

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

██████████, ss.

JUVENILE COURT DEPARTMENT
██████████ **DIVISION**

In Re:

Care and Protection of ██████████

Docket No.: ██████████

**MOTION TO AMEND MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL
PURSUANT TO MASS. R. CIV. P. 60 (b) (6)
AND TO RECONSIDER THE DENIED PORTIONS OF THAT MOTION**

I. Introduction

Mother ██████████ respectfully requests that this Honorable Court grant her leave to amend her Motion to Vacate Judgment and for a New Trial pursuant to Mass. R. Civ. P. 60 (b) (6) (“Motion for a New Trial”) to add allegations relating to her claim of ineffective assistance of counsel by her trial attorney, ██████████, based on discovery that she received from him and the newly-available transcript from her ██████████ trial date. Based on this information, ██████████ also respectfully requests reconsideration of the portions of her motion that were denied by this Court (██████████) on ██████████ so that the evidentiary hearing may encompass all the allegations. The crux of ██████████ Motion for a New Trial was that ██████████ conduct fell so far below that of an ordinary fallible lawyer that it egregiously violated the Massachusetts Rules of Professional Conduct (“MRPC”) and Committee of Public Counsel Services (“CPCS”) Performance Standards, with the result that ██████████ failed to mount numerous substantial grounds of defense that ██████████ had. ██████████ client file, E-bills, and time records entirely call into question his ability to comply with MRPC and CPCS Performance Standards, undermine his credibility, and demonstrate meager trial preparation and a routine business practice of billing the Commonwealth for unperformed work and overbilling.

II. PROCEDURAL HISTORY

1. [REDACTED] was appointed as [REDACTED] trial counsel on [REDACTED]. See Ex. 18.

2. After this Court [REDACTED] Order of [REDACTED] terminated [REDACTED] parental rights, she timely filed a Notice of Appeal on [REDACTED] (Docket Sheet, p. 10)

3. [REDACTED] was originally appointed as [REDACTED] appellate attorney. (Docket Sheet, p. 11)

4. [REDACTED] appellate case was subsequently reassigned to undersigned counsel, [REDACTED] on [REDACTED]. See [REDACTED] Aff., ¶ 3.

5. [REDACTED] identified an ineffective assistance of counsel claim and asked [REDACTED] if he would file a motion to withdraw in an e-mail chain dated [REDACTED]. Despite Mass. R. Prof. Conduct 1.16 (a) (3)'s requirement that a "lawyer ... shall withdraw from the representation of a client if ... the lawyer is discharged," [REDACTED] responded:

No. You are going to have to file the appropriate motions & affidavits. If the grounds of the motion are based on our confidential conversation, then I suspect that you are disqualified at this juncture as a material witness under Mass. R. Prof. Conduct 3.7 (a). DJR.

When [REDACTED] e-mailed [REDACTED] back asking:

How am I material witness if [REDACTED] gets a new trial?

His response was:

End of discussion. [REDACTED]

Id., ¶ 4; Exs. 1 & 2.

6. [REDACTED] subsequently filed a motion to withdraw, but only, on information and belief, after CPCS explained to him that forcing his representation on a client who did not wish it and refusing to withdraw was a violation of MRPC. Id., ¶ 5.

7. [REDACTED] was subsequently appointed as [REDACTED] trial counsel. *Id.*, ¶ 3.

8. On [REDACTED] [REDACTED] filed a Motion for a New Trial, which was heard on

[REDACTED] The Motion for a New Trial alleged that [REDACTED] provided [REDACTED] with ineffective assistance of counsel by:

- a. being unprepared on the first day of trial and failing to prepare [REDACTED] for trial;
- b. failing to call DCF's expert, who recommended that DCF consider changing the goal to reunification after 6 months;
- c. failing to call [REDACTED] primary care and Subutex doctor, whom she identified as a favorable witness – and who submitted an affidavit with his proposed testimony with the Motion for a New Trial;
- d. failing to use evidence in his file to defend Mother or impeach witnesses;
- e. failing to file motions in limine to exclude irrelevant and prejudicial evidence or to draft proposed findings of fact and rulings of law; and
- f. making comments to [REDACTED] and her appellate counsel revealing a conflict of interest because his Evangelical Christianity made it impossible for him to represent Mother, who has alternative spiritual beliefs and is bisexual.

9. On [REDACTED] this Court [REDACTED] issued an order denying most portions of the Motion for a New Trial but granting an evidentiary hearing on the issue of whether [REDACTED] prepared [REDACTED] for trial.

10. After counsel coordinated to schedule the evidentiary hearing on a mutually agreeable date, counsel for DCF, [REDACTED] sent an e-mail to [REDACTED] on [REDACTED] inquiring as to his availability. [REDACTED] responded, inter alia:

[] I am constrained to put my insurance carrier on notice for the purposes of engaging counsel to represent me at any evidentiary hearing[.]

Id., ¶ 8; Ex. 3.

