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From Constitutional Law to the Court of Appeals

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By [Nyssa Gesch](#)

Bruce J. Wagner, shareholder at McNamee, Lochner, Titus & Williams, on the strategy involved in matrimonial law, the importance of writing skills in appellate work, and his experiences as a town justice

Q: What inspired you to choose law?

A: The ability to use the law to find solutions in a creative way. Also, I was attracted to the reasoning process probably when I took some courses in college on constitutional law, U.S. Supreme Court decisions. I always found that fascinating when they decided constitutional issues: the whole process of analyzing rules and precedents.

Q: How did you come to practice matrimonial law?

A: I had had experience as a law student in two different areas of practice. One was in the personal injury area as a law clerk, where I learned a lot about how to evaluate negligence cases and other types of cases in a general practice: how to interview witnesses; interview clients about their claims; the basic civil practice and procedure of New York state. During another year of law school, I was fortunate to be in an office of a very experienced and well-known pair of matrimonial lawyers. I really developed an interest there. I found, at that point, the matrimonial area to be more interesting. In the personal injury area, it was taking a set of facts that had already happened, that couldn't be changed, and using the available solutions in the law to get the result for the client. In the matrimonial area, certainly you are presented with a set of facts, but there seemed to me, at least at the time, that there were more opportunities for planning, for drafting things like prenuptial agreements to avoid certain situations, to use different strategies in the same set of facts in a domestic relations case. It was more challenging to me, personally. I stuck with it and here I am, probably 25 years after that first job, still doing the same thing.

Q: You also practice appellate law.

A: I do a substantial amount of appellate practice in the domestic relations area. I like doing appeals. I like arguing appeals on behalf of people that want to change the result below. I like defending appeals on behalf of clients who wish to preserve the result below. Right now, I have, all at once, three [appellate cases] that are in various stages, which coincidentally are all trying to preserve the result of the court from which the appeal is taken.

I also do a lot of consulting work. Other lawyers and/or their clients will retain me to help them write, hopefully, persuasive briefs on appeal. Also, other court filings, motions, memoranda of law at the trial level. I've got at least one or two of those types of cases going right now.

Q: How much of your practice is dedicated to appellate law?

A: On a yearly basis, it might vary from between 25 to 35 percent appeal-type work and then somewhere between 65 and 75 percent of other-type work. The other-type work would probably include what seems to be more and more prenuptials.



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Q: Did anything about practicing law differ from what you expected?

A: I think what probably surprised me the most was how much effort it takes on a daily basis to balance the demands of court deadlines, trials, hearings. That continues [with] most lawyers in my position, to be a very, very tricky balance to try to keep everybody happy. It's sort of like a juggler with a lot of balls in the air at the same time. Certainly you have to meet court deadlines and client needs and things that are vital to their interests, and make sure that things are prepared and presented appropriately at any given court. At the same time, you're also in the service business, and you need to make sure that those things that are not in litigation—but are, of course, as equally important to your clients—are taken care of in a timely manner.

Q: Do you spend a lot of time in court?

A: I probably spend less time on a day-to-day basis in court than I used to. When I'm doing more appeal work, and more drafting of things like prenuptial agreements and more consulting work, that's more in-office work than out-of-office work. It goes in cycles.

Q: What's the most rewarding part about being a lawyer?

A: When you achieve a result that is good and your client is grateful for that. That's the first piece. The second piece that's gratifying is if you're able to affect real change or clarification in the law, being fortunate enough to have some cases that have given clarity or broken new ground. I've had a few of those over the years, so I've been lucky in that regard.

Q: Do you have a most memorable case?

A: I was [recently] able to bring a case before the Court of Appeals of New York, which is the highest court in the state. In most cases in the civil area, you have to ask the court for permission to appeal and they have to agree to take your case. Generally speaking, those percentages of cases that they take might be as low as 3 to 5 or 6 percent in any given year.

In this particular case [Matter of Spencer v. Spencer], I was able to get the Court of Appeals to not only take my case, but to overturn a unanimous, mid-level appellate court. I didn't do the trial in this case. The client came to me for a review process that's like an appeal, and I did that and we were unsuccessful. We took another appeal to the midlevel appellate court of the state and we lost 5 to nothing. Then we made a motion to the Court of Appeals for permission to appeal our case and that appeal was granted. On appeal, the decision went back in my client's favor by a unanimous court, 7 to nothing, in our favor. It was both very memorable and, I think, gratifying professionally. And the client was happy, too.

