

Hypnosis and Memory

The overview that follows is offered to help the trier of fact understand what hypnosis does, and does not, do to memory — a subject surrounded by popular myth and the focus of a large body of case law. Hypnosis has been used by investigators and therapists in the belief that it can recover forgotten details, and that belief has shaped how courts treat the testimony of witnesses who were hypnotized. Its purpose is to define the terms a court is likely to encounter, to summarize the research on hypnosis and memory, and to do so in plain language and without favoring any party.

The Myth and the Reality

The popular image of hypnosis holds that it can unlock a perfect recording of the past, letting a witness replay forgotten events in vivid detail. The scientific record does not support this image. Hypnosis is a procedure in which a person, guided by suggestions, enters a state of focused attention and heightened responsiveness to suggestion; people differ in how readily they respond. Whatever else it does, hypnosis is not an aid to accurate memory. On balance, hypnotically assisted recall does not improve accuracy, and it carries distinctive risks that have led many jurisdictions and professional bodies to restrict or prohibit its use for memory enhancement.

What Hypnosis Does to Memory

The research reveals a consistent pattern. Hypnosis tends to increase the sheer volume of material a person reports — but the additional output contains both accurate and inaccurate details, with no reliable net gain in accuracy. What looks like enhanced memory is better understood as a lowered threshold for reporting: the hypnotized person says more, including things that are wrong, rather than genuinely retrieving more that is right (Whitehouse, Dinges, Orne, & Orne, 1988). Hypnosis also makes people more suggestible and can implant outright false memories: in a classic demonstration, highly hypnotizable people who were told under hypnosis that they had heard noises during a past night afterward insisted the event had occurred (Laurence & Perry, 1983). Such hypnotically created recollections — confabulations that fill gaps in memory — can be held as confidently as genuine ones.

Memory Hardening: The Confidence Problem

The single most consequential effect of hypnosis for the courtroom is what it does to confidence. Hypnosis inflates a witness's certainty in the recollections it produces — accurate and inaccurate alike — and severs the already-weak link between confidence and accuracy. A witness who has been hypnotized may emerge convinced of details that are wrong and may hold them with a rigid, unshakable certainty, a phenomenon often called memory hardening or concreting. This is especially dangerous at trial because it can make the witness resistant to cross-examination: the ordinary tools for testing a witness's memory lose their purchase when the witness is artificially certain (Spanos, Quigley, Gwynn, Glatt, & Perlini, 1991). The jury may then hear a witness who sounds compellingly sure about memories that hypnosis itself manufactured or distorted.

Hypnosis Compared with Other Suggestion

It is important not to overstate hypnosis relative to other suggestive influences. The effects of hypnosis on memory, while real and detrimental, are not necessarily greater than those of ordinary leading or misleading questions; in direct comparison, misleading questions produced even more memory errors than hypnosis (Scoboria, Mazzoni, Kirsch, & Milling, 2002). This observation cuts in two directions in the legal debate — it shows that hypnosis is not uniquely corrupting, but it does not make hypnotically refreshed memory reliable. Part of what drives hypnosis-related distortion appears to be expectation: the cultural belief that hypnosis unlocks hidden memories itself encourages people to produce more, and more confident, recollections (Lynn, Myers, &

Malinoski, 1997). The same expectation makes hypnosis a poor and risky tool for memory recovery in therapy, where it can foster confidently held false beliefs about the past — a concern developed in the paper on recovered and repressed memory.

Investigative Use and Safeguards

Given this record, the prevailing professional position is that hypnosis should not be used to assist recall in forensic or clinical settings, and major medical and psychological bodies have so advised (Council on Scientific Affairs, American Medical Association, 1985). A narrow exception is sometimes contemplated: as a last resort in an investigation, where ordinary non-suggestive methods have failed and the goal is to generate a lead that can be independently corroborated — a remembered license-plate fragment, for example — hypnosis might occasionally produce useful information, provided that any resulting detail is treated as a lead to be verified, not as evidence. Even this investigative use carries risk: a false detail elicited under hypnosis can send investigators down erroneous paths and color how later evidence is interpreted. Where hypnosis is used at all, procedural safeguards developed by Martin Orne are widely recommended — recording the witness's recollections before hypnosis, conducting the session by electronic recording, using a qualified and independent operator, and avoiding leading suggestions — together with recording the witness's confidence before and after (Orne, 1979).

