musician, and that his brother, Ralph, is a world-class cellist. I still remember hearing Ralph perform in Denver, with Howard as concert-master, for the Community Arts Symphony. Music has always played an important role in Howard's life. He and his charming wife, Priscilla, built a music room onto their home and their children are extensively involved in music. They are so devoted to music that they even named their springer spaniels "Fiddler" and "Roundeaux."

Howard joined the Denver District Court bench in 1975, where he handled criminal, domestic, and civil litigation. His trial court work was highly regarded by all who appeared before him. In 1980 he was appointed to the Colorado Court of Appeals, and in 1983 he was appointed to the Colorado Supreme Court.

Howard views the work of the Colorado Supreme Court as really very different from that of the Colorado Court of Appeals. First, there is a substantially different mix of cases. More than sixty percent of the docket in the Colorado Supreme Court involves criminal cases, while the percentage in the court of appeals is much lower. Second, it is different writing for six rather than two colleagues. Third, there is a large quantity of administrative work regarding policy decisions affecting the justice system. In addition to scheduled meetings, there often are unscheduled items which must be addressed. Thus, the institutional aspects of the Colorado Supreme Court require a different mix of skills.

In spite of the demands of a law practice or judgeship, Howard Kirshbaum has perenially taught courses at various local institutions, from Metropolitan State college to the University of Denver Law School. His courses have generally focused on the operation of the adversary system and decision-making, with careful scrutiny given to how lawyers and judges operate in practice, and equally important, how they ought to perform. The "ought" is constantly held by Howard as an ideal against which we all must be measured. He is always ready to challenge existing assumptions about the legal system and has an extremely high standard of expected performance, both for himself and for others.

Howard Kirshbaum has actively worked toward making legal services accessible to a wider range of people, especially those of moderate means. He has been quite active in the Colorado Judicial Institute and in launching prepaid legal services in Colorado. Much of his time has been given to assisting the Colorado Bar Association's Committee on Alternatives to Dispute Resolution.

Howard has been active in this community and has served on the boards of several public and legal organizations. Additionally, he has a special interest in educating public school children about our legal system. Howard sometimes tells the story of a high school class visiting his Denver District Court classroom, and one of the students asking whether it was true that judges wore nothing under their robes. In a

sense, much of his career has been devoted to exploring what is and ought to be the "soul behind the uniform."

The cases heard by Judge Kirshbaum while on the Colorado Court of Appeals were as diverse as Colorado's economic and legal systems. In *Kniffin v. Colorado Western Development Co.*,[1] a developer had promised more than he ultimately could deliver—a common disease among recreational developers. The controlling issue in the case was the measure of damages. The trial court held that the developer must pay to a suing land owner the cost of the promised developments, which included three lakes stocked for fishing and capable of supporting sailing and water skiing activities, a road system and other recreational facilities. The trial court awarded $1.3 million against the developer, which the court of appeals reversed. Judge Kirshbaum noted that the purpose of damages in contract cases is to place the non-defaulting party in the position the party would have enjoyed had the breach not occurred—not to punish the breaching party. Although Colorado had not previously determined the measure of damages for failure to construct off-site improvements, the court held that the measure of damages was the "diminution in value of the property purchases"—the sum of $11,000 rather than the much larger sum awarded by the trial court. Had the trial court's decision been affirmed, it undoubtedly would have had an *in terrorem* effect on other developers and impeded economic development in Colorado. The decision also demonstrated Howard's sensitivity in handling class action cases, as well as statutes of limitation issues.

Less than a year later, Judge Kirshbaum turned his attention to such varied subjects as the priority of mining claims near Central City, *Couch v. Clifton*,[2] and creditors' remedies against secured personal property, *Wiley v. Bank of Fountain Valley*.[3] In *Wiley*, the judgment of the trial court was reversed because the trial judge had failed to submit to the jury the question of whether the debtor had received notice of the proposed public sale of a note pledged to secure a debt. Thus, the issue of whether a deficiency was appropriate upon the completion of the sale was unresolved. In resolving the interplay of various sections of Colorado Uniform Commercial Code, Judge Kirshbaum showed either that he clearly remembered what he learned in law school in 1964, or that he was able to effectively teach himself the Code seventeen years later.

