The Unreliability of Testimony From a Witness With Multiple Personality Disorder (MPD): Why Courts Must Acknowledge the Connection Between Hypnosis and MPD and Adopt a “Per Se” Rule of Exclusion for MPD Testimony

Mark Anthony Miller

Follow this and additional works at: http://digitalcommons.pepperdine.edu/plr
Part of the Courts Commons, Evidence Commons, and the Psychology and Psychiatry Commons

Recommended Citation
Mark Anthony Miller The Unreliability of Testimony From a Witness With Multiple Personality Disorder (MPD): Why Courts Must Acknowledge the Connection Between Hypnosis and MPD and Adopt a “Per Se” Rule of Exclusion for MPD Testimony, 27 Pepp. L. Rev. 2 (2000)
Available at: http://digitalcommons.pepperdine.edu/plr/vol27/iss2/1

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.
The Unreliability of Testimony From a Witness With Multiple Personality Disorder (MPD): Why Courts Must Acknowledge the Connection Between Hypnosis and MPD and Adopt a "Per Se" Rule of Exclusion for MPD Testimony

Mark Anthony Miller*

"These rules [of evidence] shall be construed to secure fairness ... to the end that the truth may be ascertained and proceedings justly determined."1

TABLE OF CONTENTS

I. Introduction ........................................................ 195

II. MPD is a Dissociative Disorder Perpetuated by the Abuse of Self-Hypnosis ........................................................ 198
   A. MPD is a Dissociative Disorder .................................... 198
   B. Self-Hypnosis is the Primary Mechanism for MPD ............. 201

III. Courts' Treatment of Hypnosis Testimony ............................ 204
   A. Whether the Evidentiary Standards for Scientific Evidence Apply to Hypnosis Testimony ........................................ 205
   B. Four Alternative Approaches to Hypnosis Testimony Used by State and Federal Courts ........................................ 208
      1. The Credibility Approach ........................................ 208
      2. The Discretionary Admission Approach ....................... 209

* Associate specializing in civil litigation with Chapin Shea McNitt & Carter in Los Angeles, California; J.D., University of the Pacific, McGeorge School of Law, 1999; B.B.A., Business Economics, University of San Diego, 1996. I would like to thank my parents, Leonard and Maria Miller, for the love, support, and encouragement they have always given me. Also, special thanks to Professor Joseph M. Hnylka for his guidance and friendship. This Article received the 1999 Stauffer Charitable Trust Writing Award.
1. FED. R. EVID. 102.
3. The Procedural Safeguards Approach .................................................. 210
4. The Per Se Rule of Exclusion Approach ............................................ 211
   a. Per Se Exclusion of Testimony While Under Hypnosis .................. 211
   b. Per Se Exclusion of Hypnotically Refreshed Testimony .................. 212

IV. A Multiple's Testimony is Testimony While Under Hypnosis .................. 217

V. Courts' Refusal to Acknowledge that MPD Testimony is Hypnosis Testimony and to Utilize Hypnosis Precedent .................................................. 218
   A. State v. Donnelly .......................................................... 219
   B. Dorsey v. State ............................................................ 220
   C. Wall v. Fairview Hospital & Healthcare Services ......................... 222

VI. Critique of MPD Cases ...................................................................... 225

VII. Courts Should Exclude a Multiple's Testimony Per Se ......................... 232
   A. A Multiple's Testimony Fails to Meet the Frye Scientific Evidentiary Standard ............................................................ 234
   B. A Multiple's Testimony is Always More Prejudicial Than Probative ............................................................................. 235
      1. The Oath is an Inadequate Safeguard to Ensure Reliability ......... 236
         a. Inability to Comprehend the Nature of the Oath .................. 236
         b. Extreme Delay and Confusion ...................................... 237
      2. Cross-Examination is an Inadequate Safeguard to Ensure Reliability ........................................................................... 238
         a. High Suggestibility ....................................................... 239
         b. Confabulation ............................................................... 241
         c. Memory Hardening ....................................................... 242
         d. Compartmentalization .................................................... 243
         e. Switching .................................................................... 245
         f. Psychotherapist-Patient Privilege .................................. 248
   3. The Jury's Observation is an Inadequate Safeguard to Ensure Reliability ............................................................. 249
      a. False Presumption that Hypnosis Improves the Accuracy of Memory ............................................................. 249
      b. Faking the Condition ....................................................... 250
      c. Complexity of the Multiple's Personality System .................... 251
      d. Demeanor Exudes Self-Confidence and Credibility ................. 253

C. Summation ...................................................................................... 254

VIII. Recommendations ......................................................................... 255
   A. To the Practitioner ..................................................................... 255
      1. Request a Competency Hearing in Advance of Trial .................. 255
      2. Request that the Oath be Separately Administered to Each Alter Personality Who Will Testify .................................................. 255
      3. Make a Timely Objection on the Record and Move to Strike if the Multiple is Permitted to Testify .................................................. 255
      4. Make an Objection to the Multiple's Testimony on Hearsay Grounds ............................................................. 256
      5. Make an Objection Based on Lack of Foundation ....................... 256
      6. Bring a Motion to Suppress or a Motion in Limine to Exclude Testimony From the Multiple .................................................. 256
I. INTRODUCTION

Over the past few decades, Multiple Personality Disorder (MPD) has sparked considerable interest. MPD is "a dissociative disorder in which the normally integrated identity and consciousness functions [of an individual] are suddenly and temporarily altered." In other words, separate and distinct alternative personalities inhabit one body. Over a decade ago, the *Diagnostic and Statistical Manual of Mental Disorders* included MPD as an official psychiatric diagnosis. Since then, the number of diagnoses have increased dramatically. As a result, courts have

---

4. See id. at 263 & nn.10-11.
5. See Sabra M. Owens, *The Multiple Personality Disorder (MPD) Defense*, 8 MD. J. CONTEMP. LEGAL ISSUES 237, 238 & n.5 (1997). The essential feature of the dissociative disorders is a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 477 (4th ed. 1994) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL]. This disturbance may be sudden or gradual, transient or chronic. See id. The five disorders included within this description include Dissociative Amnesia, Dissociative Fugue, Dissociative Identity Disorder (formerly Multiple Personality Disorder), Depersonalization Disorder, and Dissociative Disorder Not Otherwise Specified. See id.
6. See Fields, *supra* note 3, at 264-65 & nn.22-23 (explaining that more than two to three times as many cases of MPD have been diagnosed in the last twenty years than at any time prior to 1970).
increasingly been faced with witnesses who suffer from the disorder. Courts confronted with a witness with MPD (a "Multiple") uniformly permit the Multiple to testify, subject to cross-examination by opposing counsel to impeach the Multiple's credibility based on his illness. These courts take the position that jurors are best suited to assess the credibility of a Multiple's testimony.

Un fortunately, this approach fails to recognize the inherent connection between hypnosis and MPD. The unrecognized abuse of self-hypnosis is the primary mechanism of MPD. Although psychotherapists and medical practitioners recognize the inherent connection between hypnosis and MPD, the legal system refuses to acknowledge it. When dealing with hypnosis evidence, courts have fashioned strict rules regarding its admissibility. Courts uniformly rule that testimony presented while under hypnosis is per se inadmissible. In addition, many
The Unreliability of Testimony from a Witness With MPD

Courts rule that hypnotically refreshed testimony is also per se inadmissible. Courts confronted with Multiples fail to acknowledge the connection between hypnosis and MPD, refusing to utilize these hypnosis cases as precedent. Perhaps, courts refuse because to do so would often result in the exclusion of important testimony. Some courts are so bold as to acknowledge that they are admitting a Multiple’s testimony simply because it is the only evidence of a crime. This reasoning sidesteps the key issue: Is the testimony of a Multiple reliable? If a Multiple’s testimony is unreliable, then the testimony must be excluded, regardless of whether it is the only evidence.

This Article maintains that a Multiple’s testimony is a particularly unreliable form of hypnosis testimony, and therefore should be excluded per se. Part II examines the connection between MPD and hypnosis. Part III examines the courts’ current approaches to hypnosis testimony. Part IV explains that a Multiple’s testimony is actually testimony given while under hypnosis. Part V examines the courts’ current treatment of MPD testimony, illustrating the legal system’s refusal to treat MPD testimony as a form of hypnosis evidence. Part VI critiques the courts’ current treatment of MPD testimony. Part VII explains why courts should rule that a Multiple’s testimony is a particularly unreliable form of hypnosis testimony which fails to meet the Frye/Daubert tests for scientific evidence, and why the testimony is always more prejudicial than probative. Part VIII provides recommendations to practitioners and courts regarding how to proceed when confronted with a Multiple. Part IX concludes that MPD testimony should be excluded per se.

16. See, e.g., People v. Shirley, 723 P.2d 1354, 1365-66 (Cal. 1982); State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980); see also infra notes 182-247 and accompanying text.
17. See, e.g., Dorsey v. State, 426 S.E.2d 224, 227 (Ga. Ct. App. 1992) (noting that if testimony from a Multiple is never admissible, Multiples would be victimized with impunity); Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 410 (Minn. 1998) (admitting each Multiple’s testimony). The Wall court noted that exclusion of the testimony would allow Multiples’ mental states and vulnerability to become a shield of protection for the offender. See 584 N.W.2d at 410.
18. See infra notes 109-247 and accompanying text.
19. See infra notes 248-55 and accompanying text.
20. See infra notes 256-346 and accompanying text.
21. See infra notes 347-98 and accompanying text.
22. For a discussion of the application of the Frye/Daubert tests for scientific evidence to a Multiple’s testimony see infra Parts III.A. & VI.A.
23. See infra notes 399-595 and accompanying text.
24. See infra notes 596-639 and accompanying text.
25. See infra Part IX.
II. MPD is a Dissociative Disorder Perpetuated by the Abuse of Self-Hypnosis

As individuals, each of us "are bundles of contrasts and contradictions." On one occasion we may act child-like and mischievous, while on other occasions we may act adult-like and dignified. These various aspects of our being have been described as "roles." Although we normally play many roles during our lifetime, we are typically aware of these roles; we do not "role-play" outside the realm of our consciousness. In other words, we retain awareness of our child-like conduct.

The same is not true for those suffering from MPD. In a person who has MPD, the "various personalities are dissociated;" they become totally separate and autonomous. For the Multiple, these autonomous personalities usually operate outside the realm of consciousness. The Multiple will be unaware of the activities of the personality, and also may be unaware of the existence of one or more personalities. The primary mechanism responsible for creating and perpetuating these personalities is the "unrecognized abuse of self-hypnosis;" the key to the dissociative disorder known as MPD.

A. MPD is a Dissociative Disorder

Dissociation has been defined as a "psychophysiological process whereby information-incoming, stored, or outgoing-is actively deflected from integration with its usual or expected associations." While in a dissociative state, a person's thoughts, feelings or actions are not associated or integrated with other information.

27. See Bliss, supra note 12, at 158.
28. See id. at 159 (stating that in normal role-playing, "there is an integration or linkage of various parts and an awareness of their presence and conduct").
29. See id.
30. See id.
31. See id.
32. See id.
33. See id.
34. See id. at 125. "The process begins very early in childhood, and thereafter self-hypnosis becomes the dominant mode of coping with stress." Id. at 125-26. "[M]ultiples are excellent hypnotic subjects by virtue of years of unrecognized practice as well as a genetic endowment." Id. at 126.
35. See infra notes 77-108 and accompanying text.
36. See Diagnostic and Statistical Manual, supra note 5, at 477 (stating that MPD, or Dissociative Identity Disorder, "is characterized by the presence of two or more distinct identities or personality states that recurrently take control of the individual's behavior accompanied by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness"); Richard P. Kluft, The Dissociative Disorders, in Textbook of Psychiatry 557, 569-79 (J.A. Talbot et al. eds., 1988).
as they normally or logically would be.\textsuperscript{38} In other words, dissociation affects the way that experiences are perceived and stored in memory. Dissociation can be either minor and non-pathological, or major and pathological.\textsuperscript{39}

One example of minor, non-pathological dissociation is common daydreaming.\textsuperscript{40} Each of us can recall times when we were so absorbed in daydreaming that we did not hear the doorbell, the telephone, or a statement made by a companion. Such daydreaming is a form of minor, non-pathological dissociation.\textsuperscript{41} Another example of minor non-pathological dissociation is “highway hypnosis.”\textsuperscript{42} We each have had experiences when driving seemed to be “automatic.” In other words, we were not really concentrating on our driving—we may even have been daydreaming—but we nevertheless obeyed all traffic rules and arrived safely at our destination with little, if any, memory of how we got there or what occurred along the way. On these occasions, the car seemed to drive on its own. During such a trip, we most likely were experiencing minor, non-pathological dissociation.

When individuals are in dissociative states, common experiences such as hearing a telephone ring or stopping at a traffic light are not perceived and stored in memory as they normally would be.\textsuperscript{43} These experiences do not become associated or integrated with other information that individuals are processing.\textsuperscript{44} Although dissociation can be minor and non-pathological, as in the examples above, dissociation can also be severe and pathological in nature.\textsuperscript{45}

Experts have identified three principles that may be used to characterize most forms of severe, pathological dissociation.\textsuperscript{46} Each of these principles apply to an individual with MPD, which is referred to as the ultimate pathological dissociative disorder. First, a person undergoing severe, pathological dissociation “experiences an alteration in his or her sense of identity.”\textsuperscript{47} This alteration may take different forms, ranging from amnesia to “the existence of a series of alternating identities that claim independence from one another.”\textsuperscript{48} This alteration of identity is present in a Multiple. A Multiple has a series of alternating personalities that dissociate and

\textsuperscript{38} See PUTNAM, supra note 8, at 6.
\textsuperscript{39} See id.
\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See id. at 10.
\textsuperscript{43} See id. at 7 (explaining that there will be a disturbance in the individual’s memory for events occurring during a period of dissociation).
\textsuperscript{44} See id. at 6.
\textsuperscript{45} See id. at 6-7.
\textsuperscript{46} See id. (stating that the first two principles were identified by John Nemiah and that the third principle emerged from Dr. Putnam’s study of dissociative reactions).
\textsuperscript{47} See id. at 6.
\textsuperscript{48} See id. at 6-7.
become "totally separated as autonomous components." One particularly important autonomous component of the MPD personality system is the alter personality who serves as the "host." The host is the personality in charge of the body the majority of time. In the alternative, "the host may not always be a single alter personality," but could be "a social facade created by a . . . cooperative effort of several alters agreeing to pass as one." "Hosts are often overwhelmed by their life circumstances and present themselves as powerless and at the mercy of forces beyond their control and comprehension." Hence, "[t]he typical host personality is depressed, anxious, anhedonic, rigid, frigid, compulsively good, conscience-stricken, and masochistic . . ."

There are other broad categories of alter personalities that are common in Multiples. For instance, there are child personalities, suicidal personalities, protector and helper personalities, memory trace personalities, crossgender personalities, promiscuous personalities, administrator and obsessive-compulsive personalities, substance-abuser personalities, autistic and handicapped personalities, special skill or talent personalities, anesthetic or analgesic personalities, imitator and imposter personalities, demon and spirit personalities, and original personalities. Further, "[p]ersonalities may have different perceptions, recollections, priorities, goals, and degrees of commitment to . . . one another."

The second characteristic of severe pathological dissociation is "a disturbance in the individual's memory for events occurring during [the] period of dissociation. This disturbance of memory may range from complete amnesia to forms of detached or dreamlike recall of events." This disturbance in memory is also present in a

---

49. See BLISS, supra note 12, at 159.
50. See PUTNAM, supra note 8, at 107.
51. See id.
52. Id.
53. Id.
54. See id. at 107-08. The number of child personalities typically outnumber the number of adult personalities. See id. at 107. Child and infant personalities remain at a particular age until relieved of their psychological burden. See id.
55. See id. at 109.
56. See id.
57. See id. at 110.
58. See id. at 110-11.
59. See id. at 111.
60. See id.
61. See id. at 112.
62. See id.
63. See id. at 112-13.
64. See id. at 113.
65. See id.
66. See id. at 113-14.
67. See id. at 114.
68. Kluft, supra note 2, at 370 (recognizing that the personalities must "gradually arrive at a unity of purpose and a common motivation for therapy to succeed").
69. See PUTNAM, supra note 8, at 7.
Multiple. In fact, in a Multiple, the host often does not know about the existence of other alter personalities, and cannot account for the loss of time when other alters were active.\textsuperscript{70}

Third, research has established that the vast majority of pathological dissociative disorders are induced by trauma.\textsuperscript{71} MPD is no exception. MPD frequently occurs in persons who have experienced severe trauma, including sexual abuse.\textsuperscript{72} In fact, "there is strong evidence linking the development of MPD to severe, recurrent traumatic experiences usually occurring during childhood or early adolescence."\textsuperscript{73} For these individuals, "dissociation is a normal process that is initially used defensively by [the] individual to handle traumatic experiences and evolves . . . into a maladaptive or pathological [disorder]."\textsuperscript{74}

Thus, each characteristic of severe, pathological dissociative disorders is present in a Multiple. Indeed, MPD is recognized as the ultimate pathological dissociative disorder.\textsuperscript{75} However, it is not enough to merely characterize a Multiple as having a severe, pathological disorder. One must also recognize that the primary mechanism of the disorder is the abuse of self-hypnosis.\textsuperscript{76}

B. Self-Hypnosis is the Primary Mechanism for MPD

Self-hypnosis is the primary mechanism for dissociation in MPD patients.\textsuperscript{77} In fact, MPD is historically and conceptually linked with hypnosis.\textsuperscript{78} The syndrome of MPD usually begins in early childhood, as a defense against physical, sexual, or...
psychological abuse. Unpleasant or traumatic experiences are “delegated to a personality by the switch into a hypnotic state.” Hypnotic dissociation can play an important role for individuals dealing with stress and trauma. For example, hypnosis can help resolve seemingly irreconcilable conflicts, isolate catastrophic experiences, and facilitate the discharge of certain feelings. This delegation of traumatic experiences to an alter personality allows the patient to forget the experience. A hypnotized individual experiences dissociation. In the case of MPD, self-hypnosis is abused, producing amnesias and alter personalities; the alter personalities are then perpetuated by the process of self-hypnosis. Although the process begins in early childhood, self-hypnosis ultimately becomes the Multiple’s dominant mode for coping with stress. Thus, the crux of MPD is the Multiple’s “unrecognized abuse of self-hypnosis.”

