

Circuit Court for Montgomery County
Case No. 487162V

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 2263

September Term, 2022

Gary D. Howes

v.

Stephen T. Howes as Personal Representative
of the Estate of Gary W. Howes

Graeff,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned)

JJ.

Opinion by McDonald, J.
Dissenting Opinion by Shaw, J.

Filed: July 26, 2024

* Under Maryland Rule 1-104, an unreported opinion may not be cited as precedent as a matter of *stare decisis*. It may be cited for its persuasive value if the citation conforms to Rule 1-104(a)(2)(B).

In September 2021, Appellant Gary D. Howes was arrested and held in custody on misdemeanor criminal charges related to the death of his father. Shortly thereafter, Mr. Howes' cousin, the Appellee here, obtained appointment as the personal representative of the father's estate ("PR"), brought this civil action in the Circuit Court for Montgomery County against Mr. Howes to disinherit Mr. Howes, and obtained a court order prohibiting Mr. Howes from accessing funds and property. The PR later obtained an order of default and default judgment from the Circuit Court while Mr. Howes remained in custody in the parallel criminal case and was subject to COVID-19 restrictions including lack of access to computers and a law library. According to Mr. Howes, he was unable to retain counsel in this case.

Mr. Howes belatedly asked the Circuit Court to reconsider the default judgment, first in a *pro se* motion, and later through pro bono counsel, under a court rule that allows revision of a judgment in the case of an "irregularity."¹ In deciding whether an irregularity has occurred, a court is to consider the "totality of the circumstances." In other words, context matters. If the surrounding circumstances cumulatively amount to an irregularity – a question of law – the court is then to decide whether it is equitable to revise the judgment. Here, the Circuit Court denied Mr. Howes' motions, briefly referencing his failure to oppose the order of default within the 30 days allowed for filing a motion to vacate an order of default.²

¹ Maryland Rule 2-535(b).

² Maryland Rule 2-613(d).

As explained in this opinion, the Circuit Court’s decision failed to consider the totality of the circumstances of Mr. Howes’ delayed opposition to the default order and subsequent default judgment. In this case, those circumstances included a series of procedural events; communications among Circuit Court personnel, the PR’s counsel, Mr. Howes criminal counsel, and a senior judge of the Circuit Court designated to conduct court-ordered mediation of the civil case that created confusion as to whether resolution of the civil case was being deferred by an arm of the Circuit Court until after resolution of the criminal case; and Mr. Howes’ incarceration and lack of access to funds and other resources during the COVID-19 pandemic.

Taken together, those circumstances and events resulted in an “irregularity” in the way in which the case was processed – the first step under the rule governing revision of judgments. Accordingly, we reverse the judgment of the Circuit Court and remand the case to that court to assess whether it would be equitable to revise the judgment in this case – the second step under that rule.

I

Background

A. Senior Judges and the Use of Mediation in the Management of Civil Cases

To better understand what happened in this case, it is pertinent to review some basic facts about “senior judges” in the Maryland Judiciary, the use of alternative dispute resolution (“ADR”) such as mediation to resolve civil cases in Maryland courts, and the role of ADR in the case management plan of the Circuit Court for Montgomery County.

Senior Judges

A “senior judge” in the Maryland Judiciary is a former active judge, who retired voluntarily or as a result of attaining the mandatory retirement age,³ and who has been approved by the Supreme Court of Maryland “for recall” to sit as a judge as assigned by the Chief Justice.⁴

Like other judges, senior judges are governed generally by the Maryland Code of Judicial Conduct. Maryland Rule 18-100.2(c). A number of the provisions of that code regulate “extrajudicial” activities of judges.⁵ Among the provisions concerning extrajudicial activities is a rule that generally prohibits judges from acting as a mediator “apart from the judge’s official duties.” Maryland Rule 18-103.9(a). However, an exception to that general rule provides that, apart from a senior judge’s official judicial duties, a senior judge may also act as a mediator in a *private capacity*, subject to various conditions. Maryland Rule 18-103.9(b).⁶

³ Maryland Constitution, Article IV, §3, 18B(b), §41D.

⁴ Maryland Constitution, Article IV, §3A; Maryland Code, Courts & Judicial Proceedings Article, §1-302.

⁵ See Maryland Rules 18-103.1 through 18-103.15.

⁶ The portion of this rule allowing a senior judge to act as a mediator in a private capacity was added to the predecessor of Rule 18-103.9 in 2007. Rules Order (December 4, 2007). The report of the Rules Committee proposing that amendment stated that it was largely based on a similar provision in the Florida Code of Judicial Conduct. 158th Report of the Standing Committee on Rules of Practice and Procedure (September 26, 2007) at p. 6. A few years later, the Florida Supreme Court, citing ethical concerns, amended the Florida rule in various respects, including addition of a provision that prohibited a senior judge from performing private mediation services in any circuit in which the senior judge

The Judicial Ethics Committee has advised that, when acting in a private capacity as a mediator, a retired judge may “indicate his or her judicial status” in describing the retired judge’s availability and qualification to provide ADR services. *See* Opinion 2008-14 of the Maryland Judicial Ethics Committee (May 14, 2008), available at https://www.mdcourts.gov/sites/default/files/import/ethics/pdfs/2008_14.pdf. However, the Committee cautioned that, because judges must avoid even the appearance of impropriety, a senior judge providing such services must “scrupulously adhere to a bright line between” judicial service and private ADR services. For example, use of the judicial title in rendering ADR decisions would be “misleading.” *Id.* Related provisions of the Maryland Code of Judicial Conduct also stress the distinction between the judicial office and actions taken by a judge in a private capacity.⁷

presided as a judge. *In re Amendments to Code of Judicial Conduct*, 141 So.3d 1172 (Fl. 2014). That prohibition was subsequently relaxed to allow such judges to preside in *criminal* cases to mitigate the effects of the COVID-19 pandemic on the Florida judicial branch. *In re Amendments to Code of Judicial Conduct*, 317 So.3d 1090 (2021).

The federal judicial code of conduct does not contain a provision like Maryland Rule 18-103.9(b) that would generally allow retired district or appellate judges who continue to perform judicial duties to act as a mediator in a private capacity. *See* Code of Conduct for United States Judges, Canon 4(A)(4).

⁷ *See, e.g.*, Maryland Rule 18-101.3 (“A judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so”); Maryland Rule 18-103.1(e) (“... When engaging in extrajudicial activities, a judge shall not ... make inappropriate use of court premises, staff, stationery, equipment or other resources”). *See also* Administrative Order on Compensation of Senior Judges, ¶B(2), C(2), D(2) (senior judge may not receive compensation for judicial services if the judge received fees for private services during the same time period on the same day).

Mediation of Civil Cases in Circuit Courts

ADR encompasses various processes for resolving all or part of a pending case through arbitration, mediation, neutral case evaluation, neutral fact-finding, a settlement conference, or some combination of those processes. Maryland Rule 17-102(d). The Maryland Rules permit a circuit court to direct the parties in a civil case to participate in ADR, “but only in accordance with” the rules. Maryland Rules 17-201 *et seq.*

The rules distinguish between circumstances in which an ADR practitioner who conducts the court-ordered ADR in a circuit court charges a fee – referred to in the rules as “fee-for-service ADR” – and circumstances in which no fee is charged – sometimes referred to in the rules, somewhat awkwardly, as a “non-fee-for-service settlement conference.”⁸ *E.g.*, Maryland Rules 17-102(f), 17-202(b). (In contrast to the rules governing court-ordered ADR in a circuit court, no fee may be charged in connection with court-ordered ADR in the District Court or Appellate Court. Maryland Rules 17-305, 17-406.)

Non-fee-for-service settlement conferences may be conducted by an active or senior judge, as part of the judge’s official duties. Maryland Rule 17-206(b). As is evident,

⁸ The distinction between fee-for-service ADR and non-fee-for-service ADR has been the case under the court rules since the adoption of the predecessor to Rule 17-201 in 1998. *See* Jane C. Murphy, *Practice Tips: Objecting to Court Ordered Mediation*, 38 Md. Bar J. 54, 56 (Sept./Oct. 2005). And this was certainly the understanding of how the current rule was to work when it was adopted by the then-Court of Appeals in 2012. *See* 174th Report of the Standing Committee on Rules of Practice and Procedure at pp. 23, 33-34 (July 26, 2012); Rules Order (November 1, 2012).

no separate fee is charged to the litigants for payment to the active or senior judge conducting the settlement conference.

Fee-for-service ADR is conducted by a private ADR practitioner. As noted above, the Maryland Rules allow a senior judge to have an outside private ADR practice as a permitted “extrajudicial” activity.

A circuit court may compel a litigant to participate in ADR, but only if it is of the non-fee-for-service variety. In particular, if a court issues an order referring a case to ADR of the “fee-for-service” variety, a party may “file an objection” to the referral.⁹ If the party does so in a timely manner, the court is to revoke the ADR order. Maryland Rule 17-202(f)(2), (5). Indeed, a court order referring a matter to “fee-for-service” ADR must include notice of the right to object. Maryland Rule 17-202(f)(3).

Mediation under the Case Management Plan in the Circuit Court

The Maryland Rules require each circuit court to have a plan “for the prompt and efficient scheduling and disposition of actions.” Each plan must include a “system of differentiated case management,” often referred to by the acronym “DCM,” that classifies cases according to their complexity and priority. Maryland Rule 16-302.

The action from which this appeal arose was designated as a Track 3 case under the DCM plan of the Circuit Court for Montgomery County. Track 3 encompasses “routine”

⁹ This is an admittedly unusual use of the term “objection.” Generally, when a party “objects” to something in a proceeding, the court has some degree of discretion to grant or deny the objection. In this context, however, the “objection” in effect is simply the party’s indication that it declines to participate in ADR for which it will be charged a fee and the objection effectively functions as a veto over the referral to fee-for-service ADR.

civil cases for which a short trial is estimated. Circuit Court for Montgomery County, Civil Differentiated Case Management Plan (Rev. April 2017) at pp. 9, 37.¹⁰ According to the Circuit Court’s DCM plan, cases assigned to Track 3 are to be ordered to ADR, which “must be concluded 10 days prior to the Settlement Conference/Pretrial Hearing.” *Id.* at 38. The timetable for ADR to be completed pretrial obviously relates to its function in avoiding unnecessary trials. See attached diagram.¹¹

B. Factual Background

This case was resolved in the Circuit Court on a motion for a default judgment. Therefore, the merits of the factual allegations in the PR’s Amended Complaint were not tested in the Circuit Court in an adversary hearing or trial and there are few established facts related to those allegations in the record of this case. Some affidavits were filed in connection with motions, but none of the affiants was subject to cross-examination.¹²

¹⁰ The DCM plan is available on the court’s website at https://www.montgomerycountymd.gov/cct/Resources/Files/Civil_DCM_Manual.pdf.

¹¹ The diagram appears in the Circuit Court’s DCM plan. A citation in that diagram to Rule 17-103 appears to be to the pre-2012 version of that rule, which governed general ADR considerations, rather than the current version of the rule, which deals solely with the role of a mediator.

