A NEW STANDARD FOR THE ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY

State v. Iwakiri, 682 P.2d 571 (Idaho 1984)

In *State v. Iwakiri*,[1] the Idaho Supreme Court held that hypnotically refreshed testimony[2] is admissible when it appears sufficiently reliable in light of the totality of the circumstances.[3]

In Iwakiri's trial for kidnapping, the court admitted testimony of a witness who twice had undergone hypnosis prior to trial to refresh her memory of events linking Iwakiri to the crime.[4] Iwakiri appealed her conviction, contending that the trial court erred in admitting hypnotically refreshed testimony.[5] The Idaho Supreme Court reversed Iwakiri's conviction on other grounds and remanded the case for new trial.[6] The court went on to hold, however, that hypnotically refreshed testimony is admissible if the trial court determines at a pretrial hearing that the testimony is sufficiently reliable in view of the totality of the circumstances.[7]

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1. 682 P.2d 571 (Idaho 1984).

2. "Hypnotically refreshed testimony" means the testimony of witnesses who undergo hypnosis prior to trial to enhance their memory. This Comment discusses neither the admissibility of the actual results of a hypnosis session, *see, e.g.*, People v. Hangsleben, 86 Mich. App. 718, 728, 273 N.W.2d 539, 543-44 (1978) (inadmissible for purposes of establishing truth of statements made while under hypnosis or to bolster the credibility of in-court testimony), nor the admissibility of the testimony of a witness in a hypnotic trance, *see, e.g.*, Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 12 n.41 (1977).

3. 682 P.2d at 578.

4. The witness, Rebecca Boyer, testified that she had seen the missing children in Iwakiri's home. *Id.* at 573. Before trial a detective hypnotized Boyer. *Id.* The detective apparently had received some formal training in hypnosis, but was not a licensed psychiatrist or psychologist. *Id.* at 590 (Bistline, J., dissenting). Boyer's attorney, another detective, two investigators, an operator, and a recorder attended the hypnosis session. *Id.* at 573. The police tape-recorded part of the session. *Id.* Boyer underwent hypnosis a second time prior to the trial before a Dr. Streib at the Boise Hypnosis Center. *Id.* at 573, 594 (Bistline, J., dissenting).

5. *Id.* at 574. Iwakiri also asserted that the trial court erred in admitting testimony as to conversations between her and her attorney. *Id.*

6. The court ruled that the trial court improperly admitted prejudicial testimony regarding privileged conversations between Iwakiri and her attorney. *Id. See also id.* at 580-89 (Bistline, J., dissenting).

7. The court remanded the issue concerning the admissibility of hypnotically refreshed testimony to the trial court with directions to resolve it using the newly formulated "totality of the circumstances" standard. *Id.* at 574, 578. The court also noted six "safeguards" that it believed the trial court should consider in applying the test. *Id.* at 578.

The dissent contended that remanding the hypnosis issue was unnecessary because the record clearly disclosed that the court's proposed guidelines had not been followed and that the hypnosis sessions had improperly tainted the witness's memory. *Id.* at 589-90 (Bistline, J., dissenting).

Courts traditionally have been reluctant to accept hypnosis[8] as a means of generating admissible evidence.[9] Many in the legal community still oppose the admission of hypnotically refreshed testimony because of the uncertainty surrounding hypnosis and its effects on memory.[10] Experts particularly acknowledge problems with the subject's susceptibility to suggestions from the hypnotist, the subject's inclination to fabricate a "memory," and the subject's inclination to confabulate (fill in blank spots in his memory).[11]

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8. For exhaustive examinations of the theory and history of hypnosis, see K. BOWERS, HYPNOSIS FOR THE SERIOUSLY CURIOUS (1976); W. KROGER, CLINICAL AND EXPERIMENTAL HYPNOSIS (2d ed. 1977).

