IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

[redacted], **ss.** **JUVENILE COURT DEPARTMENT**
[redacted]

In Re:

Care and Protection of [redacted]

Docket No.: [redacted]

MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL
PURSUANT TO MASS. R. CIV. P. 60 (b) (6)

I. Introduction

Pursuant to Mass. R. Civ. P. 60 (b) (6), Mother [redacted] respectfully requests that this Honorable Court vacate the judgment entered on [redacted] by this Court ([redacted]) and grant her a new trial based on the ineffective assistance of her trial counsel, Attorney [redacted]. Attorney [redacted] assistance was ineffective, violated the Massachusetts Rules of Professional Conduct ("Rules of Professional Conduct" or "MRPC") and Committee for Public Counsel Services ("CPCS") Performance Standards, and deprived the Court of critical evidence because:

1. [redacted] admitted that he was unprepared on the first day of trial. He also failed to prepare Mother for trial.

2. [redacted] failed to call DCF's expert, who recommended that DCF consider changing the goal to reunification after 6 months. He also failed to call Mother's primary care and Subutex doctor, whom she identified as a favorable witness – and who submits an affidavit to the Court with his proposed testimony.

3. [redacted] failed to use evidence in his file to defend Mother or impeach witnesses.

4. [redacted] failed to file motions *in limine* to exclude irrelevant and prejudicial evidence and failed to draft proposed findings of fact and rulings of law.

5. [redacted] made comments to Mother 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.

II. ARGUMENT

A. Legal Standard

[redacted] representation of Mother fell so far below acceptable standards that this Court must vacate its judgment and grant Mother a new trial.

1. "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 ([redacted]) (internal punctuation omitted).

2. "The failure to interview witnesses and have them testify demonstrate[s] behavior … falling measurably below that which might be expected from an ordinary fallible lawyer." *Id*. at 369. "To the extent the decision to avoid calling [witnesses] to testify may have been reflective of trial strategy, it was manifestly unreasonable. Trial counsel could not have made a reasonable tactical decision regarding the testimony … without first conducting interviews …, which did not occur." *Id*. at 369, fn 14 (internal citation omitted) (reversing order denying new trial based ineffective assistance where counsel failed to interview or call witnesses or introduce favorable documentary evidence).

3. "[D]emonstrative of an over-all pattern of ineffectiveness, [is that] counsel never filed any findings of fact[.]" *Id*. at 367, fn 12.

As the result of Attorney [redacted] repeated and egregious violation of the Rules of Professional conduct and CPCS Performance Standards, his conduct fell far below that of an ordinary and fallible lawyer, and accordingly Mother is entitled to a new trial.

4. G.L. c. 211D, § 9, requires CPCS to promulgate Performance Standards for its public defender and private counsel divisions. To ensure effective assistance, all assigned counsel must comply with its Performance Standards and the Rules of Professional Conduct. Performance Standard 4.A (p. 4.2)

5. The Performance Standards ***require*** assigned counsel to do the following:

- At all stages of a case, conduct thorough investigation, including interviewing individuals with information about the family, whether identified by the client or counsel. (4.N.3 (p. 4.206); 4.N.3.1 (c) (p. 4.208))

- Effectively prepare for trial, which includes filing pre-trial motions *in limine* and subpoenaing and preparing witnesses. (4.N.6 (p. 4.220); 4.N.6.1 (a) (p. 4.216), (e) (pp. 4.217-18), (f) (p. 4.218))

- Prepare a parent through multiple meetings to explain the process and practice mock direct and cross examinations. (4.N.6.1 (g) (pp. 4.218-19))

- During trial, present witnesses and evidence in support of a client's position; make appropriate objections; and prepare proposed findings of fact and rulings of law. (4.N.6.2 (p. 4.220) ("Proposed findings and rulings are a crucial opportunity to marshal evidence supporting the client's position."))

6. The Rules of Professional Conduct require a lawyer to "provide competent representation" and to possess requisite "thoroughness[] and preparation." MRPC 1.1. They also require a lawyer to "act with reasonable diligence" and to "represent a client zealously." *Id*. at 1.3; *In re Shaughnessy*, 442 Mass. 1012 ([redacted]) (discipline imposed where attorney, by neglecting case, failed to zealously represent client). Finally, the Rules of Professional Conduct forbid a lawyer to "represent a client if the representation involves a concurrent conflict of interest … [which] exists if … there is a significant risk that the representation … will be materially limited … by a personal interest of the lawyer." *Id*. at 1.7 (a).

