

BRIEFLY: WHO? WHOM? WHAT?

by MICHAEL G. BALMAGES

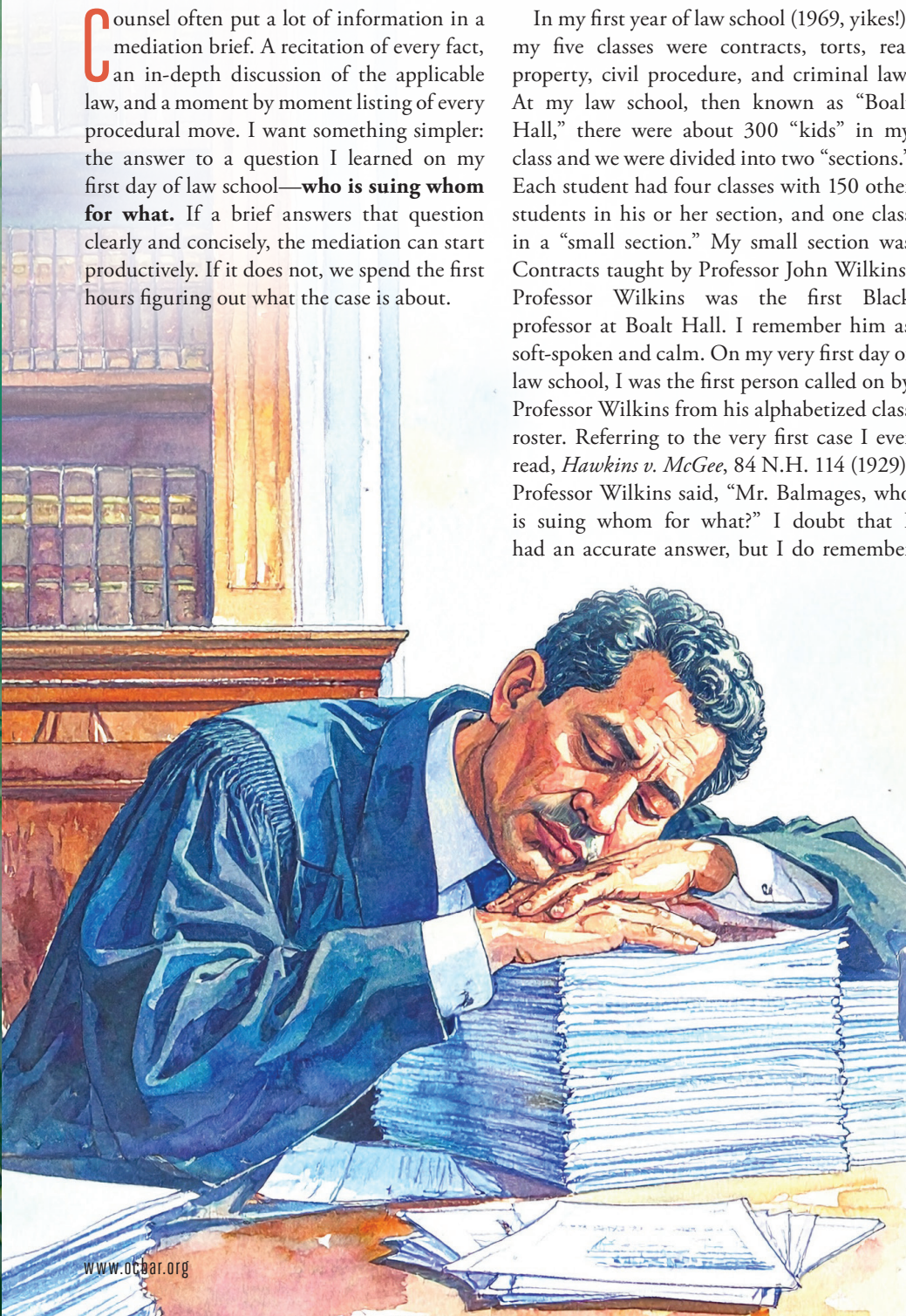
Counsel often put a lot of information in a mediation brief. A recitation of every fact, an in-depth discussion of the applicable law, and a moment by moment listing of every procedural move. I want something simpler: the answer to a question I learned on my first day of law school—**who is suing whom for what**. If a brief answers that question clearly and concisely, the mediation can start productively. If it does not, we spend the first hours figuring out what the case is about.

In my first year of law school (1969, yikes!), my five classes were contracts, torts, real property, civil procedure, and criminal law. At my law school, then known as “Boalt Hall,” there were about 300 “kids” in my class and we were divided into two “sections.” Each student had four classes with 150 other students in his or her section, and one class in a “small section.” My small section was Contracts taught by Professor John Wilkins. Professor Wilkins was the first Black professor at Boalt Hall. I remember him as soft-spoken and calm. On my very first day of law school, I was the first person called on by Professor Wilkins from his alphabetized class roster. Referring to the very first case I ever read, *Hawkins v. McGee*, 84 N.H. 114 (1929), Professor Wilkins said, “Mr. Balmages, who is suing whom for what?” I doubt that I had an accurate answer, but I do remember

Hawkins v. McGee, commonly called the “Hairy Hand Case,” i.e., skin grafted onto the plaintiff’s palm grew hair contrary to the “100% good hand” the defendant doctor had promised. “Who is suing whom for what” is the first thing I learned in law school and it has been with me for forty-five years of active practice and the eight following years of my mediation practice.

