

**“What NOT to Do”:  
Common Missteps and Oversteps to Avoid the Next Time you are in Court  
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Family Court is not a counter at McDonalds, where litigants can place their order and expect to receive whatever they please. There are very clear principles, rules, and practicalities that apply to each court attendance. Learning and practicing them will both make the job of your judge much easier and as a result, increase the chances of a successful court attendance. We have set out below a list of common missteps and oversteps to avoid when you are next in court:

1. Procedural Errors:
  - Ignoring page Limits (and use of hyperlinks to get around them)
  - Single spacing
  - Attaching long documents when only excerpts are required
  - Late service and late filing (even with consent)
  - Notices of motion requesting too much relief for the time allotted
  - Ignoring the *Family Law Rules* (“Rules”) and Practice Directions (Ontario-wide and Regional)
  - Failure to place all required materials on Caselines
  - Failure to file a confirmation
  - “59 Minute” motions that are really long motions in disguise
2. Written Materials (content):
  - Excessively rhetorical/accusatory/aggressive
  - Meandering, off-point
3. Misstating the Law:
  - Need to be aware of the law and reference it if necessary
  - Your materials should align with the legal test that your client is required to meet
  - Failing to state the law adequately or fairly can diminish your credibility with the bench
4. Misrepresenting the Facts and Providing Inaccurate Support Calculations:
  - Do not take your client at their word
  - Question the narrative if there are logical holes or allegations unsupported by evidence
  - A lack of transparency and truthfulness many lead to both unreliable judicial opinions at various stages of your proceedings (which may change over time) and the loss of your credibility
5. Taking Unreasonable Positions at the Conference or Motion:
  - Manage and temper your client’s expectations
  - Offer your client a reality check at each step – with regard to the narrative, law, reasonable expectations and costs of the proceeding
  - The judge should not be the first one to deliver bad news to your client

6. Failing to Focus on the Best Interests of the Child:

- Assuming that immediate equal shared parenting is either a presumption or automatically in the child's best interests, unless there is evidence to support same (see AFCC Ontario Parenting Guide for indicators where shared parenting is more or less likely to be successful)
- Assuming, on the other hand, that limiting the other's parent's contact is in the child's best interests or that withholding the child is acceptable (in the absence of a Court order or a written direction/request from a Children's Aid Society)
- Failing to explain that most children (from ages 3 or 4, to 12 or older) will spend "good" amounts of time in each parent's home, typically at least 5/6/7 overnights plus holidays, as is supported by social science research and the caselaw (unless child protection concerns and/or family violence do not support such a schedule)
- Disregarding outside resources that can help parents to co-parent and come to a resolution (mediation, counselling, parenting coordination, assessment)
- Failing to engage in flexible consideration of how parents can work together and, where appropriate, coparent (to a greater or lesser degree)
- Ignoring health issues of pandemic
- Failing to properly assess family violence allegations and the extent to which the children have been impacted by same (this can be addressed by using FV tools such as the HELP Toolkit [help-toolkit.pdf \(justice.gc.ca\)](https://www.justice.gc.ca/help-toolkit.pdf))
- Omitting to educate a client about the few areas that fall within major decision-making, i.e. : education, health, culture, religion (and sometimes major extracurricular activities) – these are not the areas where most conflict arises
- Avoid overinvolvement with a parent's position, particularly when it does not align with the child's best interests

7. Strategic Timing:

- Avoid:
  - Manifesting deliberate/strategic delay – delay typically advantages one side and often disadvantages the child
  - Or attempting to force matters on, (for example on short or no notice), in order to gain a strategic advantage
- Failing to request an urgent case conference before an urgent motion
- Failing to recognize that motions without notice are rarely successful (the bar is very high), can lead to extreme conflict, and are often a poor use of a client's family law budget

8. Ignoring the Purposes of the Court Attendances, as Follows:

- On a case conference: to resolve procedural/disclosure/ most urgent issues and set out next steps
- On a settlement conference: to resolve or narrow as many issues as possible
- On a trial management conference: to explore whether there is a potential to settle, to jointly choreograph the trial and to ensure that all materials are served and filed on time so that the matter can be heard without further delay
- On a motion: to succinctly present the evidence and law in your client's favour, without misrepresenting the facts or the law
- Making common conference errors of:

- Failing to have meaningful conversations or four-way meetings in advance (now required by FLR's)
- Failing to ensure that adequate disclosure is offered (now required by automatic orders)
- Relying on "missing" disclosure to delay resolution without explaining the relevance and necessity of the requested disclosure
- Expecting the judge to just "go through the motions" and move you on to the motion/trial;
- Failing to properly prepare to deal with factual and legal issues (the judge is well aware when there is a lack of preparation – for example, when the lawyer is unable to answer basic questions or not aware of the law)
- Making Common Motion Errors of:
  - Submitting materials that read as if your client has drafted them (or worse - allowing them to draft the materials)
  - Making excessive, overly rhetorical, unsupported, and manifestly unfair claims against the other party
  - Failing to admit the weaknesses of your client's case
  - Failing to raise all of the factors set out in the caselaw
  - Being unprepared for questions from the bench

9. Lack of Civility with Co-counsel, Self-rep Litigants and the Court:

- Failing to communicate with the other side in advance of a Court attendance
- Failing to resolve or narrow issues
- Failing to consider mediation or other family dispute resolution process
- Reacting negatively to the other lawyer
- Interrupting the other side or the judge
- Taking advantage of self-rep litigants

10. Unreasonable Costs Expectations:

- Failure to serve offer(s) to settle
- Failure to make offers severable
- Failure to accept reasonable costs
- Ignoring the principle that full indemnity costs is the exception rather than the rule (*Beaver v Hill*)
- Treating the Court as an "ATM machine"
- Failure to offer your own bill of costs if you are the "losing party", in violation of the *RFL's*
- Forgetting to speak to your client at the beginning and at each stage of the proceeding about the cost of the current and future steps in the litigation (send frequent interim bills, even if only "drafts")

11. The Eleventh Commandment" - Do Not Allow One Case to Ruin Your Reputation:

- Beware of overly personal investment in a case – it is not your case.
- It takes a career to build a reputation and one moment to ruin it.
- "You never get a second chance to make a first impression"