

ADVANCED TOPICS IN APPELLATE PRACTICE: THE PATH OF MASTERY

BY CHARLES A. BIRD

Reviewed by Robert M. Shaughnessy*



When I was a kid, my father was my hero. He was a football coach. He threw himself into his profession with gusto. I rarely saw him between August and November. But I carry precious memories of traveling to games under the Friday-night lights, eating stale popcorn, and watching my dad walk the sidelines with his players. In 1975, he coached Loyola High School to the AAAA championship and his team was recognized as a national champion.

When I was a teenager, my Dad remade himself. At the request of his own father, Dad walked away, left a promising coaching career to take over a small family business, a company that manufactured pipe hangers and bracing for the commercial construction industry. Dad saw the company's potential, but he had little experience with the business or the industry in which it operated. As with his coaching, Dad immersed himself in the business, and the greater industry. He soaked up knowledge from a mentor who was willing to teach. He gathered the tools that would help him guide and grow that business within that industry. Ultimately, he piloted his company through economic uncertainty and into a state of sustained success. By the end of his business career Dad was able to sell the business as a going concern, setting him and my Mom up for a long

and comfortable retirement. Things did not go as planned.

Shortly after he retired, Dad was diagnosed with cancer. He died at the end of an eight-year struggle, at the age of 72. In the midst of battling the disease, and after enduring the misery inflicted by rounds of radiation and chemotherapy, he decided to get a tattoo. Across my Dad's shoulder were inked the words "Enjoy the Journey." Dad traveled a path not unlike the path that another hero of mine, Charlie Bird, commends to those of us engaged in the practice of appellate law. *The Path of Mastery* was Charlie's magnum opus, published posthumously because Charlie also died too soon, having lived just 73 years.

It was my pleasure to get to know Charlie through the San Diego County Bar Association's Appellate Practice Section. Charlie was a lawyer's lawyer, accounted by many as one of the best legal minds in San Diego. He was indeed one of the greatest legal minds I have ever encountered.

Charlie earned his J.D. from the UC Davis School of Law, Martin Luther King Hall, in 1973. He then served as a law clerk to the Hon. Robert Boochever, both at the Alaska Supreme Court, and later at the U.S. Court of Appeals for the Ninth Circuit.

In 1974, Charlie entered private practice with the San Diego law firm Luce Forward Hamilton & Scripps. He remained with the firm, which became Big Law by acquisition, and was doing business as Dentons US LLP when he retired in 2018. Charlie's extensive career allowed him to argue civil cases in the U.S. Supreme Court, multiple U.S. Circuit Courts, the California Supreme Court, and all six of California's intermediate Courts of Appeal.

One thing that I find striking about Charlie's career path is that, more than a decade into private practice as a business litigator, he took a sabbatical to withdraw from the comforts of modern society and live in the Alaska backcountry. After months of rugged living, and much deep work, Charlie returned to civilization both invigorated and rededicated to the craft of appellate law.

If you want to read an example of the level to which Charlie elevated his practice, read the amicus brief that he authored and filed together with 35 other appellate lawyers, in the Supreme Court of the United States, in *Trump v. Hawaii* (2018) ___ U.S. ___ [138 S.Ct. 2392] (The brief is included as an appendix to *The Path of Mastery*.) His writing describes how the German judiciary, operating under the Weimar Constitution, betrayed the rule of law in the 1930's and paved the way for national socialism to take hold. He then calls out contrasting periods in the history of American jurisprudence, when United States courts compromised the rule of law by yielding to executive power and popular racial prejudice, but later affirmed the necessity of an independent judiciary as a check on expanding executive power. He writes, "Judicial loyalty to the Constitution requires upholding the rule of law not only by the substance of the Court's opinions, but also in the rules of scrutiny and review of presidential acts." (Amicus brief, at p. 24.) Charlie asserts that the rule of law requires, "when a sole actor — here the President — promulgates a challenged law, everything the actor has ever said or written about that law should be considered in testing its meaning and validity." (*Id.* at pp. 24-25.)

The co-signatories to Charlie's amicus brief read as a who's who of California appellate practice and include two former California Supreme Court justices. Charlie was a craftsman indeed. His amicus brief in *Trump v. Hawaii* was a Stradivarius. And his *Path of Mastery* offers us an understanding of how an appellate practitioner might travel the same road that led Charlie to such heights.

The book is divided into two parts. The first part of the book, chapters 1 and 2, accomplish two things. Chapter 1 argues for nothing less than a reinterpretation of the practice of appellate law as Craft — i.e. the dedication of self to a lifelong journey that brings both joy and success. Charlie speaks of these terms in the deeper sense, as the joy and success of one whose labors may produce a flawless cherry wood cabinet, or a heart-rending aria. In chapter 2, Charlie explains how to walk this path of mastery. To use his words, the chapter "shows how people of talent become world-class masters of any profession. Most important, it tells how those of us not blessed like [Itzhak] Perlman, [Stephen] Curry, and [Judi] Dench can use the same devotion to express our talents to the fullest and become masters." (*Path*, Intro., p. xv.)

