Advanced Topics in Appellate Practice

The Path of Mastery

Charles A. Bird

Full Court Press

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fastcase FULL COURT PRESS

A Full Court Press, Fastcase, Inc., Publication.

Printed and bound in the United States of America.

10 9 8 7 6 5 4 3 2 1

ISBN (print): 978-1-949884-57-9
ISBN (online): 978-1-949884-58-6

This book's cover features a paper and silk stencil from nineteenth-century Japan. The image is provided courtesy of The Metropolitan Museum of Art, New York's Open Access project.

To Charlotte
The love of my life
And my work's reasonable woman test.

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Introduction

Watch Itzhak Perlman, not just in performance but also as a teacher or in rehearsal. Feel his exuberance in mastering the craft of the violin. Or sample the joy in Stephen Curry's Master Class videos and watch his Lesson 17, "The Journey Towards Perfection." Or listen to master class interviews of Judi Dench.

Perlman, Curry, and Dench devote countless hours to studying and practicing the techniques of their professions. That is the path of technical mastery for a concert violinist, an athlete, or an actor. More than that, each demonstrates and speaks to the need to take joy from every part of the journey. Without that joy, people do not invest the effort to achieve mastery and gain the resulting quality of life.

In appellate practice, I have found the same joy seen in masters like Perlman, Curry, and Dench. My practice is not of their stardom. That does not matter to how I have felt while practicing nor how I feel looking back from retirement. The joy is in the investment, not in the tangible return.

In this book, I do my best to convey why appellate practice is as worthy of investment as the creative arts and crafts, the performing arts, and athletics. Chapter 1 expresses this stand. Chapter 2 explains how to walk the path; it shows how people of talent become world-class masters of any profession. Most important, it tells how those of us not blessed like Perlman, Curry, and Dench can use the same devotion to express our talents to the fullest and become masters.

You may come to this book for the nuts and bolts. Please read chapters 1 and 2 anyway. They make the parts into a working machine, and they are why I wrote the book. 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.

Soon enough, I will turn to the nuts and bolts. In some chapters, you may think I am teaching how to make the tools and dies to make the nuts and bolts. Yes, but they are tools that help liberate the spirit.

I come to this book from the beginning of the baby boom in California's Central Valley. There, in Stockton, honest lawyers were respected for that and their expertise. They made good livings, but few were rich, even by Stockton standards. Except for New York firms, this seemed true through law school and into the late 1970s.

In 1973 and 1974, I clerked for Robert Boochever, then an associate justice of the Alaska Supreme Court. A master advocate, he was also a first-rate mentor. Juneau abundantly supplied rainy weekends, perfect for old-fashioned research and writing. We stayed ahead of deadlines so we could ski, hike, and fish; he taught me fly-fishing. He also showed me how lawyers can keep to true north on the moral compass.

I left Juneau understanding that law is a craft and that I needed to pursue excellence in practicing it. In San Diego, appellate law was within my vision, but difficult to grasp as a specialty. As if to greet me, the managing partner named an indolent generalist to be the appellate partner, unsuccessfully trying to make him productive. So I apprenticed to four superb trial lawyers—fellows of the American College all—who kept their own appeals. I clawed for every brief I could write, knowing my name might not go on it and I would not argue.

One partner assigned me to a series of national cases. This was ideal training with lots of travel; I had the challenging privilege of doing tasks on the road unavailable to my peers at home. But it meant I wrote briefs on notepads in makeshift hotel room offices from records in suitcases and photocopied cases. Then I became a partner and had to develop a self-sustaining practice. Yes, in 1979, you proved yourself as a practitioner and your firm trusted you to build a book of business. But appellate partner was still not a practice in my firm or the local market.

Just as I was about to give up on the firm, an appellate judge castigated one of our top guns for filing trial court papers as briefs and making jury arguments to the court. The managing partner asked me if I would try to put together an appellate practice, initially fed by the work of the trial partners. What a kick-start! But I also had to plot my own study and make my own judgments about which advice to follow. That's not to say I invented anything useful about persuasion that's in this book. I have it all on loan from creditors who don't want it back. Instead, they reinforce my duty to pay it forward to a new generation of appellate lawyers.