All Multiples are excellent hypnotic subjects with unusual hypnotic abilities. There are several conditions that can provoke spontaneous hypnosis in excellent hypnotic subjects. For example, an excellent hypnotic subject may experience a hypnotic trance by reaching a certain level of “boredom, relaxation, play, [or] reflection.” Hypnotic trances are also produced by “strong emotions such as fear, anxiety, rage, and panic,” often in response to some psychological or physical threat. A Multiple spontaneously transforms or “switches” into an alter personality when he “encounters a stress with which he cannot cope.” When a Multiple switches into an alter personality, the transformation is accomplished through hypnosis.

Most Multiples receiving psychotherapy explain that the patient “disappears” when the alter personality assumes the body. Although the transformation or switch to an alter personality is usually rapid, occasionally a person observing the Multiple

79. See PUTNAM, supra note 8, at 8.
80. See BLISS, supra note 12, at 126.
81. See PUTNAM, supra note 8, at 11.
82. See A.M. Ludwig et al., The Objective Study of a Multiple Personality: Or Are Four Heads Better Than One, ARCHIVES OF GEN. PSYCHIATRY 93 (1972).
83. See BLISS, supra note 12, at 125-26.
84. See Gruenewald, supra note 12, at 172. Hypnotically induced dissociation with a hypnotist, even if experienced as involuntary, is artificial and readily reversible whereas MPD dissociation, artificial at first, becomes real by virtue of being repeatedly enacted and reinforced. See id. In other words, the dissociation is, initially, a normal defense process to handle traumatic experiences. See id. However, when it is repeatedly reenacted and reinforced over time, it evolves into the maladaptive or pathological disorder known as MPD. See id.
86. See id.
87. See id. at 125.
88. See id. at 123; PUTNAM, supra note 8, at 9-11.
89. See BLISS, supra note 12, at 71.
90. See id. (adding that “drugs and alcohol may facilitate the process”).
91. See id. at 125.
92. See id. at 123-26.
93. See id. at 138-39.
will witness a momentary pause or “blank state.” In other words, Multiples self-hypnotize, go into a dissociative state, disappear, and are “replaced” by alter personalities. Not only do Multiples frequently enter these dissociated states, but most Multiples spend inordinate amounts of their lives in dissociative states as alter personalities.

A Multiple’s recognition of alter personalities is variable; some are known to the Multiple, others are completely out of his awareness. “Many personalities know information that is inaccessible to the [host personality.]” The reason for this is that the information has been “split off from normal consciousness and hidden hypnotically.” Often, Multiples internalize and hypnotically conceal traumatic memories, delegating them to alter personalities, thereby creating a protective amnesia.

Although personalities are created by the Multiple using self-hypnosis, once created, they “continue to exist but are hidden from consciousness.” Some [personalities] may never appear but will periodically influence the [Multiple’s] conscious behavior. Other personalities assume control “and in full consciousness perform their functions.” All personalities that appear are “partially or completely divorced from judgment, moral mandates, and other factors in memory that ordinarily would function.”

The key to understanding MPD is to focus on the disorder’s ultimate mechanism, namely, self-hypnosis. Self-hypnosis and its resulting amnesia “can not only hide traumas and personalities from consciousness; it can also conceal motor movements, bodily sensations, fantasies, language, vision, audition . . . any capability recorded in short- or long-term memory.” MPD is the “best example of spontaneous self-
hypnosis” in existence.107 MPD “demonstrat[es] the ability of hypnosis to produce a galaxy of symptoms, personalities, and irrational behaviors.”108 Unless courts understand the effects of self-hypnosis, and recognize that it is the key mechanism of MPD, they will never understand the disorder and its effects on a Multiple’s testimony.

III. COURTS’ TREATMENT OF HYPNOSIS TESTIMONY

Hypnosis testimony is divided into two main types. The first type is testimony given while in an actual hypnotic state.109 The second type, hypnotically refreshed testimony, does not refer to statements made by a witness while under hypnosis. Instead, it refers to the witness’s present recollection of events that took place prior to hypnosis, but which have been refreshed or recalled by hypnosis.110 Regardless of which type of hypnotic testimony is at issue, when addressing its admissibility, the threshold question for the courts is whether the standards for scientific evidence apply to hypnosis testimony.111 An overwhelming majority of courts answer this question in the affirmative.112

Courts confronted with hypnosis testimony, regardless of whether they apply the standards for scientific evidence, adopt one of four approaches with respect to the admissibility of the testimony. These four approaches are: (1) a “credibility” approach;113 (2) a “discretionary admission” approach;114 (3) a “procedural safe-

107. See id. at 117-19 (discussing the development and origins of MPD).
108. Id.
110. See, e.g., State v. Haislip, 701 P.2d 909, 924 (Kan. 1985) (defining hypnotically refreshed testimony not as “the actual statements made by the witness while under hypnosis, but the witness’s present recollection which had been refreshed by hypnosis”).
111. See, e.g., People v. Hughes, 453 N.E.2d 484, 490 (N.Y. 1983) (noting that “[a]lthough the center of the controversy is the question as to whether the general rule governing admissibility of scientific evidence applies to hypnotic recall”); see also People v. Shirley, 723 P.2d 1354, 1366 (Cal. 1982) (recognizing that the correct analysis of the problem is to determine whether hypnotically recalled testimony is subject to the Frye rule, and if so, whether it meets the test of that rule); State v. Tuttle, 780 P.2d 1203, 1210 (Utah 1989) (stating that the Frye test is the threshold reliability test for hypnosis testimony).
113. See infra notes 139-48 and accompanying text.
114. See infra notes 149-57 and accompanying text.
guards" approach;\textsuperscript{115} and (4) a "per se inadmissible" approach.\textsuperscript{116} Courts adopting one of the first three approaches examine hypnosis testimony on a case-by-case basis.\textsuperscript{117} Courts following the "per se inadmissible" approach have determined that a case-by-case assessment is unnecessary because hypnosis testimony is unreliable, and must be excluded.\textsuperscript{118}

A. Whether the Evidentiary Standards for Scientific Evidence Apply to Hypnosis Testimony

Courts confronted with hypnosis testimony must determine whether the analysis includes the evidentiary standards for scientific evidence. Most courts have ruled that the scientific standards apply to hypnosis testimony.\textsuperscript{119} The "general acceptance" standard for scientific evidence was espoused more than seventy years ago in \textit{Frye v. United States}.\textsuperscript{120} This standard requires that in order for scientific evidence to be admissible, "the results of mechanical or scientific testing [must be] developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate."\textsuperscript{121} "[W]here the science is new, controversial, or close to the frontier of understanding, the proponent must show the proffered

\begin{footnotes}
\item[115] See infra notes 158-67 and accompanying text.
\item[116] See infra notes 168-247 and accompanying text. See \textit{generally} Paul C. Giannelli, \textit{The Admissibility of Hypnotic Evidence in U.S. Courts}, 43 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 212 (1995) (explaining that the diversity in case law has resulted from a judicial failure to understand the scientific research on hypnosis).
\item[117] See, e.g., People v. Romero, 745 P.2d 1003, 1016 (Colo. 1987) (stating that trial courts must make a case-by-case inquiry to determine whether hypnosis testimony qualifies for admission).
\item[118] See, e.g., Contreras v. State, 718 P.2d 129, 137-38 (Alaska 1986) (recognizing that a "case-by-case approach is time consuming, creates a risk of non-uniform results and requires judges to become hypnosis experts").
\item[119] For a list of cases that have ruled that the scientific standards apply to hypnotic testimony, see supra note 112.
\item[120] See 293 F. 1013 (D.C. Cir. 1923). The court stated that:

\begin{quote}
Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
\end{quote}
\textit{Id.}
\item[121] See State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980); \textit{Frye}, 293 F. at 1013; see also Campbell Perry et al., \textit{Rethinking Per Se Exclusions of Hypotonically Elicited Recall as Legal Testimony}, 44 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 66, 72 (1996) (quoting Mack for the proposition that the scientific principle must have gained general acceptance in its particular field in order to be admissible).
\end{footnotes}
evidence is valid science.\textsuperscript{122} Under \textit{Frye}, the threshold question of admissibility is whether the scientific evidence is reliable.\textsuperscript{123} \textit{Frye} ensures the reliability of scientific evidence by using the scientific community as a "technical jury."\textsuperscript{124} However, a number of courts\textsuperscript{125} have abandoned the \textit{Frye} test since the 1993 United States Supreme Court decision in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{126}

In place of \textit{Frye}, the \textit{Daubert} Court substituted a relevance-reliability test.\textsuperscript{127} According to the \textit{Daubert} Court, this test is derived from Federal Rule of Evidence 702 which governs the admissibility of expert testimony.\textsuperscript{128} Rule 702 requires that an expert's testimony pertain to "scientific knowledge."\textsuperscript{129} Thus, in application of this standard, courts should consider:

(a) whether a scientific technique has been tested, (b) whether a technique has been subjected to the peer review and publication process, (c) a technique's known or potential rate of error, (d) the existence and maintenance of standards controlling a technique's operation, and (e) whether a technique has achieved general acceptance.\textsuperscript{130}

The Supreme Court emphasized that the Rule 702 standard is a more liberal, "flexible one" that goes beyond \textit{Frye}'s "general acceptance" criterion by considering the factors discussed above.\textsuperscript{131} Further, it is important to note that \textit{Daubert} rests on an interpretation of the Federal Rules of Evidence which are statutory, and thus, only bind federal courts.\textsuperscript{132} Therefore, states still have the freedom to adopt or reject the \textit{Daubert} and \textit{Frye} tests. There are four reasons why states have adopted the
The Unreliability of Testimony from a Witness With MPD

PEPPERDINE LAW REVIEW

Frye/Daubert standard: (1) the standard is judicially manageable; (2) the standard saves judicial time and resources; (3) the standard assures that juries will not be misled by unproven, unsound “scientific” procedures, thus safeguarding the court’s truth-finding role; and (4) the standard assures fairness and uniformity of decision-making. 133

The vast majority of courts considering whether the evidentiary standards of scientific evidence apply to hypnosis testimony adopt Frye. 134 These courts hold that scientific technique is involved when a lay witness presents hypnosis testimony. 135 According to these courts, the Frye standard must apply because the hypnotically enhanced testimony is the product of scientific intervention. 136 Courts that adopt the Frye standard for hypnosis testimony agree that the standard must be applied because the witness’s testimony is “dependent upon, and cannot be [divorced] from, the underlying scientific technique” of hypnosis that helped shape it. 137 Most cases adopt

134. See, e.g., State ex rel. Collins v. Superior Court, 644 P.2d 1266, 1272 (Ariz. 1982) (en banc) (stating that hypnotic inducement is not reliable); People v. Shirley, 723 P.2d 1354, 1366 (Cal. 1982) (aligning with other jurisdictions in holding that hypnotically induced testimony is unreliable); People v. Quintanar, 659 P.2d 710, 711 (Colo. Ct. App. 1982) (noting that hypnotically induced testimony is per se invalid); People v. Gonzales, 329 N.W.2d 743, 748 (Mich. 1980) (stating that testimony that results from hypnosis is inadmissible); State v. Palmer, 313 N.W.2d 648, 655 (Neb. 1981) (barring hypnosis testimony until it gains more acceptance); People v. Hughes, 453 N.E.2d 484, 490 (N.Y. 1983) (stating that knowledge about hypnosis is in flux). For a discussion of why the Frye standard for scientific evidence should also apply to the testimony of a Multiple see infra notes 414-22 and accompanying text.
135. See supra note 134 (listing cases that have adopted Frye to determine the admissibility of scientific evidence). At least two courts have held that Frye is inapplicable to hypnosis testimony, arguing that Frye only concerns the admissibility of data derived from scientific techniques or expert opinions. See Borawick v. Shay, 68 F.3d 597, 610 (2d Cir. 1995); United States v. Valdez, 722 F.2d 1196, 1200-01 (5th Cir. 1984). These courts said that the issue confronting them when dealing with witnesses testifying under hypnosis or witnesses who have had recollection refreshed by hypnosis, is whether the witnesses are competent or whether their lay testimony is admissible. See Borawick, 68 F.3d at 610; Valdez, 722 F.2d at 1201. Under either characterization, these courts have noted that the question does not concern the admissibility of experimental data or expert opinions, therefore Frye does not apply. See Borawick, 68 F.3d at 610; Valdez, 722 F.2d at 1200-01.
136. See, e.g., Shirley, 723 P.2d at 1372 (stating that the testimony is dependent upon scientific technique); Polk v. State, 427 A.2d 1041, 1048 (Md. Ct. Spec. App. 1981) (same); Gonzales, 329 N.W.2d at 746 (same); Alsbach v. Bader, 700 S.W.2d 823, 828-29 (Mo. 1985) (same); Hughes, 453 N.E.2d at 494 (same); State v. Tuttle, 780 P.2d 1203, 1211 (Utah 1989) (same). No court has used the Daubert standard to address this issue, however, because the Daubert standard also requires general acceptance in the scientific community it is probable that these courts’ holdings would remain unchanged.
137. See, e.g., Shirley, 723 P.2d at 1372 (finding “[t]he technique of hypnosis is scientific, but the testimony . . . of the witness is the . . . product of the administration of the technique”); Polk, 427 A.2d at 1048 (same); Gonzales, 329 N.W.2d at 746 (same); Alsbach, 700 S.W.2d at 828-29 (same); Hughes,
this standard for hypnosis testimony treat the testimony as inadmissible per se.138

B. Four Alternative Approaches to Hypnosis Testimony Used by State and Federal Courts

1. The Credibility Approach

One approach used by courts when confronted with hypnotically refreshed testimony is the credibility approach. Courts following this approach find that hypnotically refreshed testimony affects the credibility of the testimony, but not its admissibility.139 Thus, a witness's hypnotically refreshed testimony is admitted, leaving the credibility of the witness for the jury to determine.140 This approach is exemplified by the Ninth Circuit's decision in United States v. Adams.141

In Adams, the defendants were convicted for conspiracy, assault with intent to rob, robbery, and murder.142 During investigation of these crimes, an eyewitness to the murder was hypnotized by postal investigators to aid his ability to recall the events of the crime.143 At trial, the defendants unsuccessfully moved to have the witness's testimony limited to his pre-hypnosis statements.144 The defense called the same eyewitness to the stand. On cross-examination, the prosecution was able to discredit the eyewitness's testimony with statements he made after undergoing hypnosis.145

On appeal, Adams argued that all of the eyewitness's in-court testimony should be excluded on the grounds that testimony from a witness who had been hypnotized

453 N.E.2d at 494 (finding that hypnosis "is a scientific process and the recollections it generates must be considered as scientific results"); Tuttle, 780 P.2d at 1211 (recognizing that "hypnotically enhanced testimony given by the witness is the product of scientific intervention").


139. See, e.g., United States v. Awkward, 597 F.2d 667, 669 (9th Cir. 1979); United States v. Adams, 581 F.2d 193, 198-99 (9th Cir. 1978); Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974).

140. See Giannelli, supra note 116, at 224 (noting both federal and state court decisions which have followed the credibility approach). However, these early cases arose before courts viewed hypnotically refreshed testimony with skepticism and questioned its reliability. See id.

141. 581 F.2d 193, 198 (9th Cir. 1978).

142. See id. at 195-96.

143. See id. at 198.

144. See id.

145. See id.

208
was unreliable. The court of appeals held that the hypnotically refreshed testimony was admissible and that its reliability was a question for the jury. Therefore, the appellate court held that the trial court did not abuse its discretion by admitting the testimony.

2. The Discretionary Admission Approach

The discretionary admission approach recognizes a judge’s discretion to exclude hypnotically refreshed testimony if it is found to be unreliable in a particular case. Most courts using this approach apply a "totality of the circumstances" analysis. The Second Circuit recently followed this approach in Borawick v. Shay.

In Borawick, the plaintiff filed a tort action against her aunt and uncle for alleged sexual abuse that occurred when she was a child. The court addressed the admissibility of memories of childhood sexual abuse recalled for the first time in adulthood as a result of hypnosis administered as part of a general psychotherapy session. The district court entered summary judgment for the defendants, following an in limine ruling prohibiting the plaintiff from testifying based on hypnotically refreshed recollections of sexual abuse.

