

No. 19-

IN THE
Supreme Court of the United States

IN THE MATTER OF TINA L. MORIN,
AN ATTORNEY AT LAW

TINA MORIN,

Petitioner,

v.

MONTANA OFFICE OF DISCIPLINARY COUNSEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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Petitioner Pro Se

QUESTION PRESENTED

Petitioner Tina Morin (“Morin”) is a lawyer who represented the husband of J.A.L., an incapacitated person subject to guardianship. J.A.L. requested an attorney. Morin sought to assert on J.A.L.’s behalf her constitutional and statutory rights to choose her own legal representation. However, the guardians and the guardian *ad litem*, claiming to be her appointed counsel, refused. The guardians filed a complaint with the Montana Office of Disciplinary Counsel (“ODC”), claiming Morin had harassed them. The Commission on Practice of the Supreme Court of Montana (“COP”), found Morin violated Mont. R. Prof. Cond. R. 4.2(a) by contacting an allegedly represented party and suspended her after a hearing in which the COP barred Morin from presenting any exhibits, J.A.L.’s testimony, or the testimony of an expert witness in her defense. Therefore, the question presented is:

Did the COP violate Morin’s due process rights under the Fourteenth Amendment when the COP ordered Morin suspended from practice for allegedly violating Mont. R. Prof. Cond. R. 4.2(a) in the course of her legally asserting J.A.L.’s constitutional and statutory rights to counsel of her own choosing?

PARTIES TO THIS PROCEEDING

Plaintiff-Petitioner: Tina Morin

Defendant-Respondent: Montana Office of Disciplinary
Counsel

STATEMENT OF RELATED CASES

In the Matter of Tina L. Morin, No. PR 17-0448, Supreme Court of Montana, Judgment Entered February 26, 2019 (Appendix at 1a), *petitions for rehearing denied*, Montana Supreme Court, Judgment Entered March 26, 2019 (Appendix at 12a).

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CITATION TO OPINIONS BELOW

In the Matter of Tina L. Morin, No. PR 17-0448 (Mont., Feb. 26, 2019) (Appendix at 1a), *petitions for rehearing denied* (Mont., March 26, 2019) (Appendix at 12a).

STATEMENT OF BASIS FOR JURISDICTION

The Supreme Court of Montana entered an order on February 26, 2019 affirming the COP's findings of fact, conclusions of law and recommendation for discipline against Morin. On March 26, 2019, the Supreme Court of Montana entered an order denying Morin's petition for rehearing and amended petition for rehearing. This Court has jurisdiction to review this petition for *certiorari* pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Montana Const. Art. 2, § 17:

No person shall be deprived of life, liberty or property without due process of law.

3. Montana Const. Art. 2, § 4:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

4. Montana Const. Art. 2, § 10:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

5. Mont. Code Ann. § 72-5-315(2):

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender, provided for in 2-15-1029, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the person in the proceeding.

6. Mont. Code Ann. § 72-5-315(4):

The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. The person is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it.

7. Mont. Code Ann. § 72-5-316(3):

An incapacitated person may not be limited in the exercise of any civil or political rights except those that are clearly inconsistent with the exercise of the powers granted to the guardian unless the court's order specifically provides for the limitations. The order must state that all rights not specifically limited are retained by the incapacitated person.

8. Mont. Code Ann. § 72-5-325(1):

On petition of the ward or any person interested in the ward's welfare, the court, after hearing, may remove a guardian if in the best interests of the ward. On petition of the guardian, the court, after hearing, may accept a resignation.

9. Mont. R. Prof. Cond. R. 4.2(a):

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

STATEMENT OF THE CASE

A. Preservation of and Basis for Federal Questions

At the COP hearing and in response to the ODC's charges against her for allegedly improperly contacting a represented party, Morin contended that the District Court did not appoint Debbie Churchill, Esq. ("Churchill") as J.A.L.'s attorney and, if it did, it was invalid because a person may not serve both as a guardian *ad litem* and an attorney for an incapacitated person at the same time. Morin also stated that J.A.L. had a constitutional and statutory right as a person under guardianship to legal representation of her choosing and the guardians, their attorney and Churchill were denying J.A.L. her civil rights. Morin argued that disciplining her for asserting J.A.L.'s constitutional rights on behalf of her husband Ron and as his attorney would violate Morin's right to due process. (*See* Appendix at 16a).

On appeal and upon petition for rehearing before the Montana Supreme Court, Morin again argued that the District Court did not legally appoint Churchill as J.A.L.'s attorney, any such dual appointment was invalid

and J.A.L. had a constitutional and statutory right to legal representation of her own choice. Morin again argued that COP discipline for her actions in asserting J.A.L.'s constitutional rights would also violate Morin's right to due process. (*See* Appendix at 16a).

B. Statement of Facts

Petitioner Tina Morin is a member of the State Bar of Montana. She was hired to represent Ron Lowney ("Ron"), the husband of J.A.L., an incapacitated person under guardianship in Montana. J.A.L. verbalized and also executed a signed writing stating that she wanted to choose her legal counsel personally, but the guardians refused to accede to her wishes. This case derives from the bar complaint the guardians then filed against Morin based on her attempts, on behalf of her client, to assert J.A.L.'s constitutional and statutory rights to representation by counsel of her choice.