11. On information and belief, [REDACTED] malpractice insurer required him to provide notice because it settled two prior malpractice suits against him. The First Amended Complaint and docket sheet in [REDACTED] v. [REDACTED] Superior Court, Civil Action No. [REDACTED] (“[REDACTED]”) are attached as Exs. 4-5. The First Amended Third-Party Complaint and docket sheet in [REDACTED] v. [REDACTED] v. [REDACTED] Civil Action No. [REDACTED] (“[REDACTED]”) are attached as Exs. 6-7. As in [REDACTED] claim of ineffective assistance of counsel, the [REDACTED] suit involved allegations of [REDACTED] failure to interview or call witnesses at trial. Ex. 4.

12. The evidentiary hearing on [REDACTED] motion for new trial was initially scheduled for [REDACTED] but was continued to [REDACTED]

13. After hearing on [REDACTED] this Court [REDACTED] allowed [REDACTED] motion for discovery as to [REDACTED] CPCS E-bills, time records, and calendar entries relating to his representation of [REDACTED]. On the same day, [REDACTED] requested [REDACTED] file for [REDACTED] case, pursuant to Mass. R. Prof. Conduct 1.15A and as the client file is defined in subsection (a). [REDACTED] also provided [REDACTED] counsel, [REDACTED] a copy of the Rule 1.15A as a courtesy. *Id.*, ¶ 12; Ex. 8.¹

¹ Rule 1.15A defines a client’s file as consisting of “the following physical and electronically stored materials: (1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer; (2) all correspondence relating to the matter, whether in physical or electronic form; (3) all pleadings and other papers filed with or by the court or served by or upon any party relevant to the client’s claims or defenses; (4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence; (5) all intrinsically valuable documents of the client; and copies of the lawyer’s work product.

14. On [REDACTED] [REDACTED] received the transcript of [REDACTED] first day of trial on [REDACTED] when she stipulated to unfitness on [REDACTED] advice, as detailed in [REDACTED] affidavit for the Motion for a New Trial. *Id.*, ¶ 14; Ex. 9.

15. On [REDACTED] [REDACTED] provided [REDACTED] with [REDACTED] client file, E-bills, time records, and calendars relating to his representation of [REDACTED]. On the same day, [REDACTED] sent correspondence to [REDACTED] to confirm that she did, in fact, have the entire file, pursuant to Rule 1.15A. In the same letter, she asked that [REDACTED] review and revise an attached draft affidavit detailing what he did or did not do in [REDACTED] case, in accordance with *Commonwealth v. Martinez*, 86 Mass. App. Ct. 545 (2014). *Id.*, ¶¶ 15-16.

16. In an e-mail dated [REDACTED] [REDACTED] confirmed, on behalf of [REDACTED] that [REDACTED] had [REDACTED] entire client file. *Id.*, ¶ 17; Ex. 10.

17. On [REDACTED] [REDACTED] sent [REDACTED] another proposed affidavit for [REDACTED] to sign. This affidavit was for [REDACTED] to attest that [REDACTED] client file was complete. She also followed up on the proposed affidavit requested pursuant to *Commonwealth v. Martinez*, 86 Mass. App. Ct. 545 (2014). *Id.*, ¶ 18.

18. On [REDACTED] [REDACTED] through [REDACTED] informed me that [REDACTED] would not sign the proposed affidavit detailing what he did or did not do in [REDACTED] case, but, at the same time, proposed no revisions that would make him amenable to signing it. [REDACTED] through [REDACTED] also refused to sign the affidavit attesting that he provided [REDACTED] with [REDACTED] complete client file. *Id.* ¶ 19.

19. ██████████ repeatedly asked ██████████ through ██████████ to confirm that ██████████ client file was complete in light of the gravity of the allegations with which ██████████ seeks to amend her Motion for a New Trial.

20. ██████████ respectfully asks this Honorable Court to make an adverse inference from ██████████ failure to cooperate with ██████████ appellate and successor trial counsel – as required by CPCS Performance Standards and MRPC – by providing the affidavit detailing what he did or did not do in ██████████ case.

III. NEW ALLEGATIONS BASED ON NEWLY DISCOVERED EVIDENCE OF ██████████ BILLING IMPROPRIETIES AND CONDUCT ON THE ██████████ TRIAL DATE

21. ██████████ spent 2 days reviewing and comparing ██████████ file, E-bills, time records, and calendars. As a result of this review, she came to the conclusion that approximately 36% of ██████████ billings were unsupported because, as detailed below:

- a. He billed for tasks that he did not complete, such as drafting a pre-trial memorandum and proposed findings of fact that are not in the file and were never filed. (¶ 34) He also prolifically billed for reviewing and drafting non-existent documents and correspondence. (¶¶ 39, 43-66)
- b. He prolifically overbilled and double-billed for tasks. (¶¶ 68-109)
- c. He occasionally billed CPCS for time that is not supported by any time record. (¶¶ 112-114)

Id., ¶¶ 21, 115.

22. ██████████ review of the E-bills also revealed that ██████████ only billed 73.5 hours – not even 2 full work weeks – on ██████████ case over the course of his entire 16-month-long representation that included 3 days of trial. When reduced by the 36%² of billings that are unsupported, this figure goes down to 47.04 hours – barely more than a full work week.