B. By Attorney [redacted] own admission, he was unprepared on the first day of trial and did not interview or call favorable witnesses, which made it impossible for him to render effective assistance and violated the Rules of Professional Conduct and Performance Standards.

7. During a telephone call on [redacted], Attorney [redacted] admitted to Mother's appellate counsel, [redacted], that he and DCF's counsel, [redacted], were unprepared on the first day of trial ([redacted]) and that is why DCF let Mother stipulate to unfitness.[1] During an in-person meeting with Attorney [redacted] on 1[redacted], Attorney [redacted] confirmed that he was unprepared on the first day of trial, saying:

> [redacted] and I have the same litigation style. We only do the "hard work" when we need to. Neither of us was ready to try the case.

To the extent that Attorney [redacted] believed that Attorney [redacted] was (or would be) unready, he should have been prepared to challenge DCF's ability to support allegations that Mother was unfit to parent Child. [redacted] Aff., ¶¶ 7, 12 (Ex. 1).

8. Mother later told Attorney [redacted] that she did not want to stipulate because she did not think she was unfit. Attorney [redacted] did not explain the significance of the stipulation to her beyond saying it would "buy time." Mother Aff., ¶ 10 (Ex. 2).

9. During the [redacted] meeting, Attorney [redacted] asked Attorney [redacted] why he called no witnesses on his witness list, such as DCF's expert, [redacted] and Mother's doctor, [redacted] Attorney [redacted] said that he did not call [redacted] because his opinion that DCF consider changing the goal to reunification in 6 months was in through his report and that he did not call [redacted] because her treatment "wasn't contested." [redacted] Aff., ¶¶ 10-11 (Ex. 1).

[1] Mother is in no way implying that Attorney [redacted] was, in fact, unprepared.

10. Attorney [redacted] never interviewed [redacted] and told Mother that [redacted] "wouldn't want to take the day off for her" and that testifying was a "waste of time and money" for him.[2] Mother Aff., ¶ 9 (Ex. 2); [redacted] Aff., ¶ 10 (Ex. 3).

11. Attorney [redacted] did not meet with Mother at all before the trial to prepare her for direct and cross-examination. Mother Aff., ¶ 11. (Ex. 2)

12. Thus, Mother is entitled to a new trial because Attorney [redacted] utter failure to interview or call favorable witnesses constitutes ineffective assistance under *Azziza*, a case where the Massachusetts Appeals Court ordered a new trial based on the identical conduct of counsel. 77 Mass. App. Ct. at 369, fn 14 ("To the extent the decision to avoid calling [witnesses] to testify may have been reflective of trial strategy, it was manifestly unreasonable. Trial counsel could not have made a reasonable tactical decision regarding the testimony … without first conducting interviews …, which did not occur.").

13. Mother is also entitled to a new trial because Attorney [redacted] conduct constituted ineffective assistance because it egregiously violated the Rules of Professional Conduct and CPCS Performance Standards. MRCP 1.1 (competent representation, thoroughness, and preparation), 1.3 (reasonable diligence and zealous representation); Performance Standards 4.N.3.1 (c) (p. 4.208) (interviewing potential witnesses), 4.N.6.1 (e) (pp. 4.217-18) (calling witnesses for trial), 4.N.6.1. (g) (preparing of parent witness with multiple meetings and mock direct and cross examination).

[2] This was untrue and [redacted] affidavit indicates that he was willing to testify at Mother's trial and would be willing to testify if Mother gets a new trial. [redacted] Aff., ¶ 11 (Ex. 3).

C. Attorney [redacted] failure to call DCF's expert and Mother's doctor and as witnesses deprived Mother of substantial grounds of defense to DCF's allegations of unfitness and that it made reasonable efforts at reunification.

14. Despite identifying [redacted] and [redacted] on his witness list, Attorney [redacted] mounted no defense for Mother and called no witnesses at a trial that lasted 5 hours and 31 minutes. T.1, 4:1, 10:16, 19-20, 142:20; T.2, 4:1, 94:4 (Ex. 4).

If Attorney [redacted] had called him (he did not), [redacted] would have provided testimony indicating that Mother's unfitness was not indefinite and that DCF's choice to follow the decision of a non-clinical social worker rather than the opinion of an expert is *de facto* not reasonable efforts at reunification.

