The trial is long over. Months pass and dust begins to collect on your trial binder and exhibit books. Post-trial submissions sit silently in the corner of your office. Suddenly, in the middle of a very busy and long day, a large, ominous manila folder arrives from the trial court: the judgment.

Your heart begins to pound heavily while your muscles start to quiver and shake. You hastily open it. You immediately skip to the conclusion. You read it. You read it again. You put it down. You think, Is this what we had proposed in our post-trial submissions to the court? This does not seem very familiar.

You race to the corner of your office to find your post-trial folder, skimming it briefly as your heart pounds. Is this result even close to our proposed judgment? Wait. What the heck? Is this decision from your case? It cannot be.

So you go back again and you read it again. You start at the beginning. You read carefully. You then go back to the judgment itself. You stop. You scan your file and read your post-trial submissions, now comparing them to the

This is not what we were seeking at all. This must be an error, a mistake, a bad dream. This is not even close to what we had proposed. My poor client. This is not right. Unfair. Unreasonable. An injustice. I need to do something. I must do something. I must appeal!!

A. WHAT IS AN APPEAL?

First, what really is an appeal? The word appeal is defined as an “earnest or urgent request.”¹ This is an insightful definition for the family law advocate and one to keep in mind as you analyze the decision to appeal.

Clients appeal adverse rulings when they are unhappy with the results. They seek justice and to show the world they are in the right and his or her ex-spouse is in the wrong. They are angry with the judge who they believe made the wrong decision. Clients wish to show the judge how “stupid” the decision is in his or her case. But the motivation “to win” or to correct a perceived injustice is not enough to seek an appeal from a reviewing court. There are numerous considerations to review prior to filing an appeal.

From a functional perspective, the appeal is a proceeding to allow a higher court to review a lower court’s decision. But appellate courts review only those issues actually presented to the trial court—the record—so long as they are preserved for appellate review.² You must specifically identify errors actually decided and committed by the trial court or you lose your appeal. Any issue not brought before the lower court is lost. In addition, statistically very few appeals succeed.

The result of an appeal of a family law decision can vary. You can lose. Worse, you can lose with an award of legal fees to the other party. A very nasty result for your client.

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Or, as often happens in family law cases, the matter is remanded for further proceedings to correct the errors found within the trial court’s judgment. This can happen, even when an appellate court finds a legal error was made; the court may simply return the case back to the trial court to reconsider its other rulings in light of the appellate court’s decision on the meaning of the law as applied to the facts in your case.

There, you end up back to square one. Ugh.

The reality is that an appeal is not an easy process, odds are high against its success, and most lawyers do not handle or even bother to touch appellate work.

There are a number of ethical obligations as the matter turns from judgment to the possibility of an appeal, starting with the duty to explain to your already agitated client the very long odds against the success of an appeal. Never an easy conversation with your client.

Your client needs to understand that an appeal is not a retrial of the facts or issues, but rather an opportunity to raise mistakes of fact or errors of law by the judge to a reviewing court. Another potentially complicated discussion.

Family law presents particular concerns differing from other areas of the law when it comes to the appellate process.

The impact upon the children is also an important consideration. The fact that the judgment may not be “stayed” during the pendency of the appeal is another.

The point of a divorce is “moving on,” and an appeal can further elongate emotions and increase the acrimony rather than de-escalate the matter and provide a client closure.

Family law attorneys are faced with a number of practical challenges in choosing whether to file an appeal. An appeal is more complex than showing the judge got it “wrong” in your case.

The decision of whether to appeal or not to appeal involves evaluating complex factors, including alternative remedies, the likelihood of success, the costs involved, and a determination of what “success” or “failure” on appeal actually means for your client.

You need a complete understanding of not only the mechanics and process of an appeal, but also how to evaluate when it is sensible to bring an “urgent plea” forward.

Let’s begin there.
B. APPEALS ARE JUST DIFFERENT IN FAMILY LAW

Family law is intimately personal, unique, exceptional, and factually based. The facts are critical in each family law matter. Family law judges are closest to the “action” of the parties. As a result, appellate courts afford broad discretion to the trial judge when reviewing family law judgments.

