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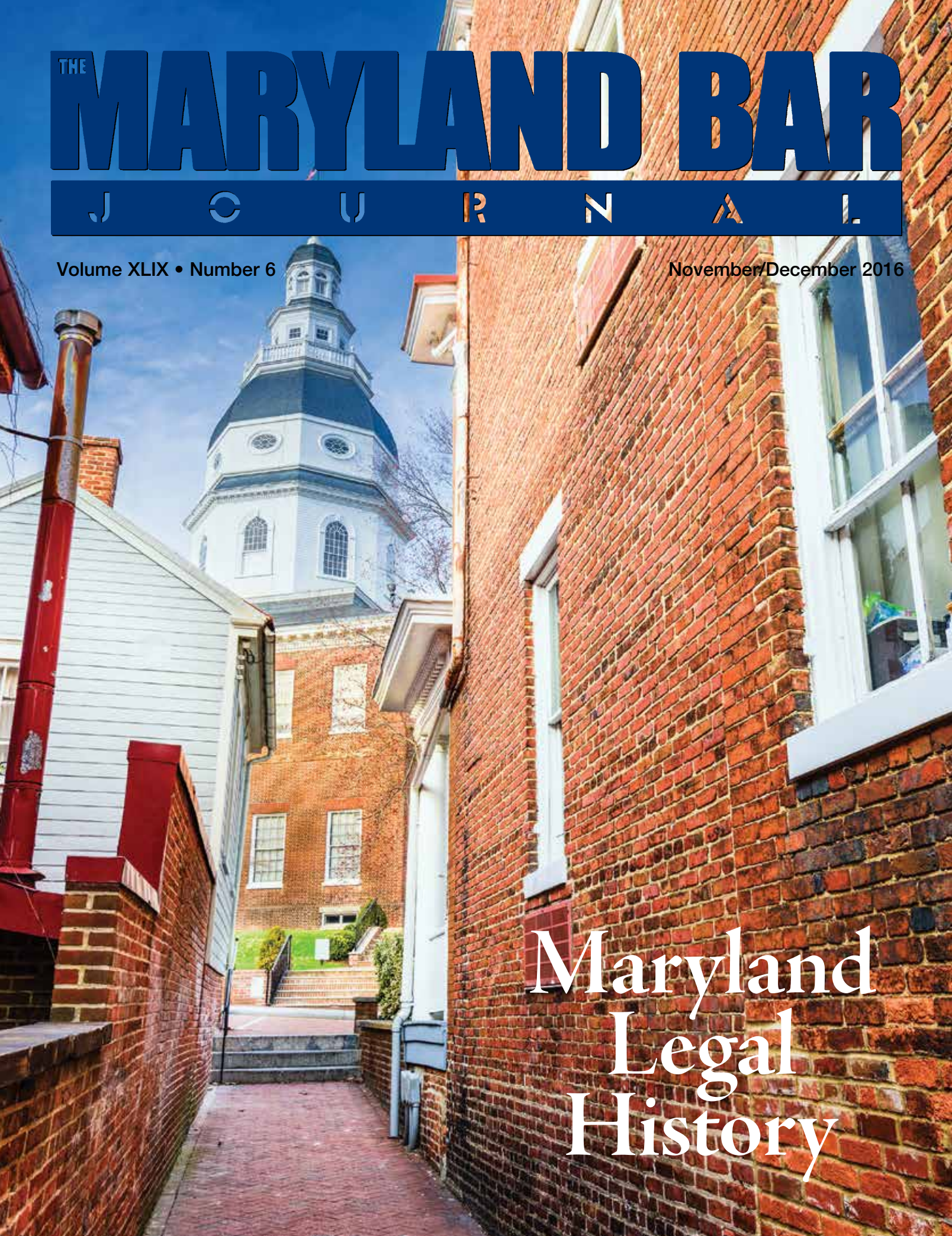

Maryland Legal History

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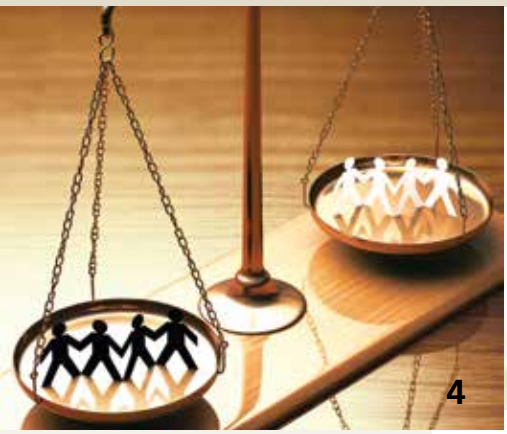

"Maryland Legal History"

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Features

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Psychologist As Expert Witness: A Legal Retrospective

By Kenneth A. Vogel

Mental Disease. Is it a disease? If it is a disease, who can diagnose it? Who can treat the disease? Diseases are ailments of the body. Diseases are treated by physicians. Or, so said the Maryland Courts.