² As detailed below, the unsupported billings are comprised of 19.5% for unperformed work, 15% overbilling for tasks, and 1.5% for entries that have no time record.

██████████ E-bills are attached as Exs. 11 and 12. ██████████ did not provide his E-bill for ██████████ Id., ¶ 23.

23. CPCS Performance Standard 5 (X) (2) (p. 5.25) requires attorney time records to include the date of the activity, client name, actual amount of time expended, including both the starting clock time and the finishing clock time. The CPCS Assigned Counsel Manual includes a sample time sheet as an addendum. The sample is attached as Ex. 33.

24. Despite CPCS' requirements, ██████████ time records do not include a starting clock time and a finishing clock time, the dates of activity often do not match the date that the same activity was recorded on the E-bill, and entries are frequently elided together so that it is impossible to tell how much time he allegedly spent on each task. Ex. 13.

25. The pervasive discrepancies between ██████████ E-bills, time records, and file violate CPCS Performance Standards. These discrepancies are so extensive and blatant that they call into question the credibility of any testimony by ██████████ about what he did to prepare ██████████ for trial and add additional allegations of ██████████ overall pattern of ineffective assistance to Mother's motion for a new trial.

26. The transcript from the first day of trial on ██████████ also gives rise to an additional allegation of ineffective assistance.

A. ██████████ **time records show he spent very little time preparing for trial and billed CPCS for tasks that he did not complete, such as drafting pleadings and reviewing non-existent documents.**

Trial date ██████████

27. ██████████ first day of trial was ██████████

28. In advance of the trial, the docket reflects that ██████████ did not file pre-trial motions or a pre-trial memorandum. A joint pre-trial memorandum was drafted and filed by

counsel for the child, [REDACTED] as reflected in an e-mail dated [REDACTED] and the docket. [REDACTED] time records reflect that he reviewed the joint pre-trial memorandum on [REDACTED] but that he did not propose any revisions. *Id.*, ¶ 28.

29. None of [REDACTED] time entries reflect that he ever read DCF's dictation, as required by CPCS Performance Standards. Ex. 12.

30. [REDACTED] E-bills reflect that in the week before trial, he only spent 3 hours total preparing: 0.6 hour on [REDACTED] 2.0 on [REDACTED] and 0.4 hour on [REDACTED]. He engaged in no preparation on [REDACTED] the day before trial. *Id.*, ¶ 29.

31. [REDACTED] E-Bill also reflects that he only spent 0.3 hour – or 18 minutes – on [REDACTED] meeting with [REDACTED]. *Id.*, ¶ 30.

32. [REDACTED] will testify that, before trial, she informed [REDACTED] she was up late the night before and had a couple of drinks. She will also testify that she informed [REDACTED] that she did not want to take a breathalyzer test.

33. Despite this, [REDACTED] inexplicably did not object to – and, in fact, agreed to – a motion to breathalyze [REDACTED] even after the trial judge stated: “Well, I mean, unless anyone is smelling alcohol this morning, does it make sense to take a breathalyzer?” (emphasis). Instead, he told the Court “It’s early, Judge, but we agree to that as well.” See Ex. 14 (T.1:5-18 [REDACTED]).

34. [REDACTED] failure to object to the breathalyzer test resulted in [REDACTED] testing positive for alcohol at a level well below the legal limit for intoxication. The Court agreed that [REDACTED] was sober and conducted colloquy with her. *Id.*

35. Even though the Court agreed that [REDACTED] was sober on [REDACTED] this test result that was well below the legal limit for intoxication was held against her at trial (Ex. 15

(T.3:24-25 (██████████)), referenced in the (██████████) Order (p. 2) on her motion for a new trial, and provided the basis for DCF's motion for (██████████) to be drug and alcohol tested at the initial date for the evidentiary hearing on (██████████). The Court denied the motion on (██████████) (██████████) objection. *Id.*, ¶ 33.

Trial dates (██████████) and (██████████)

36. As with the first day of trial, the docket reflects that (██████████) never filed pre-trial motions or a pre-trial memorandum.³ His billing records, however, indicate entries for drafting a pre-trial memorandum on (██████████) (1.6 hours) and (██████████) (1.0 hour). Despite this, no draft of the unfiled pre-trial memorandum was in the file provided to (██████████). *Id.*, ¶ 34.

37. (██████████) billing records also reflect 0.3 hour for transmitting his non-existent joint pre-trial memorandum to (██████████) and counsel. However, his file contains no e-mails or cover letters indicating that the joint pre-trial memorandum that he allegedly drafted but did not file was transmitted to anyone. *Id.*, ¶ 35.

38. Aside from allegedly drafting a pre-trial memorandum that he never filed, (██████████) E-bills reflect that he only spent a total of 6.4 hours⁴ on trial preparation in the month leading up to the (██████████) trial date: 1.8 hours on (██████████), 1.6 hours on (██████████), 0.3 hour on (██████████), 1.2 hours on (██████████), and 1.5 hours on (██████████). Aside from a trial notebook containing contemporaneous notes from trial and 8 documents separated by bright orange pieces of paper, there was no work product in (██████████) file relating to his alleged trial preparation, such as outlines for direct or cross-examination of witnesses. *Id.*, ¶ 36.

