

Chief Judge Sherman Glenn Finesilver¹

At his swearing in ceremony on October 22, 1971, Judge Sherman Finesilver pledged his strength and energies “to run an efficient and orderly court in the highest and fairest tradition of the American Judicial System.”² Joining Chief Judge Alfred A. Arraj and Judges Hatfield Chilson and Fredrick M. Winner on this the small but exemplary bench, Judge Finesilver acknowledged the challenge ahead: the great potential to heal and encourage as well as “to demoralize and shatter the human spirit,” tempered by “the need for courtesy and patience.”³ Over the twenty-three years that Judge Finesilver served on the federal bench, including the twelve years he was Chief Judge, his judicial demeanor and jurisprudence, leadership and collegiality, courtroom style and chambers management, and teaching and mentoring were guided by these values.

The son of a railway clerk who “was not too proud to wear bib overalls” to work,⁴ Finesilver was born on October 1, 1927, and grew up on Denver’s West side, then a largely Jewish community. The youngest of four children, he attended North High School where he played football and earned a place on the 1945 All City team in his senior year.⁵ After graduating from the University of Colorado, he enrolled in its School of Law. However, low grades his first year forced him to withdraw, an early lesson in failure which devastated his father and taught him “about the frailties of the human condition, and about the need to give

¹ This biography was researched and written by Doris G. Kaplan, former law clerk to Judge John C. Porfilio, with much appreciated assistance from Catherine McGuire Eason, Deputy Circuit Librarian, and a cadre of Judge Finesilver’s former law clerks.

² Ceremony of Swearing In of Sherman Glenn Finesilver as United States District Judge, October 22, 1971, Courtroom A., Denver, Colorado.

³ *Id.*

⁴ Rocky Mountain News, Sara Burnett, *Finesilver Renowned as Jurist*, Oct. 13, 2006.

⁵ Intermountain Jewish News, “*Judge Finesilver, Passing of an Era*,” Andrea Jacobs, October 20, 2006.

people second chances.”⁶ His second chance was more successful. He received his law degree from Westminster Law School, now the University of Denver Sturm College of Law and passed the Colorado bar in 1952. After three years in the city attorney’s office, Denver Mayor William Nicholson launched his judicial career, appointing Finesilver to the Denver County Court.⁷ At twenty-five, Judge Finesilver was perhaps the youngest judge in the state.⁸ Later persuaded to run for state district judge, Judge Finesilver easily defeated the incumbent in 1962, beginning a nine-year stint on the Denver District Court.⁹

While on the Denver District Court, Judge Finesilver taught evidence at his alma mater, the University of Denver School of Law. Instead of selecting a text book, Judge Finesilver assigned the proposed federal rules of evidence, correctly predicting the states would soon adopt them as well.¹⁰ During that time, Judge Finesilver authored three books published by Grosset & Dunlap. *Protect Your Life! In the Streets/In Your Home or Apartment/At School/While Travelling*; *Protect your Life: Wise words for Women*; and *Timely Tips When Disaster Strike* were practical guides drawing on his “broad judicial experience ... as well as the experience of police officials and even criminals themselves.”¹¹ The books offered advice “to concerned citizens” on how to respond to the many manifestations of crime in daily life.

Anchoring these first years on the bench and many to follow was his wife Annette, described as “my check in balance,” who might occasionally warn, “Sherm, don’t get too judge-y,” or “Sherm, climb down off that bench.”¹² Three children, Jay, Steve, and Susan, and later

⁶ *Id.*

⁷ Rocky Mountain News, “Finesilver, Renowned as Jurist,” Sara Burnett.

⁸ Comments of Jerry Melman, Portrait Presentation Ceremony Judge Sherman Finesilver, December 9, 1994.

⁹ Reminiscence of James L. Treece.

¹⁰ Interview with Judge Jeffrey Bayless, May 6, 2009.

¹¹ Jacket Cover, *Protect Your Life*.