¹² In opposing Mr. Howes’ *pro se* motion to vacate the order of default and later motion for reconsideration in the Circuit Court, the PR’s counsel asserted that the allegations of the Amended Complaint were deemed admitted by virtue of the order of default and recited them at some length as the factual background of the case. Of course, it is a circular argument to rely on facts “deemed admitted” by virtue of the default when the merits of the default are the matter at issue. In their briefing to us, the PR’s counsel recite the factual allegations of the Amended Complaint at some length without asserting that they are deemed admitted.

Nevertheless, a number of matters appear to be undisputed: that Mr. Howes was the sole surviving child of his elderly father; that he lived with and was a caretaker of his father for some period of time in his father's home; that he had joint financial accounts with his father that contained substantial amounts of money; that, at some point, the father died while in his care; that, at the behest of Mr. Howes' relatives, a police investigation was commenced and the father's body was discovered in the home that he shared with Mr. Howes; that Mr. Howes was charged criminally for neglect of his father and placed in pretrial detention¹³; that, within a few days of the arrest, Mr. Howes' cousin obtained an order from the Orphans' Court appointing the cousin as PR of the father's estate and, as PR, filed this civil action – parallel to the pending criminal proceeding – to freeze the assets that Mr. Howes had jointly owned with his father and to disqualify Mr. Howes as a beneficiary of his father's estate; that, as a result of COVID-19 restrictions at the detention center, Mr. Howes lacked access to a law library or computer, and experienced delays in the receipt of mail and restrictions on visitors.

C. Procedural History

What is perhaps better documented in the record than the underlying facts is the procedural history of the case. A review of the Record Extract alone reveals that at least a dozen judges of the Circuit Court were involved in the case at various points, including at least seven active judges of the Circuit Court and at least five senior judges. All but one of the senior judges acted in a judicial capacity. As indicated below, the one senior judge

¹³ *State v. Gary D. Howes*, Case No. C-15-CR-21-000199 (Circuit Court for Montgomery County).

who was not actually acting in a judicial capacity was referred to as a “Judge” by counsel and court personnel, was assisted by court staff, and used a courthouse address and phone number – in many ways indistinguishably from the judges who acted in a judicial capacity.

Complaint, Scheduling Orders, and Ex Parte TRO

Mr. Howes was arrested on criminal charges relating to the death of his father on September 9, 2021. Shortly thereafter, his cousin, Stephen T. Howes, obtained an order from the Orphans’ Court appointing him as PR of the father’s estate. On September 14, 2021, as PR, he filed the complaint that initiated this case. The five-count complaint alleged abuse of a vulnerable adult, unjust enrichment, and negligence. The PR sought imposition of a constructive trust, as well as declaratory and injunctive relief. In particular, the PR sought a declaration that Mr. Howes was ineligible to inherit from his father’s estate. The PR requested a jury trial.

Upon the filing of the complaint, the Circuit Court assigned the case to Track 3 under its DCM plan. The administrative judge of the court issued several scheduling orders consistent with Track 3 of the plan. One of those orders set June 21, 2022, as the deadline for completion of ADR and scheduled a pretrial hearing for June 30, 2022. No trial date was set.

On the same day that the complaint was filed, the PR obtained from the Circuit Court an *ex parte* temporary restraining order (“TRO”) prohibiting Mr. Howes from withdrawing funds from bank accounts he co-owned with his father and from removing property from the home where he had lived with his father as well as from another

address.¹⁴ The TRO was extended several times to February 9, 2022, by two other judges. No hearing was held on the substance of the allegations of the complaint and related motions. In brief cover letters enclosing the *ex parte* TROs, the PR's counsel advised Mr. Howes to obtain counsel.¹⁵

At one of the hearings that resulted in an extension of the TRO on September 30, 2021, Mr. Howes was transported from the county detention center to the court and was advised by the court on the desirability of obtaining counsel. Mr. Howes stated that he desired to be represented by counsel but that “being incarcerated kind of hamstrings one’s ability to reach out” to potential counsel. Subsequently, on November 24, 2021, Mr. Howes was again transported from the detention center to the courthouse for another hearing on extension of the TRO. Mr. Howes reported that he had made a “lot of attempts” to obtain counsel for the civil case, but had been unsuccessful. He said that the Assistant Public Defender representing him in the parallel criminal case had said she would try to help him find counsel for the civil case. The court again advised Mr. Howes that it would

¹⁴ There is no indication in the court order or otherwise in the record that Mr. Howes – or anyone on his behalf – was present at the hearing on the PR's TRO motion on September 14. According to the certificate of service for the motion, it was apparently hand-delivered to the address of Mr. Howes' residence after he had been arrested. An order issued a week and a half later extending the TRO explicitly states that Mr. Howes was *not* transported to the court for the hearing on that extension. It appears that the initial hearings on the TRO motion were conducted *ex parte*, which is permissible under the rules in certain circumstances. See Maryland Rule 15-504. Writs were issued to transport Mr. Howes to the courthouse for some of the later hearings in the case.

¹⁵ The PR's counsel reiterated that advice in a subsequent letter seeking Mr. Howes' consent to the disposition of his father's body. At the time he received all of those letters, Mr. Howes was in custody at the detention center and his assets had been frozen pursuant to the TRO.

be helpful to have an attorney in the civil case, particularly in light of the pendency of the parallel criminal case.

The Circuit Court Orders Mediation

Consistent with the DCM plan related to Track 3 cases, on January 7, 2022, the administrative judge issued an order directing the parties to participate in mediation. That order designated a Senior Judge of the Circuit Court as the mediator. The order used a judicial honorific in identifying the mediator, and provided a courthouse address for the mediator and a “home” telephone number (which was in fact the courthouse telephone number of the Senior Judges Coordinator, as indicated in her email signature block). The order directed the parties to pay the mediator \$200 per hour on a pro rata basis. Consistent with the earlier scheduling order, the mediation order stated that the mediation was to be concluded by June 21, 2022 – approximately 10 days before the scheduled date of the pretrial hearing in the case. Anyone familiar with the Circuit Court DCM plan – or, if not, who had simply read the scheduling order – would have understood that the ADR ordered by the court was to be completed in advance of any trial.

Because the parties were directed to pay a fee to the mediator, the court-ordered mediation fell into the category of fee-for-service ADR.¹⁶ Thus, although the mediation

¹⁶ The second page of the order indicated that a party could file an objection to the ADR referral, but it did not indicate what the consequences of such an objection would be. In particular, the order did not indicate that an objection to the fee-for-service mediation specified in the order would automatically prevail pursuant to Rule 17-202(f)(5).

order did not say so explicitly, the Senior Judge would be acting in a private capacity as mediator.¹⁷

Preliminary Injunction

A month later, on February 9, 2022, the Circuit Court held a hearing on the PR's motion for a preliminary injunction. Mr. Howes was transported from the detention center to the courthouse for the hearing. He remained unrepresented.

An order issued by the Circuit Court judge that day recited that the parties had agreed to entry of a preliminary injunction "until trial" and continued the freeze on Mr. Howes' bank accounts initially ordered in the TRO. The order recited that the parties had agreed that \$75,000 would be transferred from the frozen accounts to the estate for estate expenses and that Mr. Howes waived the right to seek recoupment of those funds. The same order indicated that Mr. Howes could file a motion for a court order to "invade" the frozen accounts "upon good cause." There is no transcript of that hearing in the record that would indicate what, if anything, Mr. Howes was told about the "good cause" that would support a motion to give him access to his funds.¹⁸ Mr. Howes, who was in pretrial detention in the criminal case and unrepresented in the civil case at that time, apparently did not file such a motion.

¹⁷ Although the Senior Judge was conducting fee-for-service ADR in a private capacity and not as a judge, the Senior Judges Coordinator and counsel addressed him or referred to him by his judicial title throughout the proceedings below, as well as in the briefs before us. We will simply refer to the mediator as "the Senior Judge."

¹⁸ Nor does the record indicate the nature of what must have been an oral motion by the PR at the hearing to obtain payment from those accounts, as no written motion appears in the record of this case.

Amended Complaint

A week later, on February 16, 2022, the PR filed an Amended Complaint that elaborated on some of the factual allegations of the original complaint and revised and reorganized the causes of action asserted in its five counts. Pertinent to this appeal, Count I of the Amended Complaint asserted that Mr. Howes had “feloniously and intentionally caused the death of his father” and asked the court to declare that Mr. Howes was disqualified, pursuant to Maryland Code, Estates & Trusts Article (“ET”), §11-112,¹⁹ from any inheritance from the estate of his father. That statute provides for a stay of the civil case brought under it when there is a parallel criminal case against the same person that involves the same charges. ET §11-112(e)(2).²⁰

Mr. Howes remained incarcerated in pretrial detention related to the criminal proceeding against him.

¹⁹ That statute provides, in pertinent part, that “a person who feloniously and intentionally kills, conspires to kill, or procures the killing of a decedent” is generally disqualified from benefitting from the death of the decedent. ET §11-112(a), (b).

²⁰ That portion of the statute states:

On request of a party in a civil proceeding in which a person is alleged to be a disqualified person, the civil proceeding shall be stayed pending a final judgment in a case in which the alleged disqualified person is criminally charged with feloniously and intentionally killing, conspiring to kill, or procuring the killing of the decedent.

ET §11-112(e)(2).

Senior Judge Suggests that Civil Mediation Be Coordinated with the Criminal Case

On March 11, 2022, the Circuit Court issued an order requiring Mr. Howes to be transported to the courthouse on March 25 for a mediation session “before [the] Senior Judge” and to be returned to the detention center “upon completion of the proceedings in this Court.”²¹ On March 23, two days before the scheduled mediation session, the PR’s counsel sent an email to the Assistant Public Defender representing Mr. Howes in the criminal case to inform her that the mediation session was to take place at the courthouse “before [the] Judge.” Later that same day, the Senior Judges Coordinator of the Circuit Court also sent an email to the Assistant Public Defender, similarly informing her of the mediation session “before” the Senior Judge (whom she identified by a judicial honorific) and seeking input from the Assistant Public Defender. The email stated:

This civil case is connected to the criminal case that is currently pending in the Circuit Court. The Defendant will be transported on Friday for the purposes of ADR. Please let *chambers* know how you would like to proceed in this matter.

(emphasis added). The Senior Judges Coordinator sent the email from a Circuit Court email address and indicated an address and phone number at the courthouse.

The Assistant Public Defender was away on vacation on the day the emails were sent to her. On her behalf, the District Public Defender responded that his office had not been aware of the mediation and that it was not representing Mr. Howes in the civil case. The District Public Defender stated that he believed that Mr. Howes should not be

²¹ In a brief cover letter serving the motion that resulted in that order, the PR’s counsel reiterated that Mr. Howes should obtain counsel.

participating in a mediation session in the civil case while the parallel criminal case was unresolved.

