

# SECTION REVIEW



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## BUSINESS LAW

## ALLISON V. ERIKSSON – REMEDIES AVAILABLE TO MINORITY LLC MEMBERS IN FREEZE-OUT MERGERS

BY IAN P. GILLESPIE

### INTRODUCTION

Under M.G.L. c. 156C, § 60(b), members of a Massachusetts limited liability company (LLC) who object to a merger are left with only one option: to resign and have their interest bought out by the majority. However, in *Allison v. Eriksson*, the Supreme Judicial Court (SJC) clarified that members opposing the merger of their LLC are entitled to additional equitable remedies beyond the scope of the statute if the majority member or members breached their fiduciary duties to the minority member in the process of effectuating the merger. 479 Mass. 626, 98 N.E.3d 143 (2018). In such a case, the courts have discretion to tailor equitable relief for the dissenting minority while also keeping in mind the best interests of the LLC, which may include rescinding the merger, or even modifying the operating agreement of the new LLC. This rule is applicable to “freeze-out mergers,” which occur when the majority members or member merge the business into a new entity with the purpose of eliminating, or “freezing out,” the minority.

### THE CASE

*Allison v. Eriksson* involved two founders of a Massachusetts LLC, who were also its sole members. Eriksson controlled around 75 percent of the interest and Allison controlled around 25 percent of the interest since the founding of the LLC. The operating agreement required unanimous consent from the members to add any new members and for any action that would change a member’s ownership interest. After several years of operating, the LLC became depleted in cash. Eriksson, the majority member, refused to lend the LLC money, but was willing to invest money in exchange for equity. Allison, the minority member, similarly declined to lend money to the LLC, but also refused to allow Eriksson to invest funds in exchange for equity, because Allison did not want his own interest diluted. Eriksson suggested that they both invest money in proportion to their ownership interest or personally guarantee a bank loan. Allison rejected both of these suggestions as well.

At an impasse, Eriksson, without Al-

lison’s knowledge, formed a new Delaware LLC that provided far fewer protections for minority members than the original Massachusetts LLC. Eriksson then forced the Massachusetts LLC to merge into the Delaware LLC and proceeded to purchase additional shares, which diluted Allison’s interest.

Allison filed suit to rescind the merger and restore his interest. Eriksson argued that Section 60(b) of the Massachusetts LLC Act, which applies to LLC mergers, does not allow for equitable remedies, but instead is limited to the “exclusive remedy” of buying out the opposing member’s interest. Conversely, Allison argued that the LLC Act does not limit the minority member’s remedy to a buyout when the majority breaches his or her fiduciary duty to the minority in the process of the merger. In addition, Allison contested the trial court’s refusal to rescind the merger, electing instead to modify the operating agreement of the new Delaware LLC, restoring Allison’s interest and rights.

First, addressing the scope of the statute, the SJC found that Section 60(b) provides that a buyout is the exclusive remedy for the dissenting member. However, Section 60(b) also requires the merger to comply with Sections 59-63 of Chapter 156C. In pertinent part, Section 63(b) places fiduciary and contractual duties on LLC members. The court concluded that because Eriksson acted in bad faith and clearly violated his fiduciary duties to Allison, the merger in this case was not in fact a “merger” under Section 60(b). This is because compliance with Section 63(b) is a “precondition” of Section 60(b). Therefore, Allison was not limited to the exclusive remedy of seeking a buyout, but could also seek and be entitled to certain equitable relief.<sup>1</sup>

The second half of the opinion addresses the trial court’s discretion in applying equitable relief. The SJC upheld the trial court’s order restoring Allison’s minority rights and interest to pre-merger status.<sup>2</sup> But equally notable, the SJC affirmed the trial court’s refusal to rescind the merger.

The SJC reiterated that the proper remedy for a freeze-out merger “will put the minority member in the position he would have been in had the freeze-out not occurred, and compensates him for the denial of his reasonable expectations.” The court also noted

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the “broad equitable powers” courts have in specifying the appropriate remedy and that such a remedy must be in the company’s “best interest.”

In refusing to rescind the merger, the court considered: (i) the fact that Allison, a “sophisticated corporate attorney,” waited seven months after settlement negotiations to file suit; (ii) that Eriksson had already invested \$500,000 in the Delaware LLC, complicating the divestment process; and (iii) that the merger was caused by Allison’s own breach of fiduciary duty in refusing to allow either member to invest in the cash-depleted LLC. All these factors together persuaded the court that it was not in the best interest of the LLC to rescind the merger.