Forty years ago, Maryland psychologists had a problem. Members of their profession were excluded as experts from Maryland courtrooms. Yes, the Maryland Psychologists Act provided for them to be licensed as psychologists. Yes, they explored their patients' symptoms and diagnosed their ailments. Yes, they treated patients' psychological illnesses. But the State courts concluded that they were not qualified as experts to testify on subjects within their own field of study.

The very nature of our vocabulary – "mental illness, mental disease, sick in the head" – all speak to a medical model, not a psychological or a behavioral model. A medical model requires the healer to be a physician – a medical doctor.

The Maryland Judiciary had to grapple with the nature of mental illnesses. If psychological illness is a medical disease, then only a medical doctor was qualified to testify as an expert witness on ultimate issues such as insanity, competency to stand trial, or defective delinquency. Indeed, the logical extension of this rationale was to exclude all psychologists from testifying at any trial. And some Maryland judges did just that.

The judicial tide was flowing against Maryland psychologists. Psychologists were not qualified to be expert witnesses, so said the Maryland Courts.

Background

As the doors to psychologists in the courtroom began to close in Maryland State courts, they were opening in Maryland Federal courts. The U.S. District Court for Maryland permitted a clinical psychologist to give an opinion as to the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law. Referring to *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962), the Maryland Federal court held:

[W]e think the better rule is that the determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge; it does not depend upon his claim to the title of psychologist or psychiatrist. *U.S. v. Riggleman*, 411 F.2d 1190, 1191 (4th Cir. 1969).

Maryland State courts evolved in a different direction. The seminal case was *State v. Tull*, 240 Md. 49, 912 A.2d 724 (1965). This was a refusal by the Court of Appeals of Maryland to grant a new trial based on the convicted defendant's psychiatrist's post-trial claims that the defendant was insane. The Court held that the evidence was available at the time of the original trial. While the psychologist's credentials were not placed on the record, the Court stated that it was "far from clear" that the testimony would have been admissible.

Tull was later cited for the general proposition that no psychologists could testify as to the ultimate issue of sanity. The Court also based its decision on Maryland's statutory definition of insanity. Speaking of the legal test for insanity as affecting criminal responsibility, the Court stated:

The test of the responsibility for criminal conduct under the provisions of Md. Code, Art. 59, § 9(a) is predicated upon "mental disease or defect." We think that the existence of a 'mental disease or defect' is first and foremost a medical problem. * * * But an opinion as to the ultimate fact, whether or not the accused is insane ***, in fairness both to the accused and the State, should be reached by a medical diagnosis. Thus the opinion must be made by a medically trained psychiatrist in order to be admissible in evidence. Like insanity, the issue involved here is one of mental competence. It does not encompass such reasons as physical illness or disability, inability to attend court, or other reasons which may be a proper basis for a continuance. As in the case of insanity affecting criminal responsibility, the question of competence to stand trial is first and foremost a medical problem. An opinion as to the medical fact of competence to stand trial should be reached by a medical diagnosis. Thus the opinion must be that of a medically trained psychiatrist in order to be admissible in evidence. *Saul v. State*, 6 Md.App. 540, 542; 252 A.2d 282 (1969).

So the doors began to close. If insanity was a medical diagnosis, then competency to stand trial logically must be as well. Thomas Colbert was confined to the Clifton T. Perkins State Hospital in Jessup, Maryland, for psychiatric evaluation. The medical staff at Perkins reported that the defendant was competent to stand trial. Two psychologists hired by his family proffered live testimony that he was not competent. The trial court refused to permit the psychologists to testify and excluded their reports. This ruling was upheld on appeal. *Colbert v. State*, 18 Md. App. 632; 308 A.2d 726 (1973).

The door shut further in a personal injury case involving a woman who suffered brain damage in an automobile crash. The trial court allowed a psychologist to give test results and state his opinion based on those

results. The Court of Special Appeals sustained the plaintiff's verdict but in *dicta* stated that there was no error because the psychologist did not testify as to an ultimate issue. *Spann v. Bees*, 23 Md. App. 313, 324; 327 A.2d 801 (1974).

Then the door slammed shut. The Court of Appeals held, "A psychologist, though otherwise qualified as an expert witness, may not render an opinion on the ultimate issue of defective delinquency, whether it be at the initial hearing or for purposes of redetermination." *State v. Williams*, 278 Md. 180, 187; 361 A.2d 122 (1976).