9. *See, e.g.*, People v. Ebanks, 117 Cal. 652, 655, 49 P. 1049, 1053 (1897) (rejecting testimony of hypnotist and defendant regarding defendant's statements while under hypnosis and agreeing with the trial court's statement that "the law of the United States does not recognize hypnotism"). Although hypnotically refreshed testimony has received limited acceptance by the courts, *see* Comment, People v. Hughes: *A Pretrial Procedure for Excluding Testimony Influenced by Hypnosis*, 4 PACE L. REV. 705 (1984), its use by law enforcement bodies in the investigative process has become widespread. *See* Monrose, *Justice with Glazed Eyes: The Growing Use of Hypnotism in Law Enforcement*, JURIS. DR. 54 (Oct./Nov. 1978). Police often use hypnosis to elicit information from individuals during investigation. *See* Brody, *Hypnotism v. Crime: A Powerful Weapon or an Abused Tool?*, N.Y. Times, Oct. 14, 1980, at C1, col. 1 (discussing an unreported case where hypnotically-induced recall of license plate numbers by kidnapping victim led police to perpetrators). The difference between the use of hypnosis as an investigating tool and as a means of generating testimony is that the latter establishes truth. State v. Iwakiri, 682 P.2d 571, 601 (Idaho 1984) (Bistline, J., dissenting).

10. Experts disagree about which model most accurately explains how hypnosis affects memory. One theory posits that memory works as a videotape and hypnosis merely triggers a replay of the tape. 682 P.2d at 575. Members of the "investigative hypnosis" school of thought, such as Dr. Martin Reiser, Director of the Law Enforcement Hypnosis Institute (the leading hypnosis training center for law enforcement officers), follow the "videotape" theory. *Id.* at 576. The Supreme Court of California, in People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982), *cert. denied*, 459 U.S. 859 (1983), criticized the videotape theory, asserting that the possible effect of outside influences makes memory "productive rather than reproductive." 31 Cal. 3d 57-62, 641 P.2d at 798-801, 181 Cal. Rptr. at 266-70.

An alternative contemporary theory refutes the "videotape" theory and suggests that instead of causing a playback of earlier events, hypnosis creates a state of altered consciousness in which the subject is "prone to experience distortions of reality, false memories, fantasies and confabulation." 682 P.2d at 575-76 (citing State v. Mena, 128 Ariz. 226, 228, 624 P.2d 1274, 1276 (1981)).

11. *See, e.g.*, Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980). Professor Diamond identifies twelve problems accompanying hypnosis that may interfere with accurate recall: (1) a hypnotized subject is in a state of heightened suggestibility; (2) a hypnotist cannot avoid implanting suggestions in a subject's mind; (3) a subject usually cannot distinguish his own memories from those which are implanted; (4) a subject cannot restrict his memory to facts free of fabrication and confabulation; (5) the distorting effects of hypnosis do not disappear when a subject is awakened from a trance; (6) experts cannot assume that a subject did not feign hypnosis; (7) neither a hypnotist nor a subject can separate the fact from the fantasy of a hypnotic recall; (8) the specificity of a subject's recall does not assure accuracy; (9) independent corroboration of portions of hypnotically refreshed memories does not guarantee the reli-

In 1968, a Maryland court became the first to admit hypnotically refreshed testimony. In *Harding v. State*, the court held that the use of hypnosis to refresh a witness's memory raised an issue of credibility rather than admissibility.[12] Although the court did not elaborate upon its innovative position,[13] *Harding* sparked a trend favoring the admission of hypnotically refreshed testimony.[14] Recently, however, courts have split into three camps regarding the admissibility of hypnotically refreshed testimony.

Ten states currently follow *Harding* and hold that hypnotically refreshed testimony raises a question of credibility rather than admissibility.[15] These courts prefer to accept the inherent risks of hypnosis rather than exclude relevant evidence.

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ability of the remainder; (10) it is impossible to make a complete record of a hypnotic experience; (11) hypnosis can resolve a subject's doubts and artificially improve a subject's posthypnotic demeanor and self-confidence; and (12) experts who can reliably testify to the recall of a hypnotized witness are rare. *Id.* at 332-42.

The Supreme Court of Arizona has summarized the unreliability of hypnotically refreshed testimony under the following headings: suggestion, confabulation, incorrect recall, purposeful lying, undue weight given by jury, hypnotic inducement not scientifically reliable, and safeguards cannot insure posthypnotic testimony is reliable. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 183-87, 644 P.2d 1266, 1269-73 (1982).

12. 5 Md. App. 230, 234, 246 A.2d 302, 306 (1968), *cert. denied,* 395 U.S. 949 (1969). The Maryland Court of Appeals overruled *Harding* fourteen years later in State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983).