### GOING FORWARD

The first half of *Allison v. Eriksson* provides litigants with a simple rule: In a contested merger where the majority member fails to satisfy his or her fiduciary duties, equitable remedies are available to the dissenting minority member. But if the majority member does not breach a fiduciary duty, then the minority member may only resign and seek distributions in proportion to his or her interest pursuant to Section 60(b) of the LLC Act.

The second half of the opinion demonstrates how equitable remedies are determined on a case-by-case basis, taking into account both: (i) the reasonable expectations of the minority member; and (ii) the best interests of the company. Importantly, as was the case here, these two factors do not necessarily go hand-in-hand. In *Allison v. Eriksson*, the SJC acknowledged that rescinding the merger, amending the operating

**ALLISON V. ERIKSSON**  
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agreement and adjusting the interests of the members are potential remedies. A review of cases demonstrates the broad range of other equitable remedies available, such as returning dividends to the minority; *Zimmerman v. Bogoff*, 402 Mass. 650, 661 (1988) and *Crowley v. Communications for Hospitals Inc.*, 30 Mass. App. Ct 751, 768 (1991); recovery of lost profits; *O'Brien v. Pearson*, 449 Mass.

377, 388 (2007); or reinstatement or back pay if that member is also an employee. *Wilkes v. Springside Nursing Home Inc.*, 370 Mass. 842, 854 (1976). See generally, *Rosenhouse*, 39 A.L.R. 6th 1. Interestingly enough, a buyout, the very remedy that the minority member sought to avoid in *Allison v. Eriksson*, is generally not available as an equitable remedy in a close corporation because buyouts often place the minority members in a better position than they would have been absent

the wrongdoing. *Brodie v. Jordan*, 447 Mass. 866, 872 (2006). ■

1. Notably, the court found that the remedies for LLCs in mergers should be interpreted the same as business corporations under Chapters 156B and 156D.
2. However, the court remanded the case to the trial court for further explanation on why it increased Allison's interest to 5 percent.

## DEVELOPMENT &amp; CONSTRUCTION LAW PRACTICE GROUP

## OSHA STANDARDS IMPERMISSIBLY APPLIED TO CONSTRUCTION EMPLOYERS ARE HELD INVALID<sup>1</sup>

**BY KRISTEN R. RAGOSTA**

The United States Occupational Safety and Health (OSH) Review Commission has ruled that the secretary of labor impermissibly applied certain OSH Administration (OSHA) standards to construction employers. On Sept. 28, 2018, the commission vacated an OSHA citation issued to Kiewit Power Construction Company (Kiewit) for allegedly violating the “quick-drenching” standard in 29 C.F.R. § 1926.50(g). The commission held that the standard was initially promulgated to cover non-construction employers and that the secretary of labor impermissibly expanded the standard’s scope to apply it to private parties engaged in the construction industry who did not participate in the notice-and-comment procedure. There are 146 other paragraphs in OSHA’s regulations, Part 1926, that may be invalid in the wake of the commission’s decision.

### I. BACKGROUND

The issue arose from an Aug. 3, 2011, OSHA inspection of a Kiewit worksite in Rogersville, Tennessee. OSHA cited Kiewit for failing to provide facilities for emergency quick drenching or flushing its employees’ eyes and body upon exposure to injurious corrosive materials as required under 29 CFR § 1926.50. Kiewit contested the citation and

filed a motion to dismiss, arguing that 29 CFR § 1926.50 was invalid. The commission allowed Kiewit’s motion to dismiss. The commission’s decision was based on the plain language of the OSH Act and the procedural history of the quick-drenching standard in 29 CFR § 1926.50.

### II. OSH ACT

The OSH Act authorized the secretary to promulgate workplace safety and health standards applicable to all employers “engaged in a business affecting commerce.” 29 U.S.C. §§ 651(b)(3), 655. The act provided two different procedures for promulgating standards, either under 6(b) with a notice-and-comment procedure, or under 6(a) without notice and comment for any national consensus standards or established federal standards. As part of the secretary’s implementation of section 6(a), the secretary adopted many existing standards under the Walsh-Healey Public Contracts Act of 1936 (WHA), which applied to employers that were manufacturing or furnishing materials under contract with the federal government — it did not apply to construction employers. 41 C.F.R. § 50-204.6(c).

