

# Admissibility of Post-Hypnotic Testimony

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PART II

**“... the admissibility of post-hypnotic testimony is contingent upon a showing that the hypnotically refreshed recall is reliable.”**

The inaccuracies associated with hypnotic recall cannot, necessarily, be blamed on the individuals involved in the process. Rather, the inaccuracies are more often attributable to problems inherent in the hypnotic process itself, problems such as hypersuggestibility, hypercompliance, and confabulation.

## Hypersuggestibility

Hypnosis is a state of altered consciousness “marked by heightened suggestibility”<sup>6</sup> or hypersuggestibility. Thus, an individual in a hypnotic state is very open and responsive to suggestions made by the hypnotist. While this particular characteristic is what makes hypnosis a successful technique in both the medical and entertainment fields, hypersuggestibility presents a very serious problem when using hypnosis for investigative purposes. When using hypnosis to refresh the memory of a potential witness, there exists a very real danger that the subject will respond to suggestions made by the hypnotist, no matter how subtle or unwitting those suggestions may be. The unfortunate result is an inaccurately refreshed recollection based on a commingling of the subject’s original observations and the suggestions received from the hypnotist.<sup>7</sup>

## Hypercompliance

Very closely related to hypersuggestibility is a characteristic of hypnosis known as hypercompliance—the hypnotized subject’s overwhelming desire to please either the hypnotist or others who have urged him to undergo hypnosis.<sup>8</sup> Motivated by hypercompliance, it is not uncommon for a subject being questioned under hypnosis to suppress an appropriate response and respond, instead, in a manner that he believes is expected of him.<sup>9</sup> When the subject under hyp-

*Law enforcement officers of other than Federal Jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some Police procedures ruled permissible under Federal constitutional law are of questionable legality under State Law or are not permitted by law or are not permitted at all.*

nosis is a potential witness attempting to refresh his memory, and the individual he is seeking to please is a prosecutor or an investigator, it is not difficult to imagine the havoc hypercompliance could wreak on the subject’s accurate recall.

## Confabulation

In a hypnotic state, a subject, already prone to hypersuggestibility and hypercompliance, will unconsciously invent facts in order to answer questions posed by the hypnotist, if the subject lacks adequate knowledge or memory to respond honestly to the inquiry. This process of artificially enhancing memory or “filling in the gaps” is called confabulation.<sup>10</sup>

Although hypersuggestibility, hypercompliance, and confabulation present serious problems when attempting to refresh the recollections of a witness through hypnosis, these problems are, by no means, unique to hypnosis. It is not uncommon for an individual who is overly anxious to assist in an investigation to engage in activities closely resembling hypersuggestibility, hypercompliance, and confabulation without the aid of hypnosis. However, many experts in the field of hypnosis contend that an additional feature of hypnosis puts the previously hypnotized witness in a class by himself. This distinguishing feature is the fact that a witness who admits to being

uncertain of the accuracy of his recollections prior to hypnosis often becomes firmly convinced of the accuracy of his recollections after hypnosis, despite the fact that his recollections may include false memories induced by hypersuggestibility, hypercompliance, and confabulation.<sup>11</sup>

These problems inherent in the use of hypnosis were powerfully demonstrated in a laboratory test which involved instilling false guilt in experimental subjects through hypnosis. The subjects were so strongly convinced of their own guilt that they were unable to pass a subsequently administered lie detector test. Although completely innocent, the subjects’ admissions of guilt registered as truths on the polygraph.<sup>12</sup>

## JUDICIAL ANALYSIS

Overwhelming as the problems inherent in the hypnotic process appear to be, some experts still believe the harmful effects of hypnosis can be minimized and are of the opinion that if proper precautions are taken, previously hypnotized witnesses can provide accurate courtroom testimony.<sup>13</sup>

## Footnotes

<sup>6</sup>*People v. Gonzales*, 329 N.W. 2d 743, 746 (Mich. 1980).

<sup>7</sup>*Id.* See also, *State ex rel Collins v. Sup. Ct. for the County of Maricopa*, 644 P. 2d 1266, 1269 (Ariz. 1982).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>See *State ex rel Collins v. Sup. Ct. from the County of Maricopa*, 644 P. 2d 1266, 1270-71 (Ariz. 1982).

<sup>11</sup>*Supra* note 5, at 746. See also, *Commonwealth v. Kater*, 447 N.E. 2d 1190, 1197 (Mass. 1983).

<sup>12</sup>*Supra* note 10, at 1269, citing Margolin, “Hypnosis-enhanced Testimony: Valid Evidence or Prosecutor’s Tool?” *Trial*, The National Legal News Magazine, October 1981, pp. 43-44. Although not all experts would concur with the results of this experiment, the court in *State ex rel Collins* relied on its validity, *supra* note 10.

<sup>13</sup>See generally, Reiser, *supra*.