On appeal, the court suggested that inflexible per se exclusion approaches often exclude reliable testimony, therefore, the court adopted a "totality of the circumstances" approach. In determining whether hypnotically refreshed testimony should be admissible, the court provided a nonexclusive list of factors that may be weighed on a case-by-case basis in assessing whether testimony is sufficiently reliable and whether its probative value outweighs any prejudicial effect. As a

146. See id. at 199.
147. See id.
148. See id. at 200.
150. See cases cited supra note 149.
151. 68 F.3d 597, 606-07 (2d Cir. 1995).
152. See id. at 598.
153. See id. at 600.
154. See id. at 598.
155. See id. at 607-08.
156. See id. at 608. These factors resemble the procedural safeguards presented in State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981). However, the "totality of the circumstances" factors are less refined and not mandatory. The factors include: (1) whether the refreshed memory concerns a known public event
result, the court of appeals held that Borawick's hypnotically refreshed testimony was inadmissible under the totality of circumstances.157

3. The Procedural Safeguards Approach

The third approach used by courts when confronted with hypnotically refreshed testimony is to admit the testimony if certain procedural safeguards are met.158 The leading case on point, decided by the New Jersey Supreme Court in 1981, is State v. Hurd.159 The issue before the Hurd court was whether the testimony of a witness who had undergone hypnosis to refresh her recollection was admissible in a criminal trial, and if so, under what circumstances.160 The trial court held that the hypnotically refreshed testimony was inadmissible.161 Moreover, the court affirmed the trial court's decision, and adopted a two-part test for admissibility.162

The first part of the two-part test adopted by the court is whether the testimony meets the following procedural safeguards:163

First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the hypnotic session. Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense. Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. Fourth, before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. Fifth, all contacts between the hypnotist and the subject must be recorded. Finally, only the hypnotist and the subject should be present

experienced by the subject or whether the memory is refreshed as a result of therapy; (2) whether, before or during the hypnosis, the hypnotist made any extraneous suggestions regarding the subject matter of the hypnosis which may have become part of the witness's memory; (3) the presence or absence of a permanent record of the hypnosis sessions to ascertain whether the hypnotist used reliable procedures; (4) the qualifications of the hypnotist; (5) whether any corroborating evidence tends to support the reliability of the testimony; (6) the subject's ability to be hypnotized; (7) whether any expert evidence was presented by the parties regarding the reliability of the procedures used by the hypnotist; and (8) the court should hold a pretrial hearing to enable the parties to present expert evidence and to test credibility through cross-examination. See Kristy L. Topham, Note, Borawick v. Shay: The Admissibility of Hypnotically-Induced Memories, 27 Golden Gate U. L. Rev. 423, 444-45 (1997).

157. See Borawick, 68 F.3d at 609. The court found that the hypnotist was not qualified, the record lacked any basis to assess the reliability of his procedures, and there was no permanent record of the hypnosis session. See id.

158. See, e.g., Hurd, 432 A.2d at 89-90; State v. Adams, 418 N.W.2d 618, 624 (S.D. 1988).


160. See id. at 88.

161. See id. at 89-90.

162. See id. at 96-98. Prior to applying this two-part test for admissibility, the New Jersey Supreme Court also noted that hypnotically refreshed testimony must satisfy the Frye standard for admissibility of scientific evidence. See id. at 91.

163. See id. at 96-97. The court prescribed these safeguards based on the opinions of Dr. Martin T. Ome, a noted hypnosis expert and psychiatrist. See id.
during any phase of the hypnotic session, including the prehypnotic session, the
prehypnotic testing and the post hypnotic interview. 164

The second portion of the court’s two-part admissibility test requires that the
state meet the burden of establishing by clear and convincing evidence that it
complied with these procedural safeguards. 165 Applying the two-part test to this case,
the court found that the state failed to satisfy the procedural safeguards, and that the
psychiatrist and law enforcement personnel exerted pressure on the witness inducing
her to identify the defendant. 166 Although the court recognized that hypnotic
testimony was inadmissible in Hurd, it acknowledged that such testimony would be
admissible in other cases if the procedural safeguards were satisfied. 167

4. The Per Se Rule of Exclusion Approach

The final approach used by courts for hypnosis testimony is the per se rule of
exclusion approach. This approach is used both for testimony while under hypnosis
and for hypnotically refreshed testimony.

a. Per Se Exclusion of Testimony While Under Hypnosis

Courts are in agreement that testimony while under hypnosis and evidence of
what a subject says while under hypnosis are inadmissible per se. 168 Particularly, in
People v. Hangsleben, 169 the court disallowed evidence of a subject’s responses while
under hypnosis, ruling that the testimony was unreliable. 170 The defendant in
Hangsleben was a teenage boy convicted of two counts of second degree murder for
the slaying of two young girls in their home. 171 After the murders, the defendant had
several contacts with the police, and made several incriminating admissions to
them. 172 For instance, although he denied killing the girls, the defendant admitted to

164. See id. at 97.
165. See id. at 98.
166. See id. at 88.
167. See id. at 88.
168. See, e.g., People v. Busch, 366 P.2d 314, 319-20 (Cal. 1961); Bundy v. State, 455 So. 2d 330,
340 (Fla. 1984); Pearson v. State, 441 N.E.2d 468, 472 (Ind. 1982); State v. Haislip, 701 P.2d 909, 924
1028, 1034 (Md. 1983); People v. Hangsleben, 273 N.W.2d 539, 543-44 (Mich. Ct. App. 1978); State
1975); State v. Pierce, 207 S.E.2d 414, 418 (S.C. 1974); Greenfield v. Commonwealth, 204 S.E.2d 414,
419 (Va. 1974).
170. See id. at 543-44.
171. See id. at 540.
172. See id.
being in their home the night of the murders.\textsuperscript{173} When speaking to the police, the defendant claimed that he could not remember what occurred at the girls' home.\textsuperscript{174} At trial, however, he allegedly remembered that a third person was present and committed the crimes.\textsuperscript{175} Defense counsel was denied their request to have the psychiatrist who examined the defendant after his arrest testify regarding statements made by the defendant \textit{while under hypnosis}, and to play a tape of the conversation between the psychiatrist and the defendant.\textsuperscript{176}

The defendant raised several supposed errors by the trial court, including the court's decision on the admissibility of evidence obtained by examining the defendant while under hypnosis.\textsuperscript{177} The Michigan Court of Appeals held that the testimony was inadmissible and affirmed the trial court's decision.\textsuperscript{178}

The \textit{Hangsleben} court reasoned that one purpose for introducing this testimony would be to establish the truth of the statements made by the defendant while he was under the hypnotic trance. A second use . . . would be to bolster the credibility of [the] defendant's story at trial by arguing that the hypnosis had a mind-jogging effect, which would help explain defendant's earlier inconsistent admissions to police.\textsuperscript{179}

The court held, as a matter of first impression, that "evidence of [a] subject's responses while under hypnosis is inadmissible for either of these purposes."\textsuperscript{180} In addition, the court recognized that "[c]ourts in other jurisdictions have universally disallowed" such testimony when offered to establish the truth of the statements made by a witness while under hypnosis, reasoning that such testimony is unreliable.\textsuperscript{181}

\textbf{b. Per Se Exclusion of Hypnotically Refreshed Testimony}

Courts have also adopted a rule of per se exclusion regarding hypnotically refreshed testimony. Courts adopting this approach do so using different legal arguments. The two most prominent arguments are that the testimony fails to meet the \textit{Frye} test\textsuperscript{182} and that the testimony is more prejudicial than probative.\textsuperscript{183} Two

173. \textit{See id.}
174. \textit{See id.}
175. \textit{See id.}
176. \textit{See id. at 543.}
177. \textit{See id.}
178. \textit{See id. at 543-44.}
179. \textit{See id. at 543.}
180. \textit{See id. at 543-44.} The court noted that the hypnosis testimony was unreliable. \textit{See id. at 544.} The defendant's sole assertion of reliability was that the psychiatrist who administered the test was qualified, however, the court ruled that this was inadequate foundation for the scientific evidence. \textit{See id.}
181. \textit{See id. at 544.}
leading cases adopting a per se exclusion for hypnotically refreshed testimony based on the testimony's failure to meet the Frye test are State v. Mack and People v. Shirley. The Mack court was the first state supreme court to impose a per se exclusion for hypnotically refreshed testimony. In Mack, charges were brought against the defendant, David Mack, for criminal sexual conduct in the first degree in violation of a Minnesota statute. Before any determination of probable cause had been made, the district court certified to the Supreme Court of Minnesota the question concerning the admissibility of hypnotically refreshed testimony in a criminal trial.

In Mack, the alleged victim, Erickson, met the defendant at a bar. Mack took Erickson to a motel where they engaged in sexual intercourse. Erickson began bleeding profusely from her vagina. Mack called for an ambulance to bring her to the hospital. One of the ambulance drivers observed that the alleged victim was "quite drunk" and that her speech was unclear. The driver also testified that Erickson had trouble walking, but did manage to insist that Mack was not at fault. At the hospital, Erickson was attended by one intern who recorded that she told him she had "engaged in sexual activity with fingers being placed in her vagina." Another intern, who was assisting Erickson, stated that Erickson believed that she had been in a motorcycle accident. This intern theorized that Erickson could not have been injured by a human fingernail, but rather she was suffering from a cut through the vaginal tissue into a muscle layer. This intern noted that this kind of injury could be the result of "tearing after childbirth."

Two days after the incident, after being informed of the possible causes of her injury, Erickson telephoned the police. Erickson told police that she could not

184. 292 N.W.2d 764, 764 (Minn. 1980).
185. 723 P.2d 1354, 1354 (Cal. 1982).
186. See Mack, 292 N.W.2d at 765. For a list of cases from other jurisdictions adopting a per se exclusion of hypnotically refreshed testimony, see Thomas M. Fleming, Annotation, Admissibility of Hypnotically Refreshed or Enhanced Testimony, 77 A.L.R.4th 927, 943 (1990).
187. See Mack, 292 N.W.2d at 765.
188. See id.
189. See id. at 766.
190. See id.
191. See id.
192. See id.
193. See id.
194. See id.
195. See id.
196. See id.
197. See id.
198. See id.
199. See id.
remember anything after the alleged motorcycle accident, and that she had blacked out on other drinking occasions. She then agreed to be hypnotized by a lay hypnotist to refresh her memory. Under hypnosis, the hypnotist suggested that Erickson recall the events of May 13 and 14 as they transpired. She stated that Mack “told me to get on the bed and take my clothes off.” Then, she stated that “[h]e told me to spread my legs, . . . . He pulled out a switchblade and told me he was going to kill me . . . . he kept sticking this knife up me and I remember screaming and screaming.”

The Mack court found that there was no evidence to corroborate any of the details of Erickson’s hypnotically refreshed memory of the events. For example, Erickson recalled repeated stabbing of her genitalia, but her medical records indicated that there was only a single deep cut inside her vagina, with no damage to the exterior regions. She described Mack’s motorcycle as a black Yamaha, however, Mack’s motorcycle was a maroon Triumph. Next, Erickson recalled having dinner with her father that day at the Embers restaurant, and said she ordered pizza. It was later discovered that Embers restaurant does not serve pizza. Lastly, she recalled that she and her friend, Hazel Durkin, previously met David Mack. However, Durkin said they previously met a man named Dave who she described as 5’ 1” in height, with a tattoo on his left arm. Mack was 5’ 8” and had no tattoos on either arm.

The Minnesota Supreme Court was asked to address the issue of whether Erickson’s hypnotically refreshed testimony was reliable, and therefore, admissible. The Mack court held that the proffered testimony was inadmissible under the Frye test because it did not meet the ordinary standard of reliability for admission. Erickson’s testimony could not be independently corroborated and was replete with factual inconsistencies and errors. The Mack court reasoned that hypnotically refreshed memories that are accurate cannot be distinguished from confabulated recollections by either the person hypnotized or the expert hypnotist. In addition, the court reasoned that after a hypnosis session, the account of the incident differs from ordinary recall because the hypnotized person becomes subjectively convinced of the truth of the hypnotic recollection, which hinders that recall from being

200. See id.
201. See id. at 767.
202. See id.
203. Id.
204. Id.
205. See id. at 772.
206. See id.
207. See id.
208. See id.
209. See id.
210. See id.
211. See id.
212. See id.
213. See id.
214. See id. at 769-70.
The Unreliability of Testimony from a Witness With MPD

Consequently, the court noted that, based upon the reliability problems posed by hypnosis testimony, it would be extremely difficult to formulate an admissibility rule which is sensitive to these problems. The Mack court held that “regardless of whether such evidence is offered by the defense or by the prosecution, a witness whose memory has been ‘revived’ under hypnosis ordinarily must not be permitted to testify ... to matters which he or she ‘remembered’ under hypnosis.”

The second preeminent case utilizing the Frye test to adopt a per se exclusionary rule for hypnotically refreshed testimony is People v. Shirley. In Shirley, the complaining witness testified that the defendant forced her to perform sexual intercourse and oral copulation. At trial, the defendant moved to exclude the witness’s hypnotically refreshed testimony. The trial court denied the motion, ruling that the prior hypnosis of a witness affects the testimony’s weight, but not its admissibility. Accordingly, the court directed that the facts and circumstances of the witness’s hypnosis should be put before the jury. The jury believed part of her story, and convicted the defendant of rape. However, the jury also found that the witness was lying when she described in detail the alleged act of oral copulation.

The defendant was acquitted as to that charge, and appealed the rape conviction to the California Supreme Court.

The principal question on appeal was whether the complaining witness should be allowed to testify after she had undergone hypnosis for the purpose of refreshing her memory. The supreme court identified the dangers associated with hypnotically refreshed testimony as hyper suggestibility, hyper compliance, inability to distinguish accurate from inaccurate recall, and enhanced confidence, however, the court noted that there is no correlation between the confidence of the testimony and

---

215. See id. The court further noted that after hypnosis, the ordinary indicia of reliability are “completely erased” because of the strength of the witness’s conviction. See id. at 769. For example, a hypnotic witness is able to pass lie detector tests regarding the truth of statements made under hypnosis although researchers know these statements to be completely false. See id.

216. See id. at 770.

217. Id. at 771.

218. 723 P.2d 1354 (Cal. 1982).

219. See id. at 1355.

220. See id. at 1359.

221. See id.

222. See id.

223. See id. at 1355.

224. See id. The court noted that the record was “replete with instances in which her testimony was vague, changeable, self-contradictory, or prone to unexplained lapses of memory.” See id.

225. See id.

226. See id.
Using the Frye test, the court held that the witness’s testimony relating to events recalled after hypnosis was per se inadmissible because hypnosis is so widely viewed as unreliable. Consequently, the conviction was reversed.

Contreras v. State is another leading case that excluded hypnotically refreshed testimony, but in this case the decision was based on the argument that this type of testimony is always more prejudicial than probative. In Contreras, the defendant was accused of kidnaping, assault, and sexual assault. Before Contreras’s arrest, the victim was hypnotized in an effort to reveal the suspect’s identity. The victim later identified Contreras as her assailant. Prior to trial, Contreras filed a motion to exclude all testimony by the victim on grounds that the victim’s memory was tainted by the hypnotic session. The trial court held that the victim’s testimony “pertaining to the subject matter considered during [the] hypnotic session” was to be excluded; the remaining testimony would be admitted. This ruling barred the introduction of [the victim’s] identification of Contreras at trial. The trial court ruled that the Frye test for admissibility of scientific evidence was applicable and that hypnosis did not satisfy the test’s requirements. On appeal, the court held that hypnotically adduced testimony was admissible, and reversed the trial court. Contreras petitioned the Supreme Court of Alaska for review.

The main issue before the court was whether the victim’s hypnotically refreshed testimony, identifying Contreras as the assailant, was admissible. The court concluded that hypnosis renders a witness’s subsequent testimony inadmissible per se. The court reasoned that hypnotically refreshed testimony is always more prejudicial than probative. The court recognized that most courts use a case-by-case approach to determine the admissibility of hypnotically refreshed testimony. See id. at 1382-83.

227. See id. at 1382-83.
228. See id. at 1383-84. Although the Shirley court adopted a per se exclusionary rule, it did make one notable exception: individuals will be permitted to testify as to any topic wholly unrelated to the subject of the hypnotic session. See id. at 1384.
229. See id. at 1387.
231. See id. at 136. Federal Rule of Evidence provides: “Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403.
232. See 718 P.2d at 130.
233. See id.
234. See id.
235. See id.
236. See id.
237. Id.
238. See id. On the basis of expert testimony, the court found that Contreras’s right to confront the victim would be impaired because hypnosis bolsters a witness’s confidence and alters the witness’s demeanor. See id.
239. See id.
240. See id.
241. See id. at 129-30.
242. See id. at 133.
243. See id. at 136.
case approach when balancing the testimony’s probative value versus its prejudicial effect. However, the court found that “the case-by-case approach is time consuming, creates a risk of non-uniform results and requires judges to become hypnosis experts . . .” Thus, the court concluded that the prejudice/probative balance weighs in favor of per se exclusion. The court noted that the potential dangers of heightened suggestibility, confabulation, and enhanced certainty on the part of witnesses who were previously hypnotized prejudices the opposing party so much that even expert testimony cannot “sufficiently overcome the likelihood that a jury may be misled by such testimony.”

IV. A MULTIPLE’S TESTIMONY IS TESTIMONY WHILE UNDER HYPNOSIS

Regardless of which personality is testifying, a Multiple’s testimony will be testimony while under hypnosis. A Multiple will always testify either as a host or some other alter personality. Every time an alter personality testifies, the testimony will be given by that alter personality while under hypnosis because all alters are in self-hypnotic dissociative states. Similarly, in a vast majority of cases when the host testifies, the testimony concerns the conduct or recollections of a particular alter. Such testimony is testimony while under hypnosis because the host will be recalling events, conversations, and experiences that all took place while the particular alter was present. In other words, the host will be testifying regarding matters that were experienced by an alter who was in a self-hypnotic dissociative state at the time the experiences occurred. This would be analogous to a lay witness reading a

244. See id. at 137.
245. See id. at 137-38.
246. See id. at 138.
247. See id.
248. See Bliss, Report of 14 Cases, supra note 76, at 1393-94 (explaining that the domain of the personalities is hypnosis and that Multiples are excellent hypnotic subjects). For a discussion of the interplay between MPD and self-hypnosis, see Bliss, supra note 12, at 117-63.
249. An overwhelming majority of lawsuits involving Multiples as parties or witnesses deal with the Multiple’s own criminal conduct or third party abuse of the Multiple. Under either scenario, the criminal conduct or abuse takes place when an alter was in control. For example, in situations of abuse, the Multiple is usually abused when a child alter or some other alter is present. See, e.g., Dorsey v. State, 426 S.E.2d 224, 225-26 (Ga. Ct. App. 1992) (noting that the victim was abused when she was in a dissociative state and took on the voice and personality of a five to nine year old child); Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 400 (Minn. 1998) (recounting that the victims were sexually abused in dissociative states and that alter personalities first reported the abuse).
250. Whenever the host testifies regarding the experiences of an alter, or when an alter testifies about the experiences of the host or another alter, such testimony is arguably hearsay. See, e.g., Dorsey, 426 S.E.2d at 227 (recognizing that a hearsay objection to a Multiple’s testimony may be sustained if counsel were not given the opportunity to cross-examine the specific alter); People v. Smith, 459 N.Y.S.2d 528, 540 (N.Y. Crim. Ct. 1983) (noting that if either party sought to introduce the contents
transcript of his own statements made while he was under hypnosis during a hypnotic session. Courts universally hold that such testimony while under hypnosis is inadmissible per se.