### III. QUICK-DRENCHING STANDARD UNDER PART 1926

The quick-drenching standard first appeared in the WHA such that it did not apply to construction work. When promulgating standards under the OSH Act, the secretary initially retained the coverage limitation and applied the quick-drenching standard only to manufacturing or supply operations — not construction. 20 C.F.R. § 1910.5(e), 36 Fed. Reg. at 10,468. Three months later and without explanation, the secretary revoked § 1910.5(e) and made § 1910.151(c) and all

other standards adopted from the WHA applicable to all employers covered by the OSH Act, including construction employers. 36 Fed. Reg. 18,080, 18,081 (Sept. 9, 1971); 44 Fed. Reg. 8575. 8577. 8589 (Feb. 9, 1979).

Subsequently, OSHA issued various notices and guidance, and then codified in Part 1926 the construction-specific standards, including the quick-drenching standard in 29 C.F.R. § 1926.50(g), which is the construction medical services and first aid standard. 58 Fed. Reg. 35,075, 35,076 (June 30, 1993); U.S.C. § 553(b)(3)(B); and 29 C.F.R. § 1911.5. In applying the quick-drenching standard to construction employers in Part 1926, the secretary asserted it had in good faith codified a standard already applied to construction employers.

### IV. CONCLUSION

The commission has held that the secretary’s application of the safety standard to construction employers was impermissible because the source for the standard did not apply to construction work. Where the construction industry participants against whom the secretary and OSHA are now seeking to enforce the standard did not participate in the notice-and-comment rulemaking process for the WHA, the regulation applying the standard to construction work is procedurally defective and invalid. There are 146 additional provisions in Part 1926 that may be invalid in the wake of the commission’s decision. ■

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<sup>1</sup> *Secretary of Labor v. Kiewit Power Constructors Co., OSHRC Docket No. 11-2395.*

## DISPUTE RESOLUTION

## NAVIGATING INFORMED CONSENT TO THE ROAD THAT OUGHT TO BE MORE TRAVELED

BY VICKI L. SHEMIN, J.D., LICSW, ACSW

While the practices of collaborative law and mediation are innovative shifts from the traditional adversarial legal model in the area of conflict resolution, lawyers must still adhere to the ethical rules of the legal field and obtain informed consent from clients involved in the processes. To borrow (and turn) a phrase from Professor Christopher Fairman, “Collaborative law and mediation’s glass ceiling is legal ethics.”

Although practitioners may have a broad-spectrum understanding of what constitutes informed consent, paying attention to the nuances of its practical application has far-reaching implications. In one sense, informed consent may refer to a client’s agreement to a professional’s proposed option after the professional has identified the alternatives, laid out the material strengths and weaknesses of other options, and obtained the client’s consent to proceed with the professional’s recommendation. However, informed consent may also refer to a client’s choice among various alternatives laid out by the practitioner. Ultimately, in either case, the client gives consent — but the emphasis shifts depending on whether the client chooses among the panoply of alternatives presented as opposed to opting in to or out of the professional’s proposed recommendation. Informed consent is particularly important in mediation and collaborative law because of the high level of client autonomy that is exercised in each process (collectively, “DR processes,” and purposely not identified as “ADR processes,” as they should be considered mainstream options as opposed to alternative dispute resolution options). In these DR processes, which by their nature and definition are limited-scope representations, parties are negotiating directly with each other and partnering to generate solutions as they address their independent and collective interests. While these types of negotiations are empowering for the parties, commencing a DR process without paying attention to the fundamental ethical considerations of informed consent is tantamount to malpractice at worst and unprofessional conduct on a variety of levels.

In our day-to-day work as busy practitioners, it is easy for us to be lulled into a false sense of security about fulfilling our ethical responsibility to our clients (or potential clients) in connection with advising them regarding informed consent. In truth, many of us may consider this to be part of the “housekeeping,” “elevator speech,” “spiel” or similar part of the intake process that does not recognize the due weight that should attend this gravely important part of our client-service delivery. Just as we would not want our internists to forgo detailing the potential side effects of a newly prescribed medication, so too do we as mediators and collaborative law professionals bear an equal responsibility to ensure that our (potential) clients have full informed consent prior to entering into a DR process.