In *Williams*, the Court noted that Maryland was moving opposite the national trend, stating, "This division of authority still persists, although it now appears that a majority of courts would admit such testimony, at least in those instances where the witness meets appropriate standards prescribed for psychologists who seek to qualify as expert witnesses on the subject of criminal responsibility." Ibid at 184.

In his dissent in *Williams*, Judge Smith wrote, "The majority opinion here stands for the proposition that no psychologist – however well qualified – may ever express an opinion in Maryland as to whether an individual is a defective delinquent. Not only is such a holding out of step with the modern view taken by the majority of courts in this country as to the admissibility of the expert opinion of a psychologist, it is out of step with the plain implication of our earlier cases." Ibid at 188.

The Psychiatric Debate

Even mental health experts do not agree what constitutes a mental or psychiatric disorder. Mental has to do with the mind. Disorder may be a euphemism for disease. Minds, unlike brains, are not biological. In a literal sense, minds cannot be afflicted by diseases.

The American Psychiatric Association (APA) publishes the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). The APA is a physician-oriented group. It claims to be "atheoretical" about the causes of mental disorders. Mental health professionals cannot agree on the causes of mental disorders or how to best alleviate them. Various editions of the DSM have moved between the behavioral and the psychobiological ends of the spectrum. The issue is critical as professionals strive to understand if there is an underlying organic dysfunction behind certain human behaviors. In the DSM-V, the pendulum is swinging back towards a biological root. To paraphrase one writer, the boundaries between normal and pathological are complex and contentious. *Psychol Med* 2010 Nov. 40(11) 1759

There are generally two types of professionals that treat clients with mental health issues: psychiatrists and psychologists. Psychiatrists are medical doctors. After receiving their bachelor's degrees, they complete a four-year medical degree. They then spend four years as interns and residents, generally in psychiatric hospitals. They learn by doing. Psychiatrists, being physicians, may prescribe drugs.

Doctors of psychology have a Ph.D. or a Psy.D. They earn master's and doctorate degrees. They intern and have post-doctorate training. Typically, this involves five years of graduate training in psychotherapy, psychological research, and personality assessments. In order to be licensed, psychologists have to pass a national exam. Psychologists can prescribe medications in only a few states, and only after receiving psychotropic medication training.

The Legislative Remedy

The cases where testimony regarding a litigant's mental health might be necessary continued to be an ever-expanding universe. A criminal case might involve issues of insanity, competency or delinquency. For civil cases, emotional trauma may be at issue. There was a whole universe of personal injury damages, such as psychological injury, pain and suffering, loss of consortium, social incapacity, and reduction in the enjoyment of life. Damages may include the extent of mental incapacity arising from a personal injury, or perhaps Post-Traumatic Stress Disorder (PTSD) resulting from a non-physical event, such as witnessing a car injury or other catastrophe. Mental capacity was paramount in challenges to wills and in guardianship proceedings. Psychological testimony was also used in family cases which considered fault-based divorce (insanity) and child custody disputes. Tort damages may include claims of infliction of emotional distress, either intentionally or negligently, even if there was no physical impact if the plaintiff was within the Zone of Danger, if the plaintiff was particularly vulnerable, or if the defendant's conduct was extreme. New theories of psychic injuries are constantly developed in cases as diverse as suing cults for "brainwashing" and in conjunction with trauma to the body and the nervous system. Even Catholic Courts recognized the value of psychologi-

cal testimony for annulments when grounds are raised such as insufficient use of reason (Canon 1095, 10) or psychic-natured incapacity to assume marital obligations (Canon 1095, 30).

The Association of Practicing Psychologists of Montgomery and Prince George's Counties was in a quandary. By 1976, their members were excluded from Maryland courtrooms. Even when they acted as primary mental health care providers for patients, they could not testify on behalf of their patients. Trial attorneys and their clients were forced to engage psychiatrists to testify as experts on cases where the treating doctor was a psychologist. The professional who knew the patient best could not testify. The hired expert did not have much familiarity with the patient, and it resulted in duplicative charges.

The Association wanted to act. But how? Their advisors recommended looking for the right "test case." Their intention was to wait for another case wherein a psychologist was precluded from testifying. They would then file an amicus brief on appeal to try and convince the Court of Appeals to reverse itself on *Williams* and its progeny. This strategy required convincing the Court to completely change direction on an entire succession of cases. It could take years. An adverse ruling would mean the Court simply digging deeper into its position. Another approach would be for someone to publish an academic paper on the topic. The hope was that a litigant would present the paper to the court who, in turn, would adopt its reasoning. Dr. Donald Bersoff, a psychologist and professor at the University of Maryland School of Law, was writing such an academic paper.