The second part of the book is what might be called the "nuts and bolts" or "tools" that one can employ when trying to develop a cohesive appellate practice. You may be tempted to skip to these latter chapters, which are indeed filled with some excellent advice. But in doing so, you will rob yourself of the deeper part of the book's message. Read the first two chapters. Read them twice if you need to. Let the concepts sit with you and marinate. "They make the parts into a working machine" and they are why Charlie wrote the book. (*Path*, Intro., p. xvi.) "You will not get the full benefit of any method of producing work product unless you see it and practice it integrated in a vision of mastery of appellate work." (*Ibid.*)

To develop the notion of craft, Charlie turns to Japan's concept of *Shokunin*, or "master" and *Shokunin kishitsu*, a term that "embraces the spirit and discipline one adopts to strive for mastery." (*Path*, p. 6.) The concepts convey movement. Perhaps this is why the book is entitled *The Path of Mastery*, rather than the *Path to Mastery*.

Under the concept of *Shokunin kishitsu*, the *Shokunin* strives for mastery for the sake of one's craft, constantly seeks to improve, stubbornly pursues excellence over consensus, and holds such passion for their craft that they immerse themselves in it. In a sense, a master falls in love with the work. While material rewards come from this level of commitment, they are not the goal. The joy is in the lifetime journey of mastery. Mastery is not a destination. Mastery of craft is a movement, a progression, a voyage that produces both lasting commitment and profound joy.

Charlie's message is at once profound and simple. The rule of law requires lawyers committed to appellate practice in this way.

Charlie lays out the path to a deeper commitment to appellate practice in chapter 2. There, he discusses the concept of "deep work," which was introduced to him in the 2016 book of the same name, by Cal Newport. Deep work consists of "professional activities performed in a state of distraction-free concentration that push your cognitive capacities to their limit. These efforts create new value, improve your skill, and are hard to replicate." (*Path*, p. 13.) Deep work is necessary for appellate work; brief writing, oral argument, and record review. Charlie lays out a methodology that frees up time to do deep work. His recommendations are themselves deep, encouraging practitioners to integrate mastery and life. "The goal is to have a physically and mentally healthy life in which one of your skills is directed concentration." (*Id.* at p. 18.)

Mastery requires discipline, and it is certainly an ambitious path that Charlie has laid out. But it is also a balanced path that his book recommends. To the extent it can be achieved, the ability to balance home and work life helps to avoid the kind of burnout too many within our profession experience. What is being advocated for is not more hours of work, but a cessation of less effective and time-consuming shallow work.

As part of the integration of mastery and life, Charlie's top suggestion is to cultivate at least one activity that develops and exploits the same directed attention required for mastery of appellate practice. Rock-climbing was Charlie's chosen activity. But that was Charlie. Nothing like the threat of a quick death to focus one's concentration. But dangerous outdoor activity is not required. Making music certainly may accomplish a similar directed attention.

Notably, Charlie's concept of deep work is not technology adverse. Rather, his approach asks appellate lawyers to take a discerning look at the technology surrounding their practices; to retain the technology that advances deep work, and to turn off or remove the technology that hinders it. "Aggregating knowledge and production tools on the same machine is wonderful. But adding connectivity tools does little good for deep work; it is harmful because it reduces friction on corridors for distraction

by others and creates frictionless avenues to self-distraction." (*Path*, p. 27.)

Following his discussion of mastery and the path, Charlie then lays out the tools of his craft. I am not a newcomer to appellate practice, but I found part two of Charlie's book incredibly insightful.

Charlie's discussion of the use of story, and its connection to values is insightful. Chapter 3 calls into action the "System 1/System 2" model of decision making that he draws from the work of Daniel Kahneman, author of *Thinking, Fast and Slow*. (*Path*, p. 49, citing *Thinking Fast and Slow* (2011) at pp. 11-13.) In essence, intuitive thinking informs the mind of every decision-maker, even those who consciously try to engage in a purely deliberative process free from outside beliefs and prejudices. (*Path*, pp. 48-50.) Knowing that this is so, appellate advocates should employ the use of story, to inculcate the values that advance your argument." (*Id.* at p. 50.) In the chapters that follow, Charlie describes how to write good stories, and how to write a story in a brief.

Equally valuable is Charlie's shared approach toward oral argument, which covers matters from the division of arguments among co-counsel to preparation techniques. Charlie suggests preparing for three different arguments, the stone-faced unengaged bench, the active but open-minded panel, and the active hostile panel. (*Path*, pp. 220-231.) Equally helpful is his discussion of preparing the intuitive part of your mind for oral argument as well as your cognitive mind. (*Id.* at pp. 230-231.) In sum, the chapter, like the book, is awash with advice that served Charlie well for many years.

The book was released by Full Court Press in 2021, after Charlie passed. It is dedicated to his wife, Charlotte, whom he describes as "[t]he love of my life, [a]nd my work's reasonable woman test." It was my pleasure to know Charlie, and reviewing his book was like sitting across the table from him, as he passed along what he hoped would lift up his profession. Despite my years of practice, I feel I am in no position to judge the life's work of a master like Charlie Bird. I can only conclude that Charlie did indeed enjoy the journey.

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