EXHIBIT B

Comparison of Proposed Revisions of Mass. R. Prof. C. 1.14 and Comments to Mass. R. Prof. C. 1.2, 1.4 and 1.16 With Corresponding ABA Model Rule Provisions

RULE 1.14: CLIENT WITH DECISION-MAKING LIMITATIONS

(a) A lawyer shall, as far as reasonably possible, maintain an ordinary client-lawyer relationship with a client with decision-making limitations, including when the client's decision-making limitations impact the client's ability to provide direction to the lawyer or make reasoned, informed choices in connection with the representation. A person has decision-making limitations if the person has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions even with appropriate supports or accommodations.

(b) When the lawyer reasonably believes that the client: (1) has decision-making limitations, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest to address the risk, the lawyer may take reasonably necessary protective action in connection with the representation to address the risk.

(c) Confidential ~~I~~information relating to the representation of a client with decision-making limitations is protected by Rule 1.6. However, when taking protective action pursuant to paragraph (b), the lawyer may reveal confidential information related to the representation to the extent the lawyer reasonably believes necessary to protect the client's interests.

Comment

Client Abilities and Limitations

[1] A client's decision-making limitations do not ~~diminish~~lessen the lawyer's obligations under the Rules or the importance of treating the client with attention and respect. Except as provided in this Rule, a client with decision-making limitations is owed all the protections under the Rules ordinarily afforded by the client-lawyer relationship.

[2] Decision-making limitations can be situational in nature and can vary in degree and over time. A client may have decision-making limitations with regard to certain issues and not others. A client with decision-making limitations often can understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, some adults with substantial decision-making limitations, including those due to intellectual, developmental or cognitive disabilities, mental health conditions or substance abuse disorder, can make legal decisions. In addition, even if unable to make some or all decisions, persons with decision-making limitations,

including even very young minors, may have preferences and values that can guide the lawyer's representation.

[3] A client's decision-making limitations may be affected by multiple factors. Sometimes decision-making limitations can be alleviated or eliminated by using supports or making accommodations to enhance the client's decision-making abilities, and such use can assist the lawyer in maintaining an ordinary client-lawyer relationship. Examples of supports and accommodations include communication devices or services, assistance of appropriate third parties or supported decision-making, environmental changes (e.g., conducting client meetings in a familiar setting), and using plain language or otherwise modifying the lawyer's communication and counseling techniques for the client.

Ordinary Client-Lawyer Relationship

[4] Lawyers are required to maintain, as far as reasonably possible, an ordinary client-lawyer relationship with clients with decision-making limitations. An ordinary client-lawyer relationship requires, among other things, abiding by a client's decisions concerning the objectives of the representation; keeping a client informed about the status of the matter and explaining matters to the extent reasonably necessary for a client to make informed decisions regarding the representation; and rendering candid advice to a client. See Rules 1.2, 1.4, and 2.1. An ordinary client-lawyer relationship is based, in part, on the assumption that the client, when properly advised and assisted, can make and communicate reasoned, informed decisions about important matters. When the client has decision-making limitations, however, maintaining an ordinary client-lawyer relationship may not be possible in all respects. In particular, a client with decision-making limitations may have limited ability to make or communicate legally binding decisions.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer, even if they may be personally interested. The lawyer should seek the client's informed consent to the presence of such persons. See Rule 1.6(a). Before the lawyer discloses confidential information of the client, the lawyer should consider whether it is likely that the person or entity to be consulted will act adversely to the client's interests. Decisions under Rule 1.14(b) whether and to what extent to consult or to disclose confidential information are matters of professional judgment on the lawyer's part. If the presence of such persons assists in the representation, the lawyer should document that role when such documentation could help avoid a waiver of the attorney-client evidentiary privilege.

Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members or other persons, to make decisions on the client's behalf. Whenever possible, the lawyer should afford the client the opportunity to communicate privately with the lawyer without the presence or influence of others.

[6] When a family member or another seeks a lawyer's services on behalf of an individual who may have decision-making limitations, the lawyer should identify who the client is and seek to establish an ordinary lawyer-client relationship with that client. When a family member or another seeks the lawyer's assistance in drafting a legal

document to be executed by an individual who may have decision-making limitations, the lawyer should be alert to the possibility of undue influence or fraud.

[7] When the client has granted an agent authority to make decisions, including an agent acting under a power of attorney, the lawyer nevertheless should take direction from the client and maintain communication with the client to the extent feasible unless the client has otherwise directed or is unable to provide direction. In addition, a lawyer may consult with and represent a person who seeks to challenge the actions of an agent or terminate or modify the agent's appointment. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

When a court has appointed a guardian, conservator or other appointee who is not a guardian ad litem to act on behalf of a lawyer's client or prospective client, a lawyer should ordinarily look to the court appointee for those decisions on behalf of the client or prospective client over which the appointee has authority.