13. The *Harding* court relied heavily upon the declaration of the witness, a rape victim, that she was testifying from her own recollection in trying to identify her attacker. 5 Md. App. at 234, 246 A.2d at 306. The court reasoned that the witness's achievement of present knowledge after hypnosis was relevant only to the weight of her testimony. *Id.*

14. *See, e.g.,* United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied,* 444 U.S. 885 (1979); Clark v. State, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1974); State v. Jorgenson, 8 Or. App. 1, 492 P.2d 312 (1971). *See generally* Beaver, *Memory Restored or Confabulated by Hypnosis—Is it Competent?,* 6 U. PUGET SOUND L. REV. 155, 169 (1983).

Many of the early cases following *Harding* did not address the possibility that hypnosis may distort memory. The courts instead chose to rely upon the witnesses' assertions that they testified from their own recollection and the assumption that cross-examination would reveal any credibility problems. State v. Iwakiri, 682 P.2d 571, 602 (Idaho 1984) (Bistline, J., dissenting) (quoting State v. Mena, 128 Ariz. 226, 228-30, 624 P.2d 1274, 1276-78 (1981)). Some courts continue to adhere to the *Harding* approach. *See* cases cited *infra* note 15.

15. State v. Contreras, 674 P.2d 792 (Alaska Ct. App. 1983); Key v. State, 430 So. 2d 909 (Fla. Dist. Ct. App. 1983); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); People v. Cohoon, 120 Ill. App. 3d 62, 457 N.E.2d 998 (1983); State v. Moore, 432 So. 2d 209 (La.), *cert. denied,* 104 S. Ct. 435 (1983); State v. Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980); State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Brown, 8 Or. App. 598, 494 P.2d 434 (1972); State v. Glebock, 616 S.W.2d 897 (Tenn. Ct. App. 1981); Chapman v. State, 638 P.2d 1280 (Wyo. 1982). *But see* Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983) (using conditional admissibility).

Thirteen states currently hold hypnotically refreshed testimony inadmissible per se.[16] Courts in these states, applying the rule of *Frye v. United States*,[17] find that the scientific community has not accepted hypnosis as a reliable method of restoring memory.[18] These courts hold hypnotically enhanced testimony fatally unreliable because of the lack of procedures to thwart fabrication and confabulation.[19] A slight majority of these courts, however, permits a witness who has undergone hypnosis to testify to matters recalled prior to hypnosis.[20]

Finally, seven states condition the admissibility of hypnotically refreshed testimony upon adherence to procedures that make the testimony more reliable.[21] These courts recognize the inherent risks of hypnotically enhanced testimony,[22] but believe that compliance with procedural safeguards minimizes the dangers[23] and justifies admission of the testi-

16. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982), *cert. denied,* 459 U.S. 859 (1983); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); Peterson v. State, 448 N.E.2d 673 (Ind. 1983); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); Commonwealth v. Kater, 338 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzalez, 413 Mich. 615, 329 N.W.2d 743 (1982); State v. Blanchard, 315 N.W.2d 427 (Minn. 1982); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (N.Y. 1983); State v. Peoples, 319 S.E.2d 177 (N.C. 1984); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974).

17. 293 F. 1013 (D.C. Cir. 1923). *Frye* conditions the admissibility of evidence based on scientific methods of proof upon a showing that the scientific community generally accepts the method in question. *Id.* at 1014.

18. *See, e.g.,* People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (N.Y. 1983).

19. *Id. See also supra* note 11 (noting problems of hypnosis).

20. *See* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); People v. Jackson, 144 Mich. App. 649, 319 N.W.2d 613 (1982); State v. Blanchard, 315 N.W.2d 427 (Minn. 1982); State v. Patterson, 213 Neb. 686, 331 N.W.2d 500 (1983); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (N.Y. 1983); Commonwealth v. Taylor, 294 Pa. Super. 171, 439 A.2d 805 (1982).

21. United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984) (Texas); State v. Seager, 341 N.W.2d 420 (Iowa 1983); House v. State, 445 So. 2d 815 (Miss. 1984); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (1981), *cert. quashed,* 98 N.M. 51, 644 P.2d 1040 (1982); State v. Martin, 33 Wash. App. 486, 656 P.2d 526 (1982); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983). *See also* Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983) (conditional approach). *But see* Crum v. State, 433 So. 2d 1384 (Fla. Dist. Ct. App. 1983) (per se admissible approach).

22. *See supra* note 11 (noting problems of hypnosis).

