IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

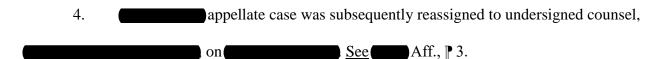
(, ss.	JUVENILE COURT DEPARTMENT DIVISION	
	In Re:	Docket No.:	
Car	are and Protection of	DOCKET NO	

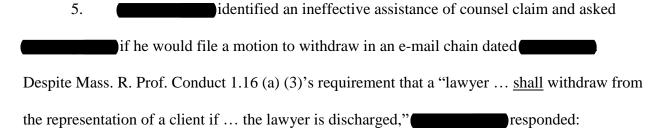
MOTION TO AMEND MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL PURSUANT TO MASS. R. CIV. P. 60 (b) (6) AND TO RECONSIDER THE DENIED PORTIONS OF THAT MOTION

I. Introduction

Mother respectivity 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 (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
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.	was appointed as trial counsel on See		
Ex. 18.				
	2.	After this Court Order of terminated		
parental rights, she timely filed a Notice of Appeal on (Docket Sheet, p. 10)				
	3.	was originally appointed as appellate		
attorr	ney. (Do	cket Sheet, p. 11)		





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 e-mailed back asking:

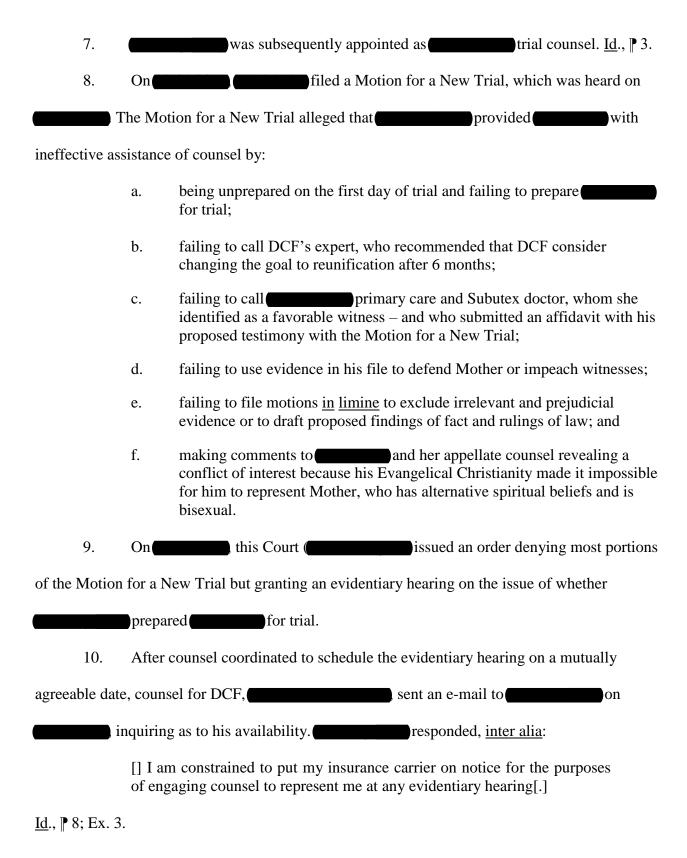
How am I material witness if gets a new trial?

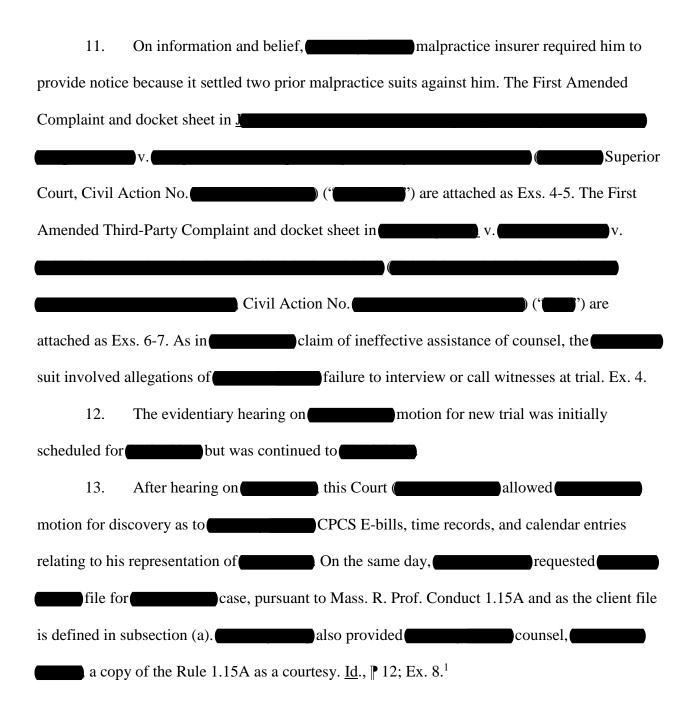
His response was:

End of discussion.

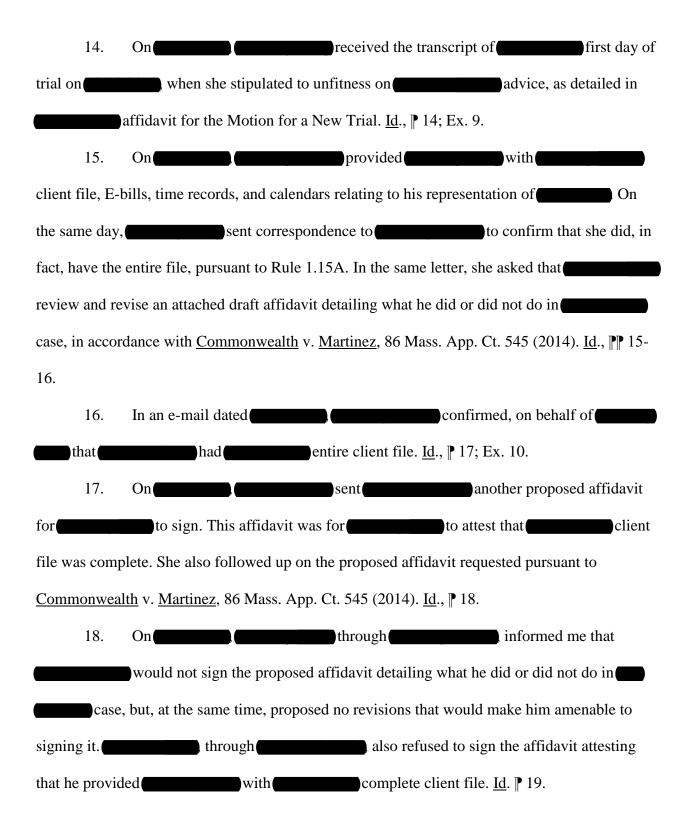
<u>Id</u>., № 4; Exs. 1 & 2.

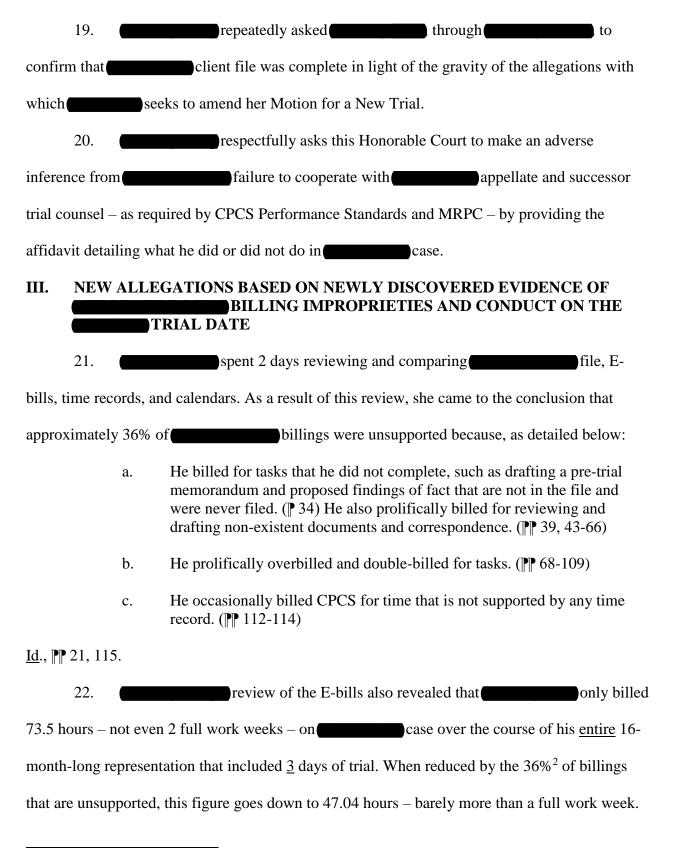
6. subsequently filed a motion to withdraw, but only, on information and belief, after CPCS explained to him that forcing his representation on a client who did not wish it and refusing to withdraw was a violation of MRPC. <u>Id.</u>, **P** 5.





