



**"JUDGE NOT,
LEST YE BE JUDGED."**

by MICHAEL G. BALMAGES

I never got to be a judge. I tried. I applied once. Hon. James Di Cesare (Ret.) for whom I sat pro tem a bunch told me that I ought to apply. I said “Nah, I’m too old.” He said, “not for this governor.” So, based on that in-depth analysis, I applied and, other than an acknowledgement that they received my application, I never heard another word. I later learned that the governor had decided that I was too old and also too immature. It was a good call. I can’t picture myself showing up on time every day or, for that matter, any day. Also reading points and authorities would be low on my tolerance index. And missing my afternoon nap? No way.

I, however, have gotten to play judge a lot. The Orange County Superior Court has a very robust temporary judge program where they use lawyers to adjudicate small claims, Mandatory Settlement Conferences (MSCs), civil harassments, unlawful detainees, traffic court trials, traffic arraignments, probate, family law, and other stuff that I didn’t even know the court did. It used to be an informal thing; you knew a judge or a clerk and they’d call you up and ask if you could help out with MSCs on Friday.

The first time I ever sat pro tem was for Hon. Ron Bauer (Ret.) He was a commissioner at the time handling one of the court’s law and motion departments. Yes, this was when the court had law and motion departments, before it switched to the “federal system.” All pre-trial motions were filed and heard in one of these departments. You generally did not know who your trial judge was until you answered “ready” in Department 1. Actually, it was kind of cool. You’d show up in Department 1 on your trial date dragging several briefcases with you because you actually could go out to trial that day, although that usually did not happen and you would “trail” in Department 1 for most of the week. In and about the department would be every trial lawyer you had ever heard of, chatting, reading the newspaper, or doing last-minute prep. I used to try to figure out what the combined hourly rate was of the 150 lawyers waiting around for the whole of Monday morning. 150 lawyers at \$300 per hour (this was a long time ago) was a whopping \$45,000 per hour of “billable” newspaper reading. Anyway, Commissioner Bauer asked me if I would handle his law and motion calendar for two days. I said that I would. I would never do that again. It was way above my pay grade, which is always zero for a pro tem. Reading all those P’s and A’s and trying to keep track of thirty calendar items was almost overwhelming. I say “almost” because I somehow made it through those two days and, as far as I know, I was not reported to the Judicial Council.

After that (and maybe because of that) the Judicial Council formalized the pro tem process. They decided pro tems would have to be trained, certified, and re-trained and re-certified every three years. Worst of all, we

could no longer be called “Judge Pro Tem.” That was too confusing for those few of the public who did not take high school Latin. So, they selected the absolutely deflating title of “Temporary Judge.” To train and supervise us, the OCSC formed a “Temporary Judge Committee,” composed of a bunch of (not temporary) judges. They would meet regularly so they could laugh at the complaint letters they received about us. Not really; I just made that up. I’m not sure what they did but it seemed to work as the program flourished under its first Chair, Hon. Kirk Nakamura (Ret.) Next, Hon. Claudia Silbar (Ret.) became Chair and the program thrived under her leadership. Each year, they’d hold a party for the TJs, give us certificates of appreciation (which we were never allowed to show to anyone because you can’t tell anyone that you were a temporary judge), and make up numbers about our contribution to the administration of justice. “This past year the temporary judges served a combined 20 million hours and disposed of 3 million cases.” One year, when I received the “award” for serving the most hours, Judge Silbar said, “Mr. Balmages served 250 hours this year and if you figure that at \$400 per hour, he has donated \$100,000 of his time to this court and the public.” Very nice, except my wife and my law partner were both present and the last thing I wanted them to hear about was my donating \$100,000 of my time.