To compound matters further, a Multiple’s testimony is often hypnosis embedded within hypnosis. Hypnosis is an integral component of a Multiple’s therapy. During therapy, a Multiple is placed under hypnosis to recall the existence and experience of alter personalities in an attempt to integrate these personalities. When the Multiple later testifies regarding an alter’s experiences, he will often be testifying as to memories that were first recalled during the hypnotic therapy session. Under these circumstances, the Multiple would be testifying as to memories first recalled during hypnotic therapy, regarding what happened to an alter while the alter was in a self-hypnotic state. Thus, a Multiple would be using hypnosis to remember what happened to him while under hypnosis. Therefore, a Multiple’s testimony is always testimony given while under hypnosis, and is often hypnosis embedded within hypnosis.

V. COURTS’ REFUSAL TO ACKNOWLEDGE THAT MPD TESTIMONY IS HYPNOSIS TESTIMONY AND TO UTILIZE HYPNOSIS PRECEDENT

Currently, courts do not recognize the inherent connection between hypnosis testimony and a Multiple’s testimony. Courts that have addressed the question of whether a Multiple’s testimony is admissible include the supreme courts of Montana and Minnesota, and the appellate courts of Georgia and Indiana.

of the actual hypnotic interviews for the purpose of proving their truth, such hearsay offers would be prohibited by the rules of evidence).

251. See, e.g., People v. Hangsleben, 273 N.W.2d 539, 543-44 (Mich. Ct. App. 1978) (holding that evidence of a subject’s responses while under hypnosis is inadmissible to establish the truth of the statements made or to bolster the credibility of the defendant’s story). The court also noted that “other jurisdictions have universally disallowed such evidence . . ., reasoning that it is unreliable.” Id. at 544.; see also Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1118-19 (8th Cir. 1985) (holding that use of a videotape of a hypnotic session is highly prejudicial, and therefore, inadmissible).

252. See cases cited supra note 168.

253. See Bliss, supra note 12, at 193-220; Kluft, supra note 76, at 230-33.

254. See Putnam, supra note 8, at 198-200, 223-35 (explaining the therapeutic role hypnosis plays when clinicians are working with Multiples).

255. See id.


259. See Thornton v. State, 653 N.E.2d 493, 497 (Ind. Ct. App. 1995). In Thornton, the appellant was convicted for molesting his daughter who suffered from MPD. See id. at 495. The trial court permitted the daughter’s alter personalities to testify. See id. at 497. Thornton failed to request a competency hearing at trial, nor did he raise the issue on appeal. See id. at 496 n.1. Although the appellate court ruled that the trial court did not abuse its discretion in allowing the daughter to testify, the sole basis of its ruling was that Thornton failed to carry his burden of proof on the competency issue because he did not present evidence to the trial court. See id. at 497. Because the appellate court based
The MPD cases from these courts are discussed below. Each of these courts failed to make the connection between hypnosis and MPD. Although there is a wealth of hypnosis precedent to provide guidance to courts confronted with a Multiple’s testimony,260 courts continue to view this body of precedent as inapplicable. Unless courts accept the inherent connection between hypnosis and MPD, they will continue to perpetuate the myth that MPD testimony is reliable.

A. State v. Donnelly

In State v. Donnelly,261 the Supreme Court of Montana addressed whether the testimony of a Multiple was reliable.262 The defendant was convicted when a jury found him guilty of incest.263 The defendant’s adopted daughter, Janey Doe, was the alleged victim.264 Janey Doe suffered from MPD.265 She, and several of her alter personalities, were permitted to testify before the jury at trial.266 During trial, the State provided expert testimony that “Janey Doe’s multiple personalities and bizarre self-destructive activities were classic symptoms of ‘abused child syndrome’ and that Janey fit the ‘abused child’ profile. The defense strategy was to present alternate explanations for the observed personality features of [Janey Doe].”267

One of the issues raised on appeal was whether the district court erred when it permitted Janey Doe and her alter personalities to testify at trial.268 The district court ruled that the victim was competent to testify, and that the victim’s credibility was a proper question for the jury.269 Further, “the District Court determined that Janey Doe had the capacity to express herself, to remember what occurred, and to understand her duty to tell the truth.”270 The district court assessed Janey Doe’s competency based on its observation of her as a witness.271 The court stated: “It is true that [Janey Doe] suffers from extensive and severe emotional damage because

its holding on the appellant’s failure to carry his burden of proof rather than on the reliability of a Multiple’s testimony, this case is not discussed in detail.

260. See supra notes 139-247 and accompanying text.
262. See id. at 94-95.
263. See id. at 90.
264. See id. at 90-91.
265. See id. at 91.
266. See id. at 91, 95.
267. See id. at 92.
268. See id. at 90.
269. See id. at 95.
270. Id.
271. See id.
of the incestuous actions of the defendant . . . However, she is able to discern the truth from falsity and her credibility is properly a question for the jury.”

The district court found that there was nothing in the witness’s demeanor that would demonstrate an inability to testify. The court also determined that each of the alters testifying consistently incriminated the defendant.

The Montana Supreme Court affirmed, stating that competency depends on the witness’s “capacity to remember the occurrence and the ability of the witness to relate her impressions of what occurred.” The court further stated that “[a]ny inconsistencies within her testimony or possible fabrication would affect Janey Doe’s credibility not her competency.” Finally, the court held that the “District Court . . . did not abuse its discretion in deciding that Janey Doe understood her duty to tell the truth and had the ability to clearly communicate her accounts of the events in question.”

B. Dorsey v. State

A Georgia appellate court addressed whether a Multiple’s testimony is reliable in Dorsey v. State. At trial, Marilyn and James Dorsey were convicted of rape, aggravated sodomy, and sexual battery. The alleged victim, a high school junior, developed MPD as the result of sexual abuse during her childhood. The victim had at least two personalities, “Big Wendy” and “Little Wendy.” When confronted with upsetting situations, the victim’s host personality, Big Wendy, retreated and Little Wendy took over. When Little Wendy appeared, the victim took on the voice and personality of a five to nine year old child. Expert testimony at trial suggested that Big Wendy had no recollection of Little Wendy’s activities. After the trial of Marilyn Dorsey, doctors discovered additional personalities, such as “Trouble.” “Trouble” appeared when any of the personalities were being physically hurt. At trial, the victim was permitted to testify against the Dorsey's in a dissociative state.

272. Id. (emphasis added).
273. See id.
274. See id.
275. See id. at 94 (citing State v. Newman, 790 P.2d 971, 974 (Mont. 1990)).
276. Id. at 94-95 (emphasis in original).
277. Id. at 95.
279. See id. at 225.
280. See id.
281. See id.
282. See id. at 225-26.
283. See id. at 226.
284. See id.
285. See id.
286. See id.
287. See id.
288. See id.
289. See id.
The defendants appealed their convictions, challenging the admissibility of the victim’s testimony on the basis that it was inadmissible hypnosis testimony. The appellants argued that a dissociative state was similar to a hypnotic state, and thus, dissociative testimony should be treated the same as hypnosis testimony. They further argued that the Supreme Court of Georgia held that statements made by a person while in a hypnotic state were inadmissible. The court of appeals rejected this argument, explaining that there was an important difference between hypnosis testimony and testimony while in a dissociative state. The court stated that “[t]he most important difference for our purposes is that hypnosis is a process a person voluntarily chooses to engage in . . . while a dissociative state is involuntary and, although triggered by external stimuli, comes solely from within.” In recognizing this difference, the court explained that the involuntariness of a dissociative state makes statements inherently more reliable than statements made during hypnosis. The court found that a Multiple’s testimony while in a dissociative state could be tested for reliability because the jury has the opportunity to observe the witness and to evaluate her demeanor. In addition, the court stated that the appellants had the opportunity to test the reliability of the victim’s testimony through cross-examination. Thus, the court held that the line of authority holding that statements made by a person in a hypnotic state are inadmissible did not control the admissibility of a Multiple’s testimony while in a dissociative state.

After determining that hypnosis cases did not control the admissibility of a Multiple’s testimony, the court of appeals considered whether such testimony was nevertheless admissible. The court recognized that the purpose of a trial is to determine truth, and that admissibility of evidence is within the discretion of the trial court. With these principles in mind, the court ruled that the victim’s testimony while in a dissociative state was admissible for several reasons. First, the court was convinced by undisputed expert testimony that a person in a dissociative state would

288. See id.
289. See id.
290. See id. (citing Bobo v. State, 327 S.E.2d 208 (Ga. 1985) for the proposition that “statements made by a person while in a hypnotic trance are inadmissible, as the ‘reliability of hypnosis has not been established’

291. See id. at 227.
292. Id.
293. See id.
294. See id.
295. See id.
296. See id.
297. See id.
298. See id.
not lie. Second, the court acknowledged that the testimony’s reliability was supported by a number of prior consistent statements. Third, the court relied on the fact that the jury observed the Multiple during her testimony and that appellants had the opportunity to cross-examine her. Fourth, the court ruled that if testimony from an individual in a dissociative state was never admissible, then persons aware of an individual’s dissociative disorder could easily take advantage of the situation. The court concluded that the trial court did not abuse its discretion in admitting the Multiple’s testimony.

C. Wall v. Fairview Hospital & Healthcare Services

The most recent case to deal with the admissibility of a Multiple’s testimony is Wall v. Fairview Hospital & Healthcare Services. In Wall, appellants Sandra Slavik and Ruth Wall brought suit against the estate of their deceased psychiatrist Dr. Routt, nurse Kathy House, and Fairview Hospitals. The plaintiffs sought punitive damages for alleged sexual abuse and mistreatment that occurred while they were patients. Both plaintiffs had extensive histories of physical, emotional, and sexual abuse. Plaintiffs struggled with depression, post-traumatic stress disorder, suicidal tendencies, and episodes of self-mutilation. Slavik and Wall were both diagnosed with MPD.

Each plaintiff had numerous alters. Slavik called herself Mary and her alters included Elizabeth, Kate, Amelia, Grandma, and Anne. Wall’s alters included Tootie Kay, Michael, Kay, the Little Girls, the Destroyer, the Silent One, and Daniel. Before trial, House moved to exclude all testimony from Slavik and Wall regarding matters that first came to light while they were in dissociative states. House relied on the Minnesota Supreme Court’s decision in State v. Mack, which held that testimony regarding matters that were first revealed during hypnosis are

See id. at 398.
See id. at 399.
See id. at 401.
See id. at 395, 408-11 (Minn. 1998).
See id. at 398.
See id. at 402.
See id. at 399.
See id. at 399.
See id. at 398.
See id. at 399.
See id. at 399.
See id.
See id.
See id. at 401.
299. See id.
300. See id.
301. See id.
302. See id.
303. See id.
304. 584 N.W.2d 395, 408-11 (Minn. 1998).
305. See id. at 398.
306. See id. at 402.
307. See id. at 399.
308. See id.
309. See id. at 398.
310. See id. at 399.
311. See id.
312. See id.
313. See id. at 401.
314. 292 N.W.2d 764 (Minn. 1980).
inadmissible. House argued that Mack’s prohibition of hypnosis testimony applied equally to testimony regarding what transpired while a Multiple was in a dissociative state. The trial court stated that it was unknown whether dissociation was a form of hypnosis. House also sought to prevent Slavik and Wall from testifying while they were in dissociative states. The court found that Slavik and Wall were competent to testify even while in dissociative states.

At trial, Slavik and Wall testified that during therapy, their psychiatrist, Dr. Routt, would hypnotize them or call forth their alter personalities, and sexually abuse them while they were in their dissociative states. The court allowed the jury to observe testimony from several of their alter personalities. Defense counsel had the opportunity to cross-examine each alter about their ability to tell the truth. The jury awarded Slavik and Wall approximately $5 million. House appealed. The court of appeals affirmed, concluding “that hypnosis and dissociation are fundamentally different” and that “Mack did not bar any testimony that first came to light during a dissociative episode.” House then appealed to the Minnesota Supreme Court.

The court in Wall addressed two issues pertinent to this Article. The first issue was whether the trial court abused its discretion in concluding that Slavik and Wall were competent to testify while in dissociative states. The second issue was whether dissociation was a form of self-hypnosis or sufficiently similar to hypnosis, so that any testimony first related while in a dissociative state would be barred.

On the first issue, the court noted that the determination of witness competency was within the trial court’s discretion. The court recognized that if the witness understood the obligation to tell the truth and could recall and relate the relevant events, the witness was competent and should be permitted to testify. The court concluded that the trial court did not abuse its discretion when it ruled that Slavik and

315. See Wall, 584 N.W.2d at 401 (citing Mack, 292 N.W.2d at 772).
316. See id.
317. See id.
318. See id.
319. See id.
320. See id. at 400.
321. See id. at 401.
322. See id. at 409.
323. See id. at 402.
324. See id.
325. See id. at 409.
326. See id. at 399, 408.
327. See id. at 408.
328. See id. at 409.
329. See id.
330. See id.
Wall were competent and permitted them to testify while in dissociative states.\textsuperscript{331} The court stated:

[P]resumably, if one of the alters said something indicating that she or he might not be competent to testify, the defense would have made a specific objection and the court would have made a ruling on the objection. Yet the record is void of objections based on the competency of specific alters, even though some of the alters who testified were only three or four years old. We conclude that the [trial] court did not abuse its discretion and, under the facts of this case, its decision to allow Slavik’s and Wall’s alters to testify was entirely appropriate.\textsuperscript{332}

The second issue before the Minnesota Supreme Court specifically required the court to make the connection between hypnosis and MPD. The court was asked to decide whether dissociation was a form of self-hypnosis or sufficiently similar to hypnosis so that the court’s earlier decision in \textit{State v. Mack} would bar Slavik’s and Wall’s testimony.\textsuperscript{333} In addressing this issue, the court recognized that it would be required to answer two questions: “[F]irst, whether some form of hypnosis actually occurred when the women dissociated[]” and second, whether the alter’s memories were first recalled while under some form of hypnosis.\textsuperscript{334} As to the first question, the court refused to equate dissociation with hypnosis; it rejected the lower courts’ uncritical reliance on \textit{Dorsey v. State} and its “holding that dissociation [was] fundamentally different from hypnosis when considering the reliability of witness testimony.”\textsuperscript{335} The court noted that “the \textit{Dorsey} court never explained why the nonvolitional nature of dissociation [made] the resulting statements more reliable than statements articulated during hypnosis.”\textsuperscript{336} In addition, the court noted that the \textit{Dorsey} court’s reasoning might have been grounded in the mistaken belief that a “victim in a dissociative state would not lie.”\textsuperscript{337}

The court recognized that several of Slavik’s and Wall’s witnesses testified that MPD can result in incomplete memories.\textsuperscript{338} Moreover, no witness testified that dissociation was fundamentally dissimilar from hypnosis.\textsuperscript{339} Although the court noted that many of the concerns expressed about hypnosis testimony in its Mack opinion also applied to testimony produced during dissociation, the court ruled that there were compelling policy arguments against a per se rule treating dissociation as

\begin{flushleft}
\textsuperscript{331.} \textit{See id.} \\
\textsuperscript{332.} \textit{Id.} \\
\textsuperscript{333.} \textit{See id.} \\
\textsuperscript{334.} \textit{See id.} \\
\textsuperscript{335.} \textit{See id.} at 410. For a discussion of \textit{Dorsey}, see \textit{supra} notes 278-303 and accompanying text. \\
\textsuperscript{336.} \textit{Id.} \\
\textsuperscript{337.} \textit{See id.} (internal quotation marks omitted). \\
\textsuperscript{338.} \textit{See id.} \\
\textsuperscript{339.} \textit{See id.} One of Slavik’s psychotherapists testified that many people with MPD, including Slavik, engage in self-hypnosis and can induce a trance. \textit{See id.} This witness also described Slavik’s presentation of alters at her therapist’s request as involving hypnosis or trance. \textit{See id.}
\end{flushleft}
equivalent to hypnosis.\textsuperscript{340} First, the court noted that if a Multiple’s testimony was excluded per se as inadmissible hypnosis testimony, then someone who was aware of the Multiple’s disorder could take advantage of the Multiple with impunity.\textsuperscript{341} Therefore, the Multiple’s disorder, which led to the Multiple’s abuse, would become a shield of protection for the abuser.\textsuperscript{342} Second, the court refused to adopt a per se rule treating a Multiple’s testimony as equivalent to hypnosis testimony because the psychiatric community’s understanding of dissociative disorders, such as MPD, was in a state of flux.\textsuperscript{343} The court stated that “the mental health community [had] not yet reached a consensus on the nature of the disorder.”\textsuperscript{344} Based on these two policy arguments, the court held that the trial court did not abuse its discretion when it allowed the jury to determine whether dissociation experienced by a Multiple was similar to hypnosis, and whether a Multiple’s memories of abuse were actually recalled during dissociation.\textsuperscript{345} Therefore, the court clearly placed the responsibility of making the hypnosis and MPD connection in the hands of the jury, and urged courts to proceed “thoughtfully and cautiously” when witnesses with MPD appear in their courtrooms.\textsuperscript{346}