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.





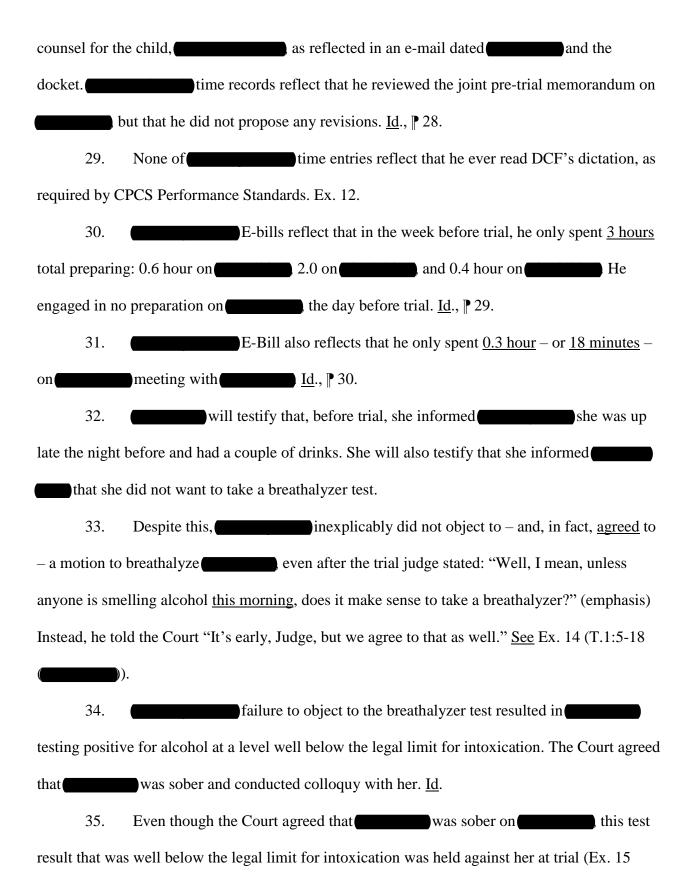
² As detailed below, the unsupported billings are comprised of 19.5% for unperformed work, 15% overbilling for tasks, and 1.5% for entries that have no time record.

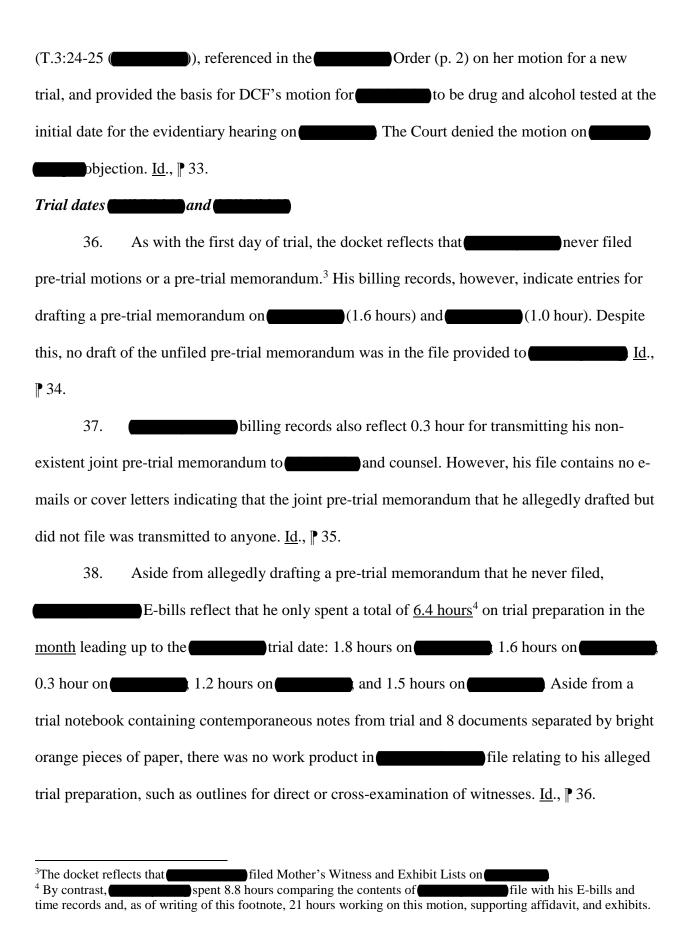
E-bills are attached as Exs. 11 and 12. did not provide his E-bill for Id., P 23.