A careful and thorough examination of the facts is necessary to determine whether to appeal or not to appeal.

Often, there are as many good reasons not to challenge a judgment as reasons to pursue a reversal or remand of a trial judgment. Fortunately, there are a few alternatives to seeking an appeal that in some circumstances can be a better choice.

C. POST-TRIAL MOTIONS BEFORE AN APPEAL

If you are unhappy with a judgment following trial, family courts provide several means for you to take the matter before the trial court again to correct the perceived mistakes rather than appeal. Consider first any post-trial motions prior to the filing of an appeal. These post-trial modifications may include:

- A motion to amend findings of fact.
- A motion to amend conclusions of law.
- A motion for a new trial.
- A motion to amend judgments.
- A motion for relief from judgment and order.
- A motion for reconsideration.
- A motion to modify a judgment based on material changes in the circumstances (if allowed by your jurisdiction).

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5. Id.
7. Id.
9. If allowed by your local rule.
There are highly specific requirements that apply to post-judgment motions, and you need to review your applicable state law post-trial to determine the appropriate steps to file such motions. There may be additional state remedies post-trial available within your local rules. Be familiar with the effect of filing these motions on your client’s appellate rights. These motions are further examined in Chapter 6.

D. MODIFICATION

Family law is somewhat unusual, as many “final” orders are subject to modification based on material changes in circumstances. Child support and parenting time orders are two good examples.

Judgments can be “modified” in the future by showing a significant change in circumstance by the same judge who issued the initial order, depending on the local rules of your jurisdiction.

As a result, when your unhappy client is looking at a two- or three-year timeline for an appeal to run through the higher courts, the initial question is whether a post-judgment modification filed during that time frame is a better remedy than an appeal for your client.

For example, a modification rather than an appeal is the correct choice if the real area of dissatisfaction is the claimed unworkability of the orders. A parenting plan that your client is unhappy with is an excellent example.

On the other hand, if the error is an issue of law, the correct remedy is an appeal to a higher court. Higher courts are more interested in issues of law than in factual disputes between parties.

If a future modification solves the post-trial problem, it is likely a better avenue than an appeal due to the long odds against a successful appeal.
E. EQUITY ACTIONS

Family law courts are of equitable jurisdiction. These local courts sometimes afford litigants special rules to allow a matter to be brought under principles of equitable fairness—for example, a client who discovers, only after the divorce judgment, his former wife owns a vacation home. States may allow an “equity action” to divide the undisclosed asset. An equity action to divide the undiscovered vacation home is a better option than seeking an appeal in the appellate court.

F. CONSIDERATIONS

Once you determine there is an alternative to an appeal, assess the practical realities of an appeal of your client’s case. First, it is a universal rule of appellate practice that the odds of success are never in your client’s favor.

In family law cases, the odds of appellate success may be even more stacked against you and your client. Appellate courts simply afford great deference to the trial judge who heard the matter.

G. THE GOAL

Keeping the broad discretion granted trial courts firmly in your mind, pay particular attention to your goal in filing an appeal for your client. The threshold questions are: What does your client hope to accomplish by filing an appeal? Will an appeal make things better or worse for your client? Your client’s goal dictates the choice of whether to appeal.

For example, a decision to appeal a minor matter, such as the hours of a child–parent exchange in a child custody judgment, might make a client appear “petty” to the trial judge—the same trial judge who may remember this petty action when the client brings a modification action on a more pressing issue in the future.

It is important to be clear and realistic with your client about the possibilities, the difficulties, the costs, the challenges, and even the statistical chances of achieving an appellate objective. On some occasions, the client may simply need to settle the case.
The next questions to ask: Are your client’s goals realistic? Does an appeal stand a chance in the face of the broad discretion granted family court judges? The short answer is many times the goal is likely unachievable.

**Practice Pointer**

Appeals are more successful when the goals of the client and attorney align.

**H. THE COSTS**

An important consideration for a client is the costs of an appeal. It is critical to be honest and open with your client regarding the costs and expenses of a possible appeal. It is not enough to simply explore the possible outcomes and challenges of an appeal. It is critical to have a detailed conversation with your client regarding the actual costs an appeal of the matter may entail.