³The docket reflects that (██████████) filed Mother's Witness and Exhibit Lists on (██████████)

⁴ By contrast, (██████████) spent 8.8 hours comparing the contents of (██████████) file with his E-bills and time records and, as of writing of this footnote, 21 hours working on this motion, supporting affidavit, and exhibits.

39. There is no time entry in his billing records whatsoever indicating that he ever read DCF's dictation, as required by CPCS Performance Standards. Thus, even though he should have used the dictation to impeach Social Worker Associate [REDACTED] he deprived [REDACTED] of this substantial defense because he did not know the contents of the dictation. See Ex. 12.

40. There is an E-bill entry on [REDACTED] for 1.5 hours of in-person client contact, but the contemporaneous time record describes the entry as: "Meet with client; trial preparation." While [REDACTED] concedes that she met with [REDACTED] on that date, she will testify that the meeting was approximately half an hour long and involved [REDACTED] telling her the legal standard for unfitness and that her case was an easy win. There was no preparation of her to testify through mock direct or cross-examination. He did not explain to her the procedure or even that her mother (whom he knew caused her anxiety) and father, as the pre-adoptive placement, would be present. Based on [REDACTED] practice of egregiously overbilling and the absence of any outline for his examination of [REDACTED] his time entries have little credibility. Id., ¶ 37.

41. [REDACTED] billed 5.0 hours for the [REDACTED] trial date even though trial that day started at 9:36 a.m. and ended at 12:51 p.m., which amounts to 3 hours and 15 minutes of trial. Id., ¶ 38.

42. On [REDACTED] [REDACTED] billed 0.2 hour for reviewing [REDACTED] CORI report, even though [REDACTED] has no CORI. Id., ¶ 39; Ex. 16.

43. In the 7 days between [REDACTED] and [REDACTED] [REDACTED] only billed for 1.0 hour of trial preparation on [REDACTED]. The [REDACTED] trial date ended with [REDACTED] mid-testimony, and [REDACTED] had yet to begin his examination of her. Ex. 17 (T.2:3 [REDACTED]). His records show that he did not meet with her to prepare her for the [REDACTED]

trial date. [REDACTED] will also testify that she did not meet with [REDACTED] to prepare for the [REDACTED] trial date. *Id.*, ¶ 40.

44. [REDACTED] billed 3.0 hours for the [REDACTED] trial date even though trial that day started at 9:14 a.m. and ended at 11:30 a.m., which amounts to 2 hours and 16 minutes. On the same date, he spent 1.0 hour reviewing and preparing testimony, even though his records reflect that he did not meet with [REDACTED] that day to prepare her for testimony. *Id.*, ¶ 41.

45. On [REDACTED] [REDACTED] also billed 1.0 hour for reviewing and preparing findings and conclusions. His file contains no draft of any opposing parties' proposed findings or his alleged proposed findings. Nor does the docket reflect that [REDACTED] ever filed proposed findings. *Id.*, ¶ 42.

46. [REDACTED] time records show an utter lack of advocacy for [REDACTED] throughout his representation and, glaringly, before, during, and after trial. Even if [REDACTED] time records could be believed (and facially they cannot), they show a grand total of 6.4 hours of preparation for a trial at which [REDACTED] fundamental interest in parenting her child was at stake. 6.4 hours is not an amount of time sufficient to identify and mount any defense. [REDACTED] conduct in failing to prepare for trial himself or [REDACTED] for trial deprived [REDACTED] of substantial defenses and her Constitutional right to effective assistance of counsel and violated MRCP and CPCS Performance Standards.

B. [REDACTED] billed for drafting pleadings, documents, and correspondence, of which no copies are included in the file, and billed for pleadings that were never filed with this Court.

47. Based on [REDACTED] review of [REDACTED] file and E-bills (and good-faith mathematical calculations), [REDACTED] appears to have billed a total of 14.3 hours for

tasks that are not supported by documentation (including the trial-related tasks detailed in subsection (A) above), for a total of \$786.50. These entries are itemized below.

48. ██████████ E-bills (exclusive of the unproduced ██████████ E-bill) to show \$4,042.50 in payments by CPCS. Thus, 19.5% of the funds that ██████████ received from CPCS appear to be for drafting or reviewing documents that do not exist or for work that he did not perform.

49. On ██████████ ██████████ time records show that he spent 0.2 hour preparing a status report, but no status report of that date is in the file. Id., ¶ 43.

50. On ██████████ ██████████ billed 0.6 hour for reviewing the court file and drafting a memo to ██████████. There is no memo to ██████████ of that date in ██████████ file. Id., ¶ 44.

51. On ██████████ ██████████ billed 0.2 hour to correspond with counsel for all parties regarding the pre-trial conference and discovery. There is no such correspondence in the file.⁵ Id., ¶ 45.

52. On ██████████ ██████████ billed 0.4 hour to correspond with ██████████ and review a permanency report. There is no such correspondence in the file or a permanency report of that or an earlier date in the file, and ██████████ billed the same amount of time again on ██████████ to review a new 29B report and forward it to ██████████ Id., ¶ 46.

