

# **Rebuttal Statement by David B. Cheek, M.D.**

**Comments in opposition to statements made by**

**Bernard L. Diamond, M.D.**

**Related to the use of Hypnosis on prospective witnesses.**

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COMMENTS IN OPPOSITION TO STATEMENTS MADE BY  
BERNARD L. DIAMOND, M.D. in a paper published by the  
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“INHERENT PROBLEMS IN THE USE OF PRETRIAL HYPNOSIS ON A  
PROSPECTIVE WITNESS”

This paper has been given wide media publicity and conclusions drawn by Doctor Diamond are the foundation for an appeal to overturn the conviction of a mass murderer. It is being used as basis for proposal to deny all evidence obtained through the use of hypnosis.

Before considering information contained in Doctor Diamond's paper it should be pointed out that it is incumbent on all of us who are active in professional fields of work to keep up with developments, to communicate with our peers and to learn from the experience of others. There are two major organizations in the United States, the Society of Clinical and Experimental Hypnosis founded in 1948 and the American Society of Clinical Hypnosis founded in 1957. The combined membership of these two organizations is over 3,000. Doctor Diamond has not been a member of either nor has he ever to my knowledge attended any of the numerous workshops offered by them or any of their annual conventions.

Doctor Diamond has made the sweeping statement that once a witness has been hypnotized for the purpose of enhancing memory, his recollection has been so contaminated that he is effectively rendered incompetent to testify.

This would apply with some validity to a very suggestible person, numbering about one in twenty, who has been placed in a deep hypnotic state and verbally coerced into fabricating information relating to an accident or a crime of violence. Hypnotized people behave like supposedly un hypnotized people in the face of coercive questioning about an experience that has been very threatening or otherwise unpleasant. They will subconsciously be so unwilling to face it that they will blot out important details or even fabricate some sort of information they hope will satisfy their interrogator.

Both Freud and Carl Jung gave up using hypnosis during their period of interest in “trauma” as a cause of persisting neurotic behavior. Both used coercive techniques and both found patients reporting traumata that were later proven not to have occurred. Herbert Spiegel has demonstrated how a very suggestible person may be given a totally untrue identity and set of circumstances that become fixed into a reality and defended against reasonable objections (1980). Spiegel pointed this but not as an objection to the use of hypnosis but as an argument in favor of having investigators thoroughly familiar with the various facets of hypnotic behavior.

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Those experienced in uses of hypnosis explain that they do not hypnotize anyone. They will teach the witness to use his own hypnosis for memory improvement. They explain that the witness can come out of hypnosis at any time and that the entire experience will be remembered on coming out of this state. They know how to help the witness review an experience with a minimum of discomfort. They do this by asking the witness to look at the scene from the time level of the interview rather than the time of occurrence. It can be done as though the witness is replaying a videotape recording on a television screen. Better yet is to ask for the entire experience to be reviewed at a subconscious level without trying to remember anything consciously. Unconscious gestures (ideomotor signals) will indicate the beginning, important moments and the ending of the experience. The scene is reviewed many times before it is raised to more conscious levels of awareness where it can be translated into words.

All sensory perceptions enter the primitive part of the brain, well below the cerebral hemispheres containing conscious memory and the associative processes having to do with speech and ability to use logic and reasoning. The brain stem and midbrain are side open for information, especially is this so when we are in danger or when consciousness is lost through injury or the influence of drugs, including alcohol and general anesthetics.

If the statements of Doctor Diamond were taken seriously and all evidence obtained through the use of hypnosis were considered tainted we would have no way of revealing important information that can be supplied by people who have been unconscious at the time of an accident or who have had a retrograde amnesia about a series of events preceding a period of traumatic unconsciousness.

In 1937 Milton H. Erickson demonstrated that retrograde amnesia and physiological details of a prolonged period of traumatic unconsciousness could be explored and details

revealed through use of hypnosis. In this case he regressed his subject to a time before the beginning of the retrograde amnesia and had him report as much as possible. Each time the man ran out of memory in the hypnotized state Erickson had him return to his starting point and advance again as far as possible. The effect, comparable to cutting tall grass by retracing steps and rushing further each time with the lawn mower, revealed a wealth of information that was verified by police investigators.

Erickson's pioneer observations regarding multiple subconscious review during ordinary conversational hypnosis took 4 1/2 hours during two days of exploration. By avoiding efforts to have the hypnotized subject convert memories into speech it is now possible to review details of a surgical operation under general anesthesia in the space of ten or fifteen minutes. The method of using ideomotor responses was outlined by Cheek in the first published paper on perception of meaningful sounds during general anesthesia in 1959 and extended in the books "TECHNIQUES OF HYPNOTHERAPY" and "CLINICAL HYPNOTHERAPY".