15. [redacted] was DCF's expert on parental fitness and the only individual on any party's witness list qualified to give expert testimony in that area. However, Attorney [redacted] did not call [redacted] who, in keeping with his expert report, would have testified to the following, which indicates that he did not believe that Mother's fitness was indefinite:

> If [redacted] can show compliance with [his] recommendations over the course of the next six months, then the Department should consider the possibility of changing the goal to reunification.

Report of Psychological and Parenting Evaluation ("[redacted] Report") (Ex. 5).

16. The testimony of [redacted] – an expert with a doctorate – would have had greater weight than the testimony of [redacted], who – as a social worker associate ("SWA") – was only licensed to provide non-clinical services:

> (1) Obtain information from agency clients and/or applicants for services to determine their service needs and/or the availability of appropriate resources;
>
> (2) Assist individuals or groups in identifying and making use of resources and services which are available to resolve day-to-day problems (*e.g.*, employment, housing, health care, child care, financial assistance problems, *etc.*); and

> (3) Gather factual information and data for use in conducting social services research including, but not limited to working with the community to identify unmet service needs.[3]

See 258 C.M.R. 12.04; [redacted] Professional Licensure (Ex. 6).

17. Despite this, Attorney [redacted] left [redacted] testimony as to her "clinical" decisions unchallenged by [redacted] expert testimony about the proper goal. The judge was curious why DCF did not listen to its own expert. However, Attorney [redacted] declined the judge's direction to ask [redacted] this question. T.1, 53:8-10, 59:6-8, 61:17-20 (Ex. 4).

18. Thus, Attorney [redacted] failure to call [redacted] deprived Mother of an otherwise available, substantial ground of defense because, with his testimony, the weight of the evidence would have been that: (1) Mother's unfitness was not indefinite; and (2) DCF's choice to follow the lay decision of a non-clinical social worker instead of the opinion of an expert is *de facto* not reasonable efforts at reunification. *Azziza,* 77 Mass. App. Ct. at 368.

If Attorney [redacted] had called him (he did not), [redacted] would have provided testimony that Mother's social use of alcohol and marijuana did not make her *per se* unfit.

19. Mother's social drinking and marijuana use do not translate automatically to unfitness. *Adoption of Katherine*, 42 Mass. App. Ct. 25, 33-34 (1997) (case remanded where parents abused cocaine and made no serious effort to stop using but child was not neglected by their drug use). Indeed, *Adoption of Katherine* – which, unlike Mother's case, involved an illegal drug – is instructive to Mother's circumstances:

> Ingesting cocaine is dangerous; its very possession is unlawful. We are not blind to the frequent linkage of cocaine addiction to personal and social disintegration. … That linkage has not, however, been demonstrated by evidence in this case to be invariable or applicable to child neglect. In the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child, we do not think a cocaine habit,

[3] Likewise, a Licensed Social Worker ("LSW") is prohibited from providing clinical services. *See* 258 C.M.R. 12.03. Only a Licensed Certified Social Worker or a Licensed Independent Clinical Social worker may provide clinical services. *Id*. at 12.01, 12.02.

> without more, translates automatically into legal unfitness to act as a parent.

Id.

20. At trial, DCF embraced the theory that Mother's social use of alcohol and marijuana made her *per se* unfit and that Mother continued to occasionally use other drugs. However, Attorney [redacted] did not call [redacted] – Mother's long-standing primary care and Subutex doctor – to provide testimony contradicting this.

21. [redacted] who indicates in his affidavit that he was willing to testify on behalf of Mother but was never interviewed or asked to do so by Attorney [redacted] would have testified to the following:

- [redacted] has been Mother's primary care and Subutex doctor for over 7 years. ([redacted] Aff., ¶ 3)
- Mother has diagnoses of moderate opioid use disorder in sustained remission on maintenance therapy for which she is prescribed Subutex; attention deficit hyperactivity disorder, predominantly inattentive type ("ADHD") for which she is prescribed Concerta; primary insomnia for which she is prescribed zolpidem; anxiety for which she is prescribed Xanax; and hypothyroidism for which she is prescribed Synthyroid. ([redacted] Aff., ¶ 4-5)
- [redacted] sees Mother for maintenance of her conditions, drug testing, and pill counts on a monthly basis. ([redacted] Aff., ¶ 6)
- Since Mother became [redacted] patient in [redacted] she has made significant progress in addressing and complying with treatment of her substance abuse and mental health. ([redacted] Aff., ¶ 7)
- Mother has not relapsed into opioid use and is stable on her medications. ([redacted] Aff., ¶ 7)
- Mother had an abnormal drug screen showing trace amounts of cocaine metabolites in 1[redacted] [redacted] made a note that he believed Mother when she said she had not used cocaine because, in over 7 years of treating and drug testing Mother, she never tested positive for cocaine. Trace cocaine metabolites can be caused by topical treatments, such as those used in dental offices. ([redacted] Aff., ¶ 8)