VI. CRITIQUE OF MPD CASES

The approaches of the courts in Donnelly, Dorsey, and Wall are flawed for several reasons. First, each of the courts erred by permitting Multiples to testify in dissociative states. Every time an alter testifies, the testimony is given by the alter while under hypnosis.\textsuperscript{347} Courts universally hold that testimony while under hypnosis, and evidence of what a subject said while under hypnosis is inadmissible per se.\textsuperscript{348} Thus, when the courts in Donnelly, Dorsey, and Wall ruled that alter personalities could testify, they were condoning the admission of inherently

\textsuperscript{340} See id. at 409-10.
\textsuperscript{341} See id.
\textsuperscript{342} See id.
\textsuperscript{343} See id. at 410-11.
\textsuperscript{344} Id. at 410.
\textsuperscript{345} See id. at 411.
\textsuperscript{346} See id.
\textsuperscript{347} See supra notes 248-255 and accompanying text.
unreliable hypnosis testimony.349

These cases are a perfect illustration of the age old maxim that “hard cases make bad law.”350 The Minnesota Supreme Court’s opinion in Wall expressly conceded that Multiples are highly suggestible and have an increased belief in the validity of inaccurate memories.351 Moreover, the court noted that cross-examination is an unavailing means to ferret out the truth regarding a Multiple’s memories.352 It is ironic that, after conceding that these inherent dangers are present in a Multiple’s testimony, the court nevertheless felt compelled to admit the testimony. The same court refused to admit hypnotically refreshed testimony which was subject to these identical inherent dangers; yet the court was perfectly willing in Wall to admit testimony of even more dubious quality. What the court failed to recognize is that, unlike hypnotically refreshed testimony, a Multiple’s testimony is actually testimony while under hypnosis.353 By admitting a Multiple’s testimony, these courts have ignored the long line of cases holding that testimony while under hypnosis is inadmissible per se.354

Second, each of these courts were mistaken when they concluded that a lay jury is capable of assessing the reliability of a Multiple’s testimony. In essence, these courts were asking a jury to determine whether a Multiple’s disorder made his testimony unreliable.355 However, a juror should be the last person to decide whether a Multiple’s testimony is affected by the Multiple’s unrecognized abuse of self-hypnosis. The dangers of hypnosis, such as confabulation,356 suggestion,357 and memory hardening,358 make the most highly skilled psychotherapist unable to differentiate between a true recollection, a fantasy, or a statement that was the product of suggestion.359 Dr. Diamond, a noted expert on hypnosis, acknowledges that “[n]o one, regardless of experience, can verify the accuracy of the hypnotically

349. See infra notes 399-595 and accompanying text.
351. See Wall, 584 N.W.2d at 409.
352. See id.
353. See supra notes 248-55 and accompanying text.
354. See supra notes 168-81 and accompanying text.
355. The court in Wall took this question a step further. The Wall court stated that it was a disputed factual issue whether dissociation was a form of hypnosis. See 584 N.W.2d at 401. Therefore, not only was the jury asked to assess the reliability of each Multiple’s testimony, but they were required to become scientific experts knowledgeable about hypnosis and MPD. Lay jurors are not equipped for such a scientific inquiry. In addition, if this question is treated as a factual one, it will cause inconsistency. It is highly probable that a jury in one case will decide that dissociation is not a form of hypnosis, while in another case a jury will decide that dissociation is a form of hypnosis. Thus, Minnesota will be admitting dissociative testimony from Multiples in some cases while excluding this testimony in other cases.
356. See infra notes 466-73 and accompanying text.
357. See infra notes 449-65 and accompanying text.
358. See infra notes 474-83 and accompanying text.
enhanced memory. Thus, if experts cannot verify the accuracy of a Multiple’s testimony, neither can the trier of fact. Because the courts are unable to verify the reliability of a Multiple’s testimony, they cannot expect that a jury will be able to do so.

Additionally, if one is to accept these courts’ rulings that the reliability of a Multiple’s testimony is for the jury to determine, then such rulings have far reaching consequences. For example, under this reasoning, voice print, truth serum, polygraph, or any other method of judging truth would be rendered admissible if the trier of fact decided to give the evidence such weight. There is no reason to make a special exception to admit the hypnosis testimony of a Multiple while refusing to admit these other types of evidence.

Third, courts admit a Multiple’s testimony based on the erroneous belief that a Multiple can accurately recall the events that transpired. “Hypnotic experiences, whether induced by a therapist or spontaneously experienced, can be as real as events in the real world—in fact, they are often indistinguishable from reality.” Psychologists generally acknowledge that there is neither an expert nor a trier of fact who can differentiate between a true recollection, a fantasy, or a statement that is the product of suggestion. Thus, a court’s belief that a Multiple can accurately recall events that transpired is mistaken. Neither a court nor a jury can accurately assess which of a Multiple’s recollections are accurate and which are the product of fantasy.

360. See id. Dr. Diamond notes that “[i]n ordinary life experience we tend to judge the validity and accuracy of memories by the amount of detail recalled[,]” See id. at 337-38. Hypnosis subjects can recite events in great detail. See id. An age progression experiment demonstrates the concept of confabulation. See id. at 337. A subject can be hypnotized, instructed to progress in age ten years into the future, and then asked to describe his surroundings. See id. at 337-38. He will relate what he imagines he sees in great detail. See id. at 338. However, his memory is false, illustrating the remarkable ability of the human mind to confabulate. See id.

361. It is interesting to note that the Wall court states that it is for the jury to determine whether a Multiple’s testimony is unreliable hypnosis testimony, yet neither the trial, appellate, nor supreme court in Wall defined “hypnosis” for the jury. See Wall v. Fairview Hosp. & Healthcare Servs., 568 N.W.2d 194, 207 n.3 (Minn. Ct. App. 1997). The court of appeals stated that the exact parameters and definition of hypnosis are unsettled. See id. The court also noted that “the trial court was wise not to attempt to define a term that is the subject of such debate.” Id. If the courts were unable to define hypnosis, how could they expect a lay juror to determine whether a Multiple’s testimony was unreliable hypnosis testimony? The Wall court gave the jury an inappropriate task, a task the court itself was unable to accomplish.

364. Bliss, supra note 12, at 79.
365. See Diamond, supra note 359, at 314; see also Bliss, supra note 12, at 160-62 (addressing legal problems associated with a Multiple’s testimony).
366. See infra notes 447-535 and accompanying text.
Fourth, courts admit a Multiple's testimony based on the mistaken belief that a Multiple can fully understand and appreciate his duty to tell the truth. Most Multiples have alter personalities of children or infants. It is highly likely that the testimony of one of these child alters would be the central focus of the litigation or prosecution because these alters contain most memories of trauma and abuse. The child or infant alter is often too young to understand the nature of the oath and the obligation to testify truthfully. Further, a serious problem arises if the court administers the oath only to the host personality, and not to other personalities who emerge at trial. The other personalities would likely have no recollection of the oath. Therefore, courts are mistaken in their belief that a Multiple can fully understand his duty to tell the truth.

Fifth, a Multiple's testimony has been admitted based on the erroneous belief that a Multiple in a dissociative state would not lie. All personalities, when they appear, "are partially or completely divorced from judgment, moral mandates, and other factors in memory that ordinarily would function." Some personalities are deceptive by nature and lie all of the time. For example, alters such as "Satan" or the "Tempter" will intentionally lie or mislead. In addition, some alters may not intentionally lie or mislead, but will do so unknowingly. Multiples are typically victims of enhanced states of suggestion and fantasy. As a result, they often testify to falsehoods while believing in the accuracy of their statements. Further, no one, including experts, can verify the accuracy of a Multiple's hypnotic testimony. Thus, courts are wrong to conclude that a Multiple does not lie while in a dissociative state.

Sixth, courts admit a Multiple's testimony based on the unsound reasoning that the opportunity to cross-examine a Multiple is an adequate safeguard to assure reliability. The cross-examination of a Multiple will not assure the accuracy and truthfulness of his testimony for six reasons. First, a Multiple is susceptible to heightened suggestibility. Second, Multiples confabulate. Third, Multiples experience memory hardening. Fourth, Multiples have compartmentalized
Fifth, Multiples may engage in switching when testifying. Sixth, access to Multiples’ medical records often proves difficult because the records are usually protected by the psychotherapist-patient privilege. For each of these reasons, cross-examination is an inadequate safeguard to assure the reliability of a Multiple’s testimony.

Seventh, courts admit a Multiple’s testimony based on the argument that excluding the testimony will permit others to take advantage of Multiples with impunity. Courts asserting this argument recognize that the testimony should be admitted because the Multiple’s testimony is usually the only evidence of his abuse, and thus, it is crucial. This argument fails because the crucial question is not

380. See infra notes 484-502 and accompanying text.
381. See infra notes 503-27 and accompanying text.
382. For example, the court in Donnelly refused to give the defendant access to the Multiple’s psychological records. See State v. Donnelly, 798 P.2d 89, 92 (Mont. 1990), overruled on other grounds by State v. Imlay, 813 P.2d 979 (1991). The extraordinary characteristics of a Multiple, such as heightened suggestibility, confabulation, memory hardening, switching, and compartmentalization, make it virtually impossible for counsel to cross-examine without access to these records. The records help determine the extent to which the therapy process itself may have created the Multiple’s memories and beliefs of traumatic experiences. See Elizabeth Loftus, Patient-Psychotherapist Privilege: Access to Clinical Records in the Tangled Web of Repressed Memory Litigation, 30 U. RICH. L. REV. 109, 121-22 (1996). The Donnelly court’s statement that the defendant did not need these records because he was aware of the Multiple’s mental and psychological history misses the point. These records are not needed to confirm her diagnosis, but rather are essential to uncover whether her memories and beliefs were created through suggestion. Finally, because Multiples have complex compartmentalized minds, the cross-examiner needs access to these records to understand the composition of the Multiple’s personality system. Such knowledge is essential to gain access to a particular alter and to attack the reliability of his testimony. For example, because the Donnelly court refused to allow access to the Multiple’s psychological records, the defendant was unable to call forth two of her alters who he alleged would have given inconsistent testimony. See 798 P.2d at 94. Therefore, his attorney’s cross-examination was ineffective.
383. See Dorsey v. State, 426 S.E.2d 224, 227 (Ga. Ct. App. 1992); Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 410 (Minn. 1998). After criticizing the Minnesota Court of Appeals’ “uncritical reliance” on Dorsey, the Minnesota Supreme Court decision in Wall adopted the “impunity” argument from Dorsey without evaluating it. See Wall, 584 N.W.2d at 410.
384. See, e.g., Dorsey, 426 S.E.2d at 227 (noting that if a Multiple’s testimony is never admissible, then others will be able to victimize Multiples with impunity); Wall, 584 N.W.2d at 410 (same). When a Multiple patient is abused by his therapist, the therapist and the Multiple are usually the only two individuals present. Because the therapist cannot be compelled to testify against himself, courts recognize that if the Multiple’s testimony were excluded, the exclusion of this testimony would become a shield of protection for the offending therapist. This need not be the case. If there is a genuine concern that the exclusion of a Multiple’s testimony would allow health care professionals to take advantage of the Multiple, then other precautionary steps can be taken, such as having a chaperone present when a Multiple is treated. To protect the psychotherapist-patient privilege, the chaperone should be an employee of the health care facility. Moreover, third parties can be present during psychological examinations without destroying the privilege if they are present to protect the patient’s interest. See 3 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence §
whether the testimony is the only evidence, but instead, whether the testimony is reliable. Even if the Multiple's testimony is the only evidence, if it is unreliable, it should be excluded. Federal Rule of Evidence 102 acknowledges that the rules must be “construed to secure fairness . . . to the end that the truth may be ascertained and proceedings justly determined.”

By focusing on the fact that a Multiple’s testimony is the only evidence, courts abdicate their responsibility to secure fairness and pursue the truth. Instead, courts should follow the approach taken in Greenfield v. Robinson where the court excluded hypnosis testimony, although it was the only evidence of a crime, because the testimony was unreliable.

In Greenfield, the defendant was convicted of second degree murder. The defendant argued that the trial court erroneously excluded expert testimony regarding statements he made while in a hypnotic trance. Rejecting his argument, the court ruled that the testimony was inadmissible because there was no showing that such evidence is reliable. The court declared that testimony which may be of dubious quality should not be admitted merely because a crime has no eyewitnesses or direct evidence. Courts should follow Greenfield, and exclude a Multiple’s testimony as unreliable regardless of whether it is the only evidence of a crime.

Eighth, admitting a Multiple’s testimony because the psychiatric community’s understanding of MPD is in a state of flux is nonsensical. If psychiatric and psychotherapeutic experts cannot agree on the nature of the disorder and its effects on memory and recall, the Multiple’s testimony must be excluded per se. Exclusion is mandated by the Frye test for the admissibility of scientific evidence. When determining whether to apply Frye to hypnosis testimony, courts recognize that the basic question is not so much whether the hypnosis process is scientific, but “whether

---

504.08[2], at 504-26 (Joseph M. McLaughlin ed., 2d ed. 1997). The therapist should explain to the patient that the chaperone is there for their mutual protection. Once this is established and the patient becomes accustomed to the chaperone’s presence during therapy, therapy should proceed as normal. See FED. R. EVID. 102.

If the Multiple’s testimony is the only evidence of a crime, then it is arguably even more imperative that the testimony be excluded. Justice is certainly not served by convicting and imprisoning a defendant based on testimony of such dubious quality when there is a complete lack of corroborating evidence.

See id. at 1120-21.

See id. at 1115.

See id. at 1120. The expert revealed that while under hypnosis, the defendant recounted the circumstances of the murder in much greater detail. See id. at 1117. In addition, the defendant recalled chasing after a man who was present at the crime scene. See id.

See id. at 1120. The court excluded the testimony although it was noted “there were no eyewitnesses and only minute evidence to suggest that the defendant did not commit the crime.” See id.

See id. The court stated that it “knows of no rule that requires a judge to accept evidence of uncertain value to go to a defense that is otherwise completely uncorroborated.” Id.


See infra notes 414-22 and accompanying text.
a jury can realistically evaluate the effects of hypnosis."395 Unless there is general scientific acceptance regarding the effects of hypnosis on the accuracy of memories, the "dangers and possibilities of prejudice" in the use of hypnosis testimony should bar its admissibility under Frye.396 Courts acknowledge that there is no general scientific acceptance regarding how hypnosis affects the accuracy of memories.397 Therefore, it is ironic that if courts believe that the psychiatric community’s understanding of MPD is in a state of flux, those same courts would refuse to apply this test to exclude a Multiple’s testimony.398 If a Multiple’s testimony fails to meet the Frye test for admissibility, it must be excluded per se.

396. See Collins, 644 P.2d at 1284-85 & nn.3-4; Kater, 447 N.E.2d at 1195; Martin, 684 P.2d at 654.
397. See, e.g., Collins, 644 P.2d at 1272 (noting there is little agreement amongst authorities on the scientific reliability of hypnosis testimony); People v. Gonzales, 329 N.W.2d 743, 748 (Mich. 1982) (acknowledging that "[h]ypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable"); State v. Palmer, 313 N.W.2d 648, 655 (Neb. 1981) (holding that "until hypnosis gains acceptance . . . a witness previously questioned under hypnosis may not testify"); People v. Hughes, 453 N.E.2d 484, 491 (N.Y. 1983) (stating that "there is no currently accepted method for scientifically determining the reliability of hypnotically induced recollection"); State v. Tuttle, 780 P.2d 1203, 1209 (Utah 1989) (discussing the lack of scientific acceptance for hypnosis as a method of refreshing recollection); see also People v. Shirley, 723 P.2d 1354, 1366 (Cal. 1982) (holding that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the Frye test); People v. Quintanar, 659 P.2d 710, 712 (Colo. Ct. App. 1982) (ruling that "hypnotically induced recollection has not attained the level of reliability among authorities in the field as required by Frye"); overruled by People v. Romero, 745 P.2d 1003 (Colo. 1987); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980) (explaining that memories retrieved through hypnosis are not scientifically reliable as accurate under Frye).
398. Interestingly, the Supreme Court of Minnesota in Mack adopted a per se exclusion for hypnosis testimony, arguing that there is no general scientific agreement regarding the accuracy of hypnosis memories due to the fact that no expert can determine whether a hypnotic memory is "truth, falsehood, or confabulation." See Mack, 292 N.W.2d at 768. This same court in Wall admitted a Multiple’s testimony, conceding that many of the same concerns it expressed in Mack regarding testimony elicited during hypnosis also apply to the statements of a Multiple produced during dissociation. See Wall, 584 N.W.2d at 410. In addition, the Wall court conceded that there is no general scientific consensus regarding the effects of MPD on the accuracy of memories "[b]ecause our understanding of [MPD] is in flux." See id. at 411. These inconsistent results indicate that the Wall court’s decision to admit the Multiple’s testimony is flawed. The court in Wall admitted a Multiple’s testimony using the very same reasons it used to justify the exclusion of hypnosis testimony in Mack. See id. at 409-10.
VII. COURTS SHOULD EXCLUDE A MULTIPLE’S TESTIMONY PER SE

Courts should adopt a per se exclusionary rule for a Multiple’s testimony. The initial question confronting a court in a case with a Multiple is whether the witness’s testimony meets the minimum threshold of credibility. In the past, courts have treated this issue as a question of witness competency. However, in both the federal and state court systems, the modern trend is to presume competency, permitting most witnesses to testify, subject to having their credibility challenged on cross-examination. The rationale behind the presumption of competency is that the oath, cross-examination, and the jury’s ability to observe the witness are safeguards to ensure the reliability of testimony. Notwithstanding the presumption of witness competency, judges have the obligation to determine that the minimum standards of competency are met, and these judges are afforded considerable discretion when making the competency determination. Courts will sometimes order a preliminary