¹² Remarks by Judge Finesilver, Swearing in Ceremony, Oct. 22, 1971.

eleven grandchildren, filled Judge Finesilver's very public life with the many joys and challenges of raising a family. To each he imparted "you get out of life what you put into it."¹³ Judge Finesilver introduced his many law clerks to his family and entertained them in his home. He told his clerks when home crises arose, "you need to do what's right for you and your family; let me worry about handling things here."¹⁴

President Nixon appointed Judge Finesilver to the U.S. District Court in 1971. Now a member of "the dynamic quartet"¹⁵ of Judges Arraj, Chilson, and Winner, Judge Finesilver "began behind," according to his first law clerk,¹⁶ buried in the substantial backlog that had awaited his arrival. Predictably, this docket spanned the range of issues arising under federal law, for example, habeas corpus,¹⁷ agency,¹⁸ patent infringement,¹⁹ and attorney fees in the ongoing litigation over the desegregation of the Denver Public Schools.²⁰ However, in an early landmark case, *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), Judge Finesilver held unconstitutional a Colorado law that required parental consent before an unmarried woman under the age of eighteen could terminate her pregnancy. In 1982, Judge Finesilver became Chief Judge of the District of Colorado, a position he held until he retired in May 1994.

In 1974, the Judicial Panel on Multidistrict Litigation transferred to the District of Colorado and assigned Judge Finesilver his first complex case alleging violations of federal

¹³ Remarks by Steve Finesilver, Portrait Presentation Ceremony Judge Sherman Finesilver, December 9, 1994.

¹⁴ Michael Flanagan email.

¹⁵ Remarks by Judge Zita Weinshank, , Portrait Presentation Ceremony Judge Sherman Finesilver, December 9, 1994.

¹⁶ Judge Jeffrey Bayless, now retired from the Denver District Court, was sworn in the same day as Judge Finesilver as his first law clerk.

¹⁷ *Hubbard v. Wilson*, 401 F.Supp.495 (D. Colo. 1975).

¹⁸ *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973).

¹⁹ *Norfin, Inc. v. International Business Mach. Corp.*, 453 F. Supp. 1072 (D. Colo. 1978)

²⁰ *Keyes v. School Dist. No. 1, Denver, Colo.*, 439 F. Supp. 393 (D. Colo. 1977).

securities laws.²¹ *King Resources* was followed by the Swine flu vaccine cases. These Federal Tort Claims Act cases were generated by the National Influenza and Immunization Program of 1976, which was implemented to inoculate the country's adult population against the threat of a swine flu epidemic.²² Plaintiffs, all suffering from Guillain-Barre Syndrome, a neurologic disorder often resulting in paralysis, alleged the United States was liable for the illness based on the causal connection between the vaccine and the illness. Judge Finesilver travelled to Salt Lake City, Oklahoma City, Tulsa, Topeka, and Santa Fe to try the approximately 125 cases.²³

From 1983 to 1986, Judge Finesilver addressed an antitrust case in which Monfort of Colorado, then the country's fifth-largest beef packer, brought an action in Federal District Court to enjoin the proposed merger of Excel Corporation, the second-largest packer, and Spencer Beef, the third-largest packer.²⁴ According to his former clerk, "Not surprisingly, counsel from all over the country were involved, and the case received a great deal of attention."²⁵ After a bench trial, Judge Finesilver enjoined the merger, a decision upheld by the Tenth Circuit Court of Appeals, although the U.S. Supreme Court ultimately reversed on the legal issue of what constituted "antitrust injury."²⁶

Under the master docket and case file styled "In re: Air Crash Disaster at Stapleton International Airport, Denver, Colorado, on November 15, 1987," Judge Finesilver was then assigned the many claims spawned by the November 15, 1987 crash of a Continental Airlines

²¹ *In re King Resources Co. Securities Litigation*, 385 F. Supp. 588 (Jud.Pan.Mult.Lit. 1974).

²² *See, e.g. In re (Swine Flu Immunization) Products Liability Litigation, Alvarez v. United States*, 495 F. Supp. 1188 (D. Colo. 1980). These cases resonate today as the media is filled with news about the possibility of an H1N1, Swine Flu pandemic.

²³ Correspondence with former law clerk, Robert W. Forman.