- On [redacted], Mother presented with ***extra*** Subutex pills. On [redacted], Mother ran out of her ADHD medication, but [redacted] made a note that he had little suspicion that Mother is taking extra ADHD medication or selling it. ([redacted] Aff., ¶ 9) (emphasis added)

- Mother has had ups and downs, as many patients do, but, overall, she has made – and continues to make – steady progress. ([redacted] Aff., ¶ 10)

- [redacted] would have deferred to the opinion of DCF's parental fitness expert that Mother be given time to comply with the expert's recommendations, after which time DCF should consider changing its goal to reunification. ([redacted] Aff., ¶ 12)

22. The testimony of [redacted] would have countered the testimony of [redacted] that Mother was "in denial" about her use of alcohol and marijuana; explained the anomalous positive screen for trace cocaine metabolites; and shown that Mother sometimes presented with ***extra pills***. [redacted] never diagnosed Mother as an alcoholic in his 7+ years of treating her, and Attorney [redacted] never had any concerns that Mother drank before their numerous interactions. If Mother were an alcoholic, it strains credulity that she would save all her drinking for [redacted].[4] [redacted] Aff., ¶ 16 (Ex. 1); [redacted] Aff., ¶ 4-5 (Ex. 3); T.1, 20:23-21:2 (Ex. 4); [redacted] Reports (Ex. 7).

23. Thus, Attorney [redacted] failure to call [redacted] as a witness deprived Mother of an otherwise available, substantial ground of defense because, with his testimony, the weight of the evidence would have been that Mother's social use of alcohol and marijuana was not of clinical concern and did not translate automatically into legal unfitness. *Azziza*, 77 Mass. App. Ct. at 368; *Adoption of Katherine*, 42 Mass. App. Ct. 25, 33-34.

[4] An odor of alcohol or marijuana is not noted in home visits, and DCF disregarded Mother's explanation that her sorbitol chewing gum produced an alcohol-like odor. *See* Dictation, p. 5 (Ex. 10). The artificial sweetener is "a polyhydric alcohol." *See* National Institute of Health, PubChem, Open Chemistry Database, https://pubchem.ncbi.nlm.nih.gov/compound/D-Sorbitol#section=Top.

D. Attorney [redacted] failure to use evidence in his file that would have provided Mother with substantial grounds of defense to DCF's allegations that she was unfit fell well below the conduct of an ordinary fallible lawyer.

24. At trial, Attorney [redacted] entered 3 exhibits: a Relapse Prevention Plan, Certificate of Completion for the [redacted] Outpatient Addiction Program, and Certificate of Participation for Promoting Parental Resiliency. He did not enter [redacted] reports or her therapist's assessment that Mother was at low risk for alcoholism, which Attorney [redacted] copied from his file. He also did not enter Mother's household budget, documentation of her application for a fortune-telling license, and the tax identification number for her business, which Mother testified he had. [redacted] Aff., ¶ 13 (Ex. 1); T.2, 8:15-17; 49:12-19 (Ex. 4).

[redacted] Reports

25. [redacted] reports reflect that Mother's opioid addiction is in sustained remission and that she has no diagnosis of any other addiction, despite her openness about social alcohol and marijuana use. Mother is prescribed Concerta for ADHD; zolpidem for insomnia; Xanax for depression with anxiety; and Synthyroid for hypothyroidism. [redacted] Reports (Ex. 8).

26. [redacted] has treated Mother for 7+ years and believed Mother about a [redacted] drug screen that was positive for trace amounts of cocaine metabolites, noting:

> This would be the first time this has ever showed up and there is certainly the possibility that it was contaminating some marijuana that she used more possibly in some topical treatment she received perhaps at a dental office. She does not recall. Given that we have never seen this ***in years*** I am inclined to believe her.

[redacted] Reports ([redacted] Note), p. 4 (Ex. 7) (emphasis added).

27. The reports also reflect no concern that Mother is abusing her medications. In fact, she had trouble remembering her third daily dose of Subutex and sometimes presented with ***extra pills***. *Id*. ([redacted]) (emphasis added).