Ron and J.A.L. have been married for more than 50 years. J.A.L. suffers from multiple sclerosis and some cognitive impairment. Until 2011, she lived with Ron, who cared for her, but Ron grew unable to care for her, even with assistance. As a result, she entered an assisted living facility, and her son and daughter were appointed her temporary guardians and conservators in 2011. Contemporaneously, the Second Judicial District Court of Silver Bow County, Montana ("the District Court") entered an order captioned "Order Appointing Attorney to Represent an Alleged Incapacitated Person," appointing Churchill as J.A.L.'s counsel "to represent [J.A.L.] in the [guardianship] proceedings before the Court, and shall have the powers and duties of a guardian *ad litem*."

Ron filed two petitions to be appointed J.A.L.'s guardian or terminate guardianship. The District Court removed the son and daughter as fiduciaries and appointed J.A.L.'s brother- and sister-in-law, the Bugnis, as her guardians and conservators ("the guardians").

The District Court held six hearings total concerning J.A.L.'s capacity and the creation of guardianship. The District Court held guardianship proceedings, during which, and against her wishes, J.A.L. was not allowed to attend the final hearing or choose her legal representation. Churchill did not present J.A.L.'s objections to the guardianship and offered no witnesses on her behalf. On September 4, 2013, the District Court entered an order finding that J.A.L. is an incapacitated person in need of a permanent guardian and conservator, appointing the guardians and authorizing them to limit future contact between Ron and J.A.L. This order expressly referred to Churchill only as J.A.L.'s "guardian *ad litem*."

Ron hired Morin to represent him in appealing those orders to the Montana Supreme Court.¹ Ron also hired Morin to represent him to try to expand his right of access to J.A.L. during the guardianship. The guardians had isolated J.A.L. by confiscating any mail she attempted to send, intercepting all of her incoming mail, restricting visitors, refusing to allow her to attend Catholic mass, refusing to allow priests to meet with her and provide her Holy Communion, restricting her travel and permitting

1. The Montana Supreme Court affirmed the order appointing the guardians, restricting Ron's access to J.A.L. and awarding the guardians attorney's fees in *In the Matter of J.A.L.*, 329 P.3d 1273 (Mont. 2014), again referring to Churchill only as a "guardian *ad litem*." 329 P.3d at 1275.

Ron to see her only for one hour a month. The guardians did not allow J.A.L. to attend her 50th high school reunion or spend Christmas or any holidays with whomever she chose.

Meanwhile, Churchill continued to act in accordance with her capacity as the guardian *ad litem* for J.A.L., filing reports with the District Court consistent with her power and duties as a guardian *ad litem* but not reflecting any actions in pursuit of J.A.L.'s legal interests as her attorney. J.A.L. was also, during this time, making it clear to Ron and others that she wanted legal representation of her own choosing and wanted the guardianship modified or terminated. The guardians and Churchill, though, ignored J.A.L.'s stated wishes.

The guardians strictly controlled access to J.A.L., and Morin believed that the guardians and Churchill were violating J.A.L.'s civil rights, particularly her right to have the assistance of counsel of her own choosing. Morin solicited the assistance of Disability Rights Montana (DRM), which has a federal right to access disabled individuals. At Morin's request, a DRM attorney, Roberta Zenker, a DRM social worker and an attorney associated with DRM, Genet McCann ("McCann"), visited J.A.L. and determined that J.A.L. wanted a choice of individual counsel to represent her. J.A.L. signed a representation agreement with McCann. McCann had entered into a representation agreement with Ron, for purposes of payment only and DRM entered into an association agreement for McCann's representation of J.A.L., which DRM understood would be *pro bono*.

On September 2, 2016, the guardians filed a bar complaint with the ODC against Morin, alleging “uncivil” behavior and intimidation and harassment but mentioning nothing to do with Morin’s efforts with DRM and McCann to secure J.A.L. her constitutional and statutory rights to legal representation of her own choice. The ODC ignored the “civility” complaints and charged Morin with professional misconduct for allegedly improperly contacting or inducing impermissible contact with a represented party, in violation of Mont. R. Prof. Cond. R. 4.2(a), R. 8.4(a) and R. 8.4(d).

The COP held a hearing on the guardians’ complaint. Morin contended that J.A.L. had a constitutional right to legal representation of her own choosing and proffered evidentiary exhibits and the expert testimony of a member of the Montana bar, Eli Parker, from the Montana Public Defenders’ Office concluding that a court-appointed attorney for an incapacitated person must be from the Public Defenders’ Office, and the incapacitated person is not to be charged a fee. Parker’s expert opinion also stated that Churchill could not represent J.A.L. as both her guardian *ad litem* and attorney. However, the COP excluded the exhibits and the expert testimony from evidence and found that Morin violated Rules 4.2(a), 8.4(a) and 8.4(d), recommending Morin be suspended from the practice of law for a period of not less than seven months and be assessed the cost of these proceedings.

Morin filed objections to the Montana Supreme Court which stated, in pertinent part, that the COP erred in finding Churchill acted both as attorney and guardian *ad litem* for J.A.L. because such dual representation is contrary to law and the COP erred when precluding

Morin from presenting her evidence and calling her expert witness.