The Senior Judges Coordinator forwarded the District Public Defender's email to the Senior Judge. The Senior Judge, in turn, sent an email the next day – the day before the scheduled mediation session – from his Circuit Court email address to the Public Defender's office and counsel for the PR. The Senior Judge suggested that the mediation session be postponed, appropriately noting:

While the [Public Defender] does not represent [Mr. Howes] in civil matters, since the subject matter of the civil suit relates to the crimes for which they are representing him, they need to advise him of the potential implications of participating in the mediation for the criminal case.

The Senior Judge indicated that he would contact the Circuit Court administrative judge about the situation and suggested that the Public Defender's Office do so as well. When the PR's counsel asked for confirmation that the mediation session would be postponed, the Senior Judge responded affirmatively and indicated that he would “excuse” counsel from the scheduled session and contact them to pick a new date for the mediation.

The next day (March 25), the Senior Judges Coordinator emailed the PR's counsel and the Public Defender's Office “on behalf of” of the Senior Judge (again using a judicial honorific) in an effort to reschedule the mediation session. That same day, the PR's counsel informed the Senior Judges Coordinator that they were available for a mediation session on May 13.

Meanwhile, the PR Asks the Circuit Court to Issue an Order of Default

Also on March 25, virtually simultaneously with the discussion of a new date for the mediation session to coordinate with the schedule in the criminal case, the PR's counsel filed a Request for Order of Default on the ground that Mr. Howes had not answered the Amended Complaint that the PR had filed a little more than a month earlier. Although the PR's counsel had copied the Assistant Public Defender on the emails discussing postponement of the mediation session, they apparently did not send a copy of the Request for Order of Default to her.²²

Continued Discussions Concerning a New Mediation Date

Over the next month, numerous emails were exchanged by the Senior Judges Coordinator, the Senior Judge, the PR's counsel, and the Public Defender's Office concerning the postponed mediation session. Throughout, the Senior Judges Coordinator and the Senior Judge communicated through Circuit Court email addresses. Also, the Senior Judges Coordinator and the PR's counsel addressed the mediator as "Judge" and referred to him on occasion as "the Court." In none of the emails did the PR's counsel mention that they had filed a motion to default Mr. Howes at the same time that they had agreed to postponement of the mediation session to coordinate with the timeline of the criminal case.

²² The certificate of service indicates that it was mailed on the day it was filed to Mr. Howes at the detention center – a fact that Mr. Howes does not dispute. There is no indication that a copy of that filing was sent to the Public Defender's Office. Nor is there any indication in the record that either the Assistant Public Defender or the Senior Judge was informed of the filing.

Having confirmed a May 13 date for the postponed mediation session with the PR's counsel, the Senior Judges Coordinator emailed the Assistant Public Defender on April 13, asking "[w]ould you let the court know your position on this matter going to mediation on May 13, 2022?" In response, the Assistant Public Defender reiterated that her office did not represent Mr. Howes in the civil case and that Mr. Howes should not be transported to the courthouse for the proposed mediation date.

The Senior Judge Suggests that Mediation Await Resolution of the Criminal Case

The Senior Judge responded to the Assistant Public Defender's email in a lengthy email, again appropriately acknowledging the difficulty of proceeding with the civil case while the criminal charges were pending. He wrote, in pertinent part:

...Your client is a party in a civil case which substantially overlaps with the allegations made in the criminal case in which you represent him. He has been Ordered ... to appear for a court ordered mediation in the civil case.

When preparing for the mediation on the original date, I realized he was unrepresented in the civil matter and there was a significant overlap with the criminal case which had not yet been resolved. I asked [the PR's] counsel to notify you of the related civil matter and determine what your position was. ... I'm sure [the PR's counsel] stand ready to provide you with whatever additional information you might need to advise your client about the effect of any decision he might make in the civil case on the criminal case.

Since your client has been ordered to appear for a hearing in the civil case, ... he'll have to attend. Once there he can decline to participate and invoke his 5th Amendment protections if that is what he wants to do. Of course, the decision may have significant financial consequences for him.

As I recall the [PR is] asking the court to determine that despite the fact he is a substantial beneficiary of his father's estate, he should not be entitled to inherit anything because he slayed his father. If the [PR is]

successful, Mr. Howes will lose hundreds of thousands of dollars, if not more, that otherwise he would inherit.

Without discussing the underlying facts or admitting any liability for his father's death, it would seem to me he could possibly negotiate some outcome that might preserve some part of his inheritance.

Alternatively, he could possibly ask the court to stay the civil matter until the criminal case was concluded. Obviously, if he is acquitted of his father's murder, his position in the civil case would presumably be strengthened. While the [PR] may oppose such a stay and there is no certainty the court would grant such a request, it might. You may or may not feel you can advise him on some or all of these issues. But unless somebody takes action on his behalf, or he seeks relief on his own, and the court orders otherwise, the mediation will go forward and he'll have to appear on May 13 at 1:30. If he does appear, he can then take whatever action he wishes.

(formatted for legibility).²³

In an email responding to the mediator, whom she addressed as "Judge," the Assistant Public Defender corrected his mis-impression that Mr. Howes was charged with murdering his father, noting that the criminal charges consisted of three misdemeanor counts and stated that, while the father's body had been found at his house, there was "no evidence of foul play."

The Assistant Public Defender also indicated that she agreed with the Senior Judge that it would be best to "continu[e] the civil matter until after the criminal charges are

²³ The Senior Judge's suggestion seems quite appropriate. *See, e.g.*, Maryland Rules 18-102.2(b), 18-202.2(b) (providing that judges and judicial appointees "may make reasonable efforts, consistent with the Maryland rules and other law, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard"); *see also* Maryland Rules 18-102.6(a), 18-202.6(a) (same). It also accords with the policy stated in ET §11-112(e)(2) pertaining to a stay of a civil case pending the outcome of parallel criminal proceedings. See footnote 20 above.

resolved.” She said that she would consult with Mr. Howes and “file an appropriate Motion well in advance of the May 13th Court date” – *i.e.*, the new date for the mediation session.

The Senior Judge Proposes, and the PR’s Counsel Agrees, to Continue the Mediation to a Date After the Scheduled Trial Date of the Criminal Case

In an email dated April 20, the PR’s counsel told the Senior Judge that “[w]e have no objection to continuing the mediation to a later date,” which seemingly obviated any need for a motion to extend the date of the mediation session beyond May 13. The PR’s counsel also stated that he did not believe that the civil case would be stayed. In response to a follow-up questions from the Senior Judge concerning the sequence of trial dates, the PR’s counsel informed the Senior Judge that trial of the parallel criminal case was scheduled for August 2022 and that there was no trial date yet for the civil case.²⁴ (The PR’s counsel did not inform the Senior Judge that the PR’s counsel had filed a motion for order of default several weeks earlier, which had been granted on April 19 by the administrative judge of the Circuit Court.)

In response, and consistent with his initial suggestion that resolution of the civil case await the conclusion of the parallel criminal proceedings, the Senior Judge proposed re-setting the mediation session for September 2022, which was after the scheduled trial date of the criminal case and before what the Senior Judge projected to be a likely trial date for the civil case sometime in 2023. The PR’s counsel responded simply “We agree.” The

²⁴ At the time the Amended Complaint was filed, jury trials in civil cases were suspended due to COVID-19 restrictions. *See* Interim Administrative Order of December 27, 2021 Restricting Statewide Judiciary Operations in Light of the Omicron Variant of the COVID-19 Emergency (December 27, 2021).

Senior Judge apparently remained unaware that a default order had been entered. There is no indication in the record that the PR's counsel disclosed that information to him.

The next day, April 21, the Senior Judges Coordinator emailed counsel proposing three possible dates during October 2022 for the mediation session. The record does not indicate what, if any, responses she received to that inquiry.

As noted earlier, the Senior Judge's suggestion that mediation (and presumably resolution) of the civil case be stayed pending the trial of the criminal case – and the Assistant Public Defender's belief that such a procedure would be followed – was consistent with a provision of the statute on which Count I of the Amended Complaint was based.

Meanwhile, the PR Moves for, and Obtains, a Default Judgment

On May 26, 2022, the PR's counsel filed a "Motion for Entry of Default Judgment (Without need for hearing)." While a copy of the motion was mailed to Mr. Howes at the detention center address, the PR's counsel did not inform either the Senior Judge or the Assistant Public Defender.

The Circuit Court granted the motion on June 6, 2022. As requested by the PR's counsel, the June 6 default judgment order declared that Mr. Howes "has been found in violation of [Maryland law] by feloniously causing the death of [his father] by intentional neglect" and that Mr. Howes was disqualified from benefiting from the estate of his father. This declaration was apparently based solely on the untested allegations of Count I of the PR's Amended Complaint. The criminal charges against Mr. Howes related to the death

of his father, which were misdemeanor charges, had not yet been adjudicated.²⁵ After the default judgment was entered on Count I of the Amended Complaint, the PR voluntarily dismissed the remaining four counts of that complaint.

When the Assistant Public Defender later learned of the default judgment from Mr. Howes, she wrote the Senior Judge stating: “I am confused as to why a judgment of default was entered when we clearly were working on the civil case being after the criminal charges ... [Mr.] Howes would like to have his day in Court and was not transported or given a chance to have a lawyer respond to his cousin’s accusations.” The record does not indicate what response she received to that email, other than an automated response that the Senior Judge was out of the country.

Mr. Howes Files Pro Se Motion to Vacate Default Judgment

On July 8, 2022, Mr. Howes filed a *pro se* motion to vacate the default judgment. He noted that he had been incarcerated since he had been arrested, which preceded the filing of the complaint in the civil case.

On July 25, 2022, a judge of the Circuit Court denied the motion to vacate the default judgment. The court did so without holding a hearing on the motion or stating any reasoning for the denial.

²⁵ The basis for the finding in the June 6 order was apparently the assertion by PR’s counsel in their motion for a default judgment that the allegations in the Amended Complaint should be taken as admitted. Not only had Mr. Howes not been convicted of feloniously causing the death of his father, but it also appears from a review of MDEC that he had not even been charged with such an offense.

Pro Bono Counsel Files Motion for Reconsideration and Includes Declaration by Mr. Howes Summarizing Certain Discussions with his Criminal Defense Counsel

Pro bono counsel entered an appearance on behalf of Mr. Howes in the civil case on September 20, 2022. Shortly thereafter, that counsel filed a motion for reconsideration, pursuant to Maryland Rule 2-535(b), of the denial of the motion to vacate the default judgment. In that motion pro bono counsel argued that the communications of the Senior Judge and the PR's counsel concerning postponement of the mediation session until after the criminal trial amounted to an irregularity under the rule. Attached to the motion were copies of the emails recounted above, and a copy of a letter to Mr. Howes in February 2022 from an attorney declining to represent him in the civil case and requiring a \$10,000 retainer to represent him in the criminal case.

Also attached to the motion was a written declaration by Mr. Howes, under penalties of perjury, that he had understood, based on discussions with the Assistant Public Defender assigned to his criminal case, that the civil case would be stayed until resolution of the parallel criminal charges against him and that a mediation session would be "forthcoming." In that declaration, he stated that, based on those discussions with his criminal counsel, he did not understand that he was required to respond to the default order, but would have done so if he had understood otherwise.