28. Attorney [redacted] failure to introduce [redacted] reports into evidence deprived Mother of an otherwise available, substantial ground of defense because they provide even greater weight to the evidence that Mother's social use of alcohol and marijuana did not translate automatically into alcoholism and legal unfitness. They also show that she took her sobriety and treatment seriously and was forthcoming with extra pills and about her social use of alcohol and marijuana. *Azziza*, 77 Mass. App. Ct. at 368; *Adoption of Katherine*, 42 Mass. App. Ct. 25, 33-34.

[redacted] Mental Health/Substance Abuse Evaluation

29. Mother's therapist, [redacted] performed a Mental Health/Substance Abuse Evaluation on Mother and found her at low risk for alcoholism. The result of the screens was that Mother "sometimes drinks to feel good, frequently drinks to celebrate, frequently drinks to be social, sometimes drinks to feel more comfortable in social situations; [*sic*] and sometimes drinks to have a good time." Mental Health/Substance Abuse Evaluation (Ex. 8).

30. Attorney [redacted] failure to introduce [redacted] evaluation into evidence deprived Mother of an otherwise available, substantial ground of defense because it provides further evidence that Mother's social use of alcohol and marijuana did not translate automatically into alcoholism and legal unfitness. *Azziza*, 77 Mass. App. Ct. at 368; *Adoption of Katherine*, 42 Mass. App. Ct. 25, 33-34.

Evidence of Mother's Increasing Financial Stability

31. Mother testified that she had documentation of her application for a fortune-telling license and her business tax identification number with her at trial and that she had a current budget. However, Attorney [redacted] did not try to admit these documents. T.2, 8:15-17; 49:12-19 (Ex. 4).

32. This unintroduced evidence deprived Mother of an otherwise available, substantial ground of defense to DCF's allegation that its efforts at reunification were reasonable because one of [redacted] recommendations was the Mother be given 6 months to demonstrate that she can earn sufficient income with her new business through filing and disclosing quarterly tax payments to DCF. *Azziza*, 77 Mass. App. Ct. at 368; [redacted] Report (Ex. 5).

E. Attorney [redacted] conduct fell so far below that of an ordinary fallible lawyer that, in violation of CPCS Performance Standards, he filed no motions *in limine* or proposed findings.

33. Attorney [redacted] filed no motions to exclude or strike evidence and no proposed findings of fact and conclusions of law.

34. At trial, the judge tried to educate Attorney [redacted] that a blanket objection in the pre-trial memorandum and oral objections before trial were insufficient to keep evidence out, stating: "You've got to file motions *in limine* if you want certain things out." However, he did not follow the judge's direction and filed no motions *in limine*. T.1, 6:23-7:6 (Ex. 4).

35. While not listed as a proposed exhibit on the parties' joint pre-trial memorandum, DCF introduced non-party [redacted] Facebook page as an exhibit at trial. Instead of moving to strike it as rank hearsay, irrelevant, and improperly authenticated, Attorney [redacted] asked that it be "admitted *de bene*, subject to authentication." He did not object to [redacted] authenticating the document, even though she was not the author. He only objected under

Section 901 (b) (11) of the Massachusetts Guide to Evidence, which pertains to authenticating electronic or digital communications. However, Attorney [redacted] failed to recognize that the case-law in the notes to Section 901 demonstrates that "confirming circumstances" do not resolve hearsay issues. This highly prejudicial and irrelevant hearsay was therefore improperly admitted. T.1, 9:17-18, 72:23-76:11 (Ex. 4).

36. Attorney [redacted] also failed to object to the relevance of non-party [redacted] Police Department records, saying they were "self-proving." It is undisputed that Mother had no intention to have Child near [redacted] and was no longer romantically involved with him. This irrelevant and prejudicial evidence was improperly admitted and used to punish Mother for being [redacted] past victim.[5] T.1, 9:20, T.2, 46:11-12 (Ex. 4).

37. Failure to file proposed findings of fact and conclusions of law and motions *in limine* – or to otherwise try to exclude or strike evidence pertaining to [redacted] on the grounds of hearsay, relevancy, or prejudice – was part of a pattern of Attorney [redacted] overall ineffectiveness as counsel. 77 Mass. App. Ct. at 367, fn 12 ("[D]emonstrative of an over-all pattern of ineffectiveness, [is that] counsel never filed any findings of fact[.]"). Exclusion of the evidence relating to [redacted] in particular, would have prevented the judge from making the finding that:

> [redacted] social media account shows recent posts of photographs of him with Mother, and despite her testimony to the contrary, which the Court did not find persuasive, it appears that they are still in a relationship to this date.

