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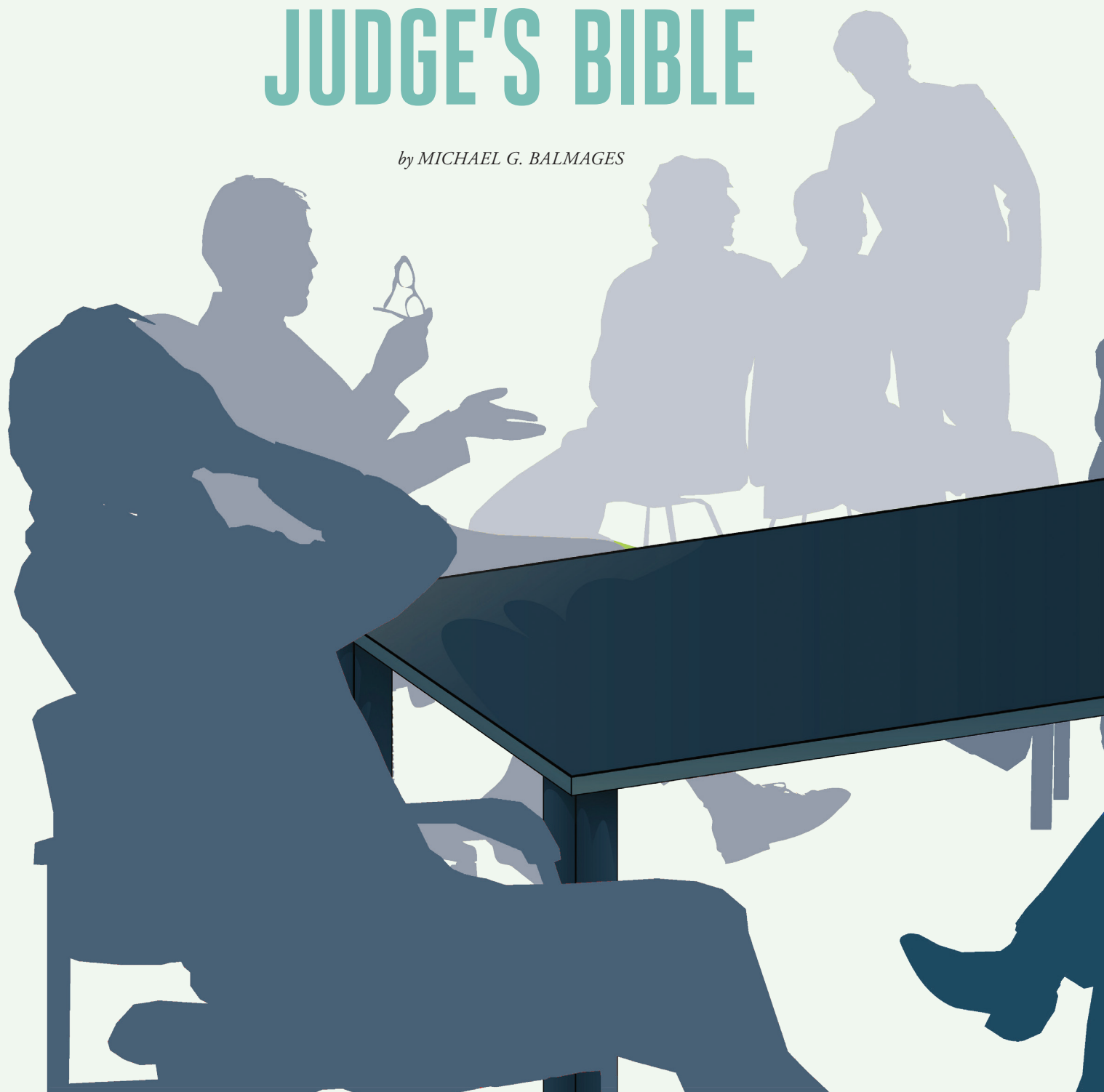


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LOCAL RULE 316 IS THE OCSC TEMPORARY JUDGE'S BIBLE

by MICHAEL G. BALMAGES



Learn it. Know it. Live it.

~ Brad Hamilton to Jeff Spicoli,
in *Fast Times at Ridgmont High*.