399. See Weinstein & Berger, supra note 384, § 601.03[1][a], at 601-10.
400. “Competency . . . refers to the general qualities that a witness must possess, the minimum standard of credibility necessary to permit any reasonable person to put any credence in a witness’s testimony.” Id. § 601.02[1], at 601-7.
401. See id. § 601.02, at 601-6; see also United States v. Bedonie, 913 F.2d 782, 799-800 (10th Cir. 1990) (recognizing that the evolution of law converts the competency question to one of credibility for the jury); United States v. Jones, 482 F.2d 747, 751-52 (D.C. Cir. 1973) (acknowledging the modern trend to relegate questions of competency to a minor role).
403. See Weinstein & Berger, supra note 384, § 601.03[1][a], at 601-9; see also Moss v. Ole S. Real Estate, Inc., 933 F.2d 1300, 1311 (5th Cir. 1991) (remarking that competency is still the focus for determining whether to admit a witness’s testimony); Bedonie, 913 F.2d at 799 (ruling that “even if credibility considerations can properly be fit under a competency rubric, the District Court has broad discretion in determining the competency of a witness to testify”); United States v. Devin, 918 F.2d 280, 292 (1st Cir. 1990) (acknowledging that the trial court is to determine competency); United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984) (emphasizing that the court retains the power to declare a witness incompetent if the witness lacks personal knowledge, lacks the capacity to recall, or lacks understanding of the duty to testify truthfully); United States v. Saenz, 747 F.2d 930, 936 (5th Cir. 1984) (observing that the trial court has discretion to determine witness competency); United States v. Banks, 520 F.2d 627, 630 (7th Cir. 1975) (opining that competency to testify, unlike credibility, “is a limited threshold decision by the trial judge as to whether a proffered witness is capable of testifying in any meaningful fashion whatsoever”); United States v. Snead, 447 F. Supp. 1321, 1324 (E.D. Pa. 1978) (noting that a competency hearing was appropriate to determine the witness’s ability to testify due to drug and alcohol abuse), aff’d, 577 F.2d 730 (3d Cir. 1978).
404. See Weinstein & Berger, supra note 384, § 601.03[1][a], at 601-10; United States v. Ramirez, 871 F.2d 582, 584 (6th Cir. 1989); United States v. Strahl, 590 F.2d 10, 12 (1st Cir. 1978). Although competency hearings are not required, many courts continue to hold competency hearings and order psychiatric examinations as they did prior to the enactment of Federal Rule of Evidence 601. See, e.g., United States v. Gates, 10 F.3d 765, 766 (11th Cir. 1993) (recognizing that the court may have a duty to hold a competency hearing when warranted); Odom, 736 F.2d at 111 (noting the great discretion a judge has in the procedure he may choose to follow in determining a witness’s competency to testify); United States v. Raineri, 91 F.R.D. 159, 162-63 (W.D. Wis. 1980) (ruling it was proper for the court to conduct a preliminary competency hearing or a voir dire examination of a witness at the time of trial.
hearing or voir dire examination to determine the competency of a witness. The judge's determination of competency will not be reversed unless it was an abuse of discretion.

The general presumption of competence does not rob the trial judge of the power to keep a witness from testifying. It merely means that [a] judge must focus on the proffered testimony rather than the proposed witness. Testimony that has no tendency to make the existence of any material fact more or less probable than it would be without that testimony must be excluded.

When dealing with hypnosis testimony, most courts employ the Frye test as a threshold for determining the admissibility of such evidence. In addition, many courts utilize a balancing test to determine the admissibility of hypnosis testimony, weighing the testimony's probative value against the dangers of unfair prejudice, confusion, or delay. "A judge may exclude even relevant testimony if its probative value is substantially outweighed by such dangers ..." Although this balancing approach traditionally requires courts to determine the admissibility of the testimony on a case-by-case basis, this approach has also been used to adopt a per se rule of exclusion for hypnosis testimony. A Multiple's testimony is unreliable hypnosis when the defendant made a pretrial motion for a competency hearing under Federal Rule of Evidence 104), aff'd, 670 F.2d 702 (7th Cir. 1982).

405. See WEINSTEIN & BERGER, supra note 384, § 601.03[1][b], at 601-11 n.6.
406. See United States v. Gomez, 807 F.2d 1523, 1527 (10th Cir. 1986).
407. WEINSTEIN & BERGER, supra note 384, § 601.03[1][c][i], at 601-11; see also FED. R. EVID. 401 ("[R]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").
408. See United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984) (using Rule 403 to determine whether the probative value of hypnotic testimony is substantially outweighed by the danger of unfair prejudice); Contreras v. State, 718 F.2d 129, 135 (Alaska 1986) (noting that "[t]he Frye standard is essentially a 'prejudice-versus-probative value test' similar to Evidence Rule 403" for purposes of addressing the admissibility of hypnosis testimony); Stokes v. State, 548 So. 2d 188, 194-95 (Fla. 1989) (utilizing Rule 403 to carefully weigh the probative value of hypnosis testimony against the dangers of unfair prejudice); State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980) (ruling that whether a witness's memory is hypnotically refreshed is a factor in determining whether the witness may testify). But see United States v. Gatto, 924 F.2d 491, 500-01 (3d Cir. 1990) (holding that the trial court abused its discretion in excluding hypnosis testimony using Federal Rule of Evidence 403).
409. FED. R. EVID. 403. Courts have also determined that a witness's testimony may be excluded for failing to meet minimum standards of credibility: (1) when the witness is incapable of telling the truth; (2) when the witness does not have the capacity to accurately recall; or (3) when the prejudice caused by the testimony would be greater than the probative value. See, e.g., Ramirez, 871 F.2d at 584; United States v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984); Odom, 736 F.2d at 109-16.
410. See Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1122 (8th Cir. 1985).
411. See Contreras, 718 F.2d at 137-38.
testimony, and should be per se excluded on two grounds. First, the Multiple’s testimony fails to meet the Frye standard, a standard that should be applied to a Multiple’s testimony. Second, the probative value of a Multiple’s testimony is minimal at best, in contrast to the extreme prejudice that arises if a Multiple is permitted to testify. Either of these grounds, standing alone, is sufficient to support a per se exclusion of a Multiple’s testimony.

A. A Multiple’s Testimony Fails to Meet the Frye Scientific Evidentiary Standard

Application of the Frye test to a Multiple’s testimony, although it might seem unusual, is appropriate because of the nature of MPD. As previously discussed, an overwhelming majority of courts apply the Frye test to hypnosis testimony. Self-hypnosis is the primary mechanism of MPD, therefore, courts should make the connection between hypnosis testimony and MPD testimony. If courts choose not to apply the Frye standard to a Multiple’s testimony, they will be divorcing the testimony from the underlying scientific technique of hypnosis which shaped it.

When a Multiple testifies, his testimony relates his experiences while in a dissociative state created by the abuse of self-hypnosis. When a particular alter is out, the alter’s reality is perceived in a self-hypnotic state. This self-hypnotic state can be likened to an individual who wears glasses. Once the individual puts the glasses on, he visually perceives the world around him through those glasses. Thus, the glasses are an integral part of the way that person perceives the world. The glasses do not literally create the world, which exists independently from the individual’s perceptions, yet they mold the way the individual sees the world, which may or may not be accurate. For example, an incorrect prescription leads to distorted perceptions. Accordingly, in order to understand and evaluate the reliability of a Multiple’s testimony, one cannot separate that testimony from the underlying hypnotic state which shaped the Multiple’s perceptions. Courts that fail to make the connection between hypnosis testimony and a Multiple’s testimony are doing just

412. See infra notes 414-22 and accompanying text.
413. See infra notes 423-592 and accompanying text.
414. See supra notes 119-38 and accompanying text.
415. Some might argue that if the Frye test applies to MPD, then it must apply to all other physical and mental disorders which affect memory. Such an argument lacks merit. A Multiple’s testimony must meet the Frye test because it is hypnosis testimony. Other disorders which do not have hypnosis as their primary mechanism need not necessarily meet the Frye standard.
416. An overwhelming majority of lawsuits involving a Multiple as a party or witness deal with the Multiple’s own criminal conduct or a third party’s abuse of a Multiple. See, e.g., Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 400 (Minn. 1998). Under either scenario, the criminal conduct or abuse takes place when the Multiple is in a dissociative state. For example, in situations of abuse, the Multiple is usually abused when a child alter or some other alter is present. See supra notes 36-76 and accompanying text.
When determining whether to apply Frye to hypnosis testimony, courts recognize that "[t]he basic question is not so much whether the process is scientific but rather whether a jury can realistically evaluate the effect of hypnosis."\(^4\) The question for the court confronted with a Multiple is the same as the question facing a court confronted with a non-Multiple presenting hypnosis testimony; namely, can the jurors "realistically evaluate the effects of hypnosis on testimony developed through hypnosis?"\(^4\)\(^7\) The answer to this question is no. Courts should refuse to adopt a rule that permits each party to offer expert testimony on the effects of hypnosis. Such a rule would be time-consuming, expensive, and would lead to inconsistent results. This "is precisely what the Frye test seeks to avoid."\(^4\)\(^9\) In addition, expert testimony in this area is futile because there is no general acceptance by experts in the field that hypnosis reliably assists a witness in accurately recalling his memories.\(^4\)\(^2\) Because the purpose of the Frye test is to conserve judicial resources and to assure that "juries will not be misled by unproven, unsound 'scientific' procedures," Multiples should not be permitted to testify.\(^4\)\(^2\)\(^1\)

Further, if courts determine on a case-by-case basis whether Multiples should testify, their decisions will lead to inconsistent results, and thwart the Frye test's goals of assuring fairness and uniformity of decision-making.\(^4\)\(^2\)\(^2\) Instead, courts should use the Frye test to per se exclude a Multiple's testimony.

B. A Multiple's Testimony is Always More Prejudicial Than Probative

Three safeguards for testimony have evolved from the Anglo-American tradition. These safeguards were developed to encourage witnesses to try their best to be accurate in their testimony.\(^4\)\(^2\)\(^3\) In addition, these safeguards were created to expose any "inaccuracies in perception, memory or narration, deliberate or otherwise, which nevertheless persist."\(^4\)\(^2\)\(^4\) The three safeguards are the oath, cross-examination, and the jury's firsthand observation of the witness.\(^4\)\(^2\)\(^5\) These three safeguards are also the rationale behind the presumption of witness competency embodied in Federal Rule

\(^{418}\) See id. at 1195-96.
\(^{419}\) Id. at 1196.
\(^{420}\) See id.
\(^{422}\) See id.
\(^{424}\) See WEINSTEIN'S MANUAL, supra note 402, § 14.01[1], at 14-3.
\(^{425}\) See id.
of Evidence 601. Unfortunately, none of these safeguards are sufficient to ensure reliability when applied to a Multiple's testimony. Therefore, a Multiple's testimony will always be far more prejudicial than probative, and should be excluded per se. 427

1. The Oath is an Inadequate Safeguard to Ensure Reliability

A witness's ability to understand the oath is a threshold of minimum competency to be determined by the court. 428 Federal Rule of Evidence 603 states that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation, administered in a form calculated to awaken the witness' conscience and impress that witness' mind with the duty to do so." 429 The oath is an inadequate safeguard to assure reliable testimony from a Multiple for two reasons. First, most Multiples are unable to comprehend the nature of an oath or affirmation requiring them to tell the truth. 430 Second, because each witness must be sworn, the oath requirement will result in extreme delay and confusion when applied to a Multiple with numerous personalities. 431 The probative value of a Multiple's testimony is minimal and will always be outweighed by its prejudicial effect. Consequently, courts should per se exclude a Multiple's testimony.

a. Inability to Comprehend the Nature of the Oath

In order to testify, a witness must be able to comprehend the nature of the oath, and understand the obligation to tell the truth. 432 However, most alter personalities are unable to meet these requirements. Many Multiples have alter personalities of children or infants; some have demonic alters such as "Satan," or even substance-
abuser alters. It is highly likely that one of these alter's testimony will be the central focus of the litigation or prosecution. For example, in most physical, sexual, or psychological abuse cases, the traumatic experiences are delegated to, and experienced by a child or an infant alter that the Multiple created to deal with the abuse. Therefore, this same child or infant alter would be needed as a witness in litigation regarding the abuse. However, most young children and infants are unable to comprehend the nature of an oath requiring them to tell the truth.

b. Extreme Delay and Confusion

Because each witness must be sworn, the oath requirement will result in extreme delay and confusion when applied to a Multiple. The oath or affirmation must be "administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully. Federal Rule of Evidence 603 requires the court to assure that each testifying witness is sworn, and that each witness appreciates the obligation to testify truthfully. A critical issue is whether the Multiple should be treated as a single witness with the oath administered once, or whether the Multiple should be treated as several witnesses, each subject to being sworn separately. If a court treats a Multiple as a single witness, it is highly likely that only the alter "out" at the time the oath is administered will be aware of it. Therefore, although it has been argued that it is therapeutically beneficial for the individual Multiple to be treated as a single witness in court, this is ineffective from a legal standpoint.

When a Multiple first takes the stand, the personality that is "out" at that time will be sworn, and questioned concerning his understanding of the obligation to tell the truth. Although the alter who was "out" may have appreciated his obligation to

434. See Putnam, supra note 8, at 107-13.
435. See Bliss, supra note 12, at 125-26.
436. See, e.g., Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 409 (Minn. 1998); see also Putnam, supra note 8, at 122 (acknowledging that alter personalities typically demonstrate a wide range of cognitive abilities). For example, many child personalities have difficulty communicating with their therapists because of an apparent difficulty in understanding ideas and language. See id.
437. See Fed. R. Evid. 603. In addition to achieving maximum efficacy of the oath, "the oath should be administered to each witness [when he takes] the stand, not to all of the witnesses as a group and not in advance." See Weinstein & Berger, supra note 384, § 603.05, at 603-10.
439. In addition to separately administering the oath to each alter, it is interesting to note that "[s]ome experts question whether different personalities should have separate legal counsel and make separate pleas and arguments." See Fields, supra note 3, at 280 n.123.
440. See Bliss, supra note 12, at 131. Alter personalities not "out" may have amnesia during that time. See id.
441. See Putnam, supra note 8, at 103.
testify truthfully, there is no guarantee that the other alters were aware of the same obligation. If these other alters were not separately sworn and questioned concerning their obligation to testify truthfully, the court runs the risk of violating Federal Rule of Evidence 603. Confronted with this dilemma, courts that have permitted Multiples to testify have treated them as several witnesses for purposes of the oath requirement. These courts administered the oath separately to each alter as it emerged during the Multiple’s testimony. This results in extreme delay, confuses the jury, and is a logistical nightmare.

The average Multiple has approximately thirteen personalities and may have as many as several hundred. Administering the oath to each of these personalities could take an enormous amount of time, and would cause significant delay in the trial. Certainly, it would require the court’s and jurors’ utmost patience, particularly if the Multiple’s several alters were constantly switching. Under such circumstances, the court would have to reaffirm that the alter who is “out” understands that he is under oath and must testify truthfully. The court’s only alternative is to treat the Multiple as a single person and swear him in on one occasion. Such an approach would violate Federal Rule of Evidence 603. For these reasons, the only acceptable solution is to exclude the Multiple’s testimony per se:

2. Cross-Examination is an Inadequate Safeguard to Ensure Reliability

The cross-examination of [a] witness is one of the safeguards of accuracy and truthfulness. It is well settled that when a witness has been examined in chief, the other party has the right to cross-examine for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation[,] uncovering his interest, his motive, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts . . . and his powers of discernment, memory and description.

442. See BLISS, supra note 12, at 148 (explaining that most alter personalities would not feel as great a responsibility for another alter’s testimony).
443. In essence, the court would be permitting an alter to testify without having been sworn and without ascertaining whether the alter fully comprehended the nature of his obligation to tell the truth.
444. See, e.g., Dorsey v. State, 426 S.E.2d 224, 229 n.1 (Ga. Ct. App. 1992) (noting that this procedure is a “logical way to deal with a difficult and unique situation”). The court in State v. Johnson, No. 90-CF-280 (Winnebago County Ct., Wis. Nov. 8, 1990) dealt with the administration of the oath to a Multiple witness by summoning six different personalities and swearing in each personality as it appeared. This could be an enormous time constraint on the court when a Multiple has several personalities and is constantly switching.
445. See, e.g., Dorsey, 426 S.E.2d at 229 n.1.
446. See PUTNAM, supra note 8, at 123.
447. Jonathan M. Purver, Annotation, Cross-Examination of Witness as to His Mental State or Condition, to Impeach Competency or Credibility, 44 A.L.R.3d 1203, 1207 (1973). “Almost any emotional or mental defect may materially affect the accuracy of testimony; a conservative list of such defects would have to include the psychoses, most or all of the neuroses, defects in the structure of the
The right to impeach a witness by cross-examination is universally recognized. However, the cross-examination of a Multiple does not assure the accuracy and truthfulness of his testimony for six reasons. First, a Multiple is highly suggestible. Second, a Multiple confabulates. Third, a Multiple experiences memory hardening. Fourth, a Multiple's mind is compartmentalized. Fifth, a Multiple experiences switching. And sixth, a Multiple's psychotherapy records are protected by the psychotherapist-patient privilege. Any of these six reasons, standing alone, makes a Multiple's testimony highly prejudicial. This prejudice, when balanced against the testimony's minimal probative value, should lead courts to exclude a Multiple's testimony per se.

a. High Suggestibility

Cross-examination will not assure the accuracy and truthfulness of a Multiple's testimony because a Multiple is subject to suggestion. This defect in a Multiple's testimony cannot be cured because hypnosis is necessarily a state of heightened suggestibility. In traditional hypnosis, the hypnotist's suggestions control each step of the hypnotism process. "The patient's dissociated attention is constantly sensitive to and responsive to cues from the hypnotist." Nevertheless, these experiences are similar, if not identical to those that have been induced by hypnotists. The Multiple is subject to the same level of heightened suggestibility which can result in nervous system, mental deficiency, ... and psychopathic personality." Id. at 1207-08. Clearly, "[t]he need for psychiatric evaluation of testimony is one of the most important problems in forensic psychiatry and a fertile field for the application of behavioral science insights to the legal process. It may be difficult, if not impossible, for the untrained observer to detect some forms of psychological illnesses in the demeanor or social attitude of a mentally disturbed witness." Id.