The costs of an appeal include the filing fees, record assembly, trial transcripts, production of the record, and assembly of the brief. These expenses need to be factored in along with the legal costs for you to write research and argue the brief. As a result, the costs of an appeal are both real and substantial and should be weighed with your client against the odds of potential success.

In addition, jurisdictions allow appellate courts to order fees against the party who brought an unsuccessful appeal. An appeal that is in bad faith or meritless may result in not only the sting of losing again, but also the additional pain of paying for the opposing party’s costs incurred by the appeal. Ouch.

**I. MOOTNESS**

Likewise, the challenged judgment remains in place during the pendency of the action. For example, a child’s parenting plan remains the same during the appeal.

As children grow and develop during the pendency of a matter, these changes can have a substantial impact on what transpires over
and above the appeal. For example, an older child may reach an age
where her voice may be heard in a new action. Also, a child could
reach the age of emancipation and an appeal may become moot.

Interestingly, the U.S. Supreme Court in *Chafin v. Chafin*\(^\text{10}\)
addressed the issue of “mootness” in the context of a child custody
matter presented under the Hague Convention.

The father, a member of the U.S. military, married the mother,
who was from Germany, where she gave birth to the parties’ daugh-
ter. While the father was later deployed, the mother took their
daughter to Scotland, but later re-joined him in Alabama.

Thereafter, the father filed for divorce in an Alabama court,
after the mother was deported. She subsequently filed a petition
under the Hague Convention, to return her daughter to Scotland.

The district court granted the Mother’s petition. The Eleventh
Circuit dismissed the father’s appeal as moot because the mother
had already moved her daughter to Scotland. The Supreme Court
reversed the decision.

The Court held a case becomes moot only when it is impossible
for a court to grant any effectual relief whatever to the prevailing
party. As a result, so long as parties have *some concrete interest in
the matter, however minute*, the case is not considered moot. Thus,
in the context of a child custody dispute, where a parent has a legal
right or interest involving a child, a case may never be considered
moot.

### J. TIMING

Although a case may not technically become “moot,” timing is an
important consideration. Sometimes, particularly where the facts
are not sympathetic to your client, the emotional toll requires an
end to litigation. A “cooling off” period is effective for parties in
family law.

An appeal to family law courts may take at least a year and
often longer, depending upon the docket of your local jurisdiction.

\(^{10}\) Chafin v. Chafin, 568 U.S. 165 (2013).
You and your client must perform a diligent, careful cost-benefit analysis, factoring in the time necessary for an appeal prior to pressing forward.

K. THE REALISTIC CHANCE OF SUCCESS

An obvious consideration is to have an initial candid assessment of the likelihood of an appeal’s success. Consider what success or failure may mean to your client after the appeal and what might happen on disputed matters while the appeal is under way.

Ask the following:

Is this a case that should be won on appeal?
Do the facts of your case reflect an injustice in the outcome?
Does the result require a remand or even a reversal?
Has the trial judge made a critical mistake in her application of the law to the facts?
Does your gut instinct tell you something is wrong?

Both the facts and the equities need to exhibit that something went very wrong in the trial court. Ideally, by the time an appellate judge reads your statement of facts, even giving the appellee any deference, the reviewing judge must feel your client did not receive the correct result.

You want your statement of the facts to highlight the injustice. It is much easier if the facts of your case weigh in favor of the result you are looking to achieve for your client. If your client does not have a favorable equitable position, then you must review the record for issues in his or her favor and underscore those principles within your brief.

But keep in mind what success is for your client. For example, how does a potential change in the judgment affect the children involved? How does an appeal impact the finances of your client? Would a victory resulting in a remand, which would mean additional costs for your client, in the long-term outweigh the price of your client’s appellate victory?

The results of all outcomes must be considered with your client prior to filing any appeal.
L. OUTCOME

The potential answer to what an appeal’s outcome may be requires an in-depth knowledge of both the facts at hand and the legal principles presented. An answer may not be possible until you have fully examined the record, researched all issues, and written your final brief. Even then, you are never entirely certain, as an appeal can sometimes end up in a result you never anticipated.