- 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.

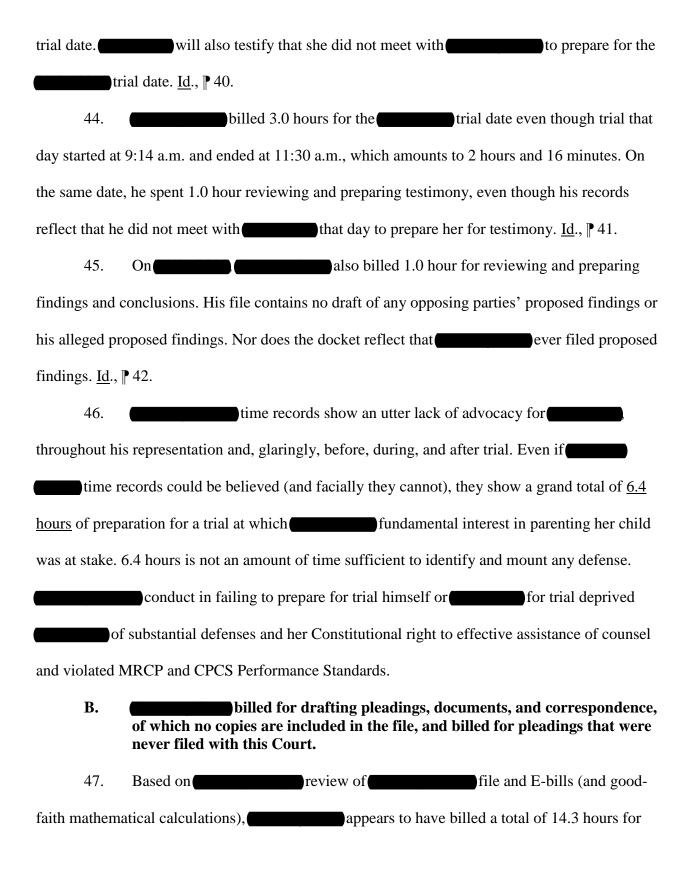
Trial date

- 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





- 39. There is no time entry in his billing records <u>whatsoever</u> 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 he deprived of this substantial defense because he did not know the contents of the dictation. <u>See</u> Ex. 12.
- 40. There is an E-bill entry on for 1.5 hours of in-person client contact, but the contemporaneous time record describes the entry as: "Meet with client; trial preparation." While concedes that she met with on that date, she will testify that the meeting was approximately half an hour long and involved 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 practice of egregiously overbilling and the absence of any outline for his examination of his time entries have little credibility. Id., 737.
- 41. billed 5.0 hours for the 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 billed 0.2 hour for reviewing CORI report, even though has no CORI. <u>Id.</u>, **P** 39; Ex. 16.
- 1.0 hour of trial preparation on The trial date ended with mid-testimony, and had yet to begin his examination of her. Ex. 17 (T.2:3). His records show that he did not meet with her to prepare her for the