His broad range of cases continued with two notable tort decisions in late 1981 and 1982. In *Van Hoose v. Blueflame Gas, Inc.*,[4] the court held that liquified propane gas supplied to a home was an exceptionally dangerous instrumentality, entitling the plaintiffs to an instruction that special care, rather than merely reasonable conduct, was required by the supplier. In addition, the court ruled that plaintiffs should have been

1. 622 P.2d 586 (Colo. App. 1980).
2. 626 P.2d 731 (Colo. App. 1981).
3. 632 P.2d 282 (Colo. App. 1981).
4. 642 P.2d 36 (Colo. App. 1981), *aff'd*, 679 P.2d 579 (Colo. 1984).

granted leave to amend their complaint to include a strict liability claim, even though notice of that claim was given only shortly before the trial.

In *Greenwell v. Gill*,[5] Judge Kirshbaum wrote an opinion which held that an expert witness need not be listed by a plaintiff for a medical malpractice case to go forward. The issues involved in this particular case were lack of informed consent, res ipsa loquitur, and negligence generally. Judge Kirshbaum pointed out that the plaintiff could call defendant to the stand and establish her claim in that fashion, thus obviating any need to list her own expert in the first instance. The opinion also pointed out that lack of informed consent typically is an issue which may not require medical testimony.

Although Judge Kirshbaum's more notable opinions, like those of most appellate judges, are reversals of the trial court rather than affirmances, his record of affirmances is extensive. A fairly typical case is *Dupuis v. Charnes*,[6] in which the court upheld a statute permitting the revocation of a driver's license after a driver refuses to take a test to determine the alcohol content of his breath or blood. In this case, the driver challenged the statute because it did not require an evidentiary hearing on the issue of his alleged refusal to submit to the test. Judge Kirshbaum found that the plaintiff had been accorded due process: the statute contemplated both an allegation by the officer of refusal, and the opportunity to contest the issue before the hearing officer, and in this case, a hearing officer had specifically found a refusal by the driver. In another case involving more complex statutory construction,[7] the court held, in an opinion written by Justice Kirshbaum, that the vehicular homicide statute was sufficiently intelligible as to not be vague under the federal Constitution. He also noted that the definition of a strict liability offense in Colorado is not characterized by the absence of any mental state but requires a voluntary act or omission, thus providing a statutory reconciliation of definitions with well-known criminal law principles. The court also upheld proximate cause as an appropriate standard for the determination of criminal responsibility under the vehicular homicide statute.

In a late 1984 case, *People v. Rubanowitz*,[8] Justice Kirshbaum authored an opinion in which a forgery conviction was reversed because the documents issued and circulated by the defendant were true. Thus, the court resisted an effort to broaden the forgery statute to include what might have been charged as theft by deception. On the other hand, the court affirmed the conviction on other counts and rejected claims that the information was not specific enough, that an instruction on child abuse was erroneous, and that the jury had not been properly selected to be representative of the community.

Another case demonstrating Justice Kirshbaum's versatility was

5. 660 P.2d 1305 (Colo. App. 1982).
6. 668 P.2d 1 (Colo. 1983).
7. People v. Rostad, 669 P.2d 126 (Colo. 1983).
8. 688 P.2d 231 (Colo. 1984).

Great Western Sugar Co. v. Jackson Lake Reservoir and Irrigation Co.,[9] in which he ruled on the complicated interplay between water rights claims, augmentation plans and the rights of stockholders in mutual ditch companies. If still water runs deep, judicial knowledge must run deeper still.

Justice Kirshbaum's judicial opinions demonstrate an openness to new ideas and thoughtful consideration which we all seek in a judge. Combined with his calm temperament and quiet reserve, Justice Kirshbaum is a powerful figure in whatever he is engaged in, including the Colorado Supreme Court.

9. 681 P.2d 484 (Colo. 1984).