

THE HYSTERICAL ATTACK ON HYPNOSIS

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There has never been a time when hypnosis and practitioners of hypnosis have been under attack to the extent that they are at present. The attack to a large extent is fueled by the False Memory Syndrome Foundation, which is advocating restrictions on the use of hypnosis. There have been three general types of cases dealing with the issues regarding utilization of hypnosis: (1) criminal cases dealing with the admissibility of hypnotically refreshed memory; (2) malpractice suits against therapists using hypnosis for acts such as sexual misconduct, while a patient was under hypnosis, and (3) the current wave of litigation over memories that are alleged to be implanted by hypnosis.

Examples of the type of criminal cases dealing with the admissibility of hypnotically refreshed memory are the California Supreme Court's decisions in *People vs. Guerra*¹ and *People vs. Shirley*.² The Supreme Court engaged in an extended review of the nature of hypnosis and the problem of confabulations. In arriving at its decision, the court based its opinion in large part on the testimony of Dr. Donald Shafer, a well-known California expert on hypnosis associated with the University of California, Irvine. Following the Supreme Court's decision, the California Legislature enacted a statute³ that sets forth the specific prerequisites that must be met before a hypnotically refreshed memory

may be introduced as evidence in a criminal trial. The California statute requires that a record be made on tape of the patient's memories prior to the hypnosis being performed, and that the sessions themselves be taped. Other states have adopted similar legislation. However, a number of states have concluded that hypnotically refreshed memory will not be allowed into evidence under any circumstances.⁴

The concern expressed by the courts in these criminal cases is focused on the fact that use of hypnosis to refresh memories may give the person who is hypnotized a false belief in the accuracy of the memories, at the same time the memories are becoming more concrete in a fashion that will make it almost impossible to use effective cross-examination.

Following this wave of cases was a series of cases that involved either civil suits or actions by licensing boards over unprofessional conduct that allegedly occurred while the patient was hypnotized. An example is *Shea v. Board of Medical Examiners*,⁵ where a California physician was subject to discipline for using lewd language on a hypnotized patient, for no therapeutic purpose. It has been well recognized in the professional community that use of hypnosis may lead some patients to sexualize non-sexual matters, and there certainly have been cases brought alleging that sexual activity and sexual contact took place between hypnotherapists and their patients. Some of the cases were valid and some were not.

The more disturbing type of litigation is the current wave attacking the use of hypnosis to recover memories of sexual abuse, and in conjunction with the treatment of dissociative identity disorder patients. Many of these cases are still in the process of being litigated. Among the few decisions that have already been reached are *Schall V. Lockheed Missiles & Space Co.*,⁶ where a California Appellate Court concluded that it was appropriate to exclude a patient's memories of sexual harassment where the patient had no recollection of the sexual harassment before undergoing hypnosis sessions. The United States Second Circuit Court of Appeal in *Borawick v. Shay*⁷ has held that hypnotically refreshed memories of sexual abuse cannot be allowed in a woman's suit against her parents. That case involved a patient who received care in California from a California physician and an unlicensed but certified hypnotherapist.

In a number of ongoing cases that we are currently handling, some plaintiff's attorneys affiliated with the False Memory Syndrome Foundation have argued that implantation of memories can occur through the utilization of hypnosis, particularly where a patient is also under the influence of potent psychotropic medication. However, if it develops that in a particular case there is no evidence of hypnosis sessions, then the attorney falls back to saying that guided imagery is almost hypnosis, so if guided imagery was used it is equivalent to

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hypnosis being used. If neither guided imagery or hypnosis were used then the plaintiff's attorney asserts that the patient was moving in and out of hypnotic states spontaneously, which was equivalent to an induced hypnotic state in terms of suggestibility.

Finally, some plaintiffs' attorneys and their experts have asserted that the mere use of suggestive questions alone, without any induced hypnotic state, can create false memories. This leads to the bizarre situation where testimony is adduced about hypnotic states, although no formal induction techniques were used and the defendant therapist asserts that hypnosis was not part of the treatment plan. In recognition of this wave of litigation, new guidelines have been established for forensic hypnosis by the American Society of Clinical Hypnosis.⁸ Another aspect of the current wave of litigation is that it tends to revive the image of hypnosis as a mystic art that allows its practitioners to have almost supernatural control over clients. The situation is compounded where the hypnotherapist uses any nontraditional, non-medical model form of treatment. Some of the forms of treatment that have been subject to specific attack in lawsuits include past life regression, use of spirit guides and entity releasement. A vulnerable point for many hypnotherapists is the fact that unlike psychotherapists they generally do not use informed consent forms, take detailed histories, or keep session-by-session notes. A plaintiff's attorney in a case asserting implantation of memories will argue that the hypno-

therapist had a duty to provide an informed consent to treatment, take a detailed medical and psychological history, and take notes of each hypnosis session. In fact, in one case that we defended the plaintiff's expert contended that the hypnotherapist was required to take notes of three hypnosis sessions, even though the sessions were audiotaped. Faced with this barrage of litigation, hypnotherapists can take some steps towards minimizing their exposure to potential litigation. These include the following:

1. Using an informed consent form of the type put out for the American Society of Clinical Hypnosis discussing the possibility that hypnosis may lead to memories that are not literally true
2. Having and using a standard form to be filled out in the patient's own handwriting listing medical and psychological history, including all prior psychological treatment
3. Taking session notes with particular attention to any statements by the patient regarding sexual feelings towards the hypnotherapist, past or present history of sexual abuse, and clearly identifying when new topics arise following hypnosis sessions and what is the hypnotherapist's explanation for the emergence of the new topic.
5. To the extent feasible, audio taping sessions routinely to corroborate that non-leading questions were used.
6. Being aware of using non-leading questions and avoiding giving cues to patients under hypnosis.