Try this thought experiment. Read anew the embedded informed consent document you hand your client, and then imagine you are in a medical setting where you likely often feel bewildered and overwhelmed; now, imagine the client coming into the legal arena — likely similarly feeling bewildered and overwhelmed — and try reading through your agreement to mediate (ATM) or collaborative law process agreement (CLPA) as a lay person would. In truth, it is probably not easily digestible to the average client. Perhaps we would serve our clients well if we initiated a discussion with them that echoes the judge’s colloquy on the day of the divorce hearing: “Have you read this agreement line-by-line? Do you understand it? Have you had an opportunity to consult with counsel about the agreement if you wish? Are there any questions that I can answer for you? Do you think your spouse has read it? Do you think your spouse understands it? Do you think your spouse has had an opportunity to consult with counsel, if he or she so wishes? Are you prepared to abide by the parameters detailed for you and your spouse as set forth in the agreement? Do you understand the mediator’s/collaborative law practitioner’s obligations as outlined in the agreement? Do you understand the so-called ‘disqualification agreement’ in the CLPA and how that might prejudice your legal position in this action?

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Bearing all of that in mind, are you still prepared to go forward??

As a “belt-and-suspenders approach,” we as practitioners may want to consider whether, as part of our informed consent protocol, we, in fact, have an affirmative duty to screen our cases. To this end, John Lande and Gregg Herman’s promulgation of “Factors Affecting Appropriateness of Mediation, Collaborative Law and Cooperative Law Procedures” is highly instructive and invaluable for conflict resolution modes that span the spectrum from unassisted negotiation to mediation to collaborative law to cooperative law to traditional litigation.

As to the basics that professionals should cover, here is a representative sampling of the rules, standards and factors that govern how lawyers (in particular) should screen for the appropriateness of cases for the mediation or collaborative law process and ensure that informed consent is obtained before entering into a formal DR process with a client.

**SOME RULES OF THE ROAD (ALONG WITH STANDARDS AND FACTORS)**

The International Academy of Collaborative Professionals (IACP) has Minimum

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Standards for Collaborative Professionals and for the Collaborative Process. These professional standards are distinctly different from the Rules of Professional Conduct for attorneys, as they are non-binding: Violation of the IACP standards does not subject the practitioner to disciplinary action, although the collaborative professional might be ousted from IACP.

- Minimum Ethical Standard for Collaborative Professionals 2.2 (and Comments): The “Collaborative Lawyer must inform the prospective client(s) of the full range of process options available for addressing any legal matter(s), and provide information reasonably necessary to enable the client to make an informed process choice.”
- Minimum Standards for Introductory Collaborative Practice Trainings and Introductory Interdisciplinary Collaborative Practice Trainings 2 (c)(4): “Ethical considerations including the need to discuss carefully the available process options with the client, informed consent, integrity, professionalism, diligence, competence, advocacy, and confidentiality.”

Unlike the IACP standards, the American Bar Association’s Model Rules of Professional Conduct subject attorneys under its auspices to disciplinary action. Lawyers are required to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” (Model Rules of Professional Conduct R. 1.4(a) (2).) In the DR context, the goal would be for the lawyer to ensure that clients understand their procedural options and anticipate what may happen during the process of these limited-scope representations. In considering all forms of dispute resolution, lawyers should help clients realistically weigh the advantages and disadvantages of the alternatives, taking into account the facts, circumstances, risks and benefits as part of client intake, orientation, interviewing and counseling.

Above and beyond these standards, there are many factors that practitioners should consider in assessing the appropriateness of a case for mediation or collaborative law, and whether or not a party’s ability to provide informed consent may be impaired. These factors include, but are not limited to:

- Personal motivation/suitability of the lawyers and/or the parties (a willingness

and ability to participate);

- Trustworthiness (a belief that the other party will not be forthcoming with information will hinder the transparent nature of the process);
- Domestic violence/state of mental health/substance abuse (these factors may cause intimidation or fear that impairs a party’s comfort level in dealing so closely with the other spouse); and
- Risk of disqualification (if there is a high risk that the parties cannot resolve the matter outside of court, it may not make sense to begin the collaborative law process that will likely disqualify the attorney).

## INFORMED CONSENT IN DR AGREEMENTS

Oftentimes, ATMs include similar provisions to those found in a CLPA, such as informed consent for information sharing, interest-based negotiations and respectful communications. Both agreements are structured to incentivize settlement, not to pressure clients into making decisions against their best interests. Clients must provide informed consent to three core aspects of the collaborative law process that are particularly important because they illustrate how the attorney-client relationship differs in collaborative law as compared to litigation: (1) limited-scope representation; (2) confidentiality; and (3) honest and full disclosure without court intervention.