The Montana Supreme Court affirmed the COP's recommendations and the suspension of Morin's law license. Morin filed timely petitions for rehearing in which she reiterated the above objections and that J.A.L. had a constitutional and statutory right to counsel and suspending Morin pursuant to R. 4.2(a), *et al.* for asserting J.A.L.'s rights on behalf of Ron and allegedly improperly contacting a represented party was in violation of Morin's right to due process under the Fifth Amendment, the Fourteenth Amendment and Montana Const. Art. 2, § 17. The Montana Supreme Court denied the petitions for rehearing.

REASONS FOR GRANTING THE PETITION

The COP Discipline and Suspension of Morin for Allegedly Violating the Montana Rules of Professional Conduct by Asserting J.A.L.'s Constitutional and Statutory Rights, Including the Right to the Appointment of Counsel of her Choice, is in Violation of Morin's Constitutional Rights to Due Process Under the Fourteenth Amendment

J.A.L.'s husband, Ron, hired Morin as his counsel to represent him in seeking the modification or termination of J.A.L.'s guardianship and help assert J.A.L.'s constitutional and statutory rights to counsel, among other constitutional rights. Ron is a party interested in J.A.L.'s welfare and has standing to seek the modification or termination of the guardianship, including the hiring of new counsel. The guardians and Churchill acted in concert

to isolate J.A.L. and deny her frequently expressed wishes to have new counsel appointed on her behalf, as well as to allow her greater freedom in her life and in her best interests. Churchill was not properly appointed as J.A.L.'s alleged attorney, but, even if her appointment as counsel were considered valid, such appointment could be modified or terminated by the court at any time at the behest of an interested party such as Ron or Morin.

Morin stepped into this conflict as Ron's attorney to advocate on his behalf for J.A.L. to be able to exercise her constitutional and statutory rights to legal representation of her choice. As discussed below, the Supreme Court has held in many different contexts, including those involving incapacitated persons, that a third-party may assert the constitutional rights of another who is unable to do so otherwise. The guardians' bar complaint cited only incivility, but the COP went searching for tangential and allegedly sanctionable conduct to punish Morin improperly. The COP's discipline and suspension of Morin for asserting J.A.L.'s constitutional rights is manifestly against her rights under the Fourteenth Amendment, as applied to the State of Montana.

1. J.A.L.'s Right to her Choice of Counsel

The 2011 order and the 2013 order stated specifically that Churchill was to act as J.A.L.'s guardian *ad litem*. The record shows that Churchill acted in that capacity and never acted in defense or protection of J.A.L.'s legal rights as a ward. Nonetheless, in these guardianship proceedings, J.A.L. had the right under Montana law to have legal representation of her own choosing. Mont. Code Ann. § 72-5-315(2) recognizes this right or limits the appointment

of counsel to a public official or the Public Defender's Office:

Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender, provided for in 2-15-1029, to assign counsel pursuant to the Montana Public Defender Act, Title 47, Chapter 1, to represent the person in the proceeding.

(Emphasis added).

An alleged incapacitated person has the right to be present at guardianship hearings by counsel of her choice and present evidence and confront witnesses:

The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. The person is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel requests it.

Mont. Code Ann. § 72-5-315(4) (emphasis added).

Under Mont. Code Ann. § 72-5-316(3), J.A.L. retained all of her political and civil rights:

An incapacitated person may not be limited in the exercise of any civil or political rights except those that are clearly inconsistent with the exercise of the powers granted to the guardian unless the court's order specifically provides for the limitations. The order must state that all rights not specifically limited are retained by the incapacitated person.

(Emphasis added).

The orders appointing the guardians, as well as Churchill as guardian *ad litem* (or attorney, allegedly), do not include any restrictions on these rights other than limiting Ron's access to visit J.A.L.

Under Montana law and the Montana Constitution, an incapacitated person has the constitutional right to counsel, grounded in the Fourteenth Amendment's Due Process Clause:

We also affirm that the right to the effective assistance of counsel in civil commitment proceedings is grounded, not only in Montana's express statutes providing for the right to counsel, but also in the Due Process Clause of the United States Constitution and Montana's Constitution, Article II, Section 17 ("No person shall be deprived of life, liberty or property without due process of law."); Article II, Section 4 ("The dignity of the human being is

inviolable.”); and Article II, Section 10 (“The right of privacy is essential to the well-being of a free society and shall not be infringed....”).

Matter of J.S., 401 P.3d 197, 205 (Mont. 2017).

This Court has recognized that an incapacitated person has a constitutionally-protected liberty interest under the Due Process Clause of the Fourteenth Amendment. *See generally Youngberg v. Romeo*, 457 U.S. 307 (1982). To defend this liberty interest, an allegedly incapacitated person must have access to legal representation of her choice. “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1958)).

Furthermore, under Mont. Code Ann. § 72-5-315, the appointed counsel pointedly no longer has the authority to act as a guardian *ad litem*. In 2007, the Legislature amended this section to delete the then last sentence of subsection (2) which had stated: “The official or assigned counsel has the powers and duties of a guardian *ad litem*.” *See* 2007 Montana Laws Ch. 184 (S.B. 164). In doing so, the Legislature recognized that the roles of counsel and guardian *ad litem* for an incapacitated person are different and conflicting. Any appointment of Churchill in 2011 as both J.A.L.’s attorney and guardian *ad litem* exceeded the District Court’s authority and is invalid.