Among the amazing changes during my decades of practice are the overwhelming focus on law as a business, and the dialog between lawyers and business clients—filled with whining on both sides—that progressively favors the bigger and richer. My native San Diego firm became Big Law by merger. I'm glad that's not how my career started, but I know many young lawyers will attempt Big Law paths to appellate practice.

This book is not about financial success. It is about mastery, which is not to be sought for money. Mastery is a never-ending quest with its own joys. As a goal, compensation interferes with mastery. A financial goal becomes a razor in key decisions and can push a result incompatible with

developing mastery. There's a good living to be made—much better than "good" in some contexts—as a natural result of top-quality practice. This book shows a way to follow your heart and your conscience in pursuing mastery, even if you live in a business plan laid down by colleagues devoted to the bottom line.

This is the book I wish I could have read as an apprentice. I invite your creativity and curiosity onto the path of mastery and into the rewarding law practice that follows.

I give immense thanks to Melanie Gold, senior staff attorney at the California Court of Appeal, and Arthur Campbell, professor of law at California Western University, for being my first two volunteer readers.

About the Author

Charles Bird served his law school—U.C. Davis's Martin Luther King Hall—as one of three executive law review editors and on the national moot court team. He clerked for Robert Boochever, then of the Alaska Supreme Court and later of the U.S. Court of Appeals for the Ninth Circuit. Bird fell in love with the appellate process. He and his wife, Charlotte, fell in love with northern wilderness and getting about in it on foot, on skis, and by canoe.

Returning to California for career, Bird found the market and law firms inhospitable to a neophyte looking for appeals. He apprenticed in complex business litigation, then built a practice in real estate litigation. In 1987, the Birds took a sabbatical in the Alaska back country. Charles reinvented himself as an appellate lawyer, and Charlotte became a professional artist.

From a San Diego base, Bird built a national practice. This was recognized by induction into the California Academy of Appellate Lawyers and the American Academy of Appellate Lawyers. He became president of each. His amicus briefs for the academies have been cited by the supreme courts of California and the United States.

Advanced Topics in Appellate Practice

The Path of Mastery

Chapter 1

Mastering Appellate Practice Is a Worthy Life Goal

The introduction declared my goal for this project. But I hope the book serves you, regardless of why you picked it up.

If you are an appellate lawyer, you have an intimate relationship with the rule of law. You cannot avoid it. But why would you want to try? One grand privilege of appellate practice is participating in maintaining and advancing the rule of law.

Politicians and professors use "rule of law" in many ways, ranging from keeping demonstrations orderly to the substantive content of justice. The language dates to seventeenth-century texts contesting the divine right of kings.[1]

I use rule of law to mean the processes essential to create space for a free society to survive and decide the substantive content of justice. One key element is captured in the phrase "a government of laws, not of men," which itself is to

[1] Most notable are Samuel Rutherford, Lex Rex (1644) at 237, available on Google Books, and James Harrington, Oceana (1656) at 37, available on the Internet archive of the John Adams Library of the Boston Public Library. Black's Law Dictionary (11th ed. 2019) has a contemporary discussion.

say two things. First, the rules that order and constrain individual liberty come from regular processes adopted by the people, not from an arbitrary sovereign or oligarchy. Second, the rules are enforced through regular processes also adopted by the people, and no arbitrary sovereign or oligarchy may exist to select how and toward whom the rules will be enforced. All people, companies, governmental bodies, and their agents, without exception, are subject equally to the ordinary law of the land.

1.1. The Rule of Law Needs Appellate Courts

It is hard to argue that any institution is more engaged with the rule of law than are appellate courts.

- In common law precedent, they make law applicable to all people who encounter similar circumstances.
- In constitutional precedent, they hold the executive and legislative powers to comply with the fundamental rules for order and liberty established by the people. Some trace the most dramatic power—to declare laws void for violating the Constitution—to *Marbury v. Madison*,[2] but that case derives from the thoughts and words of the framers. Alexander Hamilton wrote in The Federalist No. 78 that the federal courts were designed to ensure that the people's representatives acted only within the authority given to Congress under the Constitution. When a statute conflicts with the Constitution, "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[3]

[2] 5 U.S. 137 (1803).