A while ago (which means before the pandemic), the TJ committee wanted to beef up its MSC TJ panel (which is a very esoteric use of initials). Judge Silbar had me speak to several sections of the OCBA to recruit more TJs. This meant that I had to speak of advantages to serving as an MSC TJ, the biggest of which is getting to see how lawyers handle their cases and how much they settle them for. Also, you hear insurance adjusters explain how they value a case. Perhaps the biggest advantage is that you get to know a lot of judges. Perhaps the biggest disadvantage is that you get to know a lot of judges. When you appear before them as a lawyer, they make sure that your opposing lawyer knows you have served as a pro tem for them (yes, they always say “pro tem”) but that fact will not affect their impartiality. Well, they don’t

mean that. They go out of their way to show that they are not impartial in favor of you. I don’t want to name names here, but I appeared before the late Hon. Robert Monarch, for whom I had sat many times as a pro tem. He informed opposing counsel of that and said, “Not to worry; it won’t stop me from ruling against him.” It didn’t. I guess I should have asked him to recuse himself?

Part of being a TJ is that you get to see the real judges behind the curtain. I did an MSC on a small auto case that was going to settle for around \$17,000, which would cover the liens and, after attorney’s fees, leave a few dollars for the plaintiff. The impediment was that there was a prior attorney on the case who had a lien and plaintiff’s counsel could not settle the case without that attorney signing off. That prior attorney was not at the MSC and I asked plaintiff’s counsel to call him. Counsel then spoke to an associate of the prior attorney who told counsel that the prior attorney would not waive or even lower the amount of the lien. I then got the prior attorney on the phone to see if I could make headway. Instead I got a very nasty response and refusal to even talk about working with us to see if we could satisfy all parties. I reported back to the real judge whom I will not identify other than to say he has passed away, was considered gruff by some, and I thought he was terrific. He called the prior attorney and told the prior attorney to report to the courtroom at 8:30 AM the following morning. The judge told me that he would do that every day until the attorney cooperated. The judge said, “If he’s going to screw with us, then we’re going to screw with him.” I loved it.

Another MSC for this same judge was a med-mal case against a big-time hospital run by a big-time university. At the MSC were plaintiff’s counsel and a lawyer from the university’s general counsel’s office. The MSC went nowhere, the main reason being that the defense lawyer and the “client representative” (a hospital administrator) had no actual authority. I asked defense counsel who had the authority and she replied that although the Trustees of this university had the ultimate authority, the practical authority rested with the university’s General Counsel. With the approval of the real judge, I ordered the MSC continued and

ordered the General Counsel to be personally present. Two weeks later I showed up at 8:45 for the 9:00 AM continued MSC. The clerk informed me that the plaintiff's lawyer and the General Counsel had already both checked in and left because they agreed that they weren't going to settle the case. I thought to myself and said to the clerk, "They can't do that!" I asked the clerk to get both lawyers on the phone and tell them to get back to court and I went in chambers to tell the real judge what happened. He was not happy and told me to bring the lawyers to see him after I finished the MSC. The clerk managed to reach both lawyers and ordered them back. I took them to the cafeteria and we talked about the case but did not settle it. Then I told the lawyers we were going back to the courtroom because the judge wanted to talk to them. I told them I knew this judge well and to expect him to be very upset and maybe even unreasonably hard on them for leaving without permission of the Court. I strongly recommended they not argue with him or otherwise try to excuse their leaving without court permission. Luckily, they followed my advice and the very important GC of the very important university graciously took his lumps and thanked me on his way out the door.

At another MSC for another now retired judge whom I will simply describe as tall, good looking, and smart, I got the plaintiff and the defendant (the insurer) within \$3,000 of each other and neither would budge after two hours of my cajoling. This judge liked to know the details of what was happening at MSCs in his department, although many do not. I went into chambers and told him I could not close the \$3,000 gap. He told me to bring counsel into chambers. After a few pleasantries, he said he understood that they were \$3,000 apart. The lawyers so confirmed and he then spoke directly to plaintiff's counsel: "You are going to go into the hallway and get your client to accept \$1,500 less." He then turned to defense counsel and said, "You are going to go into the hallway and get your insurer to pay \$1,500 more." He asked, "Do you both understand? Come back into chambers when you've got this done." They did. After they left, he said to me, "It's not you, Mike. It's not me. It's the black robe."