In addition to its value in speeding the process of search for information the use of ideomotor responses symbolizing "yes", "no" and "I-do-not-want-to-answer" are helpful in determining validity of information at a level of response that is below conscious, conversational levels of awareness.

Information offered by alcoholics, drug addicts and known criminals can never be trusted. Their manipulation of truth has been exercised over such a long period of time in favor of exigency of the moment that they can fool a hypnotist, they can fake ideomotor responses just as they can fool a polygraph machine. Most victims of accidents or violence, however, do not fit into the above category. They are subconsciously honest. After they have made a statement verbally the information can be checked against ideomotor responses to such questions as, "does the inner part of your mind agree with what you have just told me?" At the beginning of an interview in hypnosis finger signals are set up and the instruction given that if at anytime the subconscious part of the subject's mind disagrees with what is being said he will give an unconscious gesture of a designated finger. These movements are, in fact, unconscious just as we may contradict a conscious statement with an unconscious shake of our head or an averted glance.

**"TESTIMONY DERIVED FROM HYPNOSIS DENIES THE APPELLANT THE RIGHT TO CONFRONT AND CROSS EXAMINE THE WITNESS"**

It is difficult to imagine where Doctor Diamond obtained his evidence for such a contention. Hypnosis "by definition" in no way ordains that the hypnotized person will have amnesia for everything that went on during the hypnotic state.

In the late 19th Century Freud believed his patient was hypnotized only when the patient had amnesia for the period of interview between Freud's formal induction and the time he terminated the hypnotic state. He gave up hypnosis partially because he could "hypnotize" so few of his patients. He did not seem to recognize that people frequently go into hypnosis while attempting to remember sequential events in their history. Josef

Breuer did recognize that people go into hypnosis spontaneously without anyone inducing a trance. He recognized that this would occur at the time of a “trauma” or very stressful experience responsible for the fixed pattern of behavior seen in a neurosis.

Breuer used the term “hypnoid” for such an experience. He observed that some people without urging will spontaneously relive a traumatic or “hypnoid” experience during a simple induction of hypnosis with suggestions for peaceful relaxation. Cheek (1960) pointed to this phenomenon as a reason for subjects withdrawing from a hypnotized state and refusing to again be hypnotized, until they are sure they will not have to relive an unpleasant experience. Hypnosis producing experiences included automobile accidents, falling out of a tree, rape and childhood tonsillectomy.

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Bernheim, T. J. Hudson, Estabrooks, Cheek (1962), Spiegel, Hilgard and Hilgard have all observed that hypnosis occurs spontaneously at moments of stress. Those familiar with the appearance of a person entering a hypnotic state will recognize that these changes in facial mobility and decrease in eyelid movement also occur while a witness is recounting sequential details leading up to the important event. This type of entrance into hypnosis while remembering sequential events was observed by Milton Erickson in his student days at the University of Wisconsin (1961).

Exclusion of formal hypnosis initiated by an investigator for the purpose of improving memory of a witness prior to trial would also require exclusion of all testimony obtained from any witness unless there is an observer present who is competent to know that the witness at no time has entered a hypnotic state while being questioned. This is not likely to be the case under most circumstances unless hypnosis is recognized for its value and those trained for investigation are also thoroughly trained in all aspects of modern hypnotic interview techniques. There could never be such a situation if courts disqualify all evidence derived through the help of hypnosis.

Those investigators trained in uses of hypnosis are taught that every interview must be tape-recorded or videotape-recorded from the moment the subject of hypnosis is presented to the witness and continued without interruption until the interview is terminated. These recordings are available to the defense attorney and to his consultant in hypnotic methods. (Reiser, 1980)

As with all evidence obtained where hypnosis is not knowingly used the details are checked against other information before presenting it to the court. the judge and jury have access to the tapes. It is for them to use or reject evidence derived with the help of hypnosis. There is no difficulty put in the way of a defense attorney cross-examining the witness. The educated attorney and hypnosis consultant for the plaintiff will be competent to recognize whether or not the methods of cross-examination induce hypnosis in the witness by virtue of the stress involved and possible effort to confuse the witness.

In conclusion I wish to stress the following points:

1. Hypnosis occurs spontaneously to varying degrees when a human feels threatened or loses consciousness.
2. People in spontaneous or induced hypnotic states do not always remember details of a stressful event at a conscious level of awareness. What they have registered subconsciously may not be accurate. It must be checked against all available evidence.
3. It would be a great wrong to exclude all evidence derived from the use of hypnosis.
4. Attorneys and officers trained in criminal investigation should be in possession of all available information about modern uses of hypnosis for breaking through amnesia and permitting recovery of factual data.

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