[3] The Federalist No. 78.

- In precedent applying statutes, they clarify and assure uniform application of the rules adopted by the legislative branch.
- They make or influence law in reasoned decisions that resolve real disputes. These demonstrate that judges are not autocrats and make judges accountable to the people. Some results resolve only disputes between parties, but most of those—in some states, all of those—are expressed in public written and reasoned records that serve the same goals of accountability.
- They assure that laws are applied uniformly in the cases that reach them. They hold trial judges accountable for many kinds of error, including bias; they provide less but still important accountability for juries that reach lawless results. By establishing visible norms, they provide for fairness and uniformity in cases that never reach them.
- They provide visible evidence of justice being done. Their process is mostly transparent: the records, the briefs, the arguments, and the decisions are all public. And appellate courts are improving visibility of the arguments by online access and outreach programs.
- Beginning with their oath of office and through all their work product, they reasonably demonstrate that everyone is subject to the same rules. Since the Judiciary Act of 1789, federal judges swear a simple oath that includes "that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me. . . ."[4]

[4] 28 U.S.C. § 453.

True, not every appellate judge is bright, completely free from flaws, faithful as a bird dog, and kind as Santa Claus.[5] The courts need continuous energy input to overcome entropy—the tendency of all physical and social systems to fall apart. They need more input than their inherent loss of energy to keep up with changes in their physical and social environment. The appellate courts have better stood the past fifty years' challenges than have any other U.S. institution.

I also believe that most of the American people have the same thirst for the rule of law that undergirds the first acts in creating the country. Grievances against George III in 1775 included refusing assent to laws adopted by the colonies, refusing to allow royal governors to pass laws, conditioning laws on relinquishment of representation, obstructing administration of justice by refusing consent to laws establishing judicial powers, controlling judges by at-will employment and withholding pay, transporting the accused out of the colonies for trial, and denying the right to jury trial.[6]

1.2. The Rule of Law and Appellate Courts Need Appellate Lawyers

I admit pride in spending most of my career participating in and supporting the appellate process. This is not a cynic's book. Appellate lawyers have a privilege not fully shared by others to contribute to ordered liberty. Lawyers who make a career in appellate practice enjoy that privilege continuously; with it comes an obligation to contribute meaningfully.

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[5] *See* Richard Rodgers & Oscar Hammerstein II, *There Is Nothing Like a Dame*, South Pacific (1949).

[6] The Declaration of Independence (U.S. 1776).

To illustrate, I draw from the California Court of Appeal to express the expected qualities of appellate practice. In *Marriage of Shaban*,[7] the court faced an objection to a claim for appellate attorney fees. The objecting party argued the appellate lawyer needed only to recycle papers filed in the trial court. The panel eviscerated that argument.[8] The court rejected that notion: "[A]ppellate practice entails rigorous original work in its own right. . . . Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value."[9]

Along the way to that conclusion, the court identified key differences between trial briefing and appellate briefing.[10] First was appellate orientation to correcting error rather than finding facts. Second was the difference in judicial scrutiny of briefing: three judges with moderate time pressure and support of staff attorneys versus one time-stressed judge. Third, on appeal, parties can question precedent and use more words to develop arguments. Fourth, "appellate counsel must necessarily be more acutely aware of how a given case fits within the overall framework of a given area of law, so as to be able to anticipate whether any resulting opinion will be published, and what effect counsel's position will have on the common law as it is continuously developed." Fifth, appellate practice reaches "into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities"—a characteristic of *Shaban* itself.

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[7] 105 Cal. Rptr. 2d 863, 870 (Cal. Ct. App. 2001).

[8] *Id.* at 870-71.

[9] *Id.* at 871.

[10] *Id.*

A paper of the American Academy of Appellate Lawyers as a convener of the 2005 National Conference on Appellate Justice elaborates the vital role of appellate lawyers.[11] It also contains a well-selected bibliography of works about appellate courts, lawyers, and practice. The same bibliography is available on the Academy's website, www.appellateacademy.org.