A slightly different approach was taken by a now retired federal judge when he took off his black robe. I was the appointed discovery referee in the case and there was a hearing on my recommendations. The judge asked me to be there. The case concerned a retired lawyer in pro per suing the moving company that had moved his stuff from North Carolina to Orange County. It was alleged that the movers

had ruined it all. The most significant items of allegedly ruined property were Japanese screens, the kind you see dividing rooms. Plaintiff argued that they were worth thousands and were now ruined. The defendant moving company argued otherwise. After the judge ruled on the discovery motions he turned to me and said "Mr. Balmages, how is the plaintiff going to prove the value of the screens since he does not have an expert?" I'm not sure why it was my job to answer that question but I gave it a shot "I guess he can testify to the value of his own property?" The judge said, "maybe so but I don't know if I'm going to accept that." He continued, "Mr. Balmages during the lunch break I want you to find an expert who will tell us the value of these screens. I'll see you all back here at 1:30." Wait, what? I'm just a lowly discovery referee. I did not say that out loud to this judge, but I thought it.


I went into the hallway with the lawyers and shrugged my shoulders and they shrugged theirs. I got out my smart phone. Now this was several years ago when smart phones were not as smart as they are now. I was able to find a few pictures of the kind of screens at issue with prices ranging from \$75 to \$75,000. Not helpful. I did not even know how to look for an expert with my phone. However, my mediation skills kicked in and I got the parties to stipulate that replacement costs for the screens at issue would be about \$25,000. When the courtroom re-opened we went in and the judge asked me what the expert said. I responded "no need for an expert; the parties have stippled to the value at \$25,000." The judge got very quiet and still for a moment and then heatedly said, "I want you all back here tomorrow morning with a stipulation as to the value of every single piece of property at issue. Mr. Balmages I want you here also." Wait, what? I'm just a lowly discovery referee, I again thought to myself, too afraid to say anything. The judge then adjourned court but before any of us could move he took off his black robe and walked over to counsel table and had us all sit down facing him. He pointed his finger at the plaintiff and intensely said, "You're going to take \$30,000 to settle this case." He then pointed at defense counsel and intensely said "you're going to pay \$30,000 to settle this case. I am not going to spend my time or my staff's time or this court's resources on a \$25,000 case. Agreed?" They did, I mean how could they not? We walked out in the hallway and I apologized to them. To this day I don't know why I did that. At least I did not have to come back the next morning.

I've learned a lot as a pro tem but one lesson

really stuck with me. It was from Judge Di Cesare. Several times, when sitting as pro tem in his courtroom while he was calling his calendar, I heard him address counsel and say something to the effect of, "Counsel, I and my staff are here to serve you, how can we help you move this case along?" That got to me because, in the forty years I had practiced law prior to that, I had never thought of the court as being there to help. Rather, I thought of the court as someone I had to look out for, another adversary in an adversarial system. Ever since I heard Judge Di Cesare say that, I have kept it in mind as I sit as a pro tem or a mediator: my job is to help, and not be an impediment to lawyers doing their jobs.

Two other benefits of sitting pro tem: First, I get to see a lot of my old friends and other older lawyers whom I have known for years. Second, I get to interact with a lot of young (anybody under 50!) and new lawyers and am constantly impressed by how sharp and confident they are. I was never that sharp or that sure of myself.

Since the pandemic began, I have done all of my MSCs online, probably about 200 of them. It's not the same, but it's pretty good. The main drawback is that you don't get to schmooze with the clerks and deputies or the other pro tems in the cafeteria. But most of the lawyers seem to prefer it. They prefer logging on at 9:00 AM from their home office to driving from Encino to Santa Ana for an 8:30 calendar call for an MSC.

So, although I never got to be a judge, I got to do a lot of judging. It's better this way because I still get my afternoon naps. 

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