Specifically inquiring as to whether the patient has been

reading any books or participating in any support groups that focus on sexual abuse and/or dissociative identity disorder.

7. Exploring the patient's history and current use of street drugs that may enhance suggestibility in hypnosis, as well as ascertaining the patient's use of prescription medication.

8. Having a licensed mental health professional with whom the hypnotherapist can consult. This is particularly critical if the hypnotherapist is not licensed. A frequent attack by plaintiffs' counsel is to assert that while a hypnotherapist may have had training in hypnosis, he or she did not have adequate training in psychotherapeutic principles to be able to correctly interpret what the patient was reporting.

9. Where a medical referral is made and is required under local law for hypnosis to be utilized, the hypnotherapist should make a point of making a written response back to the referring doctor about the results of the hypnotherapy. Frequently when such medical referrals are made, there is no subsequent communication between the hypnotherapist and the referring doctor. In several cases our firm has defended this has been a point of hot contention.

10. Recognizing that statements made by a patient under hypnosis may be untrue or metaphors for actual experiences that the patient has had, and as such the hypnotherapist should be cautious about interpreting such statements as literally true.

11. Being aware of local state statutes and ordinances governing the licensure of mental health professionals, and any limitations that are created by state law, so that the hypno-

therapist can stay within appropriate boundaries and treatment

12. Refraining from the use of literature that puffs the use of hypnosis as a panacea, and may contain dramatic statements and endorsements that are difficult to establish scientifically.

13. The hypnotherapist should educate himself or herself on the controversy over hypnosis and memory that is currently ongoing. In this regard, some important books that could be reviewed are Elizabeth Loftus' *Myth of Repressed Memory*, Michael Yapko's *Suggestions of Abuse*, and Lenore Terr's *Unchained Memories*.

14. Hypnotherapists should be particularly on guard when patients come in with the avowed intent of using hypnosis to corroborate memories of abuse, or to seek out memories of abuse.

15. Analogies comparing the mind to a videotape machine or computer that can play back information on demand are misleading and must be avoided.

16. Hypnotherapists must be particularly cautious when dealing with conditions that may involve medical problems such as eating disorders and addictions. In the past, hypnosis was frequently used to deal with such conditions, but as the changing state of medical knowledge demonstrates a medical or organic cause for such conditions, hypnosis may be seen as inappropriate, and hypnotherapists must work closely with a physician in some such circumstances.

It is particularly important to recognize that the views on hypnosis held by many of the mental health professionals are markedly

different from the views of many of the experts who testify in litigation. This is aptly demonstrated by Dr. Michael Yapko's book, *Suggestions of Abuse*, where his preconception about what the views of the professional community would have been regarding hypnosis were not consistent with the actual views reported. This means that what hypnotherapists believe the standards to be, and what experts hired to testify in litigation believe them to be, may be two different things. It's important for hypnotherapists to be aware of their vulnerability in this time of litigation crisis, so they can navigate the minefield of potential liability.

Footnotes

1. *People v. Guerra* (1984) 37 Cal.3d 385.
2. *People v. Shirley* (1982) 31 Cal.3d 18.
3. Evidence Code S795
4. *People v. Zayas* (Ill. 1989) 546 N.E. 2d 513; *State v. Tuttle* (Utah 1989) 780 P.2d 1203 Cert. Denied (1990) 494 U.S. 1018.
5. *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564.
6. *Schall v. Lockheed Missiles & Space Co.* (1995) 37 Cal.App.4th 1485
7. *Borawick v. Shay* (2nd Cir. 1995) WL 613931
8. American Society of Clinical Hypnosis (1995). *Clinical hypnosis and memory: Guidelines for clinicians and for forensic hypnosis*. Author.



CALLS:

1. *The First Regional Congress of Psychology for Professionals in the Americas* will be held on Mexico City, **July 27th through August 2nd, 1997**. Submissions on various areas including clinical and community psychology, psychology and law, and sport psychology among others are invited. The deadline for submission is October 30th. For further information contact the Organizing Committee at tel/fax 011-525-598-23-42 or at congreso@datasys.com.mx.

2. *The Publications and Communications Board of APA* has opened nominations for the editorship of *Developmental Psychology* for the years 1999-2004. **For further information** contact Janey Shibley Hyde, Ph.D., c/o Lee Cron, P&C Board Search Liaison, Room 2004, APA, 750 First Street, NE, Washington, DC 20002-4242, tel. 202-336-5500.

3. *The American Psychological Association* is currently receiving applications for the following 1997-98 fellowship programs:

★ *APA Congressional Fellowship Program (including policies related to HIV/AIDS and work with gifted and talented children),*

★ *APA/APF Congressional Fellowship in Child Policy,*

★ *William A. Bailey AIDS Policy Congressional Fellowship, and*

★ *the APA Science Policy Fellowship Program.*

For information or application forms, contact Brian D. Medley, Ph.D. at 202-336-6066 or at bds.apa@email.apa.org.