There was, however, another approach to effectuate change. The Court of Appeals left an opening for legislative action in *Williams*. State law was silent as to who could testify at administrative hearings. But it provided that examinations to determine possible defective delinquency be conducted by at least three persons, a medical physician, a psychiatrist and a psychologist. Thus, medical doctors played the dominant role under the statute in the diagnosis of defective delinquency. The statute also provided that if the State initiated the proceedings, the person who was the subject of the proceedings was entitled to be examined by a psychiatrist of his own choice, the costs of which were paid by the State.

The *Williams* court went on to say "the psychiatrist selected by appellee was the only expert in that field to testify. Sheer logic ... should indicate that the Legislature would not have provided for a psychiatrist to testify on behalf of the inmate had

it not intended that a medical expert likewise appear in court as a state witness on the issue of defective delinquency, and had it not viewed the question of defective delinquency as primarily a medical problem." Op cit at 187.

The Association of Practicing Psychologists of Montgomery and Prince George's Counties met on February 8, 1977 to discuss strategies. Although the test case legal strategy was discussed, Members viewed legislation as the best remedy for the ailment. If successful, it would be quicker, and the outcome would be certain.

The Association's legislative committee was chaired by Dr. Anita O. Solomon. The committee had the support of Delegate Ida Ruben and State Senator Lawrence Levitan, both of Montgomery County. An initial question was whether the law should be inserted into the MD Health Article or into the MD Courts and Judicial Proceedings Article? Given the wide variety of subjects upon which psychologists might testify, the Courts Article seemed to be a better fit. The legislation, if passed into law and signed by Acting Governor Blair Lee III, would be placed under the code section governing witnesses.

Identical bills, HB 1750 and SB 948 were introduced in the 1977 session of the General Assembly. They were assigned to each chamber's judiciary committee. Hearings were held in both houses. Initially, the legislatures viewed the bill as special interest legislation by a group of unqualified people. Testimony focused on explaining how psychologists are educated, what types of work they did, and where they can assist the trier of fact by testifying on subjects such as interpretations of tests not performed by psychiatrists.

Psychologists were afraid that a turf war would erupt between them and psychiatrists who were enjoying the exclusive right to testify as experts in court. That did not occur. Dr. Jonas Rappeport, M.D., the Chief Medical Officer of the Medical Service of the Supreme Bench of Baltimore, filed the only opposition. No psychiatric professional group opposed the bill.

Despite this, the bill received an unfavorable report. The judiciary committees agreed to study the issue during the interim between sessions.

After studies by the committees, the psychologist as expert witness bill was re-introduced in the 1978 legislative session. State Senator Melvin Steinberg, Vice Chair of the Senate Judicial Proceedings committee, became its new chief sponsor. Senate Bill 643 added the proviso that it only applied to psychologists licensed under the Maryland Psychologists Act.

Maryland Assistant Attorney General Judson Garrett, counsel to the General Assembly, wrote Senator Steinberg to discuss the interplay of the bill with Md. Article 59 relating to mental hygiene. The letter acknowledged the Maryland Courts' minority position on psychological expert testimony. Mr. Garrett described the bill as a "somewhat novel approach" in that no other statute generally designates anyone as an expert for trial purposes. He found the Senate Bill to be constitutionally permissible and only proposed changes to clarify that psychologists had to be individually qualified as experts by judges. The statute would not make all psychologists automatically qualified. The Bill passed in the 1978 legislative session and was signed into law by Acting Governor Blair Lee III.

The Maryland Courts and Judicial Proceeds Article § 9-120 is brief; its one sentence overturns an entire line of cases. The new law completely changed how the legislature instructed the judiciary to view psychologists.

CJP Article §9-120 reads: "Notwithstanding any other provision of law, a psychologist licensed under the "Maryland Psychologists Act" and qualified as an expert witness may testify on ultimate issues, including insanity, competency to stand trial, and matters within the scope of that psychologist's special knowledge, in any case in any court or in any administrative hearing."

Maryland judges now had the freedom to voir dire psychologists who are proffered as expert witnesses and to qualify them. Litigants had more options as to which professionals they may use on their behalf. Triers of fact had the benefit of more opinions upon which they can base informed verdicts. Maryland joined the majority of states in recognizing psychologists, whose time in the courtroom had come.

Mr. Vogel, a practicing attorney in Maryland and Washington, D.C., focuses in the areas of arbitration, mediation, business law, real estate, and construction litigation. He dedicates this article to the memory of Irene S. Vogel, Ph.D.