In the PR's opposition to this motion, the PR's counsel contended that the absence of an affidavit from the Assistant Public Defender corroborating Mr. Howes' statements indicated that she did not interpret her communications with the Senior Judge to mean that the civil case would be stayed. Thus, the PR's position appeared to be that corroborating

testimony from the Assistant Public Defender would be relevant and admissible and that its absence was fatal to Mr. Howes' motion.

The Circuit Court Conducts a Contested Hearing on the Motion for Reconsideration

A different senior judge of the Circuit Court was assigned, as part of that judge's judicial duties, to decide the motion for reconsideration. That judge held a hearing on the motion on January 25, 2023.

For unexplained reasons, Mr. Howes was not transported from the detention center to the courthouse on the date of the hearing. After some preliminary discussion on whether to postpone the hearing until a time when Mr. Howes could be transported to the courthouse, the court and counsel elected to proceed in his absence.

At the hearing, Mr. Howes' pro bono counsel relied on the documentary exhibits submitted with the motion. In addition, counsel called the Assistant Public Defender to the stand to relate her discussions with Mr. Howes about the court order for ADR in the civil case, the scheduled mediation session, and its postponement to a time after the scheduled trial of the criminal charges. Counsel proffered that the Assistant Public Defender's testimony would cover her discussions with Mr. Howes about obtaining counsel for the civil case, Mr. Howes' desire to participate in that case, and his good faith belief that he did not have to respond to the order of default because the civil case had been postponed pending resolution of the criminal charges.

The PR Objects Based on Mr. Howes' Attorney-Client Privilege

The PR's counsel objected on the basis that the proposed testimony of the Assistant Public Defender might be protected by Mr. Howes' attorney-client privilege. The PR's

counsel did not explain why he, or his client, had standing to raise attorney-client privilege on behalf of the opposing party to exclude evidence proffered by that party's counsel. Nevertheless, the hearing judge concluded that the proposed testimony was covered by attorney-client privilege and forbade Mr. Howes' counsel from eliciting testimony from the Assistant Public Defender about her discussions with Mr. Howes concerning the civil case. The hearing judge did permit her to testify about her own personal understanding of the emails she exchanged with the Senior Judge. Mr. Howes' pro bono counsel suggested that the hearing could be continued if it was necessary to have Mr. Howes present to explicitly waive a privilege with respect to the Assistant Public Defender's testimony, but the hearing judge did not take up that suggestion.

Limited Testimony by the Assistant Public Defender

In her testimony, the Assistant Public Defender reviewed the email correspondence among the PR's counsel, the Senior Judge, the Senior Judges Coordinator and herself concerning the postponement of the mediation session. She testified that it was her understanding that the civil case, or at least the postponed mediation session to attempt to resolve that case, would not proceed until after the resolution of the parallel criminal proceedings. She testified that she was "shocked" when she learned of the default order because the PR's counsel had never mentioned it to her in their various communications. She testified that she had spent some months attempting to find a lawyer to represent Mr. Howes in the civil case either on a pro bono basis or at least without a requirement of an advance payment.

The Circuit Court Denies the Motion for Reconsideration

At the conclusion of the hearing, the hearing judge rendered a brief oral ruling and denied the motion for reconsideration of the default judgment. Referring to the two judges who had issued orders denying the earlier motions, he stated that “[t]his Court does not find that there was any irregularity in the way the Judges performed in this case.” He did not specifically address pro bono counsel’s argument that the communications of the Senior Judge appeared to be communications from the court as “one body” and that those communications, together with those of the PR’s counsel, in the totality of the circumstances, created an irregularity in the prior proceedings. Instead, focusing on the mechanics of the default rule, the hearing judge reasoned that the requirement in Rule 2-613 that a defendant in a civil case file a motion to vacate an order of default within 30 days was “not complicated” and that the circuit court had “followed [the rule on default judgments] to a T.” The judge said he had “no issue” with the testimony of the Assistant Public Defender and the efforts of her office and the Senior Judge, and acknowledged the Senior Judge’s concern about Mr. Howes’ Fifth Amendment rights. The hearing judge did not otherwise elaborate on the reasoning underlying his ruling.²⁶

D. Epilogue

The parallel criminal case was later resolved in November 2023. According to court records, Mr. Howes entered into an agreement with the State whereby that case was

²⁶ During the Assistant Public Defender’s testimony, the hearing judge had placed some emphasis upon the fact that “[t]here was nothing before [the Senior] Judge ... in his

resolved with a not guilty plea and agreed statement of facts with respect to two counts. Mr. Howes was found guilty of two misdemeanors: abuse or neglect of a vulnerable adult in the second degree, in violation of Maryland Code, Criminal Law Article, §3-605(b)(2) and improper disposal of a body, in violation of Maryland Code, Health-General Article, §5-514. He received a suspended five-year sentence for the first offense and a sentence of one year, with all but nine months suspended followed by three years probation, for the second offense. *See State v. Howes*, C-15-CR-21-0199.

II

Discussion

Mr. Howes raises two issues in this appeal: (1) whether, during the hearing on Mr. Howes' motion for reconsideration of the default judgment, the Circuit Court erred in excluding testimony of the Assistant Public Defender when the PR's counsel objected on the basis of *Mr. Howes'* attorney-client privilege; and (2) whether the Circuit Court erred in denying the motion for reconsideration of the default judgment.²⁷

judicial capacity.” In response, the PR's counsel confirmed that the Senior Judge “was the court designated private mediator.”

²⁷ In his initial brief to us, Mr. Howes expressed the two issues in the following language and order of presentation:

1. Did the Circuit Court err in finding that no irregularity occurred when a *pro se* civil litigant, incarcerated during a global pandemic, relied in good faith and to his detriment on his criminal counsel's mistaken understanding of communications received from a Circuit Judge?

2. Did the Circuit Court err in restricting testimony from Appellant's criminal counsel about Appellant's state of mind regarding the Default Order?

A. *Standards of Appellate Review*

An appellate court reviews a circuit court's decision based on a legal issue *de novo* – that is, without any deference to the decision of the circuit court. *Ehrlich v. Perez*, 394 Md. 691, 708 (2002). With respect to a matter entrusted to the discretion of a circuit court, such as a balancing of the parties' respective interests, an appellate court applies an abuse of discretion standard. *Id.* The failure of a circuit court to apply appropriate legal standards is an abuse of discretion. *Id.*

B. *Whether the Court Erred in Limiting the Assistant Public Defender's Testimony*

Mr. Howes argues that the Circuit Court erred legally in determining that the communications between himself and the Assistant Public Defender concerning his civil case – in which she did not, and could not, act as his attorney – were privileged. As a result, the Circuit Court restricted the Assistant Public Defender's testimony concerning her discussions with him – testimony that, he asserts, would have corroborated his understanding of the status of the civil proceeding and that his counsel in the civil case sought to introduce on his behalf. He further argues that, even if those discussions were privileged, the Circuit Court erred in failing to recognize Mr. Howes' waiver of the privilege through his civil counsel and instead sustaining an objection on the ground of privilege by the PR's counsel, who represented the party adverse to Mr. Howes.

The PR asserts that any communications between Mr. Howes and the Assistant Public Defender were “presumptively privileged” and that Mr. Howes could only have waived that privilege by appearing in person at the hearing. The PR further argues that, even if the Circuit Court erred, the error was harmless.

The PR's primary argument overlooks a significant fact: in connection with the motion at issue in the hearing, Mr. Howes had already submitted a sworn declaration summarizing his understanding based on discussions with the Assistant Public Defender – a fact noted by Mr. Howes' pro bono counsel at the hearing. In that circumstance, one might have expected that the PR's counsel would agree that Mr. Howes had already waived the privilege on that topic and would argue for an opportunity to cross-examine him, as well as the Assistant Public Defender, concerning that topic. *See* L. McLain, *Maryland Evidence, State & Federal* (Sept 2023 Update), §503.15; *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 365-66 (2011), *aff'd*, 429 Md. 387 (2012) (“[W]hen a client, through his testimony, puts at issue a specific communication with his attorney, the attorney’s testimony becomes admissible because the client has waived his privilege.”).

In any event, it was not the PR's role to raise Mr. Howes' attorney-client privilege to effectively suppress the evidence his pro bono civil counsel sought to present at the hearing on Mr. Howes' behalf. *See, e.g.*, 1 McCormick on Evidence (8th ed. & July 2022 Update) §92 (noting that one of the “earmarks” of the privilege is that it cannot be asserted by the adverse party); J.F. Murphy & E.C. Murphy, *Maryland Evidence Handbook* (5th ed. & 2023 Cum. Supp.) §904[B]. In our view, the Circuit Court should not have sustained the PR's objection based on Mr. Howes' attorney-client privilege.

Nor was this error “harmless.” It may be true that this erroneous evidentiary ruling was not, in and of itself alone, an irregularity that required overturning the default judgment under Rule 2-535(b). But each piece of evidence that supports a particular proposition need not satisfy the evidentiary standard for the ultimate issue. For example, each piece of

evidence submitted at trial to support a particular verdict – by a preponderance of the evidence or beyond a reasonable doubt – need not meet the standard of proof for the verdict itself. Similarly, each piece of evidence demonstrating an irregularity under Rule 2-535(b) need not itself constitute that irregularity.

Here, the testimony that Mr. Howes’ counsel sought to elicit from the Assistant Public Defender was part of the “totality of the circumstances” that a court must consider under the rule to decide whether an irregularity had occurred and, if the court concludes that an irregularity had occurred, whether it would be equitable to revise the judgment. In excluding that testimony, the hearing judge failed to allow and consider evidence about how the statements of the Senior Judge and the PR’s counsel concerning a stay of the civil case were conveyed to and understood by Mr. Howes. As noted earlier, in the PR’s written opposition to the motion for reconsideration, the PR’s counsel had argued that the Assistant Public Defender’s testimony on this topic was not only relevant, but necessary, to support Mr. Howes’s motion.

Mr. Howes did not have the opportunity to fully present his case on the motion for reconsideration of the default judgment. The error was not harmless.

C. Whether the Court Erred in Denying the Motion for Reconsideration

The other issue raised by Mr. Howes in this appeal concerns the disposition of his motion for reconsideration of the default judgment entered against him. To understand the analysis of this issue in context, it is helpful to review the rule relating to default judgments and the rule pertaining to reconsideration of a judgment.

1. Default Judgments in Civil Cases under Maryland Rule 2-613

If a defendant in a civil case in a circuit court fails to respond to a complaint within the time provided by the Maryland Rules, the plaintiff may file a written request for an order of default and, if the plaintiff does so, the court “shall enter an order of default.” Maryland Rule 2-613(b). Notice of the order must be sent to the defendant, who then has 30 days from entry of the order to move to vacate the order, stating the reasons for the failure to respond to the complaint. Rule 2-613(c)-(d). If the court finds that there is “a substantial and sufficient basis for an actual controversy as to the merits of the action” and that “it is equitable to excuse the failure to plead,” the court is to vacate the default order. Rule 2-613(e). If no timely motion to vacate is filed, the court may enter a judgment by default. Rule 2-613(f).²⁸

“Maryland courts have repeatedly held that a trial court’s discretion to vacate a default judgment must be exercised liberally, lest technicality triumph over justice.” *Holly Hall Publications, Inc. v. County Banking & Trust Co.*, 147 Md. App. 251, 262 (2002), quoting *Royal Ins. Co. of America v. Miles & Stockbridge. P.C.*, 133 F.Supp.2d 747 (D. Md. 2001) (internal quotation marks omitted).