53. On ██████████ ██████████ billed 0.3 hour to correspond with counsel for all parties regarding the final pre-trial conference. There is no such correspondence in the file. Id., ¶ 47.

⁵ The Merriam-Webster dictionary defines “correspond” as “to communicate with a person by exchange of letters.” ██████████ time records show that he used separate billing categories for written communication (“Correspond”) and telephone calls (“Telephone Call”).

54. On [REDACTED] [REDACTED] billed 0.4 hour for correspondence with counsel regarding trial preparation and correspondence with [REDACTED]. There is no correspondence with [REDACTED] of that date in [REDACTED] file. [REDACTED] will also testify that she has no e-mail of this date. Id., ¶ 48.

55. On [REDACTED] [REDACTED] billed 0.4 hour to review a joint pre-trial memorandum and send it to [REDACTED]. There is no cover letter or e-mail in [REDACTED] file indicating that he ever sent this document to [REDACTED]. [REDACTED] will also testify that she has no letter or e-mail of this date. Id., ¶ 49.

56. On [REDACTED] [REDACTED] billed 0.3 hour for corresponding with DCF and [REDACTED]. There is no correspondence of that date to DCF or [REDACTED] in [REDACTED] file. [REDACTED] will also testify that she has no letter or e-mail of this date. Id., ¶ 50.

57. On [REDACTED] [REDACTED] billed 0.5 hour for correspondence to DCF and reviewing documentation from the [REDACTED]. There is no correspondence with DCF in [REDACTED] file from that date. Id., ¶ 51.

58. On [REDACTED] [REDACTED] billed 0.2 hour for reviewing a memo from DCF. There is no memo from DCF of that date in [REDACTED] file. Id., ¶ 52.

59. The time entries for [REDACTED] include 0.2 hour for corresponding with DCF. There is no correspondence with DCF from that date in his file. Id., ¶ 53.

60. On [REDACTED] [REDACTED] billed 0.2 hour for updating a status report. There is no updated status report of that date in his file. Id., ¶ 54.

61. On [REDACTED] [REDACTED] time records⁶ reflect that he spent 0.4 hour corresponding with an expert. There is no such correspondence from that date in [REDACTED] file. Id., ¶ 55.

62. On [REDACTED] [REDACTED] time records reflect another 0.5 hour of corresponding with an expert. There is no such correspondence from that date in [REDACTED] file. Id., ¶ 56.

63. On [REDACTED] [REDACTED] billed 0.3 hour for reviewing a memo from [REDACTED] [REDACTED]. There is no such memo in [REDACTED] file. Id., ¶ 57.

64. On [REDACTED] [REDACTED] billed 0.3 hour for corresponding with DCF. There is no such correspondence in [REDACTED] file. Id., ¶ 58.

65. On [REDACTED] [REDACTED] billed 0.3 hour for reviewing correspondence from an expert. No such correspondence is in the file. Id., ¶ 59.

66. On [REDACTED] [REDACTED] billed 0.2 hour for reviewing correspondence from an expert. There is no such correspondence in the file. Id., ¶ 60.

67. On [REDACTED] [REDACTED] billed 0.3 hour for corresponding with an expert. There is no such correspondence in [REDACTED] file. Id., ¶ 61.

68. On [REDACTED] [REDACTED] billed 0.5 hour for corresponding with DCF and [REDACTED] [REDACTED] file contains no correspondence with DCF on that date. Id., ¶ 62.

69. On [REDACTED] [REDACTED] billed 0.4 hour for corresponding with DCF and [REDACTED] [REDACTED] file contains no correspondence with DCF on that date. Id., ¶ 63.

70. On [REDACTED] [REDACTED] billed 0.3 hour for reviewing a memo from [REDACTED]. There is no memo, e-mail, or other correspondence in [REDACTED] file, and

⁶ [REDACTED] produced no E-bill for [REDACTED]

██████████ did not send ██████████ a memo or other correspondence on that date. Id., ¶ 64.

71. On ██████████ ██████████ billed 0.4 hour on ██████████ case, even though his motion to withdraw was allowed on ██████████ Id., ¶ 65.

C. ██████████ overbilled and double-billed for tasks.

72. Based on ██████████ review of ██████████ file and E-bills (and good-faith mathematical calculations), ██████████ appears to have overbilled or double-billed a total of 11.3 hours, for a total of \$621.50. Id., ¶ 109. These entries are itemized below.

73. ██████████ E-bills (exclusive of the unproduced ██████████ E-bill) show \$4,042.50 in payments by CPCS. Thus, 15% of the funds that ██████████ received from CPCS appear to be based on over billings. Id., ¶ 110.

74. When added to the discrepancies detailed in sections (A) and (B), it appears that 34.5% of ██████████ billings cannot be supported. Id., ¶ 111.

75. CPCS Performance Standard X (1) permits an attorney to round a 1/10 of an hour entry up if that entry is below 0.1. All other entries must be rounded to the nearest increment, although entries of the same billing category may be combined and then rounded accordingly. Id., Ex. 13.