Nonetheless, for the purposes of this petition, even if this Court were to assume that Churchill was legally appointed as J.A.L.’s attorney for the guardianship proceedings, J.A.L. still has the constitutional right to

counsel under the Fourteenth Amendment and Montana law. However, J.A.L. was in a position where her guardians and Churchill could successfully ignore her frequently expressed wishes to acquire her own counsel.

2. Ron is a Party Interested in J.A.L.'s Welfare

At this point, it becomes clear that, while wanting for obvious reasons to be able to see his wife of 52 years more often and on their own terms, Ron was the interested party outside of the guardianship most attuned to asserting J.A.L.'s constitutional and statutory rights on her behalf.

Mont. Code Ann. § 72-1-103(25) states that, for the purposes of Chapter 72: “‘Interested person’ includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in, or claim against, a trust estate or the estate of a decedent, ward or protected person.”

As a person “interested” in J.A.L.’s welfare, Ron has the authority to challenge the appointment of her guardian or seek the modification of the guardianship under Mont. Code Ann. § 72-5-325(1): “On petition of the ward or any person interested in the ward’s welfare, the court, after hearing, may remove a guardian if in the best interests of the ward.” (Emphasis added). The powers and duties of a guardian are subject to limitation or modification by court order. *See* Mont. Code Ann. § 72-5-321. Under Montana law, Ron, as J.A.L.’s spouse, is a party “interested” in her welfare as an incapacitated person subject to a guardianship. *See generally In re Conservatorship of Kloss*, 109 P.3d 205, 207-08 (Mont. 2002).

3. Morin, as Ron's Attorney, has the Right to Assert J.A.L.'s Constitutional Rights to Counsel, and the COP Discipline and Suspension of Morin for Contacting an Allegedly Represented Party Violates Morin's Constitutional Right to Due Process

As an incapacitated person subject to a guardianship under which the guardians isolated her, confiscated her mail, prevented her from exercising her religion and kept her apart from her husband of 52 years who was most likely to advocate for her rights on her behalf, it is clear that J.A.L. has been in no position to assert her constitutional or statutory rights that she always retained despite her incapacity. *See, e.g., Youngberg, supra*; Mont. Code Ann. § 72-5-316(3).

Ron hired Morin to represent him in his quest to defend and assert J.A.L.'s constitutional and statutory right to counsel, among others. Morin, acting zealously in her representation of her client, ascertained that no one had been appointed legally as counsel for J.A.L. and Churchill was only acting as guardian *ad litem*. No one was asserting J.A.L.'s rights in a manner which would conflict with the conflicted priorities of the guardians. Accordingly, on behalf of Ron and in pursuit of J.A.L.'s constitutional and statutory right to counsel of her choosing, Morin agreed with DRM and McCann that DRM and McCann would meet with J.A.L. and determine whether she wanted to choose her own legal representation.

J.A.L. confirmed verbally and in writing that she wanted McCann to represent her liberty interests rather

than Churchill, who was subject to conflicts of interest as the guardian *ad litem* and as the alleged court-appointed attorney for J.A.L.

The jurisprudence of this Court establishes that a third-party has standing to assert the constitutional rights of others if a substantial relationship exists between the claimant and third-party, assertion of the constitutional right by the claimant is impossible and the claimant's constitutional right will be diluted if the third-party is not allowed to assert it. See *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

Morin was acting within her capacity as the attorney for Ron, who has the legal standing as J.A.L.'s spouse interested in her welfare, to challenge the administration of guardianship and seek its modification, including the appointment of new, independent counsel of J.A.L.'s own choosing. The guardians' bar complaint did not reference anything but alleged incivility, but the COP used DRM and McCann's contacts with J.A.L., at Morin's behest, to investigate and sanction Morin for an alleged violation of Mont. R. Prof. Cond. R. 4.2(a), which states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the

other lawyer or is authorized to do so by law or a court order.

Aside from the question of whether J.A.L. was even “represented,” given Churchill’s invalid appointment as both guardian *ad litem* and attorney for J.A.L. and the fact that Churchill never acted in the capacity of attorney for J.A.L., the COP cannot sanction Morin for asserting J.A.L.’s constitutional and statutory rights, as counsel for Ron.

The first section of the Fourteenth Amendment provides that a State may not deprive a person of life, liberty or property except with due process of law:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added).

Here, the bar complaint did not reference or assert any alleged violation of R. 4.2(a), so the COP lacked the authority and jurisdiction to raise the issue of any alleged violation *sua sponte*. Furthermore, even if the COP had jurisdiction, it could not enforce R. 4.2(a) in a manner which violated Morin’s authority and standing

to assert J.A.L.'s constitutional and statutory rights to counsel of her choosing, as Ron's attorney. Finally, the COP compounded its errors by not affording Morin the opportunity to provide a full defense to the charges, as the COP excluded her evidence, the testimony of J.A.L. and her expert witness from the hearing prior to finding her in violation of R. 4.2(a), *et al.* and suspending her from the practice of law.

CONCLUSION

The Court should grant this petition and decide these constitutional issues on the merits.