²⁸ Before issuing a judgment by default, the court must also be satisfied that it has jurisdiction and that notice of the default order was mailed to the defendant in accordance with the rule. The rule authorizes the court to conduct other proceedings that may be necessary to issue a judgment. Rule 2-613(f). None of those provisions is at issue in this case.

2. Revisory Power of the Court under Maryland Rule 2-535

If a circuit court enters a judgment by default, the defendant may seek reconsideration of that judgment by invoking the revisory power of the court under Maryland Rule 2-535 and Maryland Code, Courts & Judicial Proceedings Article (“CJ”), §6-408. If the defendant files a motion for reconsideration within 30 days of entry of judgment, the court may amend the judgment or take a number of other actions affecting the judgment. Rules 2-535(a); 2-534. If the motion for reconsideration is filed after the 30-day period, a court may revise the judgment in case of “fraud, mistake, or irregularity.” Rule 2-535(b); CJ §6-408.²⁹

3. What May Be an Irregularity

“Irregularity,” for purposes of Rule 2-535(b), has been defined as “the doing or not doing of that, in the conduct of a suit at law, which ... ought or ought not to be done.” *Velasquez v. Fuentes*, ___ Md. App. ___, ___, 2024 WL 3174352 at *11 (June 26, 2024); *Early v. Early*, 338 Md. 639, 652 (1995); *Weitz v. McKenzie*, 273 Md. 628, 631 (1975); *J.T. Masonry Co. v. Oxford Constr. Serv., Inc.*, 74 Md. App. 598, 606 (1988), *aff’d*, 314 Md. 498 (1989); *see also* Black’s Law Dictionary (12th ed.) (defining “irregularity” as an act or practice that varies from normal conduct of an action”). Generally, an irregularity relates to process or procedure. *Early*, 388 Md. at 652; *Weitz*, 273 Md. at 631. An

²⁹ The language of the statute also explicitly extends the revisory power after the expiration of the 30-day period to instances involving a “failure of an employee of the court or of the clerk’s office to perform a duty required by statute or rule.” CJ §6-408. This Court has construed the term “irregularity” in Rule 2-535(b) to encompass such instances. *See Estime v. King*, 196 Md. App. 296, 307 (2010).

irregularity has been distinguished from “an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged.” *Weitz*, 273 Md. at 631.

One example of an irregularity is when notice of a default judgment is not sent to a defendant. *Maryland Lumber Co. v. Savoy Construc. Co.*, 286 Md. 98, 101 (1979). Also, an “extrinsic substantial irregularity” may arise from a “false promise of compromise” keeping a party away from court with the result “that there has never been a real contest in the trial or hearing of the case.” *Pellegrino v. Maloof*, 56 Md. App. 338, 347-49 (1983). In other cases, courts have found irregularities when an attorney was given erroneous advice by a clerk’s office as to how to change his address in cases pending in that jurisdiction (*J.T. Masonry*, 74 Md. App. at 611-12), when a clerk failed to follow court rules and, as a result, mailed a notice to the wrong address for a party (*Gruss v. Gruss*, 123 Md. App. 311, 320-21 (1998)), and when a clerk sent a court order to an old address for a *pro se* party even though the clerk should have been on notice of the party’s new address (*Estime v. King*, 196 Md. App. 296, 308 (2010)).

What these various examples of irregularities have in common is that they relate to court process and procedure and turn on whether the judgment that resulted from the irregularity – like a judgment based on fraud or mistake – is fundamentally unfair for reasons divorced from the merits of any issue in the case – as when a party is bound by a judgment of which it had no notice because the court’s own agents failed to follow the rules of the court. The fact that an irregularity occurred does not imply intentional wrongdoing or fault on the part of a court or a court employee or agent. For example, this

Court found an irregularity when a clerk's office gave counsel inconsistent advice about how to file a change of address, despite the fact that the clerk who later mailed a notice that did not reach that counsel "followed normal procedure." *J.T. Masonry*, 74 Md. App. at 611-12.

Whether particular circumstances amount to an "irregularity" for purposes of Rule 2-535(b) is a question of law. *Facey v. Facey*, 249 Md. App. 584, 601 (2021); *Peay v. Barnett*, 236 Md. App. 306, 315-16 (2018); *Wells v. Wells*, 168 Md. App. 382, 394 (2006). As noted earlier, an appellate court reviews such a determination without deference to the decision of the circuit court. *Facey, supra*. In determining whether an irregularity occurred, a court must consider the "totality of the circumstances." *J.T. Masonry Co.*, 74 Md. App. at 611.

If a circuit court determines that the particular circumstances amount to an irregularity, it then must consider whether it is equitable to revise the judgment. In making that determination, the court should consider whether the party disadvantaged by the irregularity exercised ordinary diligence and good faith in seeking revision of the judgment. *J.T. Masonry Co.*, 314 Md. at 506. The circuit court's decision at that second step is a matter of judicial discretion that an appellate court reviews under an abuse of discretion standard. *Id.* at 507; *Facey, supra*.

4. Whether There Was an Irregularity in the Circumstances of this Case

Mr. Howes argues that the circumstances resulting in the entry of the default judgment against him amounted to an irregularity that would allow the court to reconsider

that judgment. As indicated above, the first step a court must take is to assess the totality of the circumstances. Here those circumstances include:

- The Circuit Court ordered the parties to engage in mediation in this civil case pursuant to court rules and the DCM plan that contemplated that mediation ordinarily *precedes* a disposition of the case on the merits.

- The Circuit Court order directed that the mediation would be conducted by a designated senior judge of the Circuit Court. Because the mediation order directed the parties to pay the mediator at an hourly rate, the Senior Judge would be acting in a *private*, not a judicial, capacity. However, the order itself did not communicate that distinction. Instead, the mediation order conveyed a different message by referring to the mediator with a judicial honorific and providing a courthouse address and telephone number for him. The Senior Judge used a Circuit Court email address in his communications with the parties, was staffed by court personnel, and was referred to as “Judge” by all. Together, this created the appearance that the mediator was acting in a judicial capacity, or at least as an agent of the Circuit Court.

- The Senior Judge suggested, very properly, that mediation of the civil case, and perforce resolution of that case, be postponed until after the scheduled trial of the parallel criminal case, so that Mr. Howes could participate fully in the civil case without potentially compromising his position in the criminal case. The Senior Judge’s suggestion was consistent with the key statute on which the PR’s Amended Complaint was based – which allows for a stay of a civil proceeding under the statute when there is a parallel criminal proceeding. While the Senior Judge directed the Public Defender’s Office to ask for an extension of the mediation date, he said that he would also contact the administrative judge and expressed confidence that the administrative judge would extend the date for the mediation.

- During the course of this case up to entry of the default judgment against him, Mr. Howes was unrepresented, was prohibited by court order from accessing his funds without making a showing of “good cause” to the Circuit Court, and lacked access to the Internet or a law library due to COVID-19 restrictions at the detention center.

- In attempting to implement the suggested postponement, the Senior Judge essentially conscripted the Assistant Public Defender representing Mr. Howes in his criminal case to communicate with the detained and otherwise unrepresented Mr. Howes and to provide a sort of informal limited representation³⁰ for purposes of re-scheduling the mediation in an appropriate sequence with the trials of the criminal and civil cases.

- In obtaining the assistance of the Assistant Public Defender in the re-scheduling of the mediation session and sequencing of the two cases, the Senior Judge expressed the belief that the PR's counsel would provide information about the civil case to the Assistant Public Defender for that purpose – a belief that was only partially fulfilled.

- The PR's counsel told the Senior Judge and the Assistant Public Defender that they agreed to the proposed postponement of the mediation until after the scheduled trial of the criminal case. The PR's counsel further noted that no trial date had yet been set for the civil case. However, the PR's counsel apparently did not inform either the Senior Judge or the Assistant Public Defender that the PR had filed a request for a default of Mr. Howes in the civil case. Nor did PR's counsel disclose that a Circuit Court judge had granted that request shortly before the PR's counsel had told the Senior Judge that they agreed to postpone the mediation session until after the scheduled criminal trial.

- After the default judgment was entered against Mr. Howes, pro bono counsel entered the civil case on his behalf and filed a motion for reconsideration of the default judgment. In support of that motion, Mr. Howes submitted a sworn declaration that he had understood that the civil case had been postponed and that there was no need to respond to the default motion.

- At the hearing on the motion for reconsideration, to corroborate Mr. Howes' declaration, pro bono counsel sought to elicit testimony from the Assistant Public Defender about what she had told Mr. Howes about her discussions with the Senior Judge and the PR's counsel concerning postponement of the civil case. Counsel for the PR – the party adverse to Mr. Howes – objected to the Assistant Public Defender's proffered testimony

³⁰ Cf. Maryland Rules 2-131(b) and 19-301.2 concerning limited appearances by attorneys.

on the ground that such testimony would violate Mr. Howes' attorney-client privilege. The hearing judge sustained that objection. The hearing judge thus excluded key evidence that should have been considered by any court attempting to reach a fair and informed resolution of the motion for reconsideration.

In this case, the PR does not appear to dispute that the Assistant Public Defender believed, on the basis of the communications among the Senior Judge, herself, and the PR's counsel, that the civil case was being stayed until the conclusion of the criminal proceedings – or that she had communicated that belief to Mr. Howes while he was in pretrial detention. Rather, the PR essentially argues that none of that matters because the Senior Judge was not a “judge” with respect to the civil case – but just a private mediator – and the Assistant Public Defender was not an attorney for Mr. Howes in the civil case, but only his attorney in the parallel criminal case. In the PR's view, the incarcerated, unrepresented Mr. Howes was on his own in distinguishing the statements and actions taken by the Senior Judge from those of the dozen other judges, both active and senior, who had a role in the case.³¹

The PR argues that it also did not matter whether Mr. Howes understood, as a result of the agreement brokered by the Senior Judge with the PR's counsel to postpone the

³¹ The PR notes that Mr. Howes was advised by the PR's counsel and certain hearing judges to obtain counsel for the civil case and suggests that Mr. Howes should have filed a *pro se* motion supported by “good cause” for un-freezing funds from his bank accounts for that purpose. As noted earlier, the Assistant Public Defender testified to some extent about her own efforts to find pro bono counsel for Mr. Howes, although her testimony about her discussions with Mr. Howes on that subject was constrained by the hearing judge's ruling – based on the objection of the PR's counsel – that prohibited her from testifying about discussions with Mr. Howes.

mediation session, that the civil case was on hold until conclusion of the criminal proceedings. All that matters, the PR asserts, is whether the Circuit Court was responsible for that understanding. As to that question, the PR argues that Mr. Howes' understanding was not attributable to the Circuit Court and therefore does not support a determination that the judgment was based on an irregularity. Accordingly, the PR asserts that it was within the Circuit Court's discretion to deny the motion for reconsideration and effectively affirm the default judgment.