23. *See, e.g.,* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). The court maintained that procedural requirements help produce an adequate record for evaluating the reliability of the hypnotic session, *see infra* note 27 and accompanying text, and ensure a minimum level of reliability. 86 N.J. at 535, 432 A.2d at 96.

mony.[24] Before determining whether a hypnotic session complied with the required safeguards, however, these courts will make a preliminary evaluation of the reliability of the hypnosis in restoring memory by considering the type and extent of memory loss involved and the witness's possible motives for not remembering.[25] After this threshold inquiry, these courts determine whether the proffering party complied with required safeguards[26] and whether the procedures followed sufficiently assured reliability to support admission of the hypnotically refreshed testimony.[27]

In *State v. Iwakiri*, the Supreme Court of Idaho departed from the

24. *See, e.g.*, State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). *Hurd* held that hypnosis met the *Frye* test in the limited sense that experts recognize it as capable of yielding recollections as accurate as those of ordinary witnesses, who are often historically inaccurate. 86 N.J. at 531, 533-34, 432 A.2d at 92, 94-95. The court did not require hypnosis to be generally accepted as a means of reviving truthful recall because the purpose of hypnosis is not to obtain truth, but to restore memory. *Id.* at 531, 432 A.2d at 92. The court contended that because the adversary system would ferret out any weaknesses in hypnotically refreshed testimony, there was no need to "recognize historical accuracy as a condition for admitting eyewitness testimony." *Id.* at 534, 432 A.2d at 95.

25. *See, e.g.*, State v. Hurd, 86 N.J. 525, 544-45, 432 A.2d 86, 95-96 (1981).

26. *See, e.g.*, State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). The *Hurd* court adopted six procedural safeguards developed by Dr. Martin Orne, an expert in hypnotically induced testimony, that are designed to ensure a minimum level of reliability: (1) to elicit the most accurate recall possible, the hypnotist must be a psychiatrist or psychologist experienced in the use of hypnosis and should qualify as an expert to assist the court later; (2) the hypnotist should be independent of the parties to the action and any interested third parties, such as the police, so that bias is not translated into hypnotic suggestion; (3) there must be a record of information given to the hypnotist before the hypnosis session, so the court can determine whether the hypnotist could have communicated information to the witness either directly or through suggestion; (4) carefully refraining from influencing the description or adding new details, the hypnotist should take a detailed statement of facts from the subject before hypnosis by asking standardized questions, so the court can compare pre- and posthypnotic testimony; (5) there must be a record, preferably on videotape, of all contact between the hypnotist and the subject, again to enable the court to determine the risk of suggestion; and (6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and the posthypnotic interview, so as to avoid inadvertent influence. 86 N.J. at 544-46, 432 A.2d at 96-97.

Some courts add additional requirements, such as testing of witnesses prior to hypnosis for possible mental illness and competency, and requiring that consideration be given to evidence that corroborates or contradicts information elicited during hypnosis. *See, e.g.*, People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (1980). *See also* State v. Iwakiri, 682 P.2d 571, 577 n.3 (Idaho 1984).

27. *See, e.g.*, State v. Hurd, 86 N.J. 525, 536, 432 A.2d 86, 97 (1981). Factors meriting consideration include: (1) the manner of questioning and the presence of cues or suggestions during and after the hypnotic session, (2) whether the subject initially "relived" the events without much questioning by the hypnotist, and (3) the amenability of the subject to hypnosis. "None of these factors should be considered absolute prerequisites to admissibility, nor are they exclusive. They . . . illustrate the nature of the inquiry." 86 N.J. at 535, 432 A.2d at 96.

The party attempting to introduce the testimony bears the burden of proof throughout the inquiry. *See, e.g., id.* at 536, 432 A.2d at 97.

three existing standards of admissibility of hypnotically refreshed testimony, and adopted a "totality of the circumstances" rule.[28] By modifying the conditional admissibility approach, the court intended to resolve the problems that it saw in the three approaches.[29]

The *Iwakiri* court began by considering the evolution of the law of witness competence.[30] The court found that the current trend of the law rejects per se rules of witness incompetence as unnecessarily extreme limitations upon the fact-finder.[31] After identifying several commonly recognized problems associated with hypnotically refreshed testimony,[32] the court concluded that none of the three modern approaches to the admissibility of hypnotically refreshed testimony adequately addressed these problems.[33]

The *Iwakiri* court criticized those courts advocating a per se rule of admissibility and argued that cross-examination and impeachment would not always provide sufficient protection against unreliable hypnotic methods.[34] The court noted that per se inadmissibility, in contrast, would sometimes exclude reliable testimony.[35] Finally, the court criticized the conditional admissibility approach for using a strict procedural format as a proxy for reliability.[36]

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28. 682 P.2d 571 (Idaho 1984).