Q: What was the case about?

A: I had a client who had been divorced in Connecticut. And he still lived in Connecticut and that's very important in this legal analysis under the statute. He always stayed in Connecticut. Connecticut has child support to age 18. In New York, it ends at age 21. After the divorce, the mother moved from Connecticut to New York with the children and she sought to modify the Connecticut order to get an age-21 end date—in other words, three more years of child support for each child—and also get an application of New York guidelines, which was higher than what was given in the agreement that was entered into in Connecticut. The lawyer that tried the case argued that New York didn't have jurisdiction to do this because what you're essentially doing is changing the Connecticut order from age 18 to 21. All the courts up the line disagreed with that. They said: Well, it really isn't a new modification; the Connecticut order expired at age 18, so what we're doing is really making a new order. That expired order concept had started to take root in New York state for four or five years at that period of time. The ultimate result in this case was that we got New York's application of that expired order concept overturned, and the Court of Appeals said that the trial courts are no longer to do that; they are to follow the federal statute, which defined what New York had been doing in changing an age-18 order from Connecticut to an age-21 New York order [as] modification. So the father was successful in his appeal.

Q: What advice do you have for anyone who's interested in appellate law?

A: You have to be a very good writer, not only in terms of your style of writing; obviously use of proper grammar and word choice, you have to be fundamentally good at that. In addition to that,

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you have to be able to write persuasively, use word choices that are persuasive as opposed to bland or plain. You have to make your writing interesting. You have to be able to tell a story so that it accurately presents the facts.

You also have to be able to think very quickly when you're at an appellate argument because you can have, as I have had over the years, cases that are very involved and detailed that might have been on appeal from a decision after an eight- or nine-day trial where the record on appeal before the court is four- or five-thousand pages, and there might be six or seven legal issues that you're either bringing up to try to change, or you're trying to defend it if you're the one that's not appealing. You have to be able to somehow condense all the important points in both your writing—so that it's easy for the court to read, and understandable—and you also have to, at the oral argument, in 10 minutes or less, be able to give the court everything it needs to support your position.

You also can't be one of these people that stands up there and reads a prepared speech to the appellate court because they're going to start asking you questions and getting you off your prepared script. You have to be able to very quickly adapt to the situation, literally within seconds. You might have to change your whole game plan of how you thought the argument was going to go because of a question that you might have gotten from one or two judges. You have to first, of course, answer the question directly and then use that question to move in the direction that you'd like to see the court go in the case.

Q: You're a town justice for Schodack and were elected to your third term last year. Tell me a little bit about that experience.

A: In New York, we have town and village courts, which serve as the local criminal court where anything from a traffic ticket on up to the highest level felonies start in the local criminal court. In other words, we dispose of all of the traffic tickets. We have jurisdiction over misdemeanors, which means anything that's punishable by one-year-or-less incarceration. We have jurisdiction to handle the entire case, sentencing. On the felonies, which is anything that's more than a year of incarceration as a penalty, those cases all start in our court and we do some of the preliminary procedures—setting bail, holding preliminary hearings—we do those things while they're pending until a grand jury takes the case and then once the grand jury takes the case it goes to a higher court. But those cases can often come back down and be reduced to misdemeanors so that we end up handling them anyway.

On the civil side, it's a variety of small claims, not unlike what people see on television in a variety of shows such as The People's Court and others. Landlord-tenant proceedings are brought in the local court. There are building code violations and smaller commercial claims.

Q: What is your favorite part about being a justice?

A: It's so different from what I do every day at work, because it's a totally different area of law. It's sort of that additional intellectual stimulation in an area that I hadn't dealt with every day.

What I like doing the most in that job is writing decisions on motions that attorneys make in criminal cases, deciding initial issues, whether evidence should be suppressed, things on Fourth Amendment rights, the right to counsel, probable cause. In the local criminal court, you get a lot of Fourth, Fifth and Sixth Amendment issues. It was those types of things that were in these courses that I was taking in college on the United States Supreme Court. You learn a lot of Bill of Rights things: Fourth Amendment, search and seizure; Fifth Amendment, self incrimination; Sixth Amendment, right to counsel; in addition to all the free-speech type things which we don't really see in the town and village courts. I think it brings me full-circle, in a way, to what attracted me to law in the first place.

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