Dated: August 23, 2019

Respectfully submitted,

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APPENDIX

1a

**APPENDIX A — ORDER OF THE SUPREME
COURT OF THE STATE OF MONTANA,
FILED FEBRUARY 26, 2019**

IN THE SUPREME COURT
OF THE STATE OF MONTANA

PR 17-0448

IN THE MATTER OF TINA L. MORIN.
AN ATTORNEY AT LAW,

Respondent.

ORDER

On July 28, 2017, a formal disciplinary complaint was filed in this matter against Montana attorney Tina L. Morin. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

The Commission on Practice (COP) held a hearing on the complaint on December 3 and 4, 2018. Both the Office of Disciplinary Counsel (ODC) and Morin, as represented by their respective counsel, presented argument and questioned witnesses.

On January 2, 2019, the COP submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Morin then filed objections, and the ODC filed a reply.

This Complaint arose from Morin's involvement with the guardianship of J.A.L., an incapacitated person. After

Appendix A

the Second Judicial District Court, Silver Bow County, affirmed the appointment of J.A.L.'s brother and sister-in-law as her guardians and conservators, authorized them to restrict J.A.L.'s husband's access to her, and awarded them attorney fees, Morin represented J.A.L.'s husband in appealing those orders to this Court.¹ Morin also represented him in his efforts to expand his right of access to J.A.L., both before and after this Court affirmed the appealed orders.

After Morin undertook representation of J.A.L.'s husband, she learned the District Court had appointed attorney Debbie Churchill to represent J.A.L. in some capacity. The District Court's order of appointment was captioned "Order Appointing Attorney to Represent an Alleged Incapacitated Person" and it states in relevant part that Churchill was appointed to represent J.A.L. "and shall have the powers and duties of a guardian *ad litem*." Morin examined Churchill's actions in the case and determined she had consistently advocated for what Churchill determined was J.A.L.'s best interest and did not advocate for J.A.L.'s stated interests. Morin further believed Montana law no longer allowed for a single person to act as both attorney and guardian *ad litem* for an individual. She concluded Churchill was only a guardian *ad litem* and that J.A.L. was unrepresented. She further concluded Churchill's appointment as guardian *ad litem* would have ended when the District Court confirmed J.A.L.'s brother and sister-in-law as permanent guardians.

1. See *In re J.A.L.*, 2014 MT 196, 376 Mont. 18, 329 P.3d 1273.

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Morin then proceeded to exclude Churchill from service in her filings. Morin was unsuccessful in obtaining any relief for her client, either via appeal to this Court, via requests to attorney Stephen Shapiro, who represented J.A.L.'s guardians, via the numerous motions she filed in the District Court, or via a Petition for Writ of Mandate she filed in this Court. J.A.L.'s guardians strictly controlled access to J.A.L. and Morin became convinced that J.A.L.'s civil rights were being violated.

Morin sought the assistance of Disability Rights Montana (DRM), which has a federal right to access disabled individuals. DRM visited J.A.L. and determined she was not abused or neglected. Morin was insistent that DRM take further action, alleging that J.A.L. was being denied legal representation. Morin did not inform DRM that Churchill had represented J.A.L. in any capacity.

Although Morin urged DRM to challenge the guardianship, DRM did not have the resources to do so. Morin asked DRM to use its right of access to have an attorney visit J.A.L. to determine if she desired legal representation. DRM agreed. Morin then contacted attorney Genet McCann, who agreed to visit J.A.L. under DRM's right of access.² McCann, accompanied by a DRM representative, then visited J.A.L. J.A.L. signed a representation agreement with McCann. McCann and DRM entered into an association agreement for McCann's representation of J.A.L., which DRM understood would

2. McCann was subject to discipline for her actions in this matter and she has since been disbarred for her actions in another matter.

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be *pro bono*. However, DRM was unaware that McCann, with Morin's knowledge and approval, had also entered into a representation agreement with J.A.L.'s husband in which she agreed to pursue his interests in removing J.A.L.'s guardians. Morin knew McCann had entered into both representation agreements. However, she maintained there was no conflict of interest because J.A.L. and her husband had common goals.

McCann then took actions in her representation of J.A.L. which exceeded the scope of her agreement with DRM. DRM disassociated from the matter.

J.A.L.'s guardians filed a complaint with the ODC concerning Morin's actions. The ODC charged Morin with professional misconduct. In its Complaint, the ODC contended Morin knew or should have known that the District Court appointed Churchill as both attorney and guardian *ad litem* for J.A.L. The ODC alleged Morin violated Montana Rules of Professional Conduct 4.2(a) and 8.4(a) by inducing McCann to have unauthorized contact with J.A.L. while Churchill represented J.A.L. The ODC further alleged Morin violated M. R. Pro. Cond. 8.4(d) because she attempted to induce McCann to file a Petition for Writ of Mandate on J.A.L.'s behalf to serve Morin's client's interests.