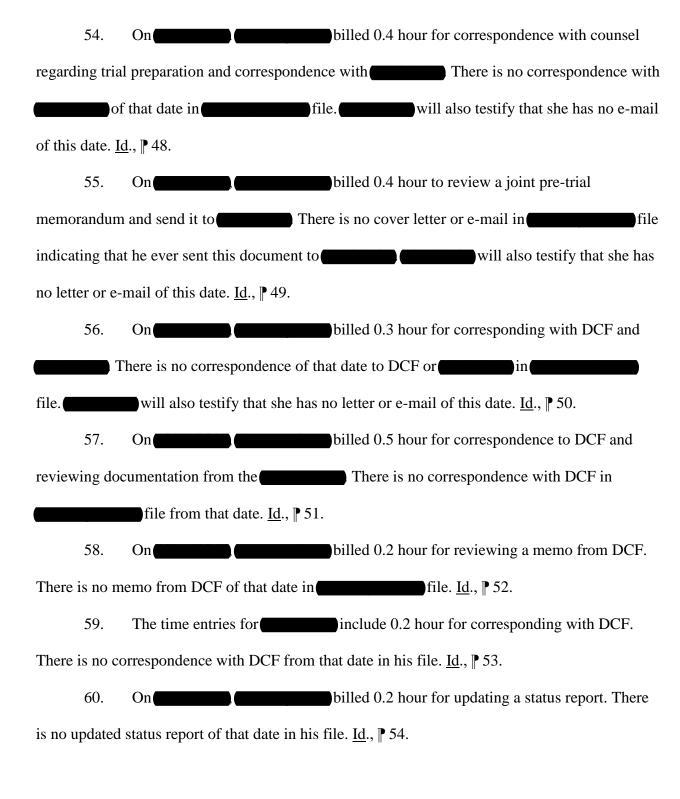


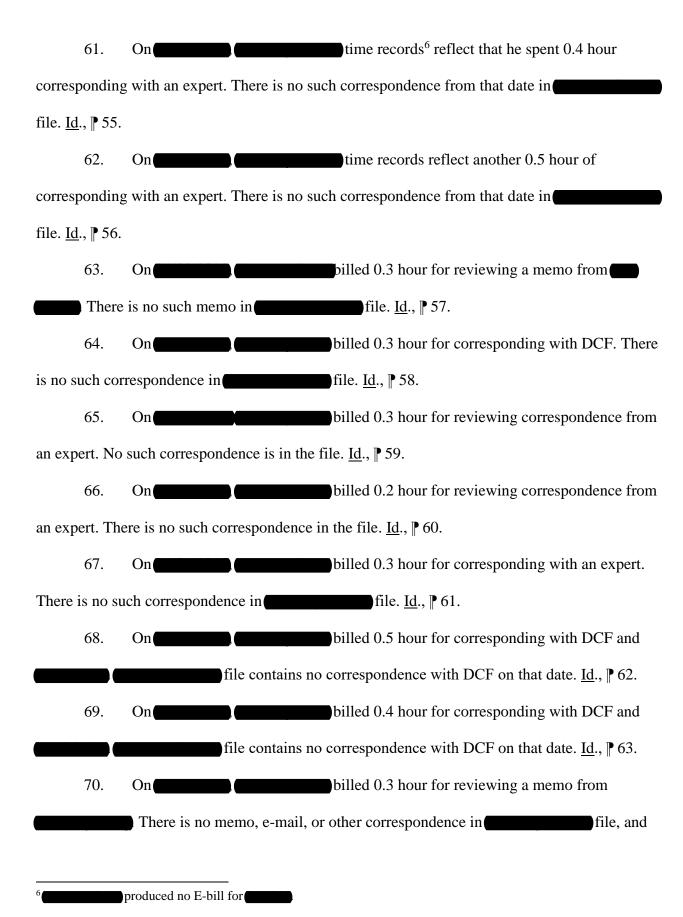
tasks that are not supported by documentation (including the trial-related tasks detailed in subsection (A) above), for a total of \$786.50. These entries are itemized below.

