Hypnosis / Hypnotherapy

written by Richard Leslie | May 24, 2016

Avoiding Liability Bulletin – January 2008

… Suppose that a counselor or therapist is treating a woman who was the victim of a rape. Assume further that the practitioner is experienced and competent in the use of hypnosis or hypnotherapy (and is allowed by state law to utilize hypnosis in his or her practice) and has advertised that fact. After the client/patient tells the practitioner in some detail about the rape, but is unable to recall some important aspects of the vicious crime, she asks the practitioner to use hypnosis with her in order to assist in her recollection of some of the aspects of the rape. The practitioner believes that such recollection, in the long run, will be helpful to the treatment of the client/patient. Is the therapist or counselor allowed to do this? Are there any potential problems that must first be considered and addressed?

The answers to these questions may not be easy to find – and they are likely dependent upon state law. In one state, for example, the treating therapist would be allowed to hypnotize the patient in order to help her recollect the details of the rape that she cannot recall. However, the therapist is first required to follow procedures set out in law. Failure to comply with these procedures would jeopardize a later criminal prosecution of the alleged rapist. In fact, failure to follow the procedures set out in the law would mean that the victim of the rape would not be allowed to testify in the criminal prosecution about the details of the rape that she did remember prior to any hypnosis being used! This would likely mean that a conviction would, at a minimum, be very difficult.

Even if the procedures are followed, this particular state law (and I suspect other states have similar laws) makes clear that the witness is only allowed to testify about those matters that the witness recalled prior to the hypnosis. In other words, even when the procedures are followed, the witness (victim) is not allowed to testify about the memories recovered as a result of the hypnosis. Thus, the purpose of the specified procedures is to preserve the right of the witness to testify to those matters that she remembered prior to the use of hypnosis by showing that there was no contamination by the hypnosis.

The state law referred to requires that the substance of the pre-hypnotic memory be preserved in written, audiotape, or videotape form prior to the hypnosis. It also requires that the hypnosis is conducted in accordance with the following procedures: a) a written record is made prior to hypnosis documenting the subject's description of the event, and information which is provided to the hypnotist concerning the subject matter of the hypnosis; b) the subject gives informed consent to the hypnosis; c) the hypnosis session, including the pre- and post-hypnosis interviews, is videotaped recorded for subsequent review; and, d) the hypnosis is performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the

defense.

As if this weren't enough, the state law in question also provides that prior to the admission of the testimony, the court must hold a hearing at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' pre-hypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' pre-hypnosis recollection.

What is the law in your state? While many of the readers may not utilize hypnosis during the course of their work, some do. And, to the unwary, imagine discovering, after it is too late, that the hypnosis performed in a situation such as this has jeopardized the prosecution of the person who perpetrated this horrendous act. Be prepared – find out how this issue is addressed by the laws in the state where you practice.