²⁴ *Monfort of Colorado, Inc. v. Cargill, Inc.*, 591 S. Supp. 683 (1983).

²⁵ Correspondence with former clerk, Michael D. Flanagan, Foley & Lardner LLP, Milwaukee, Wisconsin.

²⁶ *Cargill, Inc., v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986).

DC-9 airplane en route from Denver to Boise, Idaho.²⁷ On take-off in a snow storm at Stapleton International Airport, the plane crashed, killing 28, including the pilot, copilot and flight attendant and injuring 54 passengers. Plaintiffs, residents of Arizona, Colorado, Idaho, New Jersey, and Washington, claimed the crash was caused by pilot inexperience and poor training, Continental Airlines' willful, wanton and reckless disregard for passenger safety; they also alleged various deceptive trade practices.²⁸ Despite the complexity of these claims as well as the magnitude of the loss and injury, Judge Finesilver resolved the cases within two years after the crash.²⁹

Storage Technology Corporation's petition for reorganization under Chapter 11 of the Bankruptcy Code soon followed.³⁰ Fifteen separate class actions alleging violations of federal securities law were added to the underlying bankruptcy action. After the consolidated securities litigation was settled in September 1990,³¹ undisbursed funds of approximately \$108,000 remained. With the approval of plaintiff and defense counsel, Judge Finesilver ordered the funds distributed to various community groups to support programs for physical and mental abuse, infant screening and treatment, and legal services to the poor, to name a few. In this settlement, Judge Finesilver demonstrated his reputation for innovation "in structuring settlements in a way to provide the broadest possible public good."³²

²⁷ *In re Air Crash Disaster at Stapleton Intern. Airport, Denver, Colo., On Nov. 15, 1987*, 720 F. Supp. 1433 (D. Colo. 1988).

²⁸ *Id.* at 1434.

²⁹ Remarks by Judge David Ebel, Portrait Presentation Ceremony Judge Sherman Finesilver, December 9, 1994.

³⁰ Headquartered in Louisville, Colorado, Storage Tech manufactured tape data storage devices and systems generating sales of over \$1 billion in 1982. Like the Swine Flu cases, this bankruptcy filing and securities litigation occupied Denver headlines.

³¹ *In re Storage Technology Corp. Securities Litigation*, 1990 WL 260592 (D. Colo. 1990).

³² Remarks by Judge David Ebel, Portrait Presentation Ceremony Judge Sherman Finesilver, December 9, 1994.

Chief Judge Finesilver also organized, managed, and ultimately settled the Superfund cleanup of Lowry Landfill.³³ Under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”), 42 U.S.C.A. §§ 9601 et seq., a settlement was required to reflect the dual purpose of achieving the prompt cleanup of hazardous waste sites and imposing the cost of cleanup on those responsible for the contamination.³⁴ Over the course of one year, the City and County of Denver and other landfill operators settled their CERCLA action against 75 defendants, reaching settlement agreements the court found to be fair and reasonable with “complete and justifiable terms.”³⁵

In the meantime, Chief Judge Finesilver oversaw the Rocky Flats grand jury proceedings.³⁶ In 1989, a Special Grand Jury was empaneled to investigate federal environmental crimes that may have occurred at the Rocky Flats Nuclear Weapons Plant in Jefferson County, Colorado. Upon its discharge in 1992, the Special Grand Jury submitted a report of its findings to the court, after which Rockwell, Rocky Flats’ corporate operator, and the Department of Justice entered into a plea agreement. Rockwell pled guilty to ten criminal charges violating federal environmental laws in its operation of Rocky Flats and paid an \$18.5 million fine.³⁷ When the court sealed the report, various media corporations then moved for the release of the special grand jury documents.³⁸ The court ultimately ordered the redacted report to be filed as a public record.³⁹

³³ *City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340 (D. Colo. 1993).

³⁴ *Id.* at 344.

³⁵ *Id.* at 347; see also Bill Scanlon, “Companies to pay bulk of landfill cleanup settlements apportion responsibility and cost among Coors, Syntex, others who used Lowry, Rocky Mountain News, May 8, 1993.