448. See id. at 1209.
449. See Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 410 (Minn. 1998); Gruenewald, supra note 12, at 186.
450. See Diamond, supra note 359, at 333 (observing that even a skilled hypnotist cannot avoid implanting suggestions in the mind of a hypnotized subject).
451. Id. (stating that "[h]ypnosis can be described as an altered state of intense and sensitive interpersonal relatedness between hypnotist and patient, characterized by the patient's nonrational submission and relative abandonment of executive control to a more or less regressive, dissociative state ... ").
452. See Gruenewald, supra note 12, at 182 n.9 (observing that "in the case of self-hypnosis, a three-way split may be tentatively proposed, with one part exercising the function usually assumed by the hypnotist").
fabricated false memories. Furthermore, Multiples most often are treated for their disease with hypnotic therapy. When seeking treatment, the Multiple is again subject to the heightened levels of suggestibility created by the hypnotism process induced by the therapist. Therefore, because the crux of MPD is the abuse of self-hypnosis, and because treatment of the MPD patient also requires hypnotic therapy, Multiples have double exposure to hypnosis and heightened suggestibility.

The implantation of suggestions in the mind of a Multiple cannot be avoided, even through the exercise of skill and attention. Suggestive messages are often nonverbal and the cues are often so minute that even a trained observer is not cognizant of them. Moreover, a hypnosis subject, such as a Multiple, responds remarkably to explicit suggestions as well as implicit ones. It is possible that a Multiple could respond to a therapist’s implicit and unintentional cues such as his attitude, demeanor, tone of voice, and body language. For example, a therapist who is frustrated may inadvertently sigh or speak in a stern tone of voice, causing a Multiple in a hypnotic state to change his response to an earlier question in the hope of pleasing the therapist. A Multiple undergoing therapy generally aims to please his therapist, and so it follows that the experiences recalled during hypnotic therapy may have been generated to serve the purpose of the session. A Multiple’s high suggestibility and desire to please his therapist leads to the problems of confabulation and memory hardening. Thus, the implantation of suggestion in the mind of a Multiple is common and cannot be avoided.

An attorney cross-examining a Multiple will be unable to uncover false suggestions implanted in the Multiple’s mind. Cross-examination of a Multiple is an ineffective means of revealing the implantation of false suggestions because there is no way to determine with certainty whether such falsity was introduced by the hypnotic process. Even a Multiple who has accepted a post-hypnotic suggestion

453. Some might argue that if a conventional eyewitness’s testimony, which is subject to grave inaccuracies and distortion, is admissible in court in spite of its potential unreliability, then a Multiple’s testimony should also be admissible. This logic is deceptive. It may be true that a conventional eyewitness’s testimony is subject to inaccuracy, however, witnesses whose testimony is shaped by hypnosis, such as Multiples, are a great deal more vulnerable to suggestion than the normal person. For such witnesses, the hypnotic distortions persist into the post-hypnotic period with much more force. See Diamond, supra note 359, at 342.
454. See id. at 333.
455. See id.
456. See id. (stating that most hypnotic subjects will be responsive to such cues because they desire to please the hypnotist).
457. See id.
458. See id. (identifying that the nature of these cues may be quite obscure to the hypnotist, to the subject, and even to the trained observer).
459. See id.
460. See id.
461. See id. at 335, 337.
462. See id. at 337 (noting that even the best experts cannot verify the accuracy of hypnotically enhanced memory).
463. See id.

240
to forget aspects of the hypnotic procedure will generally remain unaware of the source of the statements he makes while testifying. Moreover, the fabrications that occur during self-hypnosis or induced hypnosis will be honest in the sense that the Multiple is not aware that he is fabricating memories.

b. Confabulation

Cross-examination of a Multiple cannot assure reliability because a Multiple is unable to restrict his memory to accurate facts, free from fantasies and confabulation. Every Multiple develops a compensatory process that helps him deal with missing information and gaps in memory. This process is known as confabulation. Confabulation is an unconscious compensatory process in which gaps in memory are filled through the insertion of imagined experiences that the Multiple believes to be real. Moreover, the mind of a Multiple is extraordinary in the sense that a Multiple can confabulate about imaginary experiences that he believed went on for long periods of time, perhaps even weeks or months. A Multiple will often remember specifics of a fabricated event because the imaginary events contain portions of real memories. A Multiple will express confidence in the accuracy of his recovered memories, however, this confidence does not guarantee the accuracy of the memory.

With confabulation, the Multiple awakens from dissociation and is unable to recognize that some of his own thoughts might be implanted or fantasized; in other

464. See id. at 333-34. Misperceptions created by hypnosis “will withstand the most vigorous cross-examination.” See id. at 334.
465. See id. at 333-34.
466. See Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 410 (Minn. 1998) (acknowledging that inaccurate information can be recalled by a Multiple during dissociative episodes). Hypnotically recalled memory consists of: “(1) appropriate actual events; (2) entirely irrelevant actual events; (3) pure fantasy; and (4) fantasized details supplied to make a logical whole.” See Diamond, supra note 359, at 335.
467. See Diamond, supra note 359, at 335. The gaps in memories are often filled with details that are portions of real memories, “but ones unrelated to the situation that the hypnosis seeks to probe.” See id.
469. See Jacqueline R. Kanowitz et al., Witnesses with Multiple Personality Disorder, 23 PEPP. L. REV. 387, 426 (1996).
470. See BLISS, supra note 12, at 77 (noting that Multiples tend to confuse memories of fantasies with memories of real events); Diamond, supra note 359, at 335 (observing that hypnotic subjects who confabulate do not recognize that they are making errors in recall).
471. See BLISS, supra note 12, at 78-81 (explaining that hypnotic memories are often mistaken as real events).
words, the Multiple does not know the inaccuracy of his thoughts.472 The Multiple’s unwarranted belief that his thoughts are accurate is further enhanced because following a hypnotic state, mental processes are rationalized and experienced as the product of free will although they are not.473 Cross-examination is inadequate to ascertain which portions of a Multiple’s testimony are factually accurate, as opposed to confabulated details used to fill in missing gaps of memory. Without this knowledge, the cross-examination of a Multiple is ineffective to uncover those portions of the Multiple’s testimony which are the unreliable product of confabulation.

c. Memory Hardening

Cross-examination of a Multiple is also ineffective due to memory hardening.474 Memory hardening is referred to as “unshakeable recall.”475 A Multiple believes that his recall is accurate because he can recall with amazing detail and verisimilitude.476 Furthermore, because a Multiple witness has such a firm belief in his memories, thoughts, and feelings, it is extremely difficult to persuade him otherwise.477 The enhanced confidence in a hypnotic memory is known as memory hardening.478 Memory hardening causes a Multiple to passionately attest to the veracity of his confabulated memories, thoughts or feelings which are the product of suggestion or fantasy.479 Therefore, despite his serious impairment, a Multiple makes a surprisingly convincing witness. A witness with memory hardening has the uncanny ability to persuade people, especially jurors, that his statements are accurate.480 This is true even when a Multiple’s stories are improbable and contrary to established facts.481

472. See id. (noting that a hypnosis subject may believe fully in his recalled hypnotic experiences).
473. See Diamond, supra note 359, at 334. During one hypnosis session, a psychotherapist suggested to the patient that he should open a window when the psychotherapist cleaned his glasses. See id. The patient awoke. See id. When the psychotherapist began cleaning his glasses, the patient opened the window. See id. When the subject was asked why he opened the window, he answered, “I felt warm and I wanted to let some air in.” See id. This response indicated that the patient had no awareness that the suggestion was implanted. See id. Further, the patient believed that it was his own idea to open the window, and began to rationalize his belief and action. See id. Thus, the patient confabulated the reason he opened the window. See id.
475. See Diamond, supra note 359, at 336.
476. See BLISS, supra note 12, at 78-81.
477. See Diamond, supra note 359, at 334. For example, Sirhan Sirhan was hypnotized in an effort to restore his memory of the assassination of Robert Kennedy. See id. Sirhan persisted in his conviction that he had never succumbed to the hypnosis, although he repeatedly went into deep trances during which he was extremely susceptible to post-hypnotic suggestions. See id.
478. See Borawick v. Shay, 68 F.3d 597, 603 (2d Cir. 1995) (labeling a subject’s enhanced confidence in his hypnotic recall as memory hardening).
479. See BLISS, supra note 12, at 78-81.
480. See Diamond, supra note 359, at 339-40 (noting that a jury might rely on a witness’s uncertainty when apportioning the weight to give his testimony and that hypnosis has the ability to remove doubts and uncertainty).
481. See BLISS, supra note 12, at 160-62.

242
An attorney conducting a cross-examination of a Multiple will have a very difficult time because of memory hardening. For example, the Multiple's testimony creates a substantial problem for the cross-examiner, judge, and jury because the witness becomes an "honest liar" so to speak. Although the Multiple is convinced of the veracity of his testimony, it may be complete confabulation derived from suggestion or fantasy. Because jurors rely on indicators, such as uncertainty of recall and demeanor,\textsuperscript{482} the Multiple will have little or no problem deceiving a jury with vividly detailed testimony, rationalized through confabulation, and made convincing by an "unshakeable" attestation to its veracity.\textsuperscript{483}

d. Compartmentalization

Cross-examination is an inadequate safeguard of reliability because Multiples have compartmentalized minds.\textsuperscript{484} Within the ordinary mind, experts have suggested that memory banks are analogous to filing systems with "labeled, interconnected receptacles[.]\textsuperscript{485} Without these receptacles, "information would be chaotic and scattered, inaccessible to rapid retrieval."\textsuperscript{486} The Multiple's mind has this problem. The fact that a Multiple's memories are scattered and often inaccessible is best illustrated by comparing a Multiple's and non-Multiple's memory systems using an analogy.

One can compare a Multiple's and a non-Multiple's memory systems to a typical dresser used to store clothing. For the non-Multiple, imagine that each drawer in the dresser represents a memory bank, storing particular types of similar information. However, for the Multiple, each drawer represents a memory bank of a particular alter personality.\textsuperscript{487} For both the non-Multiple and Multiple, assume that each item of clothing in the drawer represents a distinct memory. The non-Multiple, when storing clothes, would sort out his clothes and place particular items of clothing in specific drawers.\textsuperscript{488} For example, a non-Multiple might store important birth dates in a particular memory bank. In this instance, if each shirt represented a particular birth date then it would be stored with other shirts in a specific drawer. In essence,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{482} See Weinstein & Berger, supra note 384, § 601.03[2][a], at 601-13.
\item \textsuperscript{483} See Diamond, supra note 359, at 335-36, 339-40.
\item \textsuperscript{484} See Putnam, supra note 8, at 124-26 (analyzing a Multiple's complex personality structures); Kanovitz, supra note 469, at 415 (noting that compartmentalization will challenge even the most seasoned attorneys who cross-examine a Multiple).
\item \textsuperscript{485} See Bliss, supra note 12, at 101.
\item \textsuperscript{486} See id.
\item \textsuperscript{487} See Putnam, supra note 8, at 103-04 (remarking that alter personalities are "highly discrete states of consciousness").
\item \textsuperscript{488} See Bliss, supra note 12, at 101.
\end{enumerate}
\end{footnotesize}
a non-Multiple’s dresser would be comprised of well-organized drawers. One drawer might contain undergarments, another might contain socks, and yet another might contain shirts. When the non-Multiple needs access to his socks, undergarments, or a particular shirt, he knows what drawer that particular item of clothing is in and can easily retrieve it.

A Multiple’s memories are difficult, if not impossible, to retrieve for several reasons. First, a Multiple’s memories are difficult to retrieve because particular types of clothing are not organized and placed into specific drawers. Instead, clothes are scattered amongst the drawers. For example, socks are mixed with undergarments and shirts throughout the dresser. Moreover, particular pairs of socks may be split amongst several drawers, illustrating the fact that a Multiple has fragmented memories. Second, a Multiple’s memories are scattered and difficult to retrieve because a Multiple’s knowledge of what items of clothing are contained in particular drawers could range from comprehensive knowledge, to limited knowledge, to no knowledge whatsoever. In other words, a particular alter would most likely have knowledge of his own memories—the contents of his own drawer—or he may have limited knowledge of memories which have been fragmented. However, his knowledge of a fragmented memory might not include awareness of where the other portions of the fragmented memory are stored. Additionally, a particular alter may be completely unaware that a specific memory exists. Therefore, a cross-examiner must interrogate every alter to locate one particular memory. This is analogous to searching and sifting through every drawer in the dresser to locate one particular item of clothing. To complicate matters further, the dresser may have hidden compartments or additional drawers that no one, including the Multiple, is aware exists. In other words, a Multiple might have alter personalities that are hidden and may never

489. See id.
490. See id.
491. See id. This sock analogy becomes even more complicated when a particular item of clothing is fragmented and pieces of the item of clothing are stored in dozens of different drawers. In other words, a certain memory could be fragmented amongst dozens of alter personalities. See id. at 198-99.
492. See Id. This sock analogy becomes even more complicated when a particular item of clothing is fragmented and pieces of the item of clothing are stored in dozens of different drawers. In other words, a certain memory could be fragmented amongst dozens of alter personalities. See id. at 198-99.
493. See BLISS, supra note 12, at 140-41; PUTNAM, supra note 8, at 114-15.
494. See PUTNAM, supra note 8, at 198-99.
495. See id. at 114-15, 198-99. A survey “found that three-quarters of MPD patients had at least one personality who denied all knowledge of any other personalities.” Id. at 114-15. One problem that a cross-examiner may have when dealing with a Multiple witness is that a particular event may have been experienced by several different alters, each of them experiencing a distinct portion of the event, but none of them experiencing the event in its entirety. For example, alter A may be able to give the cross-examiner a detailed description about facts leading up to a particular event, and alter B may be able to give the cross-examiner a detailed description of facts after the particular event in question, but the actual experience of the event may be subdivided amongst alters C, D, E, and F. Therefore, if each alter were cross-examined, with the exception of alter F, the cross-examination would be incomplete and ineffective. Unfortunately, there is no effective means to determine with accuracy which alter personalities possess the information the cross-examiner seeks to uncover.
496. See id. at 114.
emerge. This makes it virtually impossible to have complete access to a Multiple’s memories. The cross-examiner would have no way of knowing whether these hidden compartments or additional drawers even exist.

Third, a Multiple’s memories are scattered and difficult to retrieve because, in the course of a Multiple’s treatment, a psychotherapist will inevitably probe and sift through the drawers in an attempt to reorganize and match garments. The psychotherapist does so in an attempt to restore fragmented memories and to integrate the memories of each alter personality within the system. The psychotherapist is trying to place particular items of clothing into their proper drawers. In essence, psychotherapists are attempting to group and organize the memories by placing them in the appropriate memory bank. Unfortunately, this complicates memory retrieval, and distorts the accuracy of memories. For example, by attempting to reorganize the dresser, a psychotherapist will sometimes unknowingly place an item of clothing into an improper drawer. To make matters worse, a psychotherapist could take one sock and match it with a different sock in an attempt to make a matching pair. However, many socks, although they appear similar, are not a precise match. The psychotherapist would be gathering fragments of a memory that are mismatched, and by combining them, a completely inaccurate memory can be formed.

e. Switching

Cross-examination is also ineffective due to the problem of switching. Switching is the process of changing from one alter personality to another, and is a core behavioral phenomenon in MPD patients. The alter personality present before

497. See Bliss, supra note 12, at 138.
498. This exact problem was encountered by counsel in Dorsey v. State, 426 S.E.2d 224, 226 (Ga. Ct. App. 1992). In Dorsey, counsel was unable to cross-examine a key alter personality because the existence of the personality was not discovered until after trial. See id.
499. See Loftus, supra note 382, at 110. During treatment, therapists often use a variety of tools to help reorganize and match memories, a process known as integration. See id. These tools and techniques have the potential for creating pseudo-memories. See id. In addition, many of these tools do not have legitimate scientific standards for validity and more importantly, have not been declared reliable by the psychiatric community. See id. These tools include suggestion, social contagion, misdiagnosis, and the misapplication of hypnosis, dream work, and regressive therapies. See id.
500. See Putnam, supra note 8, at 198-200 (explaining the process a Multiple’s therapist uses to assemble whole memories from fragments).
501. See id. at 115.
502. See Kluft, supra note 76, at 230-33 (discussing problems associated with the use of hypnosis to treat Multiples).
503. See Putnam, supra note 8, at 117 (recognizing that any mental health specialist who hopes to successfully treat a Multiple must become skilled at recognizing switches).
the switch is replaced by another personality.\textsuperscript{504} \textsuperscript{504} "[S]witches tend to be triggered by environmental cues or internal conflicts, and are experienced as being out of volitional control[.]	extsuperscript{505} However, it is important to recognize that switching is a psycho-physiological process, and some Multiples will have control over switches to particular alters, but no control over switches to others.\textsuperscript{506} In fact, "[i]n times of stress, . . . alter personalities may emerge who are inappropriate to the situation[.]	extsuperscript{507} The switching of alter personalities can be overt or covert.\textsuperscript{508} "The latter can be extremely difficult to detect, and it is only after one has observed a number of overt switches that covert switching is likely to be recognized."\textsuperscript{509} "The actual moment of switching can last from fractions of a second to several minutes or even longer[.]	extsuperscript{510}" Alter may be present for only brief moments.\textsuperscript{511} Most switches are "signaled by a blink or upward roll of the eyes, . . . [or] a rapid fluttering of the eyelids."\textsuperscript{512} Other signals may include "bodily twitches, shudders, or abrupt changes in posture."\textsuperscript{513} In addition, Multiples may go into a trance-like state or even have a convulsion that is similar to a seizure.\textsuperscript{514} However, some Multiples have "learned to disguise or cover up switching behavior."\textsuperscript{515}

As demonstrated above, the switching process is very complex. Moreover, some Multiples have the ability to hide their multiplicity, dealing with situations using several different alters.\textsuperscript{516} This uniquely complex ability creates several problems during the cross-examination of a Multiple. One problem is that Multiples may switch uncontrollably during cross-examination. There is no doubt that a courtroom can be a stressful place for anyone, particularly a witness on the stand. Multiples often react to stressful situations by uncontrollable switching.\textsuperscript{517} This uncontrollable switching will create chaos, resulting in an ineffective cross-examination due to questioning of the wrong alter or the inability to fully question a particular alter.