"To craft work . . ." Craft pervaded European culture for centuries, crossed the Atlantic, and connected with similar elements of Native American culture. Mastery of a craft was—and is—a lifelong process delivering social, spiritual, and financial rewards. Later, material craft faded in social and economic importance because of mass, inexpensive production of goods.

Today, the language of craft is subordinate to business lingo of artificial intelligence and mechanized efficiency. Just-in-time inventory has replaced a lifetime of acquiring and preserving perfectly grained cherry stock.

Remarkably, Japan has preserved the language and culture of craft while being a world leader in tech-based manufacturing. I draw language and concepts from Japan because they remain contemporary elements of popular culture. I could draw the same from the history of the craft movement in the United States, but craft manufacturing processes are too often relegated to quaintness in our culture.

The role of the *shokunin* is most important to my purpose. *Shokunin* translates reasonably as master, and I use those words interchangeably. *Shokunin kishitsu* embraces the spirit and discipline one adopts to strive for mastery. It also describes the spirit and discipline of one recognized in the culture as a shokunin. A documentary film, *Jiro Dreams of*

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[11] Am. Acad. of App. Lawyers, *The 2005 National Conference on Appellate Justice: Background: Statement on the Functions and Future of Appellate Lawyers*, 8 J. App. Prac. & Process 1 (2006).

Sushi, available on Netflix, charmingly illustrates a national treasure shokunin, his spirit, and the shokunin kishitsu of his son in pursuing the culinary craft.

- The master is serious about the craft and brings all power to bear to perform at the highest level possible. The master always produces the finest product out of respect for the craft itself, regardless of whether the customer appreciates it.
- A shokunin always aspires and tries to improve. "There is always a yearning to achieve more."[12] Perfection is impossible. With each work, one climbs the mountain, knowing there is no summit. If you think you have arrived, you have begun your descent. Humility runs with this.
- Masters are stubborn. They pursue excellence, not consensus. They assemble, train, and lead teams. It's okay, sometimes necessary, not to be a follower or team player.
- A shokunin has passion for the craft. As Jiro Ono says, "Once you decide on your occupation … you must immerse yourself in your work. You have to fall in love with your work. Never complain about your job. You must dedicate your life to mastering your skill. That's the secret of success … and is the key to being regarded honorably."
- How a master prepares and presents the product requires the same dedication as the tangible outcome. The shokunin owes a spiritual and material duty to society to do the best work.
- Material rewards flow from mastery, but they are not the goal.

[12] Jiro Ono in Jiro Dreams Sushi (2011).

I have these things in mind when I write about mastery of appellate practice.

1.3. Why I Focus Mostly on Intermediate Appellate Courts

The numbered federal circuits, the D.C. Circuit, and the Federal Circuit have 179 active judgeships, and senior judges function virtually as active judges in several. Thirty states have intermediate appellate courts with ten or more authorized judges; some are separated by civil and criminal jurisdiction. Only nine states[13] lack any intermediate appellate court.

Most appellate practice is done in intermediate appellate courts. In the federal system and some large states, the ratio of cases decided in written opinions in the intermediate system compared to the court of last resort exceeds 1,000-to-1. In smaller states, the ratio goes down, but the majority of appellate practice occurs in the lower court.

With few exceptions, a lawyer who pursues excellence and seeks to make a living in appellate practice must do so in intermediate appellate courts. State and federal intermediate appellate court share characteristics and practices that create common characteristics of mastery. A foundation of excellence transcends locality in intermediate appellate court practice. I have heard federal judges from every circuit except the eleventh and judges from at least thirteen of the thirty largest state courts say this is so.

The structure and operations of intermediate appellate courts frustrate lawyers' desire to know their audience. The federal courts sit in panels of three judges drawn at random,

[13] Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

or geographically weighted random, from all eligible judges. Many state courts follow the federal model strictly or within geographic districts; a few sit in panels of five. Most courts do not disclose the identities of judges assigned to a case until shortly before argument, "shortly" ranging from minutes to weeks. Few intermediate appellate judges have publicly discoverable personal jurisprudences. When they do, another judge on the same court may have an opposite perspective, and it is impossible to know when writing a brief which, if either, of those judges will be on the panel. This focuses the advocate's attention on persuading a general judicial audience, not on pandering to specific judges.