³⁶ Rocky Mountain News, *Grant Rocky Flats Jurors Immunity and Let Them Speak Up*, November 14, 1993; see also Los Angeles Times, *Showdown at Rocky Flats: The Justice Department’s Negotiation of a Rocky Flats Settlement Leaked by Grand Jury*, August 15, 1993.

³⁷ *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 1993 WL 24557 (D. Colo. 1993).

³⁸ *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. 1451 (D. Colo. 1992).

³⁹ *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 1993 WL 24557 (D. Colo. 1993).

This litany of only a few of the complex cases Judge Finesilver resolved and to which he brought his considerable skills of managing complex litigation and settling disputes is a template of his judicial philosophy and professional expertise.⁴⁰ Although attorneys grouched, he was “an arm twister,” “he sits you down well in advance and you better have a very good reason for not settling,”⁴¹ judicial intervention in cases he viewed as appropriate for settlement began early and remained proactive until the parties either decided to settle or deadlocked. In that event, Judge Finesilver tried the case. “He worked as hard as the attorneys and researched the issues as much as if he were deciding summary judgment to fully understand the strengths and weaknesses of each party.”⁴² “Judge Finesilver grasped a case on a macro level. He could see the overall picture while understanding a specific issue on a motion.”⁴³ From this perspective, he worked to move the parties to the center, motivated by “a true desire to see them reconcile.”⁴⁴

Of his remarkable role in settling complex cases, Christine Castellano, a former clerk, wrote, “First, Judge Finesilver's true passion as a jurist was in the area of mediation and settlement. This was long before early dispute resolution became a norm in litigation. He, as a matter of course, would call the litigants together, insisting that clients with authority be present and with every intention of devoting as much time to the settlement process as was needed for resolution of the matter. Settlement conferences were not pro forma, “in and out” activities, but were a commitment from which no one departed until the matter was resolved or true impasse was reached. During settlement discussions, Judge Finesilver quickly and forcefully moved past rhetoric into the heart of a claim or defense. Speeches were not welcome, kept to a minimum.

⁴⁰ The list is hardly complete. See, e.g. Joe Wheelan, “Neil Bush Settles Silverado Lawsuit: He and 12 Associates to Pay \$49.5 million,” *San Francisco Examiner*, May 30, 1991.

⁴¹ Rocky Mountain News, Sue Lindsay, *Lawyers Give Glimpse of Judges' Traits*, Sept. 22, 1991.

⁴² Interview of Judge Jeffrey Bayless, May 6, 2009.

⁴³ Interview with Judge C. Jean Stewart, Presiding Judge of the Denver Probate Court, June 3, 2009.

⁴⁴ *Id.*

He was a skilled reader of the people present, and exercised firm control to ensure that the settlement discussions remained focused and productive. In the end, probably no one left happy, but each party left having made compromises to reach resolution.”⁴⁵

This view was shared by many former law clerks. “Judge Finesilver was truly ‘ahead of the curve’ when it came to working with litigants to facilitate settlements.⁴⁶ I suspect you have heard this from others. Judge Finesilver was a great trial judge – and appeared to genuinely enjoy trying cases – but he also made every attempt to resolve cases without the parties having to spend the time and money on a full blown trial. He routinely set cases for settlement conferences, bringing in both the lawyers and ‘decision makers’ for each side. In advance, he (along with his clerks) would generate lists of the weaknesses in each side’s legal arguments. He would not tip his hand or ‘twist arms,’ but particularly in commercial disputes he helped parties realize that they could resolve disputes as business matters rather than through protracted trials.

Significantly, I watched him do this when I clerked for him in the early 1980s – and I am sure he had been doing it long before then -- before many people in the country were utilizing mediators or other forms of ‘alternative dispute resolution.’ Suffice it to say, for someone just out of law school (me), it was a great education. Years later, when as a practicing attorney I watched mediation and alternative dispute resolution sweep the country, I couldn’t help but laugh to myself and think how Judge Finesilver was way ahead of the curve.”⁴⁷

Judge Finesilver also brought innovation into his leadership as Chief Judge. The local rules were implemented during his tenure as Chief Judge along with the district’s support of the Criminal Justice Act Committee, Outreach to the Denver Bar Association and the Civil Justice

⁴⁵ Christine Casellano, Associate General International Counsel, Corn Products International, Inc. Ms. Castellano clerked for Judge Finesilver from 1990 to 1991.