In the Orange County Superior Court, most civil cases have a mandatory settlement conference about a month before trial. The MSCs are generally conducted by temporary judges who are volunteer lawyers trained to settle cases and certified by the court to do so. Before the pandemic, most MSCs were held in the courthouse cafeteria with some held in jury rooms or small “conference rooms” on the upper floors of the courthouse. “Conference rooms” is in quotes because the rooms are tiny with barely enough room to open the door fully and hardly enough room to walk around the small table to get to your seat. Mysteriously, it is always hard to figure how to open the door when you want to exit the room. Just when you think the door will open outward, you realize it opens inward and you have to get out of the way of the door to open it. Then, when you try to open it inward, it seems to change its mind, requiring that you open it outward; at least that’s the way the doors operate for me. The rooms are also windowless, which might

actually encourage settlement as everyone wants to get out of them quickly. It was the cafeteria for me. On any Friday, there would be ten to twenty MSCs being conducted at the same time. During the pandemic, there was the shift to remote MSCs and, now, post pandemic, there are MSCs held both in the courthouse and remotely. I only do remotely as most lawyers seem to prefer that to driving from Encino to the Orange County courthouse for an 8:30am MSC.

The conduct of MSCs is governed by OCSC Local Rule 316, appropriately titled “Mandatory Settlement Conference.” It was adopted as Rule 448, effective April 22, 1991, then revised and renumbered effective July 1, 2009, which means that the authors had never heard of text messages or Zoom. The rule starts with language which sounds mandatory: “All trial counsel and parties must attend a mandatory settlement conference set by the assigned judge.” I mean “must” must mean something. From there, the rule prescribes the nature and manner of MSCs and the obligations of the parties and counsel. I’ve excerpted the highlights of the rule below in italicized font and have followed the excerpts with my bracketed, admittedly hyperbolic comments based on conducting more than 1,000 MSCs.

Rule: *The parties must execute a Settlement Conference Statement . . . and must lodge it . . . five court days prior . . .* [There is about 50% compliance, and the statements that are lodged are often meaningless. Conversely, some counsel fill in all the blanks of the Settlement Conference Statement with “See attached brief.” The attached brief is 28 pages, with 168 pages of attached exhibits. When you ask counsel what the case is about, they reply, “it’s all in the brief.” I’ll bet it is! For in-person MSCs, where I get the MSC statement and/or brief a few minutes before I meet with counsel, I usually do not read the briefs before I begin the MSC. Instead, I ask counsel “who is suing whom for what?”]

Rule: *The purposes of the mandatory settlement conference will include:*

1. *Settlement discussions;*
[Seems appropriate for a

settlement conference.]

2. *Setting of a trial date, if not already set;*
[This never happens at the MSC.]

3. *Such other matters which may be necessary to assure a just and expeditious disposition of the case.* [Also never.]

Rule: . . . *the attorney who will try the case must be present or represented by someone completely familiar with the case and who has full authority . . .* [Frequently, the trial attorney is not present. She is “engaged” elsewhere. No one knows where “elsewhere” is, but they think it’s in L.A. County. The attending attorney never is completely familiar, never has full authority. On occasion I have had the attending attorney track down the trial attorney and have learned that the trial attorney is “engaged” driving to Big Sur for the weekend, or is at LAX waiting for her flight to Vegas. This is one of the most fun parts of doing MSCs.]

Rule: *The failure . . . to . . . participate in good faith . . . is an unlawful interference . . . and the court may order . . . reasonable expenses and attorneys’ fees.* [If only.]

Rule: *Duties of Plaintiff’s . . . Counsel must notify their client(s) in writing . . . of the [MSC] and . . . that they be personally present.* [How often is this done?] *A copy of such written notification . . . must be brought to the hearing . . .* [Never.]

Rule: *At least 5 days prior to the hearing . . . must serve a settlement demand on all defendants . . .* [Surprisingly, this is frequently not done.] *The demand . . . is to be brought to the hearing . . .* [Rarely. You’d think plaintiffs would want to demand money prior to the MSC!?!]

Rule: *Duties of Defendant’s . . . Counsel must notify their client(s) in writing . . . of the [MSC] and . . . that they be personally present. A copy of such written notification . . . must be brought to the hearing . . .* [Also never done.]