Hypnosis and the Law

Courts have responded to this science in several ways, and the resulting law is not uniform. Many jurisdictions adopted a per se rule excluding the testimony of a witness about matters explored under hypnosis, on the ground that such testimony is inherently unreliable and that hypnosis renders the witness effectively immune to cross-examination (People v. Shirley, 1982; State v. Mack, 1980). Others admit such testimony if specified procedural safeguards were followed, placing the burden on the proponent to show the session was not impermissibly suggestive (State v. Hurd, 1981). Many courts that restrict hypnotically refreshed testimony nonetheless allow the witness to testify to recollections that were documented before the hypnotic session.

A constitutional limit cabins the per se approach. In *Rock v. Arkansas* (1987), the Supreme Court held that a State may not apply a per se rule to bar a criminal defendant from giving her own hypnotically refreshed testimony, because doing so impermissibly burdens the defendant's constitutional right to testify in her own defense; the reliability concerns must instead be addressed through safeguards, corroboration, and cross-examination. The admissibility of hypnosis-related evidence is otherwise tested under the rules governing scientific and expert evidence — *Daubert v. Merrell Dow Pharmaceuticals* (1993) and *Kumho Tire Co. v. Carmichael* (1999) in federal court and the states that follow them, and the general-acceptance test of *Frye v. United States* (1923) elsewhere — and a witness's competency remains governed by Federal Rule of Evidence 601. Expert testimony explaining the effects of hypnosis on memory is offered to inform the trier of fact about those effects, not to opine on whether a particular hypnotically influenced memory is accurate, a judgment the law reserves to the fact-finder.

Special Issues in Legal Practice

The principles described above apply with equal force to every party in a legal proceeding. Memory operates the same way regardless of who is asking the questions, and the science summarized here favors no side. What differs between the parties is not the science but the vantage point — the particular places where memory issues tend to surface, and the particular errors each party is best positioned to guard against. The two summaries below identify those recurring issues. They are offered for orientation, not as litigation strategy; in every case the controlling question is

what the evidence in that case will, and will not, support, and the expert's role is to inform the trier of fact rather than to advocate for either side.

Special Issues for Prosecutors

For the State, the safest course is to avoid hypnosis as a means of developing a witness's memory, because doing so can taint the witness and, in many jurisdictions, render the affected testimony inadmissible. Where hypnosis has already occurred — for example, early in an investigation — the prosecution is best positioned to protect the case by establishing and documenting what the witness recalled and recorded before the hypnotic session, since prehypnotic recollections are often admissible even where hypnotically refreshed ones are not, and by showing that any recognized procedural safeguards were observed. The errors to guard against are treating hypnotically elicited detail as reliable evidence rather than as an investigative lead requiring corroboration, and failing to anticipate that a hypnotized witness's inflated, hardened confidence may be challenged as a product of the procedure rather than of genuine memory. Anchoring the case in pre-hypnosis statements and independent corroboration is both sound practice and the more defensible record.

Special Issues for Defense

For the defense, the recurring task is to identify when a witness's account has been shaped by hypnosis and to bring the resulting risks before the court — recognizing that a hypnotized witness may be entirely sincere and yet report manufactured or distorted details with artificial certainty. Key inquiries include whether the witness underwent hypnosis, what was recorded before and after, whether suggestive techniques were used, and whether the witness's present confidence reflects memory hardening rather than reliable recollection — a particular concern because such hardening can blunt cross-examination. Depending on the jurisdiction, the remedy may be exclusion of the hypnotically influenced testimony, limitation to documented prehypnotic recollections, or a safeguards inquiry, subject to the constitutional protection that a defendant's own testimony cannot be barred by a per se rule (*Rock v. Arkansas*, 1987). The law contemplates that these matters be addressed through pretrial challenges to admissibility, through cross-examination, and, where the governing standard is met, through expert testimony (*Daubert v. Merrell Dow Pharmaceuticals*, 1993; *Frye v. United States*, 1923). The aim is not to assume that every hypnotized witness is wrong, but to ensure that the distinctive distortions hypnosis introduces are recognized and weighed.

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