## LIMITED SCOPE OF REPRESENTATION

Lawyers have a duty to screen potential cases for appropriateness and obtain clients’ informed consent to use collaborative law. This rule authorizes lawyers and clients to agree on a limited scope of representation “if the limitation is reasonable under the circumstances and the client gives informed consent.” (Model Rules of Professional Conduct R 1.2 (c).) Similarly, the Restatement of the Law Governing Lawyers provides that agreements limiting the scope of representation are approved if “the client is adequately informed and consents, and [...] the terms of the limitation are reasonable in the circumstances.” (Restatement (Third) of The Law Governing Lawyers § 19 (2000).) Summarizing the disqualification provision without explaining the implications does not satisfy the ethical requirement. It is crucial to assess the need for professional services and risks of litigation at the outset because termination of a collaborative law process would require the disqualification of all professionals from participation

in any subsequent litigation.

Like collaborative law, mediation is a voluntary process, but there is a different disqualification provision for a mediator. In many ATMs, the document emphasizes that mediation is a voluntary process but adds this important twist:

Either party may terminate the mediation for any reason by written notification to the mediator and to the other Party. The mediator may terminate his/her participation in the mediation if: (1) the parties fail to pay for the mediator’s services, (2) continuation of the mediation would involve a violation of applicable ethical rules, or, (3) other reasonable cause. In the event of such termination, the mediator shall maintain the confidentiality of all information to which the obligation of confidentiality applies under this Agreement.

Consider the ethical conundrum that might arise if an untenable/confidential secret is disclosed by one party to the mediator versus the quandary of a collaborative law attorney who may be duty bound to withhold sharing of the secret.

## CONFIDENTIALITY

Confidentiality is approached differently in mediation than in the collaborative law (CL) setting. “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” (Model Rules of Prof’l Conduct R 1.6(a).) However, CL meetings and mediation involve the parties negotiating with each other in the presence of a third party, which could include opposing counsel, opposing parties, financial planners, coaches, mental health counselors and (of course) mediator(s). Therefore, clients expressly need to waive the attorney-client privilege of confidentiality.

Unquestionably, there are vocal critics of CL who have illuminated the problem of the quite possibly unattainable twin goals of the CL commitment to share material and relevant information, coupled with the lawyer’s constrained ethical duty to maintain client secrets as privileged and confidential. Perhaps informed consent is a bridge towards helping to resolve the otherwise seemingly unresolvable. Although parallels to what unfolds in mediation are often pointed to as an example of resolving the inherent conflict, the essen-



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tial difference is that in CL, parties are being asked out of the gate to enter into binding contracts with an advance express agreement to disclose certain information. Although it has not, unfortunately, become common practice, this author strongly advocates for having the CLPA remain unsigned until there have been two to three meetings so that the parties can assess whether the process and its constraints are workable for each of them — including the all-important duty to disclose. This, too, should be part of informed consent so that clients do not feel compelled to sign binding contracts from the get-go.

Some states have adopted portions of the Uniform Collaborative Law Act (UCLA) and have retained its provisions on privilege of collaborative law discussions. Other states have otherwise adopted the UCLA, but have reserved the portions of their code corresponding to the UCLA's provisions on privilege. In effect, then, a state may opt in to or out of (in whole or in part) what is and is not deemed a privileged communication. Here in Massachusetts, the Legislature has not enacted a collaborative law statute so, arguably, collaborative law discussions are governed by contract law. A contract cannot alter the rules of evidence; thus, unless and until the Legislature amends the rules of evidence to provide for privilege, four-way meetings are not privileged in Massachusetts. Notwithstanding, as stated in some model collaborative law process agreements: "The entire collaborative law process is confidential and shall be treated as a compromise negotiation for the purposes of the rules of evidence and other relevant provisions of state and federal law."

The scope of confidentiality is decidedly different in mediation. In Massachusetts, the mediation process is confidential and privileged if certain conditions are met. Except when disclosure is required by law or court rule, the parties and the mediator agree not

to disclose communications made by the parties or their counsel in connection with the mediation. Exceptions to confidentiality, as described in an ATM, may include disclosing information to one's attorney, therapist or financial advisor; disclosing information concerning child/elder abuse/neglect; and risk of serious harm to an individual or unlawful activity to the appropriate authority. Confidentiality and privilege also do not apply to evidence relating to the liability of the mediator in a subsequent suit against the mediator or disciplinary proceedings against the mediator. Parties may also agree that they will not seek to obtain testimony of the party or the mediator regarding the mediation or disclosure of the mediator's file.