29. 682 P.2d at 577-78. *See supra* notes 15-27 and accompanying text (discussing the three modern approaches).

30. *Id.* at 575. The court noted that while at early common law certain types of witnesses were considered incompetent per se, the rigid rules had evolved "into a general rule of competency, giving to the jury the duty of judging the credibility of witnesses." *Id.*

31. *Id.* (citing FED. R. EVID. 601).

32. *Id.* at 575-76. The court first noted the uncertainty regarding how hypnosis and memory work. *See supra* note 10. The *Iwakiri* court did not adopt a theory as to the functioning and interrelationship of hypnosis and memory. The court also noted the possibility that a hypnotized subject might receive suggestions, confabulate, or believe that distortions in memory due to suggestions or confabulations are actually a part of their memory. *See supra* note 11 and accompanying text.

33. 682 P.2d at 576-78. The court found that each approach advocates a type of per se rule inconsistent with the trend towards presuming every person to be a competent witness. Each of the three approaches focuses upon one aspect of competency rather than allowing the trial court to look to all relevant factors. *See infra* notes 34-38 and accompanying text.

34. 682 P.2d at 577. A per se admissibility standard, therefore, sometimes would allow the admission of unreliable testimony.

35. *Id.*

36. "We foresee circumstances where, even when the safeguards are not strictly or entirely followed, a trial court could nevertheless conclude that the testimony would still be sufficiently reliable for its admission." *Id.* at 577-78. As an example, the court indicated that the presence of persons other than the hypnotist and the subject at the session, *see supra* note 26, would not necessarily render the testimony unreliable. *Id.* at 578.

For these reasons, the court rejected the three approaches and adopted a "totality of the circumstances" test that requires trial courts to conduct pretrial hearings regarding the hypnotic procedures used in each case.[37] At the pretrial hearing, the judge must determine whether, in view of the totality of the circumstances, the proffered hypnotically refreshed testimony is sufficiently reliable to be admitted.[38]

To guide trial judges in applying the "totality of the circumstances" test, the *Iwakiri* court adopted a modified version of the procedural safeguards required by courts adhering to the conditional admissibility approach.[39] Although these guidelines are not solely determinative of the admissibility of hypnotically refreshed testimony, the court cautioned that admission of such evidence would be unusual if none of the sug-

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37. *Id.*

38. *Id.* The court believed it best to have the trial court determine reliability prior to submission of the evidence to the jury, as it does when faced with similar evidentiary problems such as eyewitness testimony. *Id.* at 578-79. The "totality of the circumstances" rule applies regardless of whether the plaintiff or the defendant produces the witness. *Id.* at 578. *See also id.* at 606 (Bistline, J., dissenting) (discussing an inconsistent line of cases that allowed prosecutors, but not defendants, to introduce hypnotically refreshed testimony).

If hypnotically refreshed testimony fails to satisfy the "totality of the circumstances" test, the trial court may still allow the witness to testify on matters upon which hypnosis has not tainted his memory. *Id.* at 579. The court did not decide whether such permissible testimony should be limited to situations where parts of the witness's memory clearly existed prior to hypnosis. *Compare id. with supra* note 20 and accompanying text (cases permitting testimony to matters recalled prior to hypnosis). The court did suggest, however, that the trial court examine statements made by witnesses prior to hypnosis, as well as records of the session, to determine whether certain areas were not covered. *Id.* at 578.