In this case, it does matter how Mr. Howes could reasonably understand the Circuit Court's and the Senior Judge's communications, as relayed to him by the Assistant Public Defender. What Mr. Howes did not know, and lacked the means of knowing, was that the Circuit Court deemed the mediation by the Senior Judge to be a privately-conducted proceeding distinct from the litigation of the civil case, such that the civil case could proceed to a conclusion despite the postponement of the mediation that had been ordered by the Circuit Court. The irregularity is that the mediator here, as the collective result of a number of circumstances, had every appearance of being a judicial officer involved in the civil case.³²

The Circuit Court's ADR order indicated that the Senior Judge was to be paid by the parties for this mediation. A person familiar with the Code of Judicial Conduct and the ADR rules would glean that the Senior Judge was actually acting in a private capacity.

³² This is not to attribute any wrongdoing to the Senior Judge in this regard. As noted earlier, his suggestions to counsel concerning the sequencing of the civil and criminal cases appear to have been made with proper intentions and were consistent with the policy underlying the statute on which Count I of the Amended Complaint was based.

However, a lay person, and perhaps many lawyers, could be forgiven for thinking otherwise, given all of the circumstances. The mediator was in fact a longtime active judge of the Circuit Court and subsequently a senior judge, and was referred to by all counsel and his administrative assistant in all communications as “Judge.” The assistant who assisted in scheduling the mediation was in fact an employee of the Montgomery County Circuit Court – the “Senior Judges Coordinator” (although the mediator was acting in a private capacity and not as a judge). Both the Senior Judge and the assistant used the courthouse mailing address, phone numbers, and their official Circuit Court email addresses, not a private email address, and the parties were instructed to submit forms to that address. Moreover, as noted above, as part of their official judicial duties, senior judges are authorized to conduct “non-fee-for-service” ADR as part of their judicial duties, and many do so in presiding over a “settlement court” for civil cases.

It would have taken a fairly sophisticated observer to understand that the Senior Judge, when he postponed the mediation session on the understanding that the civil case would come after the criminal proceeding, was not acting in a judicial capacity while another senior judge, similarly addressed by counsel and court personnel, who heard and denied the motion for reconsideration was acting in a judicial capacity. That, however, is beside the point. The circumstances of this case were that the mediator had every appearance of being a judge, or at least an agent, of the Circuit Court. “Parties are entitled to understand clearly whether the person before whom they are appearing is a judge.” *State v. Wiegmann*, 350 Md. 585, 599-600 & n.5 (1998) (vacating conviction for resisting arrest and noting that, under the particular circumstances of this case, even experienced deputy

sheriffs apparently believed that a magistrate in a family law case had the legal authority of a judge).

Those circumstances distinguish this case from *Banegura v. Taylor*, 312 Md. 609 (1988), which the PR urges us to find dispositive of the issue of irregularity in this case. In that case, Banegura entered an Alford plea to a charge of assault; he received a suspended sentence of imprisonment and was placed on probation. The victim in the criminal case then brought a civil action against Banegura for damages. When no answer was filed on behalf of Banegura, an order of default was entered. Banegura's attorney filed a belated motion to vacate the default, which the circuit court denied. On the advice of his attorney, Banegura did not participate in the subsequent trial to set the amount of damages, which resulted in a judgment of \$4 million in compensatory and punitive damages against him. On appeal, the Court of Appeals (now known as the Supreme Court of Maryland) held that the circuit court had acted within its discretion in declining to vacate the default order and in declining to grant a motion to revise the final judgment under Rule 2-535(b).

In seeking to overturn the default, Banegura and his attorney offered contradictory explanations for the failure to answer the complaint or file a timely motion to vacate the default order: Banegura indicated that he had relied on the attorney while the attorney asserted that he had not yet been retained at the time those filings were due.³³ With respect to whether there was an irregularity that would trigger Rule 2-535(b), the Court held that

³³ In a footnote, the Court of Appeals noted that correspondence between the two appeared to support Banegura's version. 312 Md. at 620 n.4. The Court also noted that a subsequent malpractice action by Banegura against the attorney resulted in a judgment of \$7 million in compensatory and punitive damages. *Id.* at 617.

the different versions provided by Banegura and his attorney as to why neither an answer nor a timely motion had been filed did not constitute an irregularity for purposes of the rule. In *Banegura*, there was no indication or even allegation that anyone associated with the circuit court or the opposing party played any role in that confusion. *Banegura* therefore has little application to this case.

In denying the motion for reconsideration in this case, the hearing judge never discussed the predicate legal question of whether the totality of the circumstances that gave rise to the default amounted to an irregularity under Rule 2-535(b). Rather, the court denied the motion for reconsideration under that rule solely by looking to the 30-day period for filing a motion to vacate an order of default under Rule 2-613 and basing its denial of the motion on the expiration of that period, as though the question was whether to continue a basketball game beyond the sound of the buzzer. That approach would also appear to generally render a default judgment immune from revision under Rule 2-535(b). And so, the court never proceeded to the second step – the step entrusted to its discretion – of determining whether it was equitable to revise the judgment and grant the motion for reconsideration. The failure to do so was a legal error and, accordingly, an abuse of the court's discretion.

III

Conclusion

Maryland courts aspire not simply to process cases efficiently but, first of all, to do so fairly and ultimately to provide equal justice for all.³⁴ To that end, Maryland case law reflects a preference for deciding cases on the merits and not on the basis of technicalities. It may well be that Mr. Howes should lose this case on the merits. The issues at stake have not been joined; no factfinder has had an opportunity to make the pertinent decisions.

The merits of the case, however, are a separate question from whether there was an irregularity in the disposition of this case by a default judgment. The record establishes that the cumulative effect of the communications and other circumstances relating to the sequencing of the parallel civil and criminal proceedings that resulted in the default judgment amounted to an irregularity for purposes of Rules 2-535(b). Accordingly, we shall remand this case for the Circuit Court to consider the second step in the application of that rule – whether it would be equitable to revise the default judgment and allow Mr. Howes to contest the allegations of the Amended Complaint on the merits.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY
REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.**

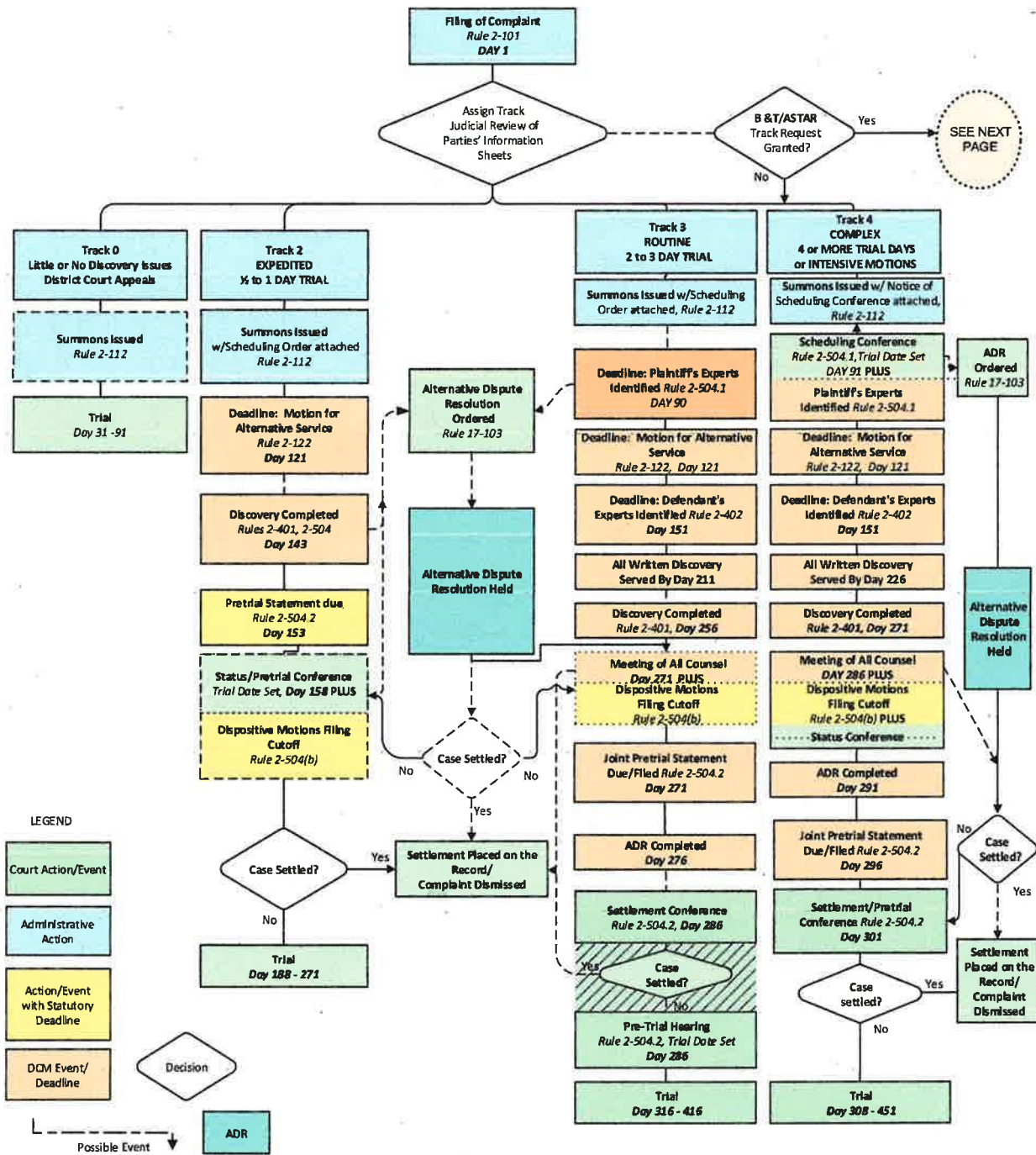
³⁴ See tag line at top of www.mdcourts.gov and mission statement at <https://www.mdcourts.gov/about/mission>. (“*Fair, Effective, & Efficient Justice For All*”) (emphasis added).

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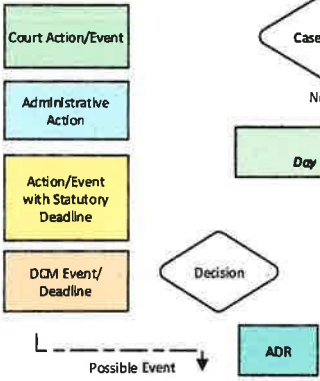
Attachment

**Circuit Court for Montgomery County,
Civil Differentiated Case Management Plan
(Rev. April 2017), p. 5**

Civil Case Overview Tracks 0-4



LEGEND



Circuit Court for Montgomery County
Case No. 487162V

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 2263

September Term, 2022

Gary D. Howes

v.