## HONEST AND FULL DISCLOSURE WITHOUT COURT INTERVENTION

As part of informed consent, it is also of particular importance for prospective clients to be aware that there is no court intervention in CL or mediation and no formal discovery procedures. Therefore, this voluntary process requires trust in the inherent principles of CL and mediation (which should be memorialized in writing in the CLPA and ATM) because parties who sign on the proverbial dotted line submit themselves to abiding by the pledge to provide all relevant financial and other pre-trial information, and there is no ability to use the authority of the court to compel a party to "do the right thing" or order a party to refrain from transferring or dissipating marital assets. Aspirationally, parties agree not to withhold or misrepresent material and relevant information, not to secretly dispose of marital property, and not to fail to disclose the existence or true nature of assets and obligations. Informed consent on this issue is singularly significant because it may concern issues of privacy and safety. Practitioners should gauge the comfort level of their prospective clients in the DR process, characterized by transparency and trust, because there is no accountability measure imposed

by the court.

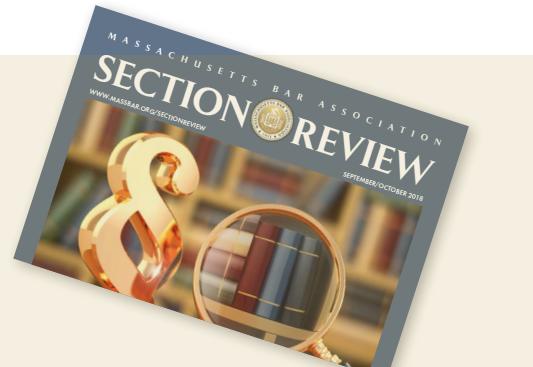
## CONCLUSION

The ever-evolving nature of the professional roles of lawyers as collaborative law practitioners and mediators continuously raises the bar of whether there is a need to re-evaluate the ethical rules and standards reflected in collaborative law and mediation, two mainstay pillars of DR. While the scope of this article emphasizes the duty of lawyers in certain sections, the central place and importance of financial, mental health and other collaborative law practitioners in the collaborative law field is noted and heralded. Undisputedly, the issue of informed consent is of paramount importance to protect not only prospective clients' interests, but also those of practitioners who, if they do not comply with ethical obligations, may be liable for professional discipline. To avoid potential malpractice issues and to better fulfill our informed consent responsibilities to prospective clients, professionals should provide comprehensive and balanced descriptions of conflict resolution processes — not limited to only those DR processes in which the client may express interest, but to examine other processes that clients might consider, such as mediation, collaborative law, cooperative negotiation, arbitration, med-arb, arb-med, neutral expert evaluations, settlement special masters, conciliation, court-annexed DR processes and, of course, litigation.

In summary, bearing in mind the applicable rules, standards and factors that comprise the ethical signposts of mediation and collaborative law — combined with a review of how each of us currently handles informed consent in our respective practices — may lead us to consider spending a lot more time idling on this very important path before having our prospective clients sign on the dotted line and letting them pass "go." It surely beats the alternative of ruefully reflecting back in the rear-view mirror. ■

## HOW TO SUBMIT ARTICLES

To inquire about submitting an article to SECTION REVIEW,  
contact Kelsey Sadoff (KSadoff@MassBar.org).



## TAXATION LAW

**SEN. JASON LEWIS' LEGISLATIVE BILL TO IMPOSE INCOME TAX ON MILLIONAIRES**

*The following is a summary of State Sen. Jason Lewis' presentation from Dec. 20, 2018.*

The millionaires tax, originally proposed by the Raise Up Massachusetts coalition, which represents community organizations, religious groups and labor unions, sought to apply a 4 percent surtax on income over \$1 million of each Massachusetts taxpayer. Raise Up developed an initiative petition, the Fair Share Amendment, to amend the Massachusetts Constitution to allow that surtax and to earmark the surtax revenues for transportation and education. New revenue is necessary to rebuild crumbling roads, bridges and paths; improve public schools; invest in fast and reliable public transportation; make public higher education affordable; expand opportunities for healthy walking and bicycling; and give every child access to high-quality early childhood education and pre-kindergarten programs.

Right now, the highest-income households in Massachusetts — those in the top 1 percent — pay a smaller share of their income in state and local taxes than do any other income group. Our wealthiest residents can clearly afford to pay a little more to fund the investments we all need.

The Massachusetts Supreme Judicial Court (SJC) struck down the 2018 citizens' initiative proposal as unconstitutional because it failed to meet the "relatedness" requirement for citizen-initiated constitutional amendments. Specifically, the spending provisions in the proposal combining education and transportation were unrelated to each other.