76. On ██████████ ██████████ billed 0.2 hour for reviewing the order regarding his appointment, when it took ██████████ 23 seconds to read the same order. Id., ¶ 69; Ex. 18.

77. On ██████████ ██████████ billed 0.2 hour for reading a Foster Care Review notice that took ██████████ 59 seconds to read. Id., ¶ 70; Ex. 19.

78. On [REDACTED] [REDACTED] billed 0.2 hour to read a couple of brief e-mails from counsel for the child and one from DCF. He did not respond to any. Id., ¶ 71; Ex. 20.

79. On [REDACTED] [REDACTED] billed 0.4 hour for correspondence with counsel regarding trial preparation and correspondence with [REDACTED] (which is not in his file). The correspondence with counsel for all parties was a 7-line e-mail from [REDACTED] that took [REDACTED] 18 seconds to read. Id., ¶ 72; Ex. 21.

80. On [REDACTED] [REDACTED] billed 0.4 hour for reading an e-mail from [REDACTED] that it took [REDACTED] 11 seconds to read and for drafting a 3-sentence response to the e-mail. Id., ¶ 73.

81. On [REDACTED] [REDACTED] billed 0.5 hour for corresponding with [REDACTED]. The correspondence from this date is an e-mail re-forwarding an old e-mail to which [REDACTED] never responded. It took [REDACTED] 54 seconds to read the 2 e-mails. Id., ¶ 74.

82. On [REDACTED] [REDACTED] billed 0.3 hour for 2 short e-mails from [REDACTED] that took [REDACTED] 20 seconds total to read. Id., ¶ 75.

83. On [REDACTED] [REDACTED] billed 1.0 hour for reviewing a service plan faxed to him the day before. It took [REDACTED] 4 minutes and 33 seconds to read the service plan. Id., ¶ 76; Ex. 22.

84. On [REDACTED] [REDACTED] billed 0.5 hour for correspondence to DCF and reviewing documentation from the [REDACTED] Center. There is no correspondence with DCF in [REDACTED] file from that date, and the 4-page facsimile from the [REDACTED] Center – one page of which is the transmission page and 2 pages of which are a release – took [REDACTED] 32 seconds to read. Id., ¶ 77; Ex. 23.

85. On [REDACTED] Attorney Rose billed 0.3 hour for reviewing this Court's 2-page judgment as to Father R. F. It took Attorney Long 1 minute and 57 seconds to read the judgment. Id., ¶ 78; Ex. 24.

86. On [REDACTED] [REDACTED] billed 0.3 hour for drafting a 4-sentence e-mail to [REDACTED] Id., ¶ 79.

87. On [REDACTED] [REDACTED] billed 0.4 hour for drafting a 3-sentence response to an e-mail from [REDACTED] that took [REDACTED] 24 seconds to read. Id., ¶ 80.

88. On [REDACTED] [REDACTED] billed 0.2 hour for drafting a 1-sentence response to an e-mail from [REDACTED] that took [REDACTED] 14 seconds to read. Id., ¶ 81.

89. On [REDACTED] [REDACTED] billed 0.4 hour for drafting 1 sentence in an e-mail forwarding an e-mail from the social worker to [REDACTED]. The e-mail from the social worker took [REDACTED] 43 seconds to read. Id., ¶ 65; Ex. 25.

90. On [REDACTED] [REDACTED] billed 0.4 hour for reading 2 e-mails from [REDACTED] [REDACTED] that took [REDACTED] 3 minutes and 47 seconds to read. Id., ¶ 83.

91. On [REDACTED] [REDACTED] billed 0.4 hour for re-reading the 2 e-mails from [REDACTED] from [REDACTED] and drafting a 6-sentence response. Id., ¶ 84.

92. On [REDACTED] [REDACTED] time records reflect that he spent 1.3 hours researching & drafting a motion for funds, contacting his client, and conferring with an expert. The draft motion with accompanying affidavit, as transmitted to [REDACTED] the following week, are attached as Ex. 26.⁷ Despite the fact that the drafts transmitted to [REDACTED] in [REDACTED] and the versions ultimately filed with this Court were identical, [REDACTED] again billed for researching and drafting the motions on [REDACTED]. The signed, filed, and allowed version of the motion with affidavit is attached as Ex. 27. Id., ¶ 85,

93. On [REDACTED] [REDACTED] billed 0.2 hour for reviewing an e-mail from [REDACTED] [REDACTED] that took [REDACTED] 1 minute and 15 seconds to read. Id., ¶ 86.

94. On [REDACTED] [REDACTED] billed 0.2 hour for an e-mail from [REDACTED] that took [REDACTED] 33 seconds to read. Id., ¶ 87.

95. On [REDACTED] [REDACTED] billed 0.5 hour for reviewing e-mails from [REDACTED] [REDACTED] that took [REDACTED] 1 minute and 52 seconds to read and drafting a 6-sentence response. Id., ¶ 88.

96. On [REDACTED] [REDACTED] billed 0.3 hour for reviewing a 1-sentence e-mail from [REDACTED] and drafting a 2-word reply. Id., ¶ 89.