Stephen T. Howes as Personal Representative
of the Estate of Gary W. Howes

Graeff,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned)

JJ.

Dissenting Opinion by Shaw, J.

Filed: July 26, 2024

* Under Maryland Rule 1-104, an unreported opinion may not be cited as precedent as a matter of *stare decisis*. It may be cited for its persuasive value if the citation conforms to Rule 1-104(a)(2)(B).

-Unreported Opinion-

I respectfully dissent from the majority's holding that the "cumulative effect" of the communications and other circumstances relating to the sequencing of the civil and criminal proceedings resulted in an irregularity under Rule 2-535(b). I do not agree that the mediator "had every appearance of being a judicial officer involved in the civil case." In support, I offer the following additional background from the record in this case.

On September 14, 2021, Appellee, Stephen T. Howes, cousin of Appellant, filed a complaint, and an amended complaint in the Circuit Court for Montgomery County to prevent Appellant from collecting his inheritance or otherwise benefitting from the estate of Gary W. Howes, based on Appellant's involvement in his father's death. Appellee sought a declaratory judgment, injunction and temporary restraining order ("TRO"). Appellee's complaint also included a survival action alleging negligence and intentional infliction of emotional distress.

The court issued a temporary restraining order on September 15, that prevented Appellant from (1) withdrawing any money from any of the decedent's bank accounts and (2) from removing any property or financial documents from the decedent's residence without permission from the court.

On September 24, 2021, the court extended the TRO to September 30 when a hearing would be held. Prior to the September 30 hearing, Appellee's counsel mailed Appellant a letter reminding him to retain counsel before the hearing. The letter, and all correspondence and notices, thereafter, were mailed to the Montgomery County Correctional Facility ("MCCF"), where Appellant was housed because of criminal charges lodged against him in connection with his father's death.

-Unreported Opinion-

At the hearing on September 30, Appellant appeared without counsel. The court asked Appellant about his lack of representation and advised him that there were:

criminal charges pending that are in some way related to these proceedings, any statements [he] might make in conjunction with defending the claims that are being made today, might tend to incriminate [him] or provide evidence to the State that could be used to prosecute [him] in connection with the reason [he is] being held in jail. . . . So that is one reason why an attorney might be helpful to [him] in connection with this proceeding.

Appellant informed the court that he was not electing to proceed without counsel and that “being incarcerated kind of hamstrings one’s ability to reach out” to counsel. He then agreed to an extension of the order. The order stated:

WHEREAS, on September 30, 2021, the Defendant, Gary D. Howes, appeared at the proceeding unrepresented and without a lawyer. At the hearing, the Defendant requested that this matter be continued so that the Defendant could obtain legal counsel for the hearing. In furtherance thereof, the Defendant consented to an extension of the Temporary Restraining Order entered on September 24, 2021, to the new date of November 24, 2021.

At the November 24, 2021, hearing, Appellant again appeared without counsel. He informed the court that his criminal trial counsel, “would try to obtain a lawyer for [him] through the civil attorney.” Appellant and Appellee agreed to an order that granted Appellant a sixty-day extension to obtain counsel, scheduled a new hearing date for February 9, 2022, and extended the temporary restraining order. The court prefaced its ruling stating that:

I’m going to reiterate that next time we’re here, if you don’t have a lawyer, I mean, I guess in all likelihood, we shouldn’t keep extending this. . . . Sixty days would be plenty of time, in my judgment, because by then, you would have had 90 days, three months, to try to find an attorney. . . . I think the guidance of an attorney would be helpful because, you know, you’re facing criminal charges and a defense to this, if it involved having you testify, might implicate your constitutional right not to - - well, to avoid self-incrimination.

-Unreported Opinion-

. . . So, I just want to reiterate that as being another important reason why you should continue your search.

At the February 9 hearing, Appellant, again, appeared without counsel and the court determined that no further continuance would be granted. Both parties agreed to the entry of a preliminary injunction with a condition that Appellant would be allowed to “invade the identified accounts by Court Order and upon showing of good cause.” He did not, thereafter, seek permission to access funds to obtain an attorney or for any other reason.

Shortly after the initial filing of the complaint in September 2021, the circuit court, as a part of its process, issued a scheduling order that outlined the deadlines for filing an answer, discovery, dispositive motions, and set a pretrial hearing date. The order also stated that the parties would be required to participate in mediation. On January 7, 2022, the case was scheduled for mediation for a maximum of three hours before a senior judge. The mediation was to be concluded by June 21, 2022. The parties were directed to pay for the mediation or file an objection. No objections were filed.

The senior judge coordinator for the circuit court emailed Appellee’s counsel and Appellant’s criminal trial counsel, an assistant public defender, and her supervisor, on March 23, to notify them of the mediation date. The coordinator shared that Appellant would be transported for mediation and requested that the attorneys “let chambers know how [they] would like to proceed in this matter.” That same day, the supervisor for Appellant’s public defender responded to the coordinator’s email stating:

Neither attorney representing Mr. Howes is available this Friday. Additionally, until we were contacted today by the attorneys for the estate we did not know about the mediation session. Due to this, we have not discussed this with Mr. Howes, including the fact that he should not be participating in this session while his criminal charges are unresolved.

Please do not transport Mr. Howes to participate in this mediation.

Finally, our attorneys are not representing Mr. Howes in this civil matter.

(Emphasis in original).

In response to the supervisor's email, the senior judge, in his capacity as mediator, emailed Appellee's counsel and Appellant's criminal trial counsel on March 24, stating:

Although it's court ordered so I hesitate to speak for Judge [], I cannot see anyway it goes forward until the public defender has a chance to advise their client, so I will excuse you and your clients. I'll check with you before we pick a new date.

The following day, the senior judge coordinator sent an email to criminal counsel and counsel for Appellee stating that the mediation would be rescheduled. Another email was sent by the senior judge coordinator to criminal counsel on April 13, asking for her "position on this matter going to mediation" given that criminal counsel was counsel for Appellant in the criminal matter. Criminal counsel replied that Appellant "should not be participating in this session while his criminal charges are unresolved," to "not transport [Appellant] to participate in this mediation," and that "our attorneys are not representing [Appellant] in this civil matter"

On April 14, 2022, the senior judge, as mediator, replied to criminal counsel's email, stating:

it does not seem to me the answer is as simple as you suggest. Your client is a party in a civil case which substantially overlaps with the allegations made in the criminal case in which you represent him. He has been Ordered by J., Bonifant to appear for a court ordered mediation in the civil case.

When preparing for the mediation on the original date, I realized he was unrepresented in the civil matter and there was a significant overlap with the criminal case which had not yet been resolved. **I asked Plaintiff's counsel to notify you of the related civil matter and determine what your position was.** It was last minute and you were out of town. We continued the mediation until your return so you could decide what to advise your client once the matter had been brought to your attention.

I'm sure Mr. Hyatt and or Mr. Maloney stand ready t[fo] provide you with whatever additional information you might need to advise your client about the effect of any decision he might make in the civil case on the criminal case. Since your client has been ordered to appear for a hearing in the civil case, I do not believe you can simply tell the Sheriffs to ignore Judge []'s order and not transport him. Unless J. [] rescinds the order fo[r] mediation, he'll have to attend. Once there he can decline to participate and invoke his 5th Amendment protections if that is what he wants to do. Of course, the decision may have significant financial consequences for him.

As I recall the Plaintiffs are asking the court to determine that despite the fact he is a substantial beneficiary of his father's estate, he should not be entitled to inherit anything because he slayed his father. If the Plaintiffs are successful, Mr. Howes will lose hundreds of thousands of dollars, if not more, that otherwise he would inherit. Without discussing the underlying facts or admitting any liability for his father's death, it would seem to me he could possibly negotiate some outcome that might preserve some part of his inheritance.

Alternatively, he could possibly ask the court to stay the civil matter until the criminal case was concluded. Obviously, if he is acquitted of his father's murder, his position in the civil case would presumably be strengthened.

While the Plaintiffs may oppose such a stay and there is no certainty the court would grant such a request, it might. You may or may not feel you can advise him on some or all of these issues. But unless somebody takes action on his behalf, or he seeks relief on his own, and the court orders otherwise, the mediation will go forward and he'll have to appear on May 13 at 1:30. If he does appear, he can then take whatever action he wishes.

(Emphasis added).

Criminal trial counsel responded, in part, that “continuing the civil matter until after the criminal charges are resolved, would be in my client’s best interest.” She then assured

the senior judge that she would “speak to Mr. Howes and then file the appropriate Motion well in advance of the May 13th [c]ourt date.” No motion was filed.

During this timeframe, and concurrent with Appellee’s participation in the mediation discussions, on February 16, 2022, Appellee filed an amended complaint. The amended complaint was mailed via certified mail to Appellant at the Montgomery County Detention Center on February 16, 2022. On March 25, 2022, Appellee filed a motion requesting an Order of Default based on Appellant’s failure to answer or respond to either the original complaint submitted in September 2021, or the amended complaint submitted on February 12, 2022. The court issued a notice of the Order of Default on April 19. The notice provided that Appellant had thirty days to respond and warned that a failure to respond could result in a default judgment. According to hired counsel for Appellant, “based on his conversations with [criminal trial counsel], he understood he did not have to respond to the default order.” Therefore, Appellant did not file answer, contest the Order of Default, or otherwise take action.

On May 26, Appellee filed a Motion for a Default Judgment. The court granted Appellee’s motion on June 6, 2022, and entered a Default Judgment on Count One of the amended complaint. The Judgment declared Appellant a “disqualified person under [§]11-112(a) of the Estate and Trust Article . . .” and that he was, therefore, “disqualified from taking or receiving any property owned by Gary W. Howes, or otherwise benefiting from the death of Gary W. Howes” Appellee later filed a voluntary dismissal of counts two, three, four and five of the amended complaint.

Acting *pro se*, Appellant filed a motion to vacate the Default Judgment on July 8, 2022, explaining that he and his “criminal counsel are currently working to find a civil attorney to represent him in this matter.” Appellee opposed the motion, citing the numerous postponements Appellant had been granted for the purpose of obtaining counsel, the order allowing Appellant to access funds that could be used to obtain counsel, the email thread between the mediator and criminal trial counsel, and the letter Appellee’s counsel sent Appellant advising Appellant of the importance of obtaining counsel. Appellant’s Motion to Vacate was denied.

On September 30, 2022, Appellant, then represented by counsel, filed a Motion for Reconsideration. It stated, in part:

Prior to the entry of final judgment, ***it was my understanding through my former criminal counsel*** that this case would be stayed until after the resolution of my parallel criminal charges against me.

Prior to the entry of default judgment, ***it was communicated to me by my former criminal counsel***, [], that a court ordered mediation in this matter was still forthcoming

Given the foregoing, ***I, acting in good faith, did not understand that I needed to respond to the default order*** entered in this case in order to continue to defend my case. If I had understood that, I would have responded to the default order.

(Emphasis added).