Appellate courts sometimes find value in an issue you considered only minor. But regardless of where you may end up, it is possible during your review of the record to find significant legal errors providing keys to a reversal or a remand.

M. DISCUSS ALL POSSIBLE OUTCOMES

It is important to be candid with a potential client. There are a number of possible results of a family law appeal. First, inform your client most appeals end up with the appellate court affirming the results from the trial court. After you have had this difficult conversation, explore the possibilities of remand, reversal, and an affirmation of the trial decision, all within the context of winning and losing.

N. REMAND

An appellate court can make a wide variety of decisions that may not result in the end of the case. One possible outcome is the matter being remanded back to the trial court with instructions for further review. This often happens when an appellate court finds a legal error but then requires the trial court to reconsider its original rulings in light of the appellate decision.

Practice Pointer

Always inform your client that an appeal does not always end with a simple win or lose.
O. LOSING

You must consider what may happen if the judgment is affirmed and the appeal lost. Consider the reality of losing an appeal. How will the loss affect your client? Will the risk of losing the appeal cause further harm to the client? To the children? Does closure now make sense for both the client and the issues?

P. TO NOT APPEAL

Why not file an appeal of a family law decision?

A client’s immediate reaction to an adverse ruling is likely to seek further justice in a higher court. However, your same client wanting to pursue an appeal is unlikely to understand the significant expense, time, and odds against the success of an appeal.

In addition, your client is unlikely to understand how an appeal may affect the current orders or judgment issued by the lower court.

For example, a client who seeks a reduction in child support may not realize he must continue to pay child support at the same level during the pendency of an appeal.

Once you educate a client on the harsh realities of an appeal, the desire to seek further justice can wane.

In addition, unlike other areas of civil law, family law judgments are usually not stayed pending an appeal.

The house may be sold, for example, thereby losing the purpose of the appeal itself. You may win the battle but still end up losing the war.

A stay may involve a supersedeas bond. These bonds are prohibitively expensive, as they often include the amount in dispute, interest, and an estimate of costs and fees that may ultimately be awarded.

Q. MEDIATION PROGRAMS

Both sides face risks and delays when an appeal is taken by a party or both parties. There are multiple points when mediation is an alternative. A well-drafted docketing statement or an appellant’s
brief might alter the appellee’s opinion on whether sticking to the lower court’s judgment is wise.

Many states offer appellate court mediation programs.

You may find these programs to be useful, if available in your local jurisdiction. They may help you settle a case without involving the appellate court panel and reduce costs for the courts and your clients. It is an option to explore with your client.

R. SETTLEMENT

Discuss with your client whether it is possible to settle the matter short of filing an appeal. The client, or the opposing side, may be loath to settle after a favorable judgment, but it must be considered with your client, particularly in the context of whether it makes sense to go forward with an appeal.

In general, any recommendation to settle is usually not possible until you have reviewed the record and researched any legal issues presented. At a minimum, conduct a full and careful review of the record before exploring settlement options with your client. Look at the facts as they are in the record and not just your client’s or trial counsel’s memory. Consider the standard of review. Then make your settlement recommendation.

You may consider an initial engagement to review the matter only and have the client execute a fee agreement clearly defining the limited nature of your representation.

After your review is completed, all options can be discussed with your client and a new engagement can be executed.

S. SETTLEMENT AFTER THE APPEAL IS DOCKETED

The timing of any settlement is often unpredictable. There are times the mere filing of a notice of appeal followed by the appeal being docketed in the appellate court may move your client, or an opposing party, to settle the matter.
If you come to an agreement, after the matter is within jurisdiction of the appellate court, then an appropriate joint motion is filed with the appellate court to dismiss the appeal.

Once the appeal is dismissed by the appellate court, then the settlement can be effectuated in the trial court.

T. CONCLUSION

In summary, the decision to appeal is carefully weighed with each client and in each case. All possible alternatives are discussed, including post-trial motions and possible future modifications within the lower court. Thereafter, the possible outcomes of an appeal are discussed with your client, including the long odds against winning and the substantial costs and risks of losing the appeal and the potential for remand. After you have had these discussions with your client, then it is time to ask yourself a few ethical questions (discussed in Chapter 2) before choosing to appeal.