97. On [REDACTED] [REDACTED] billed 0.3 hour for corresponding with [REDACTED] [REDACTED]. The e-mail [REDACTED] sent took [REDACTED] 15 seconds to read, and [REDACTED] response was 5 sentences long. Id., ¶ 90.

98. On [REDACTED] [REDACTED] billed 0.3 hour for reading a 7-sentence e-mail from the social worker and forwarding it to [REDACTED] with a 1-line e-mail. Id., ¶ 91.

99. On [REDACTED] [REDACTED] billed 0.2 hour to review and diary a 3-sentence Notice of Rescheduling the R&R Hearing from [REDACTED] to [REDACTED]. It took [REDACTED] 7 seconds to read the Notice, which is attached as Ex. 28. Id., ¶ 92.

100. On [REDACTED] [REDACTED] billed 0.3 hour for reviewing 2 e-mails on an e-mail chain including [REDACTED]. Both e-mails took [REDACTED] 44 seconds to read. Id., ¶ 93.

101. On [REDACTED] [REDACTED] billed 0.3 hour for a Foster Care Review Report dated [REDACTED] that took [REDACTED] 1 minute and 7 seconds to read. The Foster Care Review Report is attached as Ex. 29. Id., ¶ 94.

⁷ One of the pages did not scan, but [REDACTED] will bring the hard copy to Court to verify its contents.

102. On [REDACTED] [REDACTED] billed 1.2 for reading a report and correspondence. The report took [REDACTED] 8 minutes and 14 seconds to read. [REDACTED] file does not contain the described correspondence. Id., ¶ 95.

103. On [REDACTED] [REDACTED] billed 0.2 hour for a 1-sentence e-mail to [REDACTED] [REDACTED] to which [REDACTED] replied with one word and for forwarding the e-mails with a 1-sentence explanation to [REDACTED]. The redacted e-mail is attached as Ex. 30. Id., ¶ 96.

104. On [REDACTED] [REDACTED] billed 0.2 hour for sending a 2-sentence response to a 3-line e-mail from [REDACTED]. Id., ¶ 97.

105. On [REDACTED] [REDACTED] billed 0.4 hour for reviewing a Family Action Plan and contacting [REDACTED]. The file contains no Family Action Plan from before that date, but does contain a Family Assessment from that date that took [REDACTED] 4 minutes & 20 seconds to read. [REDACTED] e-mail to [REDACTED] on that date is 1 sentence long. The Family Assessment is attached as Ex. 31. Id., ¶ 98.

106. On [REDACTED] [REDACTED] billed 0.7 hour for reviewing the DCF psychological evaluation entered at trial as DCF Exhibit #9 that took me 10 minutes and 54 seconds to read and a 1-sentence e-mail from [REDACTED] forwarding the evaluation. Id., ¶ 99.

107. On [REDACTED] [REDACTED] billed 0.4 hour for reviewing 4 brief e-mails from [REDACTED] that took [REDACTED] 40 seconds to read and drafting 4 responses that were all under 3 sentences in length. Id., ¶ 100.

108. On [REDACTED] [REDACTED] billed 0.2 hour for reading a 1-sentence e-mail to [REDACTED] and drafting a 1-sentence response. Id., ¶ 101.

109. On [REDACTED] [REDACTED] billed 0.4 hour for reading the termination of parental rights decision in [REDACTED] case. It took [REDACTED] 3 minutes and 45 seconds to read the same decision. Id., ¶ 102.

110. On [REDACTED] [REDACTED] billed 0.2 hour to review and diary a permanency hearing notice that took [REDACTED] seconds to read. This notice is attached as Ex. 32. Id., ¶ 103.

111. On [REDACTED] [REDACTED] billed 0.5 hour to prepare and file a form transcript request after looking up trial dates. [REDACTED] billed 0.3 hour for performing the same task, and her entry included drafting a cover letter. Id., ¶ 104.

112. On [REDACTED] [REDACTED] billed 0.2 hour for reviewing [REDACTED] prior appellate counsel's 1-sentence notice of appearance. Id., ¶ 105

113. On [REDACTED] [REDACTED] billed 0.8 hour for a conversation with [REDACTED] [REDACTED] for which she billed 0.5 hour. Id., ¶ 106.

114. On [REDACTED] [REDACTED] billed 0.2 hour to review [REDACTED] 1-sentence notice of appearance as appellate counsel for [REDACTED] Id., ¶ 107.

115. On [REDACTED] [REDACTED] billed 0.3 hour for a brief e-mail chain with the stenographer and [REDACTED] [REDACTED] spent so little time on the task that I did not bill for it. Id., ¶ 108.

D. [REDACTED] made E-bill entries that are not supported by any time record.

116. Based on [REDACTED] review of [REDACTED] file and E-bills (and good-faith mathematical calculations), it appears that [REDACTED] billed 1.2 for tasks that have no contemporaneous time record and received \$66.00 for these billings. Id., ¶ 114. These entries are itemized below.