At a hearing held on January 25, 2023, Appellant’s counsel argued that an irregularity had occurred. Counsel contended that “communications between Judge[] and [criminal trial counsel] left [Mr. Howes] with documented assurances from the court that the present matter should and would be mediated after the resolution of his pending criminal charges[,]” and that “Mr. Howes could not have appreciated the significance of

[the] Judge []'s Order of Default dated April 19th, when afterward, the court, through [the] Judge [], continued to communicate about the case as if it were ongoing.” Appellant’s counsel proffered that Appellant’s criminal counsel would testify about her discussions with Appellant regarding the processes and expectation that the civil case would be stayed pending resolution of the criminal charges. The court did not allow the proffered testimony and ultimately denied Appellant’s Motion for Reconsideration, ruling that there was no irregularity:

This [c]ourt does not find that there was any irregularity in the way I read the Judges performed in this case. Neither Judge [] when he issued the motion for default and subsequently signed that motion. Now, on the argument about the defendant not understanding, the Court doesn’t find anything complicated about you must respond in 30 days. That’s not complicated at all. The defendant conceded himself that he did not respond.

The Majority has concluded that, as a matter of law, an irregularity occurred that was fundamentally unfair to Appellant because the court’s agents failed to follow the rules of the court. The Majority states that “[t]he irregularity is that the mediator here, as the collective result of a number of communications, had every appearance of being a judicial officer involved in the civil case” such that it was reasonable for criminal counsel and Appellant, to believe that the “civil case was stayed until the conclusion of the criminal case.” The Majority holds that Appellant, based on what was relayed to him by his criminal counsel, could not have understood “that the [c]ircuit [c]ourt deemed the mediation by the Senior Judge to be a privately-conducted proceeding distinct from the litigation of the civil case, such that the civil case could proceed to a conclusion despite the postponement of the mediation.” Given the record, I must disagree.

Under Maryland Rule 2-535, the court may exercise revisory power in the case of fraud, mistake or irregularity. In determining whether an irregularity exists, the court looks at the totality of the circumstances. “If the judgment under attack was entered in conformity with the practice and procedures commonly used by the court that entered it,” no irregularity exists and there is no justifiable reason to exercise revisionary power. *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (quoting *De Arriz v. Klinger-De Arriz*, 179 Md. App. 458, 469 (2008)). The negligence or mistakes of agents or counsel of the complaining party are not sufficient to justify a court in striking out an enrolled judgment. *Woody v. Woody*, 256 Md. 440, 453 (1970). Each party has a duty to stay informed. *See Das v. Das*, 133 Md. App. 1, 26 (2000).

An irregularity may exist where the court “fail[s] to send notice of a default, to send notice of an order dismissing an action, [or] to mail a notice to the proper address” *Thacker v. Hale*, 146 Md. App. 203, 220 (2002). It may also include a court clerk’s failure “to perform a duty required by statute or a Rule.” *Estime v. King*, 196 Md. App. 296, 307 (2010) (quoting *J.T. Masonry Co., Inc. v. Oxford Const. Services, Inc.*, 74 Md. App. 598, 607 (1988)) (finding no irregularity in process or procedure where the court accepted counsel’s Motion to Strike Appearance leaving the appellant without representation close to the appellant’s deadline to file an Answer without granting a hearing because the duty to stay informed and file pleadings in a timely fashion ultimately lay with the appellant, and not with his attorney, incumbent or newly retained); *see Banegura v. Taylor*, 312 Md. 609, 621 (1988) (The court refused to find an irregularity when the appellant’s personal attorney failed to file responsive pleadings because he had not been retained for that

particular action.). However, an irregularity is not present when the mistakes of the party and their communications with counsel result in a failure to follow the advisement of the court and directions for recourse provided by our Maryland Rules. *See Woody*, 256 Md. at 453.

Looking directly to the totality of the circumstances here, including the process and procedures followed by the circuit court, the scheduling order, the ADR order, the disposition of motions and hearings by several circuit court judges, the use of the court's email address and the use of the honorific "Judge," there was no irregularity as contemplated by Rule 2-535.

Following the filing of the initial complaint, court hearings were scheduled where Appellant had the opportunity to object, present evidence and otherwise directly participate. Several hearings were scheduled where the court discussed with Appellant its concerns about him appearing unrepresented. The court cautioned Appellant that it would not continue to delay the proceedings after he had not obtained counsel at the third scheduled court hearing. The court also provided that Appellant could "file a motion with the [c]ourt to invade the identified accounts by Court Order and upon a showing of good cause." Because the case was in the preliminary stage, several circuit court judges ruled on various aspects of the case. The case proceeded on a normal track and was not specially assigned to any judge. This process is a common way of handling such cases in most circuit courts throughout Maryland as it allows for the efficient disposition of cases. It, therefore, is not an irregularity.

The Majority states that the Differentiated Case Management Plan contemplates that mediation will proceed prior to the disposition of a case on the merits. However, clearly, the plan also anticipates that the defendant will file an answer or otherwise, participate in the initial proceedings before the court. Here, Appellant did not.

The court's scheduling order provided that a mediation date was to be determined and conducted by a senior judge acting as mediator. The senior judge and senior judge coordinator then attempted over a period of three months, to schedule the mediation. There were no court hearings regarding these attempts and the senior judge and court staff had no involvement in the civil case itself and did not communicate that they did. In his emails, the senior judge indicated that he could not speak for the judge who ordered the mediation, and in another email, he stated that Appellant could possibly ask the court for a stay. He, in no way, indicated that such a motion could be sent to him or that he had the authority to rule on such matters.

According to the Majority, the senior judge's use of his judicial email to correspond with criminal trial counsel was, as part of the "totality of the circumstances," an "irregularity." In my view, the use of the court email address was simply to facilitate scheduling and there is no indication in the record that either counsel thought that the senior judge mediator was acting in his official capacity as a circuit court judge. Neither expressed an understanding that the mediation was an official action of the court, especially since the parties were required to pay for the mediation. There is also no indication from the record that the criminal trial attorney was "conscripted" or drafted into provided representation. As the Majority points out, criminal trial counsel performed "informal

limited representation. . . .” The record indicates that while she and her supervisor continuously stated that they did not represent Appellant in the civil matter, criminal trial counsel did offer her assistance. In criminal counsel’s email response to the senior judge mediator on April 14, 2022, she stated:

That being said, it seems to me that continuing the civil matter until after the criminal charges are resolved, would be in my client’s best interest. **We will speak to Mr. Howes and then file the appropriate Motion** well in advance of the May 13th Court date.

(Emphasis added). Further, according to Appellant, criminal counsel informed him that a postponement of mediation was equivalent to staying the civil case, despite the senior judge mediator explaining to criminal counsel that someone needed to “take[] action on his behalf . . . otherwise the mediation will go forward.”

The issue, here, is unlike the one we were presented with in *J.T. Masonry Co., Inc. v. Oxford Const. Services Inc.*, 74 Md. App. 598, 611-12 (1988), where a clerk of the court gave inaccurate advice and information to counsel, and counsel subsequently relied on that advice in advising their client. Here, the information given by the mediator and coordinator were accurate i.e., the mediation would not be stayed without further action from Appellant and that Appellant needed to be advised of his rights with respect to the criminal matter. Here, it was counsel, not the court or an agent of the court, who provided inaccurate information to Appellant. *See J.T. Masonry*, 74 Md. App. at 611-12 (“The clerk’s advice to counsel was inconsistent not only with counsel’s usual responsibility to change his or her address in each open file, but with the court’s notice practice [T]he clerk’s action

in sending the notice to counsel's last address, in light of counsel's justified reliance on the clerk's advice, was an irregularity.)

The mediator judge wrote:

Alternatively, *[Appellant] could possibly ask the court to stay the civil matter* until the criminal case was concluded.

[...]

While the [Appellee] may oppose such a stay and *there is no certainty the court would grant such a request*, it might. You may or may not feel you can advise him on some or all of these issues. *But unless somebody takes action on his behalf, or he seeks relief on his own, and the court orders otherwise, the mediation will go forward* and he'll have to appear on May 13 at 1:30.

(Emphasis added).

In his Motion for Reconsideration following the Default Judgment, Appellant did not claim that he did not receive communication about the mediation scheduling, the complaints, the Order of Default or the Default Judgment. He did not argue that he did not claim that the court's postponements and offer to allow him to invade the funds within his father's estate upon a showing of "good cause" were unclear or insufficient. Rather, he stated that the written communication between the senior judge and his criminal counsel left him with "documented assurances" from the court that the civil matter should and would be mediated after the resolution of his pending criminal charges. No documented assurances are a part of the record.

In the appeal, Appellant does not argue that he did not receive the notice of the Order of Default, the Default Judgment or any other noticed sent by the court. Appellant asserts that he "was led to believe by [criminal counsel] and [the mediator] that this case was being sequenced after his criminal case, notwithstanding the pending default order." In his brief,

he argues that “[a]lthough [criminal counsel] was mistaken, she should never have been placed in the role of intermediary in the civil case—she and her supervisor had repeatedly informed the judge and his staff that she did not represent Appellant in the civil case.” Appellant contends that his incarcerated *pro se* status, coupled with his criminal trial attorney acting as an intermediary between the court and Appellant in the civil matter, contributed to his “reasonable understanding that this case would proceed after the resolution of his pending criminal charges.” Appellant argues that because of this “game of ‘telephone’” he “was forced to rely on secondhand information” that “left him under a mistaken impression” concerning his obligations in the civil suit.

At oral argument, Appellant’s counsel argued that an irregularity existed because Appellant “was left off of critical communications involving his case” and only his public defender was involved. Appellant argued that mediators, as agents of the court, may not leave *pro se* litigants off communications involving their own cases. He argued that it was the judge’s communications, through email that caused him to default. The facts, however, do not support this position. Again, it is clear that the senior judge informed criminal counsel that a motion needed to be filed to stay the matter and she offered to file the motion. No such motion was filed.

In sum, the totality of the circumstances here did not constitute an irregularity, and further, Appellant did not exercise ordinary due diligence in this case. The case was initiated in September 2021, and as of June 2022, the date the default judgment was granted, Appellant had not filed any responses or motions. *J.T. Masonry Co. Inc., v. Oxford Const. Services Inc.*, 314 Md. 498, 506 (1989) (quoting *Platt v. Platt*, 302 Md. 9, 13 (1984))

-Unreported Opinion-

(The court must find “that person seeking the revision acts with ordinary diligence and in good faith upon a meritorious cause of action or defense.”). Appellant received several continuances to obtain counsel and did not retain an attorney. He further did not respond to any of Appellee’s filings, including the Complaint, Amended Complaint, or the Order of Default. It is Appellant’s inactions that resulted in the default judgment. In sum, this was not a case where the court allowed a “technicality [to] triumph over justice.” *Holly Hall Publications, Inc. v. County Banking & Trust Co.*, 147 Md. App. 251, 262 (2022).

While I agree that the court erred in finding that the attorney client privilege prevented Appellant’s attorney from presenting communications between herself and Appellant at the motions hearing, because there were no irregularities, the Court was not required to proceed to the second step, a discretionary one, and determine whether it was equitable to revise the judgment.