In my litigation practice, when I was on the defense, I needed to know who was suing, exactly whom they were suing, and for what—both in terms of the alleged bad conduct and the relief being sought. On the plaintiff side, I still needed to figure out who would be suing, whom they would sue, and for what conduct and relief. For me it became a simple and effective rubric for almost every case, and it has translated well into my ADR practice.

I started asking that question as a *pro tem* in Mandatory Settlement Conferences. Pre-pandemic, we did the MSCs at the courthouse. You would arrive at the department at 8:30 a.m. and the clerk would hand you a file and tell you to use the jury room or the cafeteria. I always went to the cafeteria. I would crowd everyone around a cafeteria table and ask plaintiff’s counsel to tell me, “Who is suing whom for what?” Counsel invariably would say, “It’s in my MSC statement.” I would tell them, “Great, but I have not read that.” Counsel would reply, “You have to read that,” and I would respond, “I will when I get a chance.” Counsel would then proceed to tell me what was going on. Of course, defense counsel would tell me that plaintiff’s version was all wrong, and give me the defense version of who was suing whom for what. It got us started, and I would fill in gaps about the facts as we proceeded. Today, with most MSCs being remote, it’s somewhat different. The *pro tems* get the MSC statements in advance and have the opportunity to read them before the MSC.



For mediations, “who is suing whom for what” is what I want to learn from a mediation brief. Briefs should be, well, brief, and simple. Include only the key facts, ideally in chronological bullet points. Cite only the most pertinent legal authority, not every element of the case and every jury instruction, and just list the causes of action. Are there cross-complaints and, if so, for what? Bullet-point defenses? Are there Motions for Summary Judgment or Summary Adjudication decided or pending? What about Section 998 offers, expired and outstanding? What discovery has been served and what’s left? Have experts been designated? Prior MSCs? Prior Mediations? Prior demands and offers? Attorney’s fees exposure; basis and amount? Trial date? Trial budget? Importantly, never, ever attach your MSA/MSJ. I’m not going to read it, and I doubt any other mediator will.

Setting aside the law practice and procedural differences from 1929 to today, what would I expect the plaintiff’s mediation brief in the Hairy Hand Case to read?

Plaintiff’s Mediation Brief

Plaintiff George Hawkins is suing Dr. Edward McGee for breach of contract arising from a surgical procedure in which Dr. McGee promised to produce a “100% good hand.” Plaintiff seeks compensatory damages for the difference between the promised result and the condition of the hand after surgery.

Key Facts (Chronological)

- Plaintiff suffered childhood burns to his hand, leaving scarring and deformity.
- Dr. McGee repeatedly approached plaintiff and his father about performing a skin-graft procedure to improve the condition of the hand.
- Dr. McGee promised that the surgery would result in a “100% good hand.”
- Plaintiff relied on that promise and agreed to the procedure.
- Defendant performed a skin graft using tissue taken from plaintiff’s chest.
- Hair subsequently grew on the palm of the hand and the hand’s condition was worse than before surgery.
- Plaintiff contends the result fell far short of the “100% good hand” that was promised.

Cause of Action

- Breach of Contract

Damages

- Expectation damages measured by the difference between the value of the hand promised and the hand received.
- Associated pain, suffering, and disability.

Defense Mediation Brief

Plaintiff George Hawkins is suing Dr. Edward McGee, a surgeon, claiming breach of contract based on an alleged promise that surgery would produce a “100% good hand.” Plaintiff seeks damages for the condition of the hand following a skin-graft procedure.

Defense Position: There was no contract guaranteeing a particular surgical result. Any statement regarding a “100% good hand” was at most an expression of medical opinion or encouragement, not a binding warranty.

Cite only the
most pertinent
legal authority,
not every
element of
the case and
every jury
instruction,
and just list the
causes of action.

Key Facts (Chronological)

- Plaintiff had long-standing burn scars on his hand prior to surgery.
- Plaintiff and his father sought medical advice regarding possible improvement.
- Defendant agreed to attempt a reconstructive skin-graft procedure intended to improve the appearance and function of the hand.
- Plaintiff consented to the surgery with knowledge that surgical procedures carry inherent risks and uncertain outcomes.

- A skin graft from the chest was used in the procedure.
- Post-surgery hair growth occurred on the grafted skin, an outcome related to the characteristics of the donor tissue rather than negligent or improper conduct.

Defenses

- No enforceable contract guaranteeing a specific surgical result.
- Statements attributed to defendant were non-binding medical opinions, not contractual promises.
- Plaintiff accepted the inherent risks associated with surgery.
- Damages, if any, must be measured only by the difference between the hand before the surgery and after the surgery—not by comparison to a perfectly normal hand.

Damages

Defendant disputes that plaintiff suffered legally compensable damages and contends that any award should be limited under applicable contract-damage principles.

Brief and simple, these briefs would be all a mediator would need to start the mediation. Placing the two briefs side by side shows exactly why the question “who is suing whom for what?” remains one of the most efficient ways to begin any case analysis. In *Hawkins v. McGee*, as in just about every case since, settlement can be a little hairy. 

Michael G. Balmages is a mediator, arbitrator and discovery referee with ADR Services, Inc., and a former Chair of the Orange County Bar Association Alternative Dispute Resolution Section. He has presided at more than 600 mediations and more than 1,000 Mandatory Settlement Conferences as a temporary judge in the Orange County Superior Court. Mr. Balmages was “hairy” when he was in law school in Berkeley. Now, not so much. Mr. Balmages may be reached at mbalmages@adrservices.com.

This article first appeared in Orange County Lawyer, August 2026 (Vol. 68 No. 8), p. 39. The views expressed herein are those of the author. They do not necessarily represent the views of Orange County Lawyer magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.