39. *Id.*

> (1) The hypnotic session *should* be conducted by a *licensed* psychiatrist or psychologist *trained* in the use of hypnosis *and thus aware of its possible effects on memory, so as to aid in the prevention of cueing and improper suggestion.*
>
> (2) The *person* conducting the session should be independent *from either of the parties in the case.*
>
> (3) *Information* given to the hypnotist by *either party concerning the case should be noted,* preferably in written form, so that *the* extent of information the subject received from the hypnotist may be determined.
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> (4) Before *hypnosis,* the hypnotist should obtain a detailed description of the facts from the *subject, avoiding* adding new elements to the subject's description.
>
> (5) *The session* should be recorded so a permanent record is available *to ensure against suggestive procedures.* Videotape is a preferable method of recordation, but not mandatory.
>
> (6) *Preferably,* only the hypnotist and subject should be present during any phase of the hypnotic session, *but other persons should be allowed to attend if their attendance can be shown to be essential and steps are taken to prevent their influencing the results of the session (i.e., they are not allowed to participate in the session, etc.).*

Id. (emphasis added to indicate modifications). Compare *Iwakiri*'s procedural safeguards, *supra,* with those proposed by Dr. Orne and used by courts following the conditional admissibility approach, *supra* note 26.

gested safeguards were followed.[40] It would also be unusual, the court noted, for a trial court to exclude testimony upon a showing of full compliance with the suggested procedures.[41]

If the trial court finds the witness competent, the witness may testify. The *Iwakiri* court, however, indicated that the witness could not testify to the fact of hypnosis. The cross-examining party can impeach on the basis of hypnosis or inconsistent prehypnosis statements. If such impeachment occurs, both parties may introduce expert testimony regarding hypnosis.[42]

In dissent, Judge Bistline criticized the majority's holding on two grounds. First, Judge Bistline found fault with the majority's refusal to apply its new rule to the case at bar.[43] He believed that the defendant had convincingly established that prior hypnosis had tainted the witness's memory.[44] Second, he criticized the majority for adopting a rule under which hypnotically refreshed testimony might be admissible[45] and asserted that hypnotically refreshed testimony was per se inadmissible.[46]

The *Iwakiri* court properly rejected existing standards of admissibility of hypnotically refreshed testimony. The *Iwakiri* approach creates a pre-

40. *Id.* at 579.

41. *Id.*

42. *Id.* at 579-80. The court was concerned that a witness might buttress his testimony by stating that his present memory resulted from hypnosis, a testimonial practice forbidden in the context of lie detectors. *Id.* (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)). *See also* People v. Hangsleben, 86 Mich. App. 718, 273 N.W.2d 539 (1978) (defendant cannot inform jury that his memory was restored by hypnosis).

43. 682 P.2d at 589-98 (Bistline, J., dissenting).

44. *Id.* at 589-90, 598 (Bistline, J., dissenting). Judge Bistline identified several fatal shortcomings in the procedures surrounding the hypnosis. The detective conducting the first session was not a licensed psychiatrist or psychologist. *Id.* at 590. It was unclear whether Boyer had reported seeing the children in Iwakiri's home before she submitted to hypnosis. *Id.* People other than the hypnotist and the subject were present during the session. *Id.* at 590-91. The responses given by the hypnotist to the subject may have tainted her memory. *Id.* at 591. The record of the first session was of poor quality. *Id.* at 594 (summarizing the testimony of one of Iwakiri's expert witnesses). The depth of the hypnotic trance was disputed. *Id.* at 594-96 (summarizing the testimony of both of Iwakiri's expert witnesses).

45. *Id.* at 598-606 (Bistline, J., dissenting). Judge Bistline argued that (1) the case at bar was an inappropriate vehicle for formulating a new rule, (2) overwhelming authority indicated that hypnotically refreshed testimony is unreliable, and (3) the state of the science of hypnosis is not sufficiently advanced to support a rule of admissibility. *Id.* at 598. In reference to the third point, Bistline chiefly relied upon the opinion of Idaho's solicitor general as expressed in a brief in a case contemporaneous to *Iwakiri*. At oral argument, the solicitor general stated: "I'm suggesting to you that the empirical evidence about the effect of hypnosis on witnesses is sufficiently incomplete that neither the state nor the Court should take a position on that aspect of it at this juncture." *Id.* at 601.