Intermediate appellate courts are characterized by heavy caseloads per judge; reliance on interns, law clerks, and professional staff attorneys; high percentages of unpublished and memorandum opinions unless forbidden; and unanimity of decisions. These characteristics focus the advocate's attention on persuading by the facts and their application to basic law, not by complex scholarship.

In emphasizing universal aspects of intermediate appellate practice, I do not demean the value of local knowledge. Consider, for example, the basic structure of briefs. Rule 28 of the Federal Rules of Appellate Procedure details the parts a brief "must contain, under appropriate headings and in the order indicated. . . ." Many states follow the federal model, but some leave the structure to counsel, generating often-unpublished local practices. California's structural rule is laissez faire, but it uses its own system of citation. Illinois prescribes a briefing structure like no other jurisdiction's—as just one illustration, each argument has its own list of authorities, until recently organized "as near as may be in the order of their importance. . . ."[14] But local differences have little to

[14] Former Ill. R. App. P. 341(h).

do with how intermediate appellate judges' minds progress from the first glance at a case to decision.

Judges often refer to intermediate appellate courts as courts of correctness.[15] They view courts of last resort as courts of policy. But the tools of persuasion and excellence remain the same at both levels. Therefore, this book applies to excellence in advocacy in state courts of last resort just as it does to their subordinate courts. The legal analysis in high court briefs must be shaped toward the judges' concerns about making precedent, but this is true when intermediate court cases present publishable legal issues. And at both levels, this often involves more assuaging fear than inspiring heroism.

One court is different. The Supreme Court requires a precise structure for certiorari petitions and party briefs, has unwritten practices within that structure, and has developed—and is satisfied with having—an inner circle of advocates who have mastered the rules and lore. I have enough practice in that court to know four things: (1) I would not file a certiorari petition or party merits brief without a member of the inner circle on my team; (2) I would not argue a case without the same support; (3) I lack expertise to write about Supreme Court practice; and (4) while excellent writing is excellent writing in all courts, much else about Supreme Court practice does not reliably guide practice in lower courts.

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[15] *See* Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Survey for Appellate Court Justices (2005) at 24.

Bird's *Advanced Topics in Appellate Practice* promises much and delivers more. In a dozen tightly constructed chapters, he significantly adds to the literature of appellate practice by focusing on the quantum leap from mere best practices to the absolute finest of practices. Donning the mantle of Jedi Zen Master, Bird guides the reader down paths beyond technical mastery to the heights of artistry, pursuing excellence to a nearly spiritual realm. Drawing on a career's worth of distilled wisdom and experience, with support from the latest in cognitive science, this inspiring magnum opus tackles topics never or rarely addressed elsewhere and sheds innovative light on classic questions. For practitioners ready to transcend from upper-division skillsets and strategies to graduate-level artisanal craft and philosophy, Bird's words are worth devouring and savoring.—Benjamin G. Shatz, Certified California Appellate Specialist, AAAL, CAAL.

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About the Author

Charles Bird served his law school—U.C. Davis's Martin Luther King Hall—as one of three executive law review editors and on the national moot court team. He clerked for Robert Boochever, then of the Alaska Supreme Court and later of the U.S. Court of Appeals for the Ninth Circuit. Bird fell in love with the appellate process. He and his wife, Charlotte, fell in love with northern wilderness and getting about in it on foot, on skis, and by canoe.

Returning to California for career, Bird found the market and law firms inhospitable to a neophyte looking for appeals. He apprenticed in complex business litigation, then built a practice in real estate litigation. In 1987, the Birds took a sabbatical in the Alaska back country. Charles reinvented himself as an appellate lawyer, and Charlotte became a professional artist.

From a San Diego base, Bird built a national practice. This was recognized by induction into the California Academy of Appellate Lawyers and the American Academy of Appellate Lawyers. He became president of each. His amicus briefs for the academies have been cited by the supreme courts of California and the United States.

$29.00
ISBN 978-1-949884-57-9
52900>
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