In the past, there have been five proposed referenda to graduate the Massachusetts income tax, but voters have voted down each proposal. If the Legislature initiates a tax proposal, there are different procedural and legal requirements for passing the proposal into law as compared to initiatives brought by the public (see chart on page 9). With a legislative filing, for example, there is no restriction on the relatedness of matters in the proposal.

In January, Lewis filed in the Legislature the formerly proposed millionaires tax. Because legislator-initiated constitutional amendments are not subject to the relatedness requirement, this proposal would not face the same issues that caused the SJC to strike

down the public initiative. The proposal will be reviewed and debated in committee and, if passed, would go to a joint session of the Legislature in a constitutional convention, where it would need a majority vote to pass. A majority vote is needed in two successive legislative sessions (2019-20, 2020-21) before the proposal can be presented to the voters as a referendum question and before it can become law. Lewis hopes to put the proposal before voters in 2022.

**QUESTION-AND-ANSWER SESSION**

*Q. Why did the previous attempts for a graduated Massachusetts income tax fail?*

A. The voters do not trust what the graduated tax rates would be or the financial impact on them, and harbor cynicism about how government spends resources.

*Q. Do you believe millionaires would leave Massachusetts to avoid the surtax?*

A. Sen. Lewis did not believe that there would be a mass exodus of millionaires from the commonwealth if his proposal became law. This is backed up by extensive economics research on how the rates of state taxation impact resident migration.

*Q. Can the Legislature pass a more general constitutional amendment relaxing the graduated tax prohibition, but not specifying rates?*

A. A more general amendment could be passed, but then it would be up to the Legislature to determine actual tax rates and brackets. Such a proposal went before voters five times already, and each time it was soundly defeated.

*Q. Would you establish two trusts (one for education, the other for transportation), not subject to appropriation, to track the proceeds from spending the millionaires tax so that proceeds of the surtax are not diverted to other things?*

A. Sen. Lewis believes that tracking the spending of the tax proceeds is a valid concern, but thinks it strikes an appropriate balance if the Legislature went through a budget process instead that included the proceeds from the millionaires tax. The opportunity for voters to vote on education and transportation allocations was taken

**STATE SEN. JASON LEWIS** represents the Fifth Middlesex District of Massachusetts, which includes the cities and towns of Malden, Melrose, Reading, Stoneham, Wakefield and parts of Winchester. He was elected to the state Senate in 2014 following five years serving in the Massachusetts House of Representatives. As the assistant majority whip, he is part of the leadership team that sets the agenda and policy priorities for the Senate. He also serves as the Senate chair of the Joint Committee on Public Health and the Joint Committee on Labor and Workforce Development. He is a member of the Joint Committee on Education, Joint Committee on Healthcare Financing, Joint Committee on Election Laws, Joint Committee on Marijuana Policy, and the Senate Committee on Global Warming and Climate Change. He also co-founded and co-chairs the Legislature's Prevention for Health Caucus.

Lewis holds an MBA from Harvard Business School and worked for 15 years in the private sector before entering politics.

away by the SJC in its 2018 decision. He would put the same proposal before voters in four years so that the voting public can approve the best policy moving forward.

*Q. How do you prevent the state Legislature from reducing appropriations that would otherwise go to transportation and education?*

A. The Legislature would appropriate funds toward education and transportation, and the new law would show the intention of where the additionally raised funds must be spent.

*Q. What is your sense of the Legislature's support for your proposal?*

A. The citizens' petition proposal in this session and in the 2015–16 legislative session (i.e., the two prior consecutive sessions) garnered 70 percent support along party lines. In public polling, there was also 70 percent support.

*Q. What are the dollar estimates of what the surtax would raise under your proposal?*

A. It is estimated that the 4 percent surtax on individuals with over \$1 million of taxable income, taking into account the inflation adjustment, would generate about \$2 bil-

**MILLIONAIRES TAX  
CONTINUED FROM PAGE 7**

lion of new revenue for Massachusetts. The total state budget is \$40 billion (including federal funds for Medicaid), so this new proposed revenue would constitute approximately 5 percent of the existing state budget.

*Q. Is all Massachusetts taxable income over \$1 million subject to the surtax?*

A. Yes, the surtax applies to Massachusetts taxable income over \$1 million. Massachusetts taxable income includes income from investments and compensation.

*Q. Considering the distinction between the interpretation of statutes, which are read closely, versus constitutional law, which is read broadly, could you instead enact a specific tax statute and then propose the constitutional amendment as a general statement allowing progressive taxation?*

A. Sen. Lewis is not sure the voters would understand such a process without specifying the surtax on millionaires of 4 percent.