See Summary of Findings, Decision, and Orders After Trial, p. 2.

[5] Attorney [redacted] statement that Mother's CORI "is what it is" is also part of a larger pattern of ineffectiveness. It shows a lack of familiarity with the case because Mother has no criminal record. T.1, 9:16. 19-20 (Ex. 4).

38. These failures also far well below the conduct of an ordinarily fallible lawyer because they repeatedly and egregiously violate the CPCS Performance Standards which mandate filing pre-trial motions *in limine*, making appropriate evidentiary objections, and preparing proposed findings of fact and rulings of law. 4.N.6. (p. 4.220), 4.N.6.2 (p. 4.220 ("Proposed findings and rulings are a crucial opportunity to marshal evidence supporting the client's position.").

F. Attorney [redacted] conduct also fell far below that of an ordinary fallible lawyer because he failed to impeach [redacted] with her dictation leading the Court to make an incorrect finding.

39. Also demonstrative of an over-all pattern of ineffectiveness was Attorney [redacted] failure to impeach [redacted] testimony with her dictation. [redacted] testified that Mother's home was dirty and that she had been asked to clean since [redacted]. T.1, 67:3-7 (Ex. 4).

40. However, [redacted] dictation – which Attorney [redacted] copied from Attorney [redacted] file – uniformly describes Mother's home as ***clean***:

> [redacted] SW viewed home which was ***reasonably clean*** with no hazards. (p. 4)
>
> [redacted] The home was ***clean***, however, it was very cold. (p. 7)
>
> [redacted] The home was in relatively ***the same condition*** as the last home visit. (pp. 20-21)
>
> [redacted] Apartment in ***the same condition*** as the last visit. … SW saw that there were several large piles of dirty clothing in the basement. [redacted] stated that she needed to do laundry and that she was going to work on that today. (p. 25)
>
> [redacted] The home was in ***the same condition*** as last month with large piles of laundry in the basement, minimal food, and minimally furnished. (p. 32)
>
> (No [redacted] visit in dictation.)

> [redacted] The home was in ***the same condition*** with minimal food and laundry not done on the floor of the basement. (p. 46)

[redacted]Aff., ¶ 13 (Ex. 1); Dictation (Ex. 9) (emphasis added).

41. Attorney [redacted] had the dictation, but did not use it to impeach [redacted] testimony, resulting in the incorrect finding that:

> Despite having no apparent physical limitations, Mother has also struggled to clean or keep clean, her apartment; DCF asked her to declutter and clean in [redacted]. To date she has not done so. … While having a messy house, or being financially in tough straights would not, in and of themselves be a basis to terminate Mother's rights in this case, they are indicative of the greater problem, which is Mother's struggles with sobriety and stability.

See Summary, p. 2.

42. Thus, Attorney [redacted] pattern of ineffectiveness was so egregious that his conduct led the judge to make findings that were entirely incorrect.

G. Attorney [redacted] personal conflict of interest with Mother's alternative spiritual beliefs and sexuality made it impossible for him to provide effective assistance.

43. "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if … there is a significant risk that the representation of one or more clients will be materially limited … by a personal interest of the lawyer." MRPC 1.7 (a).

44. In late summer [redacted], Attorney [redacted] was appointed as successor counsel for Mother. At this time, he told Mother that her case was "easy" and that he "hand-picked" it. Mother Aff.., ¶ 4 (Ex. 2).

45. At an early meeting, Mother informed Attorney [redacted] that she was a clairvoyant and offered to perform a psychic reading for him. Attorney [redacted] had a strong negative reaction,

nearly jumping out of his chair and exclaiming: "I'm an evangelical Christian!" Mother Aff., ¶ 5 (Ex. 2).

46. Mother, who is bisexual, also told Attorney [redacted] that she had a girlfriend during the case. Mother Aff., ¶ 6 (Ex. 2).

47. Attorney [redacted] Facebook page indicates that, in addition to practicing law, he is a theology student and a lay preacher. *See* [redacted] Facebook Page (Ex. 10).

48. To the best of knowledge and belief, Attorney [redacted] is a member and lay preacher in a theologically conservative Christian church that is part of The Conservative Congregational Christian Conference, which condemns Mother's alternative spiritual beliefs and bisexuality. [redacted] Aff., ¶ 15 (Ex. 1).

49. On [redacted], Attorney [redacted] was appointed as appellate counsel for Mother and spoke with Attorney [redacted] by phone. During this conversation, Attorney [redacted] made negative comments about Mother's alternative spiritual beliefs and the fact that Mother wore henna tattoos, which are associated with Hinduism, a non-monotheistic religion. *Id*., ¶ 6.