⁴⁶ Correspondence with Michael D. Flanagan.

⁴⁷ *Id.*

Reform Act Advisory Group.⁴⁸ His collegiality, fostering cooperation among the judges and chambers then numbering eleven, was often extended by the delivery of a dozen bagels and cream cheese or his holiday bags of peanuts.

Judge Finesilver may be credited with hiring the first woman to clerk for a federal judge in the District of Colorado.⁴⁹ Each new team of law clerks, hired for two years, was initiated into the many routines of clerking – arriving at 7:30 each morning and working until 5:00. “He expected a lot from all of us clerks, but that one year of clerkship was probably worth five years of training in the real world.”⁵⁰ Former clerks praised Judge Finesilver’s teaching and mentoring them, not simply during the clerkship but long after as well. He offered advice on career choices law clerks discussed with him and maintained contact with his former clerks, whether getting together in town for lunch or at clerk reunions. Judge Finesilver officiated at law clerk weddings,⁵¹ called the delivery room to see how a clerk’s wife was doing during her labor, and regularly included his clerks in his own family gatherings. “He was loyal, polite, and funny, had a great sense of humor, and never lost his temper. He cared about you and made sure you were successful.”⁵² In 1993, Judge Finesilver assembled and distributed a Law Clerk Scrapbook at the reunion he organized that year. The book included photos, short updates – professional and personal – and reminiscences sent by his former clerks.

⁴⁸ Remarks by U.S. District Judge Zita Weinshank, Portrait Presentation Ceremony Judge Sherman Finesilver, December 9, 1994.

⁴⁹ Interview with State Rep. Beth McCann, who holds that title. Rep. McCann also noted Judge Finesilver previously hired now Judge C. Jean Stewart as an intern just before she started, and Judge Stewart later clerked for him as well.

⁵⁰ Email, April 22, 2009, from former clerk, Karen Treece, Treece, Alfrey, Musat & Bosworth, P.C.

⁵¹ New York Times, Sept. 22, 1991, Chief Judge Finesilver officiated at Jan Zavislan’s wedding at the Brown Palace.

⁵² Interview with Colorado State Representative Beth McCann, who clerked for Judge Finesilver in 1974-75.

Importantly, “he truly had compassion for people in his courtroom.”⁵³ What Judge Finesilver imparted to clerks was “to the parties and litigants, this case is their case, their only case, and it may be their lives literally. The parties who appeared, whether they won, lost or drew ... they knew they had their say, that they had their day in this court, and this is what the value of our clerkship is in the wider scheme of things.”⁵⁴ As now retired Denver District Judge Jeffrey Bayless acknowledged, “I wanted to be a judge. I watched him, and ultimately became a judge. He was a great role model.”⁵⁵ Denver Probate Judge C. Jean Stewart credits Judge Finesilver as a model that shaped her own judicial career. “He was a wonderful example of how to be a judge – ‘be humble, work hard, that’s what people expect you to do, and do what’s right.”⁵⁶

Although Chief Judge Finesilver retired from the bench on May 31, 1994, his retirement was short-lived. The following year he joined Popham, Haik, Schnobrich and Kaufman as special counsel and brought his trove of experience to this Denver law firm.

Judge Finesilver died on October 12, 2006, at the age of seventy-nine. The legacy he bestowed on the judiciary and the Denver legal community demonstrates he was truly ‘way ahead of the curve.’ His work embraced and affected much of the history of Denver and Colorado. And, his memory is a source of pride, inspiration, and dedication to the law to all who knew him.

⁵³ *Id.*

⁵⁴ Remarks by Tom Roberts, Portrait Presentation, December 9, 1994.

⁵⁵ Telephone interview with retired Judge Jeffrey Bayless.

⁵⁶ Interview with Judge Stewart.