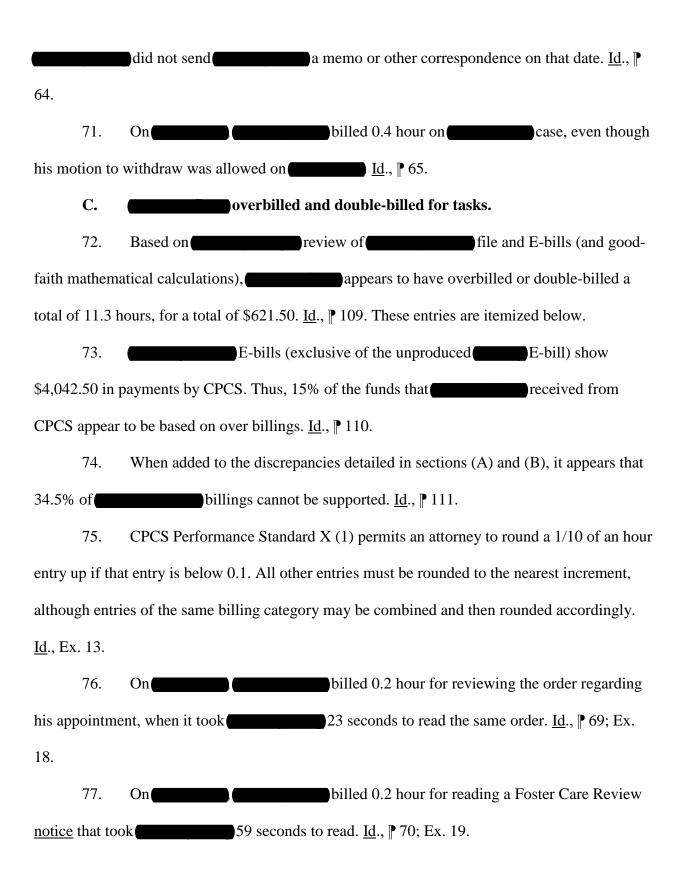
- 48. E-bills (exclusive of the unproduced E-bill) to show \$4,042.50 in payments by CPCS. Thus, 19.5% of the funds that received from CPCS appear to be for drafting or reviewing documents that do not exist or for work that he did not perform.
- 49. On time records show that he spent 0.2 hour preparing a status report, but no status report of that date is in the file. <u>Id</u>., **P** 43.
- 50. On billed 0.6 hour for reviewing the court file and drafting a memo to file. Id., \ \bigvert 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., 1 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. <u>Id.</u>, <u>P</u> 47.

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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").