However, a lawyer may consult with and represent a person subject to guardianship or conservatorship who seeks representation to challenge or modify the terms of that arrangement, or who seeks representation with regard to any other matter over which the person retains decision-making authority. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

If a lawyer represents the guardian, conservator, or agent of a person with decision-making limitations, and is aware that the guardian, conservator or agent is acting adversely to the person's interest, the lawyer may have an obligation to prevent or rectify the misconduct.

[8] When a client in a criminal matter appears to have decision-making limitations, the lawyer's ethical duty to render competent representation and to protect the client's constitutional rights may require the lawyer to seek a competency evaluation or other mental health evaluation to determine whether the client is capable of deciding whether to testify or to plead guilty or to determine whether the client can meaningfully participate in preparation for trial, sentencing or another adjudicatory process. Because a client's liberty may be at stake, these questions are uniquely difficult. ~~Judicial decisions vary regarding whether, without the client's informed consent, a lawyer for the accused may or must raise doubts with the court about the competency of the accused.~~ In such situations, lawyers should inform themselves of relevant judicial decisions and other authority in the jurisdiction and are encouraged to seek guidance from other organizations and resources~~, such as the ABA Defense Function Standard on Establishing and Maintaining an Effective Client Relationship and the ABA Criminal Justice Standards on Mental Health~~.

[9] A lawyer representing a minor should be mindful that the minor may have decision-making limitations due to age and stage of development. As with adult clients with decision-making limitations, the lawyer for a minor with decision-making limitations should, as far as reasonably possible maintain an ordinary client-lawyer relationship. Accordingly, a lawyer for a minor capable of providing direction ordinarily should advocate for the minor's objectives of the representation. See Rule 1.2(a). In assessing

the minor's decision-making limitations, including with regard to providing direction on a legal matter, a lawyer should consider a variety of factors such as the minor's developmental stage, cognitive ability, emotional development, ability to communicate, ability to understand consequences, and consistency of decisions, the informed opinions of professionals and others with knowledge of the child's abilities and limitations, and the factors identified in Comment [13].

[9A] In civil cases involving a minor, it is common for parents to seek representation for themselves and their child. Before undertaking such representation, the lawyer should carefully consider whether joint representation of the family is in the best interests of all parties under the circumstances, including the relationship among the family members, the ability of the parents to consider the child's interests, the nature and the amount of the claim, the feasibility or advisability of obtaining separate counsel for either the parents or the child, and the availability of other procedural safeguards. Where such joint representation is initially deemed advisable, the lawyer should be alert to issues that may arise during the representation and to the need to re-evaluate the circumstances. See Rule 1.7.

[10] A lawyer acting as guardian ad litem for a person is often tasked with advocating for the best interest of that person. Because the lawyer's assessment of what is in the best interest of that person may diverge from that person's objectives, lawyers who simultaneously act as a guardian ad litem for a person and provide direct legal representation of that person may find themselves in an ethically untenable position and should consider the need to withdraw as counsel or request to be relieved of the guardian ad litem appointment.

[11] A lawyer representing a client with decision-making limitations can employ a variety of techniques to ensure that the lawyer's representation is competent. For example, the lawyer can use developmentally appropriate interviewing and counseling skills when representing a minor, employ or invite the client to use supports and accommodations that make it easier for the client to understand and communicate information, or meet with the client at a place and time where the client is likely to have less difficulty providing direction. To identify and learn such techniques, lawyers can seek guidance from resources developed by professional associations and others with expertise in working with individuals with decision-making limitations.

Taking Protective Action

[12] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that an ordinary client-lawyer relationship cannot be maintained as provided in paragraph (a), paragraph (b) permits the lawyer to take protective measures the lawyer deems necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; or consulting with support groups, healthcare professionals, other professional services, adult-protective agencies, or other persons or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and

respecting the client's family and social connections. In litigation involving the capacity of the client, such as a guardianship or conservatorship proceeding, the lawyer should advocate for the client's expressed position regarding what, if any, protective action should be taken.