50. A difference in religion between an attorney and a client is not *per se* a conflict of interest. However, Mother is entitled to a new trial because Attorney [redacted] strong negative reactions to Mother's spiritual beliefs, comments to Mother and Attorney [redacted], and conduct at trial indicate that Attorney [redacted] had a personal conflict of interest based on his own Evangelical Christianity that violated Rule of Professional Conduct 1.7 (a) and made it impossible for him to render effective assistance as counsel.

III. CONCLUSION

For all of the foregoing reasons, Mother respectfully requests that this Honorable Court vacate the judgment in this matter and granting Mother a new trial based on the ineffective assistance of her trial counsel, Attorney [redacted].

Respectfully submitted,

By Appellant-Mother,
[redacted]

[redacted] BBO# [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]

EXHIBIT 1

“Affidavit of [redacted]”

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

[redacted] **ss.** **JUVENILE COURT DEPARTMENT**
[redacted] **DIVISION**

In Re:

Care and Protection of

[redacted]

Docket No.: [redacted]

AFFIDAVIT OF [redacted], ESQ.

I, [redacted], hereby depose and state:

1. I am an adult resident of [redacted], Massachusetts, and I make this affidavit on my personal knowledge.

2. I am a member of the Massachusetts bar in good standing.

3. On [redacted], the Committee for Public Counsel Services reassigned me as counsel for [redacted] in the appeal of the instant matter.

4. On the same day, [redacted] trial counsel, [redacted], contacted me and we had a telephone conversation.

5. During that conversation, I did not feel as if Attorney [redacted] was speaking about Ms. [redacted] in respectful terms.

6. Attorney [redacted] told me that Ms. [redacted] believed that she was a psychic. He elaborated, saying that Ms. [redacted] was not like a "circus performer" who pretended to speak with spirits for money, but that she really believed that she could commune with them. He also made negative comments about Ms. [redacted] henna tattoos.

7. Attorney [redacted] also told me that he and the Department of Children and Families ("Department")'s trial counsel, [redacted], were both unprepared on the first day of

trial ([redacted]) and that is why the Department offered to let Ms. [redacted] stipulate to unfitness, which she did.

8. On [redacted], I met Attorney [redacted] in his office to review his file and discuss the case.

9. At that time, I asked him several questions about his trial strategy.

10. Attorney [redacted] said he did not call Ms. [redacted] primary care doctor, [redacted], or therapist, [redacted], as witnesses because Ms. [redacted] treatment "wasn't contested."

11. He also stated that he did not call the Department's expert, [redacted] because his report came in as an exhibit.

12. Attorney [redacted] told me again that he was unprepared on [redacted] stating:

> [redacted] and I have the same litigation style. We only do the "hard work" when we need to. Neither of us was ready to try the case.

13. While I was in Attorney [redacted] office I viewed and copied from his file Ms. [redacted] records from [redacted], [redacted] Mental Health/Substance Abuse Evaluation of Ms. [redacted], and the Department's dictation.

14. Attorney [redacted] has Facebook page, which looks outdated based on the fact that it says he a partner at [redacted], but states:

> [redacted] is an active participant in his community. He serves as chairman of the municipal planning board of [redacted], and is a graduate theology student and a lay preacher at several churches in [redacted] County.

15. An internet search also shows Attorney [redacted] involvement with a church that a member of the The Conservative Congregational Christian Conference, is theologically

conservative, and condemns homosexuality. To the best of knowledge and belief, this denomination also condemns Mother's alternative spiritual beliefs.

16. I have never noted a smell of alcohol or marijuana on Ms. [redacted] during any of our numerous in-person interactions.

Signed under pains and penalties of perjury, on this [redacted]

[redacted]

EXHIBIT 2

“Affidavit of [redacted]”

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

[redacted] **ss.** **JUVENILE COURT DEPARTMENT**
[redacted] **DIVISION**

In Re:

Care and Protection of

[redacted]

Docket No.: [redacted]

AFFIDAVIT OF [redacted]

I, [redacted] hereby depose and state:

1. I am an adult resident of [redacted] Massachusetts, and I make this affidavit on my personal knowledge.

2. I am the Mother of [redacted] the child that is the subject of this case.

3. I was initially represented in this case by Attorney [redacted] After she withdrew, Attorney [redacted] represented me.

4. Early in Attorney [redacted] representation of me, he told me that my case was "easy" and that he "hand-picked" it. This seemed very strange to me.