After hearing, the COP found Morin knew Churchill was acting as J.A.L.'s attorney and that her claimed belief that Churchill was only guardian *ad litem* was not credible. It found she failed to advise DRM of Churchill's role, and neither she nor McCann disclosed to DRM that Morin

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had already orchestrated and approved an attorney-client contract between McCann and J.A.L.'s husband. The COP found neither McCann nor Morin sought informed consent from J.A.L., her husband, or her guardians to waive the conflict of interest, assuming it was a waivable conflict. The COP found Morin used, directed, and controlled McCann to ostensibly represent J.A.L. while simultaneously representing a person with adverse interests, J.A.L.'s husband, to pursue his and Morin's agenda. It found Morin used McCann's ostensible representation of J.A.L. as a subterfuge to pursue expanded visitation for J.A.L.'s husband and Morin knowingly assisted and/or inducted McCann into violating the Montana Rules of Professional Conduct. It pointed to an e-mail Morin sent to McCann in 2017, in which she directed McCann to tell Shapiro that McCann did not represent J.A.L.'s husband—a statement Morin knew to be untrue as she had signed McCann's attorney—client agreement with J.A.L.'s husband several months earlier.

Based on these and other findings, the COP concluded McCann acted as Morin's agent and surrogate in this matter, and Morin violated M. R. Pro. Cond. 4.2(a), 4.2(d), and 8.4(a) due to her and McCann's actions.

The COP recommended Morin be suspended from the practice of law for a period of not less than seven months, and assessed the cost of these proceedings. The COP noted this was Morin's second disciplinary proceeding within a year and both instances, in the COP's opinion, reflected "an unreasonable method of practicing law that employs intimidation, accusation and artifice to accomplish her

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goals” and, “Morin’s conduct displays a determination to accomplish her goals by any means, including unethical ones.” The COP found it significant that Morin created after-the-fact justifications for her behavior and failed to show remorse, accept responsibility, or express contrition for her conduct.

In her objections, Morin argues: the COP erred in finding Churchill acted both as attorney and guardian *ad litem* for J.A.L. because such dual representation is contrary to law; the COP erred in finding Morin knew or should have known Churchill was J.A.L.’s attorney because Morin could not “know” a “fact” that is contrary to law; the Chairman of the COP erred when he precluded Morin from calling an expert witness to testify about whether a district court can appoint a private fee-charging attorney to represent an incapacitated person; the Chairman of the COP erred when he precluded Morin from calling J.A.L. as a witness; the Chairman of the COP erred when he limited Morin’s ability to question witnesses about Churchill’s actions in the case; the COP erred in concluding McCann acted as Morin’s agent and surrogate; the COP erred in concluding the District Court appointed Churchill as J.A.L.’s attorney and that her role as guardian *ad litem* did not terminate when the court appointed permanent guardians; and Morin did not violate any of the Montana Rules of Professional Conduct in this matter. Morin further raises over 40 objections to specific factual findings made by the COP.

This Court reviews de novo the Commission’s findings of fact, conclusions of law, and recommendations. *In re*

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Neuhardt, 2014 MT 88, ¶16, 374 Mont. 379, 321 P.3d 833 (citation omitted). This Court reviews matters of trial administration for abuse of discretion. Further, despite its duty to weigh the evidence, this Court “remain[s] reluctant to reverse the decision of the Commission when its findings rest on testimonial evidence. We recognize that the Commission stands in a better position to evaluate conflicting statements after observing the character of the witnesses and their statements.” *In re Neuhardt*, ¶16 (quoting *In re Potts*, 2007 MT 81, ¶32, 336 Mont. 517, 158 P.3d 418).

We have thoroughly reviewed the record in this matter. Even if we were to assume that Morin is legally correct that the District Court erred in appointing Churchill to act as both attorney and guardian *ad litem* for J.A.L., it would not justify Morin’s actions in the present case. The record is abundantly clear that the District Court did in fact appoint Churchill to act as both attorney and guardian *ad litem* for J.A.L. An experienced attorney, Morin surely understood the court’s intention when she reviewed the record. Had she considered it an erroneous decision, she should have challenged the appointment in the courts. She did not have the option to simply ignore Churchill’s appointment as attorney and then unilaterally conclude that Churchill’s appointment as guardian *ad litem* had terminated. Although Morin had a basis to believe the appointment as both attorney and guardian *ad litem* may have been unlawful, she did not have the right to pretend Churchill’s appointment as attorney for J.A.L. did not exist because that suited the needs of her client.

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As such, the vast majority of Morin’s objections in this matter are inapposite. The issue at hand is not whether the District Court erred in appointing Churchill; the issue is whether Morin violated the Montana Rules of Professional Conduct through her actions in this case. For that reason, it is irrelevant whether Churchill’s appointment was contrary to law, and the testimony Morin sought to offer via her expert witness, J.A.L., and other witnesses regarding Churchill’s role is irrelevant. Aside from Morin’s own theory that Churchill was only a guardian *ad litem*, there is no evidence that Churchill’s appointment terminated when the District Court appointed permanent guardians for J.A.L.

The majority of the objections Morin makes to the COP’s findings are of no consequence as they go to the issue of whether the District Court erred in its appointment of Churchill, which we have found to be irrelevant to the present case. Others are based on Morin’s contentions, which neither the COP nor this Court finds credible, that she believed the District Court appointed Churchill as guardian *ad litem* only. In the remainder, Morin either suggests rewording to make findings less “confusing” or quibbles over details that have no bearing on the outcome: for example, she objects to the COP’s finding that she was “retained” by J.A.L.’s husband because he paid her no retainer. This Court will not spend its time and resources to investigate and correct inconsequential details that cannot conceivably change the outcome here.