[13] In determining the extent of the client's decision-making limitations, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to understand consequences of a decision; appreciation of the substantive fairness of a decision; the consistency of a decision with the known long-term commitments and values of the client; and whether supports or accommodations could alleviate factors contributing to decision-making limitations. A lawyer's reasonable belief that the client cannot make and communicate reasoned, informed decisions may be based on the lawyer's own observations. In forming a reasonable belief, a lawyer should ordinarily not rely exclusively on a medical diagnosis, but rather should consider the client's functional abilities and whether the limitations in the client's abilities could be alleviated by the use of accommodations or supports. In forming a reasonable belief, a lawyer who is aware of a healthcare professional's evaluation of the client's current abilities and limitations should take such evaluation into consideration. However, the lawyer should recognize that the evaluation may have been done for a different purpose, and that the evaluator may have evaluated the client based on standards that differ from the relevant legal standard and at a time when client's abilities differed from the present.

[14] A determination that a client has decision-making limitations need not have been made by a healthcare professional or court for a lawyer to form a reasonable belief that a client has such limitations. Nevertheless, in appropriate circumstances, the lawyer may seek guidance from a healthcare professional with relevant expertise or with knowledge of the client's abilities or limitations. If obtaining such guidance requires revealing confidential information about the client and the client does not or cannot give informed consent, it is permissible only if it is a reasonably necessary protective action under paragraph (b).

[15] If a lawyer reasonably believes that the client meets the criteria set forth in paragraph (b) of this Rule, the lawyer may consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. For example, if the client has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a guardian or conservator, which may be temporary or limited in nature, or a court order in lieu of such an appointment. In addition, rules of procedure in litigation sometimes provide that minors or persons with decision-making limitations must have their interests represented by a guardian ad litem or next friend if they do not have a general guardian. In many circumstances, however, appointment of such a legal representative may be more intrusive, expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances, including whether the appointment of such a legal representative is appropriate and whether a family member can effectively serve in that capacity, is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should generally advocate the least restrictive action on behalf of the client, and be aware of any law that so requires. The lawyer should also communicate with the client regarding such protective action to the

extent feasible unless doing so is not necessary for the client to make informed choices about the representation and would be detrimental to the client or the lawyer's ability to protect the client's interests. See Rule 1.4.

[16] If another person has petitioned a court for an appointment of a conservator or a guardian or another restriction on the client's legal capacity, the lawyer may not advocate for such an appointment or restriction if the client opposes it. If the lawyer represents a client who is a respondent in a proceeding for guardianship or conservatorship, the lawyer must advocate for the client's objectives if known or ascertainable.

[17] Taking protective action under paragraph (b) of this Rule does not, without more, require the lawyer to terminate the representation. However, the lawyer must inform the client of the protective action and should consider whether withdrawing from the representation has become necessary under Rule 1.16(a). For example, the lawyer may have a conflict of interest necessitating withdrawal in light of the particular protective action, the subject of the representation, the nature of the client-lawyer relationship, and other relevant considerations. See, e.g., Rule 1.7.

Disclosure of Confidential Information When Taking Protective Action

[18] Disclosure of the client's decision-making limitations could adversely affect the client's interests, including constitutional or other legal rights. For example, raising the question of decision-making limitations could, in some circumstances, lead to proceedings for involuntary civil commitment. Confidential ~~I~~information relating to the representation is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer may reveal confidential information about the representation without the client's informed consent, but only to the extent reasonably necessary to protect the client's interests. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other persons or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

Emergency Legal Assistance

[19] In an emergency where a substantial health, safety or financial interest of a person with decision-making limitations is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or communicate reasoned, informed judgments about the matter. Such action may be taken when the person has consulted with the lawyer or when another acting in good faith on that person's behalf has consulted with the lawyer.

Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person with decision-making limitations has no other lawyer, agent or other representative available to act. The lawyer should take legal action on behalf of the person with decision-making limitations only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person with decision-making

limitations in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[20] A lawyer who in an emergency acts on behalf of a person with decision-making limitations who is unable to establish a client-lawyer relationship should keep the confidences of the person with decision-making limitations as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer's relationship with the person with decision-making limitations. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. ~~Ordinarily, a lawyer would not seek compensation for such emergency actions taken.~~

~~ABA Model~~Proposed Rule 1.2, Comment 4:

[4] When a client has decision-making limitations, the lawyer's duty to abide by the client's decisions concerning the objectives of the representation is to be guided by reference to Rule 1.14.

~~ABA Model~~Proposed Rule 1.4, Comment 6:

[6] Ordinarily, the information to be provided is that appropriate for a client who is an adult capable of making and communicating reasoned, informed choices. When the client has decision-making limitations, the lawyer should look to Rule 1.14 Comment [11] for guidance on communicating with the client. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

~~ABA Model~~Proposed Rule 1.16, Comment 6:

[6] If the client has decision-making limitations, and those decision-making limitations cannot be adequately alleviated or eliminated by using supports or accommodations, the client may lack the legal capacity to discharge the lawyer. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action if consistent with Rule 1.14.