46. *Id.* at 601-06 (Bistline, J., dissenting).

sumption of witness competence and retains some flexibility in determining admissibility.[47] Although significant costs in the form of increased expense, complexity, and duration of trial accompany a flexible approach to the question of admissibility, these costs are clearly less than those resulting from rigid per se rules.[48]

Although the *Iwakiri* court employed sound logic in reaching its decision, it might have articulated its theory more cogently. The persuasiveness of *Iwakiri* hinges upon the acceptability of the court's assumption that hypnotically refreshed testimony can be reliable in at least some circumstances. Rather than directly addressing the question of whether hypnosis lacks sufficient scientific acceptance to support judicial approval,[49] the court simply relied upon the modern presumption of witness competence.[50]

The court overlooked several responsive arguments. First, the court could have adopted the videotape model of hypnosis,[51] thereby preventing challenges based on reliability. Such a position, however, arguably lacks convincing scientific backing[52] and would be subject to challenges based upon increased understanding of hypnosis.[53] Second, the court could have argued that the scientific community has generally accepted hypnosis as a reasonably reliable method of restoring memory, subject to the inaccuracies common to all human recollection.[54] Such a position finds support in both the per se[55] and the conditional[56] admissibility camps and is consistent with a preference for allowing witnesses of vary-

47. *Accord* FED. R. EVID. 601 (presumption of witness competency).

48. Per se inadmissibility rules may exclude reliable and relevant evidence and they run contrary to the general presumption of witness competence. *See supra* notes 35 & 47 and accompanying text. Per se admissibility rules may permit admission of unreliable evidence and they create a condition more consistent with an irrebutable presumption than with the simple presumption currently favored. *See supra* note 34 and accompanying text. Finally, strict procedural requirements lack the flexibility preferred by modern courts. *See supra* note 31 and accompanying text.

49. *See supra* notes 16-20 and accompanying text (the inadmissible per se approach) & note 45 and accompanying text (the *Iwakiri* dissent).

50. *See supra* notes 30 & 31 and accompanying text.

51. *See supra* note 10.

52. *See supra* note 10 (comparing the competing understandings of hypnosis).

53. *See, e.g.*, State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981).

54. *See* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); *see also supra* notes 21-27 and accompanying text (discussing the theory that hypnotically refreshed testimony is beneficial within the limits imposed by its inherent risks of inaccuracy).

55. *See supra* note 15 and accompanying text.

56. *See supra* notes 21-27 and accompanying text.

ing degrees of reliability to testify subject to credibility challenges.[57] By supporting its underlying assumption with either of the above-noted arguments, the court could have strengthened the persuasive force of its opinion.

The court's failure to elaborate upon the differences between its "totality of the circumstances" approach and the conditional admissibility approach further dilutes *Iwakiri*'s persuasiveness. *Iwakiri* inaccurately contends that the conditional admissibility approach merely uses compliance with procedural requirements as a proxy for reliability.[58] While failure to comply with procedures bars admission of hypnotically refreshed testimony under the conditional approach, compliance does not guarantee admission.[59] Instead, a further analysis of reliability, analogous to a review of the "totality of the circumstances," follows a finding of procedural compliance.[60] Hence, the *Iwakiri* standard and conditional admissibility differ only as to the significance attributed to procedures.[61] Finally, unlike some conditional admissibility decisions,[62] *Iwakiri* does not explain what factors amidst the "totality of the circumstances," aside from suggested procedures, support a finding of reliability.[63] Without such guidance, lower courts are likely to place greater reliance upon procedures than the *Iwakiri* court desires and perhaps even more so than they would if applying the conditional admissibility approach.

Despite its shortcomings, *Iwakiri* makes possible an increased flexibility in the determination of admissibility of hypnotically refreshed testimony. If realized, this potential will enhance the fact-finding process by increasing the amount of potentially valuable evidence that may be admitted. Widespread realization, however, depends upon a future elabo-

57. *See supra* notes 30 & 31 and accompanying text.

58. *See supra* notes 26 & 27 and accompanying text.

59. *Id.*

60. *See supra* note 27 and accompanying text.

61. "Conditional admissibility" courts demand complete satisfaction of procedural prerequisites, without exception. *See supra* notes 21 & 26 and accompanying text. Contrariwise, *Iwakiri* incorporates procedural compliance into its "totality of the circumstances" analysis, commenting that full compliance would normally lead to admission, whereas complete failure to comply would normally lead to exclusion. *See supra* notes 39 & 40 and accompanying text. The *Iwakiri* court suggested that a trial judge nevertheless might exercise his discretion to admit the evidence even if all the safeguards are not met. 682 P.2d at 579.

62. *See supra* note 27 and accompanying text.

63. *See supra* note 39 and accompanying text.

ration of the components of the "totality of the circumstances" standard that support courts' underlying preferences for admitting testimony.

R.G.O.