As to the remaining issue—whether the COP erred in concluding McCann was Morin’s agent and surrogate—

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Morin maintains the COP misuses the word “surrogate” in this context. She further argues McCann did not approach J.A.L. as Morin’s agent, but as the agent of J.A.L.’s husband. The ODC responds that regardless of word choice, the substance of the issue is that Morin recruited McCann to do her bidding and manipulated DRM into getting McCann access to J.A.L. The ODC points to M. R. Pro. Cond. 4.2(a), which provides, “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” The ODC argues Morin cannot circumvent this Rule by using a third party to accomplish the communication. We agree. In this instance, Morin, representing J.A.L.’s husband, used McCann and DRM to communicate with J.A.L. without the consent of Churchill, J.A.L.’s appointed counsel. In so doing, Morin violated M. R. Pro. Cond. 4.2(a).

Moreover, consistent with the COP’s conclusions, we hold that Morin violated M. R. Pro. Cond. 8.4(a) and 8.4(d) in this matter. M. R. Pro. Cond. 8.4(a) provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. M. R. Pro. Cond. 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Morin’s enlistment of McCann to obtain access to J.A.L. and gain representation of J.A.L. via subterfuge and manipulation, while Morin knew Churchill represented J.A.L., violated these Rules and prejudiced the administration of justice.

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Additionally, Morin objects to the discipline recommended by the COP, which she characterizes as “unduly harsh.” She alleges she did not owe a duty to Churchill because Churchill did not adequately represent J.A.L. and thus McCann’s subsequent representation of J.A.L. had no adverse impact on Churchill’s and J.A.L.’s attorney-client relationship. She further alleges that there was no nexus between her conduct and an adverse effect on the administration of justice. She further argues that the Complaint did not accuse her of practicing law in an unreasonable manner and she had no opportunity to defend against such a charge. Finally, she argues that her punishment should be mitigated by the facts of this case and that the actions she undertook were to further her *pro bono* representation of an elderly man who sought the right to visit his incapacitated wife.

If anything, Morin’s arguments support the COP’s position that she has failed to show remorse, accept responsibility, or express contrition for her conduct. We do not agree that the COP’s recommendations are unduly harsh.

Based upon the foregoing,

IT IS HEREBY ORDERED:

1. The COP’s Findings of Fact, Conclusions of Law and Recommendation for Discipline are ACCEPTED and ADOPTED.

2. Tina L. Morin is hereby suspended from the practice of law in Montana for an indefinite period of not less than seven months, effective thirty days from the

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date of this Order. Morin is directed to give notice of her suspension to all clients she represents in pending matters, any co-counsel in pending matters, all opposing counsel and self-represented opposing parties in pending matters, and all courts in which she appears as counsel of record in pending matters, as required by Rule 30 of the Montana Rules for Lawyer Disciplinary Enforcement.

3. Tina L. Morin shall pay the costs of these proceedings, subject to the provisions of Rule 9(A)(8) of the Montana Rules for Lawyer Disciplinary Enforcement allowing her to file objections to the statement of costs.

The Clerk of this Court is directed to serve a copy of this Order of Discipline upon counsel for Tina L. Morin, and to provide copies to Disciplinary Counsel, the Office Administrator for the Commission on Practice, the Clerks of all the District Courts of the State of Montana, each District Court Judge in the State of Montana, the Clerk of the Federal District Court for the District of Montana, the Clerk of the Circuit Court of Appeals of the Ninth Circuit, and the Executive Director of the State Bar of Montana.

DATED this 26th day of February, 2019.

/s/ _____
Chief Justice

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

**APPENDIX B — ORDER OF THE SUPREME
COURT OF THE STATE OF MONTANA, FILED
MARCH 26, 2019**

IN THE SUPREME COURT OF
THE STATE OF MONTANA

PR 17-0448

IN THE MATTER OF TINA L. MORIN
AN ATTORNEY AT LAW,

Respondent.

ORDER

On February 26, 2019, this Court issued an Order accepting and adopting the Findings of Fact, Conclusions of Law and Recommendation for Discipline of the Commission on Practice (COP), suspending Tina L. Morin from the practice of law for an indefinite period of not less than seven months, and ordering her to pay the costs of these proceedings. Morin has petitioned this Court for rehearing. The Office of Disciplinary Counsel (ODC) has responded and objects to Morin's petition.

Under M. R. App. P. 20, this Court will consider a petition for rehearing only upon three grounds: the Court overlooked some fact material to the decision; the Court overlooked some question presented by counsel that would have proven decisive to the case; or the Court's decision conflicts with a statute or controlling decision not addressed by the Court. Morin contends this Court's Order erred in all three respects.

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First, Morin alleges this Court overlooked three facts which she believes are material to the decision. In the Order which is the subject of Morin's petition, this Court determined that the vast majority of Morin's objections to the Findings of Fact, Conclusions of Law and Recommendation for Discipline of the COP were inapposite because the issue at hand was whether Morin violated the Montana Rules of Professional Conduct and not whether the District Court erred in appointing an attorney to serve in the dual role of both attorney and guardian ad litem for an incapacitated person—J.A.L., the wife of Morin's client. We explained that it was irrelevant to the disciplinary proceeding if the District Court's appointment of counsel to represent J.A.L. was contrary to law because Morin could not choose to ignore the fact that the court had appointed counsel to represent J.A.L.