*Q. What if Massachusetts raised the additional \$2 billion legislatively by increasing the flat tax for all taxpayers (with exemptions for low-income taxpayers), instead of changing the Constitution?*

A. In 2002, the voters voted to reduce the Massachusetts income tax to 5 percent from a higher rate. The Legislature gradually lessened the flat rate over the years. The reduced rates are 5.1 percent in 2018, 5.05 percent in 2019 and 5 percent in 2020. It would be against the will of voters to raise that tax now. It took 16 years to get the rate down to 5%. Raising the flat rate also hits the middle class, too, unless there are more individuals exempt from the tax. (Former Gov.) Deval Patrick proposed to increase the class exempt from income tax, lower the sales tax and increase the flat income tax rate. That proposal failed, as the Legislature rejected it. The proposal is not progressive like a graduated system and squeezes middle- and upper-income taxpayers, but not the highest-income taxpayers. Taxes that fall on the middle class

are unpopular with voters and elected officials. The middle class is already burdened with medical, housing and tuition costs, and adding an additional tax burden is difficult. There used to be two rates on earned income and capital gains tax, but the SJC rejected this regime. Going back to one rate could hurt retirees if their capital gains are taxed at a higher tax rate, and hurts the middle class if the flat tax rate is increased. In the economy now, there is a large spread of wages, and Massachusetts has one of the largest rates of income inequality in the country. Now nurses and teachers have to work two jobs to get by. The middle class is angry, and that is why (President) Trump was elected. The Fair Share Amendment is a progressive revenue source that will invest in the areas where working- and middle-class people need the most assistance and investment: education and transportation. ■



## Comparison of Constitutional Amendment Tracks

Deadline	Initiated by the people ("Initiative Petition")	Initiated by a legislator	Citation
3 <sup>rd</sup> Friday of January of the 1 <sup>st</sup> year of the legislative session		Petition filed as a bill (soft deadline).	Joint Rule 12
1 <sup>st</sup> Wednesday of August in 1 <sup>st</sup> year of a legislative session	Language must be prepared, signed by 10 registered voters and submitted to the Attorney General's Office.		Section 3 of Part 2 of Article 48 as amended by Article 74 of the Mass. Constitution
1 <sup>st</sup> Wednesday in September	The attorney general determines whether to certify the language of the petition according to the guidelines set forth in Article 48, as amended by Article 74. If certified, the petition is filed with the secretary of the commonwealth.	Article 48 as amended by Article 74 does not apply to a constitutional amendment proposed by a legislator. Therefore, there are no excluded matters delineated by the Mass. Constitution AND there is no need for subjects in the proposed language to be related.	Section 3 of Part 2 of Article 48 as amended by Article 74 of the Mass. Constitution
Within 14 days after filing with the secretary of the commonwealth	Secretary of the commonwealth has petition forms prepared for collection of required number of signatures.		Section 3 of Part 2 of Article 48 as amended by Article 74 of the Mass. Constitution
14 days before 1 <sup>st</sup> Wednesday in December	Petitioners must collect 3% of the total vote cast for all candidates for governor, excluding blanks, at the last state election (64,750 signatures this past session) and deliver signatures to the local election officials where collected.		Section 2 of Part 4 of Article 48 as amended by Article 81 of the Mass. Constitution
1 <sup>st</sup> Wednesday in December	Signatures certified by local election officials must be filed with the secretary of the commonwealth.		Section 3 of Part 2 of Article 48 as amended by Article 74 of the Mass. Constitution
2 <sup>nd</sup> Wednesday in May	The petition must be laid before a joint session. Petition may be amended by ¼ of the affirmative majority vote of the House and Senate.	The petition must be laid before a joint session. Petition may be amended by ¼ of the affirmative majority vote of the House and Senate.	Section 3 of Part 4 of Article 48 of the Mass. Constitution
By the end of the legislative session (July of 2 <sup>nd</sup> year of legislative session)	25% of the total legislators in a joint session in two successive legislative sessions.	Simple majority of the total legislators in a joint session in two successive legislative sessions.	Section 4 of Part 4 of Article 48 of the Mass. Constitution
1 <sup>st</sup> Tuesday after the 1 <sup>st</sup> Monday in November in 2 <sup>nd</sup> year of legislative session	Petition language before voters of the commonwealth. Amendment shall be approved if passed by voters equal in number to at least 30% of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.	Petition language before voters of the commonwealth. Amendment shall be approved if passed by voters equal in number to at least 30% of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.	Section 5 of Part 4 of Article 48 of the Mass. Constitution



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