5. Early on, I also told Attorney [redacted] that I am a clairvoyant (meaning I can see and feel spirits but not hear them) mind-reader and fortune-teller and offered to perform a psychic reading for him. Attorney [redacted] had a strong negative reaction, jumping back away from me and nearly out of his chair, shouting: "I'm an evangelical Christian!"

6. I am bisexual and told Attorney [redacted] that I had a girlfriend during the case.

7. I also told Attorney [redacted] that my primary care and Subutex doctor, [redacted] [redacted] and my therapist, [redacted] were potential witnesses.

8. Dr. [redacted] has treated me for 7 years.

9. Attorney [redacted] told me that he was not going to call Dr. [redacted] as a witness because he "wouldn't want to take the day off for" me and that testifying was a "waste of time and money" for him.

10. The first day of trial in my case was on [redacted]. I stipulated to unfitness on that day because Attorney [redacted] advised me to. I did not want to stipulate because I did not think I was unfit. Attorney [redacted] did not explain the significance of the stipulation beyond saying it would "buy time."

11. Attorney [redacted] did not meet with me before the trial to prepare me for the witness stand. Attorney [redacted] did not go over his direct examination with me or prepare me with practice cross-examination.

12. At my trial, Attorney [redacted] did not call any of the people I told him were witnesses.

13. On [redacted], through my appellate counsel, [redacted], I asked Attorney [redacted] to withdraw from representing me because I did not believe he was capable of effectively representing me.

EXHIBIT 3

“Affidavit of [redacted]”

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

[redacted], ss. **JUVENILE COURT DEPARTMENT**
[redacted] **DIVISION**

In Re:

Care and Protection of

[redacted]

Docket No.: [redacted]

AFFIDAVIT OF [redacted], M.D.

I, [redacted], M.D., hereby depose and state:

1. I am a board-certified internist with a medical practice in [redacted], Massachusetts, and I make this affidavit on my personal knowledge.

2. I have a medical degree from the University [redacted] and have practiced medicine since [redacted].

3. I have been [redacted] primary care and Subutex doctor for over 7 years. Ms. [redacted] first came to me for treatment of opioid addiction.

4. Ms. [redacted] has a diagnosis of moderate opioid use disorder in sustained remission on maintenance therapy. She is prescribed Subutex 3 times per day for treatment.

5. Ms. [redacted] also has diagnoses of attention deficit hyperactivity disorder, predominantly inattentive type for which she is prescribed Concerta; primary insomnia for which she is prescribed zolpidem; anxiety for which she is prescribed Xanax; and hypothyroidism for which she is prescribed Synthyroid.

6. I see Ms. [redacted] for maintenance of these conditions, drug testing, and pill counts on a monthly basis.

7. Since she became my patient in [redacted]1, Ms. [redacted] has made significant progress in addressing and complying with treatment of her substance abuse and mental health. Ms. [redacted] has not relapsed into opioid use and is stable on her medications.

8. When Ms. [redacted] had an abnormal drug screen showing trace amounts of cocaine metabolites on [redacted], my notes reflect that I believed her when she said she had not used cocaine. This is because in over 7 years of treating and drug testing Ms. [redacted], she never tested positive for cocaine. Trace cocaine metabolites can be caused by topical treatments, such as those used in dental offices.

9. My notes reflect that Ms. [redacted] presented with extra Subutex pills on [redacted] My [redacted] note also reflects that I have little suspicion that Ms. [redacted] is taking extra ADHD medication or selling it, despite running out of it on one occasion.

10. I was never contacted by Ms. [redacted] trial counsel, [redacted], about testifying at Ms. [redacted] termination of parental rights trial. If I had been called as a witness, I would have testified to the above. I would have also testified favorably about Ms. [redacted] progress in substance abuse and mental health treatment. She has had ups and down, as many patients do, but, overall, she has made -- and continues to make -- steady progress and has not relapsed into opioid addiction in over 7 years.

11. I was willing to testify on behalf of Ms. [redacted] at the time of her trial and would be willing to testify on her behalf in a future trial if necessary.

12. As Ms. [redacted] medical doctor, I cannot provide an expert opinion on her parental fitness. However, I would have deferred to the Department of Children and Families ("the Department")'s expert opinion that Ms. [redacted] be given 6 months to comply with the expert's recommendations, after which time the Department should consider changing its goal to reunification.

Signed under pains and penalties of perjury, on this [redacted]

[redacted], M.D.