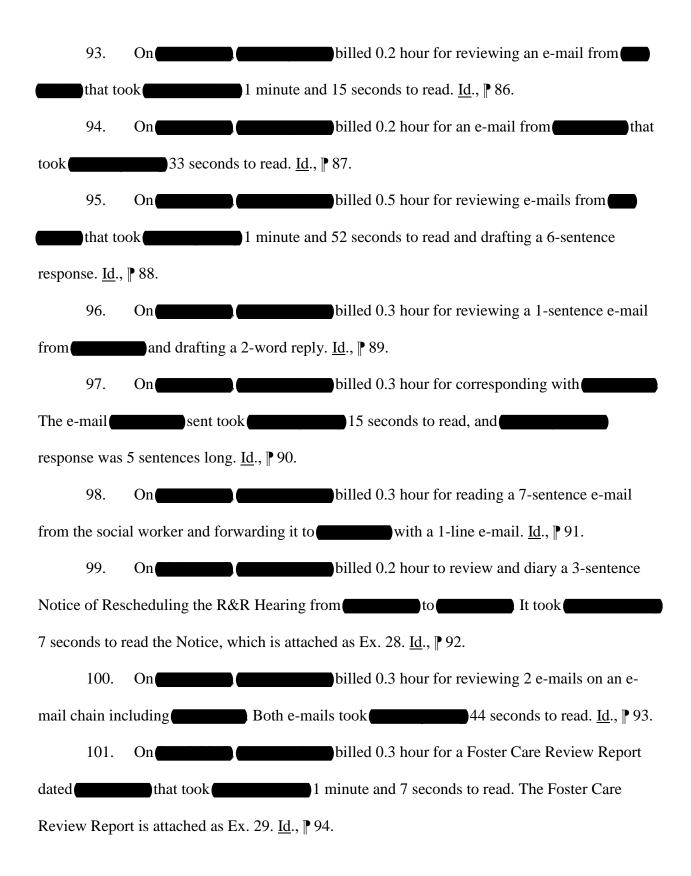




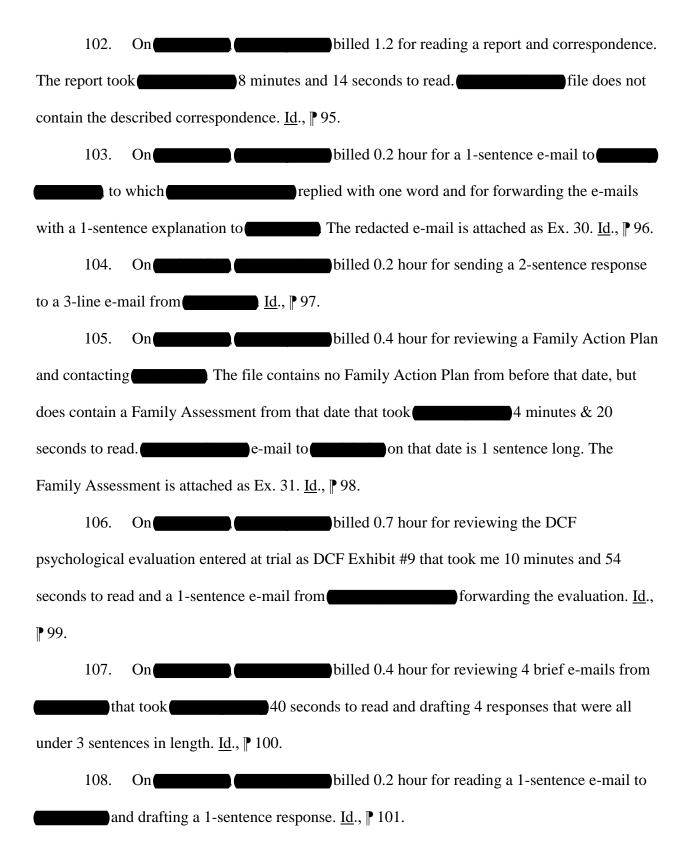


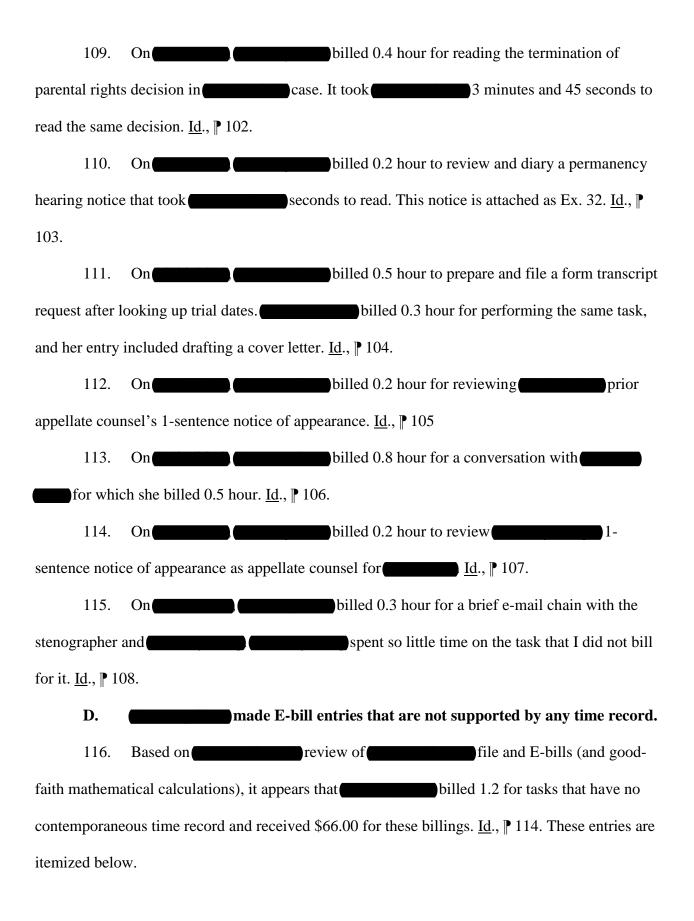
78. billed 0.2 hour to read a couple of brief e-mails from counsel for the child and one from DCF. He did not respond to any. Id., 71; Ex. 20. 79. On billed 0.4 hour for correspondence with counsel regarding trial preparation and correspondence with which is not in his file). The correspondence with counsel for all parties was a 7-line e-mail from that took 18 seconds to read. <u>Id</u>., **P** 72; Ex. 21. 80. billed 0.4 hour for reading an e-mail from that it took 11 seconds to read and for drafting a 3-sentence response to the e-mail. Id., \mathbb{P} 73. On billed 0.5 hour for corresponding with 81. The correspondence from this date is an e-mail re-forwarding an old e-mail to which never responded. It took 54 seconds to read the 2 e-mails. <u>Id.</u>, 74. 82. billed 0.3 hour for 2 short e-mails from On that took 20 seconds total to read. Id., \(\bigvere 75. 83. billed 1.0 hour for reviewing a service plan faxed On to him the day before. It took 4 minutes and 33 seconds to read the service plan. <u>Id</u>., № 76; Ex. 22. 84. billed 0.5 hour for correspondence to DCF and reviewing documentation from the Center. There is no correspondence with DCF in file from that date, and the 4-page facsimile from the Center – one page of which is the transmission page and 2 pages of which are a release – took seconds to read. Id., ₱ 77; Ex. 23.