Rule: . . . *must notify all insurance carriers which may provide coverage . . . of the [MSC] and . . . that they have present a representative with full and unconditional authority to settle.* [Rarely do you have an insurance rep present with “full and unconditional authority” to settle—make that “never.” Defense counsel and the insurance rep will insist that the rep has full authority, and that may be true up to a point—a dollar point, that is. The rep may have full and unconditional authority to settle up to \$25,000, or \$50,000, but not a dollar more—literally, not one dollar more. For that additional dollar the rep has to go back for more authority to his or her supervisor. You discover this by observing how the rep responds to the settlement demands and by

asking questions such as, “Since you have already offered \$50,000 and told me that is all you’ve got, if the plaintiff would lower its demand from \$95,000 to \$55,000 would you agree to that?” Answer, “No.” “Would you have to go to someone else for authority to do that?” Answer, “Yes. But they would never agree; they are even tougher than I am.” “Okay, go ask anyway, and if they say ‘no’ tell them that I want them to appear at the MSC, either today, or if I continue it.” Answer: “My supervisor is not in today and I can’t get a hold of her.” This recently happened to me on a Zoom MSC where the insurance rep was at her desk and I could see several other people working at desks behind her. When I asked her to call her supervisor anyway, she muted herself and I could see her supervisor pick up the phone and then hang up concurrently with the rep who told me she could not get a hold of the supervisor. I asked, “Isn’t that your supervisor right there two desks behind you?” She said, “Yes.” Another fun part of doing MSCs.]

Rule: . . . must serve a response to the settlement demand . . . The response . . . must be brought to the hearing . . . [Even when plaintiff does serve a demand, it is infrequent for the defendant to respond.]

Rule: Duties of Plaintiffs . . . a. All plaintiffs . . . must be personally present. An . . . attorney claiming to have settlement authority does not satisfy this requirement. [Plaintiffs are usually present, but when they are not, the attorney will say that he or she has “full authority.” That often leads to this conversation: Me: “Counsel your client needs to be here.” Attorney: “No, she doesn’t. I have full authority.” Me: “Doesn’t matter, she needs to be here.” Counsel “No, she doesn’t.” Me: “Yes, she does.” And, so on.]

Rule: If a plaintiff . . . is an entity . . . all persons whose consent to a settlement is necessary must be present, [Rare, if ever] unless the representative present has written authorization, signed by all persons whose consent is required, extending unlimited and unconditional authorization . . . [Never once in the history of creation has this happened.]

Rule: Duties of Defendants . . . a. All defendants . . . must be personally present, unless an insurance carrier acknowledges an unqualified and unlimited duty to indemnify [In what universe does this happen?] . . . and the consent of the client . . . is not required. An . . . attorney claiming to have settlement authority does not satisfy this requirement. [Oh yeah, just ask them.]

Rule: If the defendant . . . is an entity . . . all persons whose consent to a settlement is

necessary must be present, [Extremely rare, if ever] unless the representative present has written authorization, signed by all persons whose consent is required, extending unlimited and unconditional authorization . . . [Extremely never.]

Rule: Duties of Insurance Carriers. Each insurance carrier which acknowledges a duty to indemnify . . . and each insurance carrier as to which any party contends there is a duty to

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indemnify . . . must have a representative present. Such representative must be a person who has the unlimited and unconditional authority to enter into a settlement. [Hah! Right!] All persons whose consent to the settlement is necessary must attend the settlement conference.

Rule: Duty of All Parties and . . . Carriers . . . must be prepared to make good faith offers . . . [I thought so].

Rule: Waiver of . . . Personal Presence . . . the court may waive such requirement provided (a) good cause is shown and (b) the application for

waiver is made prior to the date scheduled . . . [Smart counsel do this but it is not done very often.] [T]he court may impose appropriate conditions. [Like “being available by telephone,” meaning “being available by telephone.” Many times the client who was ordered to be available by telephone is anything but.]

Help your temporary judge help you settle your case by:

1. Bringing all the decision-makers to the MSC. If this is not possible, let the court know in advance and arrange some alternative such as having the decision-maker available, actually available, by phone. If your client is an entity, have the person with the last word on settlement present. If that’s the CEO have him or her there, not the COO. If the General Counsel is the decision-maker, the GC needs to be present.

2. Having plaintiff make a settlement demand prior to the MSC. Settling is a lot more likely if the defendant has an idea of what you are going to ask for. Make it high, but not ridiculous. You might win ridiculous at trial but the defendant will never pay ridiculous to settle. Your prior 998 does not count as a demand for the MSC. Make a demand specifically for the MSC. Defendant, respond to that demand, and if the plaintiff does not make one, you should demand that it does.

There are many lawyers who mostly comply with Rule 316 and make a good faith attempt to settle the case. For me, as a temporary judge, the rules are only important when the lawyers do not do this.

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