Morin now offers: an order in which the District Court referred to the appointed attorney as a guardian ad litem; the appointed attorney's testimony regarding her role that Morin characterizes as "a perfect definition of a guardian ad litem"; and an argument that Morin was justified in approaching J.A.L. because J.A.L. was entitled to an attorney of her choice. None of these "facts" were overlooked by the Court. Even if true, they do not change the outcome here. As stated in our Order, "The record is abundantly clear that the District Court did in fact appoint [attorney Debbie] Churchill to act as both attorney and guardian ad litem for J.A.L. An experienced attorney, Morin surely understood the court's intention when she reviewed the record."

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Morin next argues this Court should grant her petition for rehearing because it overlooked the question of whether Churchill was J.A.L.'s attorney. Morin argues that the question of whether Churchill was J.A.L.'s attorney was "both a question of fact and a question of law, which should have been decided by a district court." Contrary to Morin's assertion, this Court addressed that question: "The record is abundantly clear that the District Court did in fact appoint [attorney Debbie] Churchill to act as both attorney and guardian ad litem for J.A.L." Although Morin now argues the issue of Churchill's role should have been decided by the District Court, Morin made no effort to bring that issue before the District Court in the underlying case. As we stated in the Order, had Morin considered the District Court's decision to appoint Churchill to serve as both attorney and guardian ad litem to be erroneous, she should have challenged the appointment in the courts.

Morin next argues her petition for rehearing should be granted because this Court's Order conflicts with multiple statutes and controlling decisions not addressed. First, she argues that the United States and Montana Constitutions and § 72-5-315, MCA, all guarantee J.A.L. the right to be represented by counsel of her choice. As more fully explained in this Court's Order and the Findings of Fact, Conclusions of Law and Recommendation for Discipline of the COP, Morin's actions in this case did nothing to further J.A.L.'s right to counsel. Rather, Morin sought to circumvent M.R. Pro. Cond. 4.2(a) by suing a third party to communicate with J.A.L. without the consent of her appointed counsel.

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Second, Morin argues the underlying Order conflicts with this Court's decision in *In re J.A.L.*, 2014 MT 196, ¶ 4, 376 Mont. 18, 329 P.3d 1273, because there, this Court referred to Churchill as J.A.L.'s guardian ad litem. There is no conflict here because, as noted repeatedly in these proceedings, the District Court appointed Churchill as both J.A.L.'s attorney and guardian ad litem.

Third, Morin argues she cannot be disbarred or suspended because she did not violate any provision of § 37-61-301, MCA. The ODC responds that this statute does not preclude this Court from imposing attorney discipline, and Morin's misconduct falls within § 37-61-301(2)(c) and (2)(e), MCA.

This Court has original and exclusive jurisdiction regarding the conduct and discipline of persons admitted to practice law in Montana. *In re Potts*, 2007 MT 81, ¶ 31, 336 Mont. 517, 158 P.3d 418 (citing Mont. Const. art. VII, § 2(3) and Title 37, chapter 61, MCA). Although Morin is incorrect that violation of § 37-61-301, MCA, is the only basis this Court may use for discipline, as the ODC points out, Morin nonetheless violated that statute. Section 37-61-301(2)(e), MCA, provides that an attorney may be removed or suspended from practice for being guilty of deceit, malpractice, crime, or misdemeanor involving moral turpitude. In the context of § 37-61-301, MCA, this Court has defined "moral turpitude" as "[e]verything done contrary to justice, honesty, modesty or good morals." *In re Peters*, 73 Mont. 284, 289, 235 P. 772, 774 (1925). In our Order accepting and adopting the COP's Findings of Fact, Conclusions of Law and Recommendation for Discipline,

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we concluded Morin violated M. R. Pro. Cond. 8.4(d) by engaging in conduct prejudicial to the administration of justice. Thus, she also violated § 37-61-301(2)(e), MCA.

In addition to her arguments for rehearing under M. R. App. P. 20, Morin raises a jurisdictional argument: she alleges the ODC exceeded its jurisdiction in investigating her conduct. Morin alleges the ODC undertook its investigation after it received a written complaint accusing her only of uncivil behavior, and uncivil behavior is not grounds for discipline under the Montana Rules of Professional Conduct. Morin incorrectly interprets the ODC's limitations. Under Rule 5B(3) of the Montana rules for Lawyer Disciplinary Enforcement, the ODC is empowered to "[i]nvestigate all information coming to the attention of the [ODC] which, if true, would be grounds for discipline" The ODC is not limited to investigating only information it receives via a written complaint. Therefore, Morin's jurisdictional argument is without merit.

Morin further argues this Court should grant her motion for rehearing because she alleges the discipline imposed violates her constitutional rights. Morin raises no new arguments that she could not have raised in her initial Objections to the COP's Findings of Fact, Conclusions of Law and Recommendation for Discipline. Therefore, these arguments provide no grounds for rehearing pursuant to M. R. App. P. 20.

IT IS THEREFORE ORDERED that the petition and amended petition for rehearing are DENIED.

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The Clerk of this Court is directed to serve a copy of this Order upon Tina L. Morin personal and to all counsel of record.

DATED this 26th day of March, 2019.

/s/ _____
Chief Justice

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Justices