85. On 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. <u>Id</u>., № 78; Ex. 24. billed 0.3 hour for drafting a 4-sentence e-mail to 86. On <u>Id</u>., ₽ 79. 87. On billed 0.4 hour for drafting a 3-sentence response to an e-mail from that took 24 seconds to read. Id., \(\bar{\P} \) 80. 88. billed 0.2 hour for drafting a 1-sentence response to an e-mail from that took 14 seconds to read. Id., P 81. 89. billed 0.4 hour for drafting 1 sentence in an e-mail forwarding an e-mail from the social worker to The e-mail from the social worker 43 seconds to read. <u>Id</u>., **№** 65; Ex. 25. took 90. billed 0.4 hour for reading 2 e-mails from On that took 3 minutes and 47 seconds to read. <u>Id.</u>, \mathbb{P} 83. 91. On billed 0.4 hour for re-reading the 2 e-mails from from and drafting a 6-sentence response. Id., P 84. 92. 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 the following week, are attached as Ex. 26.7 Despite the fact that the drafts transmitted to an and and the versions ultimately filed with this Court were identical, researching and drafting the motions on The signed, filed, and allowed version of the motion with affidavit is attached as Ex. 27. Id., \ 85,



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





117. When added to the other amounts detailed above, it appears that 36% of billings cannot be supported. Id., P 115 118. There is an E-bill entry for 0.9 hour on that is not supported by any time record. Id., P 112. billed 0.3 hour for Hearing/Trial Prep & 119. Discovery. This E-bill entry is unsupported by any time record for that date. Id., 113. IV. **ARGUMENT** "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. billing records speak for themselves. He spent 3 hours preparing for trial in the week leading up to the trial date and a whopping 3.7 hours in the month leading up to that date. He met with for 0.3 hour to prepare her. To the extent ridiculously inflated the time spent on other tasks, to infer that he engaged in the same practice for these entries. See Ex. 11. 122. Leading up to the spent a meager <u>6.4</u> hours preparing for trial. He billed for a pre-trial memorandum and proposed findings that he never drafted, much less filed. He provided no advocacy for the second in the

form of these pleadings or in motions in limine. He billed for reviewing non-

existent CORI and overbilled the amount of time he spent in trial.⁸ While

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billing

⁸ To the extent that 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.

before trial—will testify that the meeting was much shorter and that it was comprised of 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. made no outline or other work product relating to 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, 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.

- substantial grounds of defense are described in detail in her Motion for a New Trial. However, file and billing records and the transcript of the trial date both compound the allegations in the Motion for a New Trial and show that was deprived of additional substantial grounds of defense. 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 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 He filed no pre-trial motions or memorandum and no proposed findings despite billing the Commonwealth for some of these documents.
- on especially when 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.

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 possible 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,
DATED:	
CERTIFICATE OF	SERVICE
I hereby certify that a true copy of the above electronic mail with consent upon trial and appellate	