117. When added to the other amounts detailed above, it appears that 36% of [REDACTED] [REDACTED] billings cannot be supported. *Id.*, ¶ 115

118. There is an E-bill entry for 0.9 hour on [REDACTED] that is not supported by any time record. *Id.*, ¶ 112.

119. On [REDACTED] [REDACTED] billed 0.3 hour for Hearing/Trial Prep & Discovery. This E-bill entry is unsupported by any time record for that date. *Id.*, ¶ 113.

IV. ARGUMENT

120. “On the question of ineffective assistance of counsel, first, we look to determine whether the behavior of counsel fell measurably below that which might be expected from an ordinary fallible lawyer and, if so, we further inquire whether counsel’s conduct has likely deprived the defendant of an otherwise available, substantial ground of defence [*sic*].” *In re Adoption of Azziza* (“Azziza”), 77 Mass. App. Ct. 363, 368 (2010) (internal punctuation omitted).

121. [REDACTED] billing records speak for themselves. He spent 3 hours preparing for trial in the week leading up to the [REDACTED] trial date and a whopping 3.7 hours in the month leading up to that date. He met with [REDACTED] for 0.3 hour to prepare her. To the extent that [REDACTED] ridiculously inflated the time spent on other tasks, [REDACTED] asks the Court to infer that he engaged in the same practice for these entries. *See* Ex. 11.

122. Leading up to the [REDACTED] and [REDACTED] [REDACTED] spent a meager 6.4 hours preparing for [REDACTED] trial. He billed for a pre-trial memorandum and proposed findings that he never drafted, much less filed. He provided no advocacy for [REDACTED] in the form of these pleadings or in motions in limine. He billed for reviewing [REDACTED] non-existent CORI and overbilled the amount of time he spent in trial.⁸ While [REDACTED] billing

⁸ To the extent that [REDACTED] may claim that the entry includes waiting, etc., a review of his CPCS E-bills shows that court waiting time must be logged in a different field.

records claim 1.5 hours of in-person client contact with [REDACTED] on [REDACTED] – 2 weeks before trial – [REDACTED] will testify that the meeting was much shorter and that it was comprised of [REDACTED] describing the legal standard of unfitness to her and telling her how she did not meet it and how her case was an easy win. [REDACTED] made no outline or other work product relating to [REDACTED] testimony, and it is therefore impossible that he could have effectively prepared her without any prior preparation on his part. Again, to the extent that he ridiculously inflated the time spent on other tasks, [REDACTED] asks the Court to infer that he spent even less than the meager 6.4 hours he spent preparing for trial and to discredit the amount of time he allegedly spent preparing her. See Ex. 11.

123. [REDACTED] substantial grounds of defense are described in detail in her Motion for a New Trial. However, [REDACTED] file and billing records and the transcript of the [REDACTED] trial date both compound the allegations in the Motion for a New Trial and show that [REDACTED] was deprived of additional substantial grounds of defense. [REDACTED] engaged in trial preparation so minimal that it would be impossible for any lawyer to identify – much less mount – any grounds of defense. He failed to prepare [REDACTED] for trial. He failed to read the DCF dictation, making it impossible for him to impeach the social worker associate. He failed to interview or call witnesses identified by [REDACTED]. He filed no pre-trial motions or memorandum and no proposed findings – despite billing the Commonwealth for some of these documents.

124. Most concerning, however, is [REDACTED] failure to object to the breathalyzer on [REDACTED] – especially when [REDACTED] told him that she had a couple drinks the night before and the trial judge indicated her disinclination to order the test. This failure led to a positive result for alcohol that, despite being well below the legal limit and having no impact on

ability to engage in colloquy with the Court, has been used against throughout this case. While the test result is obviously something concerning to the Court, this fact does not absolve of his failure to provide with zealous advocacy and effective assistance of counsel. failure to object – along with his almost complete failure to prepare for trial – falls well below the conduct of an ordinary fallible lawyer.

125. Finally, conduct repeatedly and egregiously violated MRPC and CPCS Performance Standards. Tellingly, when approached about the instant claim of ineffective assistance of counsel, his gut-reaction was to violate his ethical obligations under Mass. R. Prof. Conduct 1.16, refuse to withdraw, and threaten to disqualify under an inapplicable rule – thereby violating his duty of loyalty to a former client. His representation of also violated the strictures of zealous advocacy and competent representation since it would be impossible for any lawyer to do so in the amount of time spent on her case. Based on his E-bills, he spent a whopping 73.5 hours – not even 2 full work weeks – on her case over the course of his entire 16-month-long representation. When reduced by the 36% of billings that are unsupported, this figure goes down to 47.04 hours – barely more than a full work week. No lawyer could possibly provide competent representation – much less prepare for 3 days of trial – in the amount of time that billed for his entire representation of

V. CONCLUSION

For all of the foregoing reasons, Mother respectfully requests that this Honorable Court allow her leave to amend her Motion for a New Trial and reconsider the denied portions of that motion so that her evidentiary hearing may go forth as to all the allegations contained therein and in the instant motion.

Respectfully submitted,

By Appellant-Mother,

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DATED: [REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served by first-class and/or electronic mail with consent upon trial and appellate counsel of record for all parties on [REDACTED]
[REDACTED]

[REDACTED]