Another problem is that opposing counsel may be unable to call forth a particular alter. This exact situation arose in \textit{State v. Donnelly}.\textsuperscript{518} In \textit{Donnelly}, the defendant

\begin{footnotesize}
\begin{enumerate}
\item[504.] See id. In some cases, two personalities are present at the same time. See id.
\item[505.] Id.; see also BLISS, supra note 12, at 125 (commenting that the "'spontaneous' transformation of the alert patient into a personality usually occurs when the patient encounters a stress with which he . . . cannot cope").
\item[506.] See PUTNAM, supra note 8, at 117.
\item[507.] Id. at 118.
\item[508.] See id.
\item[509.] Id.
\item[510.] Id. at 120.
\item[511.] See id. at 121.
\item[512.] Id. at 120-21.
\item[513.] See id. at 121.
\item[514.] See id.
\item[515.] See id.
\item[516.] See id. at 118.
\item[517.] Id. at 117.
\end{enumerate}
\end{footnotesize}
was convicted of sexual abuse of his adopted daughter, Janey Doe. The defendant claimed that two of Janey Doe’s alters would have testified inconsistently with her accusations. However, those alters were never questioned because they did not emerge at trial. Because these alters never emerged, defense counsel was unable to effectively cross-examine Janey Doe. Thus, if a particular alter personality is not present on the stand, the cross-examiner will be unable to thoroughly explore that alter’s testimony in order to attack his credibility.

The third problem that arises during cross-examination is that counsel often will be unable to recognize when switches occur in personalities that are being cross-examined. The cross-examiner’s ability to recognize a switch between two alter personalities is influenced by four factors.

First, if the cross-examiner has a limited knowledge of psychotherapy, it is likely that he is unfamiliar with the mechanics of switching. Therefore, he is less likely to recognize when a switch takes place. Second, the cross-examiner’s ability to recognize when a switch has occurred will depend on his degree of access to the Multiple’s psychotherapy records. If he does not have access to the records, it is unlikely that he will be able to recognize when a switch occurs.

Third, the cross-examiner may not recognize that a switch has occurred if there is little difference between the former alter and the newly emerged alter. If the change is dramatic, such as a change from female to male, or child to adult, the cross-examiner will readily recognize that a switch has taken place. However, if the change is a subtle one, and the newly emerged alter is similar to the former alter, the switch will be much more difficult to detect.

Fourth, if the cross-examiner has little or no familiarity or past experience with the Multiple’s alters, it is possible that he will be unaware that a switch has taken place. The more familiar the cross-examiner is with the Multiple’s alters, the more likely he will recognize when a switch occurs.

---

519. *See id.* at 91.
520. *See id.*
521. *See id.* at 94.
522. *See id.*
523. The court ruled, however, that the mere fact that Janey Doe was cross-examined was sufficient, regardless of whether these alters actually emerged. *See id.* at 93-94.
524. *See PUTNAM, supra* note 8, at 118.
525. *See id.* (opining that covert switches can be recognized only after a person has spent an extraordinary amount of time with the Multiple).
526. *See id.*
527. *See id.* It is only after therapists came to know alter personalities over an extended period of time, that “they developed an ability to distinguish them more easily and to discern greater degrees of differences among them.” *See id.*
makes the cross-examination of a Multiple ineffective.

f. Psychotherapist-Patient Privilege

Most Multiple's psychotherapy records are inaccessible to counsel because of the psychotherapist-patient privilege. The common law psychotherapist privilege was first recognized by the United States Supreme Court in Jaffee v. Redmond. All fifty states and the District of Columbia have adopted some form of the psychotherapist-patient privilege. However, some states qualify the privilege and subject it to a balancing test. When balancing, if "the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests," then the record will be disclosed. It is important to recognize that a defendant's counsel cannot effectively cross-examine the Multiple without access to the clinical records, therefore, the probative value of the information contained in those records is substantial.

The cross-examiner will need the Multiple's psychotherapy records to attack the Multiple's credibility on cross-examination. These records are essential for several reasons. First, these records permits the opposition to evaluate the extent to which the therapy process itself may have suggested or implanted unsubstantiated or unverifiable memories and beliefs. Second, these records are necessary for the cross-examiner to understand the internal model and make-up of the Multiple's personality system. The records typically reveal the number of alter personalities, their names, ages, traits, functions, and particular experiences revealed during treatment.

528. See, e.g., State v. Donnelly, 798 P.2d 89, 91-94 (Mont. 1990), overruled on other grounds by State v. Imlay, 813 P.2d 979 (1991). The psychotherapist-patient privilege serves three purposes. First, the privilege serves the interest of the patient because it is intended to inspire confidence in the patient and to encourage him to make full disclosure of his symptoms to the psychotherapist. See WEINSTEIN & BERGER, supra note 384, § 504.03[4][a], at 504-10. Further, it prevents the physician from making public certain information that would possibly result in the humiliation, embarrassment, or disgrace of the patient. See id. The second important public interest served by the privilege is the facilitation of treatment for individuals suffering the effects of a mental or emotional problem. See id. Finally, the privilege promotes confidential conversations between psychotherapist and patient, which would be curtailed if the privilege did not exist. See id. There are three reasons why ethical and seasoned psychotherapists are sensitive to the importance of confidentiality in psychotherapy. See FED. R. EVI.D. 504 advisory committee's notes. First, the success of the treatment directly reflects on the quality of the patient/therapist relationship. See id. Second, ethical guidelines published throughout the profession require clinicians to safeguard patient confidentiality and to disclose information only when permitted or explicitly demanded by law. See id. Finally, in most jurisdictions, mental health records are protected by the privilege of confidentiality. See id.


530. See WEINSTEIN & BERGER, supra note 384, § 504.03[4][b], at 504-11 n.12.

531. See, e.g., ME. REV. STAT. ANN. tit. 32 § 7005 (West 1964); N.H. REV. STAT. ANN. § 330-A:19 (1999); N.C. GEN. STAT. § 8-53.7 (1986); VA. CODE ANN. § 8.01-400.2 (Michie 1992).

532. See WEINSTEIN & BERGER, supra note 384, § 504.04, at 504-14.

533. See Kluft, supra note 76, at 230-33; see also Diamond, supra note 359, at 333 (emphasizing that a hypnotist cannot avoid implanting suggestions in the mind of a hypnotized subject).
therapy. Third, Multiples commonly switch from one alter to another, covertly or overtly, usually in response to certain stimuli or "triggers." Access to the psychotherapist’s records provides important insights regarding how to best effectuate the switch. There may be circumstances when the cross-examiner will need to trigger a switch in the Multiple from one alter personality to another in order to attack that particular alter’s credibility. The cross-examiner must know that this overt or covert switching can take place, and how to recognize it when it occurs. The fact that these records are privileged makes effective cross-examination of a Multiple impossible.

3. The Jury’s Observation is an Inadequate Safeguard to Ensure Reliability

Courts have long recognized that the jury’s observation is a traditional safeguard to assure the reliability of testimony. In fact, the presumption of witness competency that underlies Federal Rule of Evidence 601 is based, in part, on the belief that the jury is best equipped to assess the credibility of a witness and the witness’s reliability based on their observations. However, the jury’s observations are insufficient to assess the reliability of a Multiple’s testimony for several reasons. First, the jury may falsely presume that hypnosis improves the accuracy of memory. Second, the jury may be deceived by a witness faking the condition. Third, the jury will be unable to understand the complexity of a Multiple’s personality system. Fourth, the jury will be unable to assess the reliability of a Multiple’s testimony because a Multiple’s demeanor exudes self-confidence and credibility. Each of these reasons, standing alone, makes the testimony of a Multiple more prejudicial than probative.

a. False Presumption that Hypnosis Improves the Accuracy of Memory

There is a false presumption among the general public that hypnosis improves the accuracy of memory. Because of this presumption, a jury composed of members

534. See infra notes 556-587 and accompanying text.
535. See PUTNAM, supra note 8, at 117-18.
536. See WEINSTEIN’S MANUAL, supra note 402, § 14.01[1], at 14-2; WRIGHT & GOLD, supra note 423, § 6011, at 124, 127.
537. See WEINSTEIN’S MANUAL, supra note 402, § 14.01[1], at 14-2 (noting that “the trier of fact can more accurately evaluate credibility if it can observe the witness’ demeanor while testifying”).
538. See infra notes 542-50 and accompanying text.
539. See infra notes 551-55 and accompanying text.
540. See infra notes 556-87 and accompanying text.
541. See infra notes 588-92 and accompanying text.
of the public will be unable to assess the reliability of a Multiple’s testimony. Based on the mistaken belief that hypnosis improves the accuracy of memory, most jurors will give undue weight to the Multiple’s testimony. This public opinion is deceiving because most research suggests that this belief is false. During a trial, the false presumption that hypnosis improves the accuracy of memory will be strengthened further by expert testimony. For instance, the Multiple’s expert will express his conviction in the truth and accuracy of the Multiple’s recall. The value of using expert testimony to establish the reliability of a Multiple’s testimony is minimal. The accuracy of hypnosis testimony is impossible to verify, even for an expert. Because a Multiple falls prey to the unrecognized abuse of self-hypnosis, no means exist to determine whether his testimony is replete with falsities and distortions.

Many experts may be highly skilled as to the therapeutic and diagnostic uses of hypnosis, yet they may have no insight into the complexity and operation of the legal system. When an expert testifies that a Multiple’s testimony is just as detailed, coherent, and indistinguishable from the testimony of a non-Multiple, he is proclaiming the testimony’s accuracy. However, even if the Multiple’s testimony has all the earmarks of accuracy, it still may be fantasy or the product of suggestion.

b. Faking the Condition

Through observation, a juror will be unable to tell if a Multiple is genuine or a fake. Moreover, even a skilled psychotherapist cannot detect whether an alleged

542. See Graham F. Wagstaff et al., The Effect of Hypnotically Elicited Testimony on Jurors’ Judgments of Guilt and Innocence, 132 J. SOC. PSYCHOL. 591, 592 (1992) (explaining that research stretching from countries such as the United States to the United Kingdom has indicated that this presumption is widespread).
543. See BLISS, supra note 12, at 193-220; Kluft, supra note 76, at 230-33.
544. See Wagstaff et al., supra note 542, at 591 (commenting on the inaccuracy of survey data from several countries indicating the belief that hypnosis increases the accuracy of an eyewitness’s memory).
545. See, e.g., Dorsey v. State, 426 S.E.2d 224, 227 (Ga. Ct. App. 1992) (recognizing that “[t]here was undisputed expert testimony at both trials that the victim in a dissociative state would not lie”).
546. See, e.g., United States v. Ramirez, 871 F.2d 582, 585 (6th Cir. 1989) (asserting that “[i]n this era of increasing use of experts in both civil and criminal trials, the sad truth is that an ‘expert’ can be found to testify on behalf of almost any viewpoint or position”).
547. See Diamond, supra note 359, at 337. Those who attempt to verify the accuracy of hypnosis testimony usually rely on such factors as detail, coherence, and compatibility with facts established from other sources. See id. However, even if the testimony has all of these earmarks of accuracy, it still may be fantasy. See id.
548. See id.
549. See id.
550. See id.
551. See BLISS, supra note 12, at 161 (asserting that a clever criminal can learn to fake MPD). Despite this fact, at least one court has allowed the jury to determine, after listening to the experts, whether the defendant genuinely had MPD or faked the condition. See State v. Darnall, 614 P.2d 120, 123-24 (Or. Ct. App. 1980).
Multiple is genuinely suffering from MPD or faking the disorder. A witness who desires to deceive a jury or an expert can study the MPD literature and learn how to fake the condition. Furthermore, a witness faking MPD may feign all of the traditional symptoms of the disorder with great skill. Thus, because hypnosis and MPD can be feigned, and neither a lay juror nor a psychotherapist can detect that it is being feigned, a jury's observation is insufficient to determine the reliability of an alleged Multiple's testimony.

c. Complexity of the Multiple's Personality System

The jury's observation is inadequate to assure reliability because the personality systems of Multiples are complex and beyond the understanding of a typical lay juror. Psychotherapists have generated metaphors, maps, and diagrams to describe the internal world of alter personalities. Psychotherapists have used three particular metaphors to explain the complex personality structure of a Multiple. Regardless of which metaphor or internal model is used to explain the Multiple's personality system, the jury must come to appreciate the particular Multiple's unique metaphors or internal models in order to understand the Multiple's testimony.

The first system metaphor or internal model used by psychotherapists to explain a Multiple's personality system is layering. Layering is a term used "to describe a set of phenomena that many therapists find as they work through traumatic materials with [the Multiple.]" Layering phenomena are one aspect of the Multiple's defensive process of dissociation. Layering phenomena disassemble

---

552. See BLISS, supra note 12, at 161; see also Diamond, supra note 359, at 337 (recognizing rigorous scientific experiments have repeatedly demonstrated that even the best experts cannot consistently distinguish between actual and feigned hypnosis). The faking phenomenon is accurately illustrated in the movie Primal Fear where Richard Gere stars as a defense attorney whose client is believed to have MPD. PRIMAL FEAR (Paramount 1996). At the movie's end, it was revealed that the client was faking the disorder, despite the fact that he successfully convinced his therapist, attorneys, and the court that he suffered from the disorder. See id.

553. See BLISS, supra note 12, at 161.


555. See BLISS, supra note 12, at 161.

556. See PUTNAM, supra note 8, at 123-26 (detailing the complexity of a Multiple's personality system).

557. See id. at 210-11.

558. See id. at 124-26.

559. See id. at 124-25.

560. See id. at 124.

561. See id. at 125.

---
painful memories, making it difficult for the Multiple to remember them.\[^{562}\] Layering may also occur as alters "within the Multiple’s system begin to fuse or integrate."\[^{563}\] The personalities within the system may be described as layered because "certain groups of personalities overlie each other, or are buried beneath other personalities."\[^{564}\] It is possible for one overt personality to hide several covert active personalities.\[^{565}\] Due to the several layers of personality groups, it is conceivable that specific details or memories are missing within the personality system.\[^{566}\] Thus, the more personalities within a Multiple’s system, the greater the potential for increased levels of complexity.\[^{567}\]

The second unique system metaphor or internal model used by psychotherapists to explain a Multiple’s personality system is families.\[^{568}\] Personalities may be “related on the basis of sharing a common traumatic origin.”\[^{569}\] In addition, personalities may be related because their origins share a common alter.\[^{570}\] Further, “[p]ersonalities may be grouped together by the functions they perform[.]”\[^{571}\] For example, a Multiple may divide tasks requiring complex functions, such as a job, among certain alters who perform the sub-tasks necessary to perform the particular task.\[^{572}\] These types of personalities which are grouped by task are also referred to as a family.\[^{573}\]

It is highly probable that an alter in one family group will have no knowledge of an alter in another family.\[^{574}\] This is true even though a Multiple with a large number of personalities may have several families residing within the personality system.\[^{575}\] Moreover, when there are internal conflicts, one family may be at war with another family.\[^{576}\] Families have designated gatekeepers that serve as a means by which the families communicate with each other within a personality system.\[^{577}\] It is often difficult to reach certain members of a family because access may be denied unless the gatekeeper alter is confronted.\[^{578}\]

On occasion, an attorney will need to question an alter within a particular family

\[^{562}\] See id.
\[^{563}\] See id.
\[^{564}\] See id. at 124.
\[^{565}\] See id.
\[^{566}\] See id. at 125.
\[^{567}\] See id.
\[^{568}\] See id. at 125-26.
\[^{569}\] Id. (explaining that “personalities within a group or family are generally more aware of each other and have better access to [a] shared pool of memories or skills than personalities across families”).
\[^{570}\] See id. at 126.
\[^{571}\] Id.
\[^{572}\] See id.
\[^{573}\] See id.
\[^{574}\] See id.
\[^{575}\] See id.
\[^{576}\] See id.
\[^{577}\] See id.
\[^{578}\] See id.
which has a gatekeeper personality. The steps the attorney must take to accomplish this illustrates the complexity of a Multiple's personality system. The attorney seeking to question a particular alter must first ascertain what family that alter belongs to, and who the gatekeeper personality is for that family.\textsuperscript{579} The gatekeeper must usually be called forth before access to the particular family member alter will be granted.\textsuperscript{580} While all of this questioning is taking place, it is extremely improbable that the average lay juror will understand what is taking place and why.

The last unique metaphor system or internal model used by psychotherapists to explain a Multiple's personality system is the tree structure.\textsuperscript{581} Tree structures within Multiples have the same design as hierarchical relationships within a traditional family tree.\textsuperscript{582} A typical tree structure has an "original or core personality at the top or root vortex, branching downward to other personalities."\textsuperscript{583} The other personalities split and branch downward again into more personalities.\textsuperscript{584} The bottom branches of the tree consist of the currently active personalities.\textsuperscript{585}

Most psychotherapists recognize that the use of detailed maps, diagrams, and blueprints are essential to assemble information about a Multiple's personality system.\textsuperscript{586} Even with such charts and diagrams, there is no guarantee that a psychotherapist will accurately depict the Multiple's personality system. Psychotherapists recognize that these metaphors and internal models are not exclusive. In other words, families may exist within a particular tree structure.\textsuperscript{587} Thus, more than one of these internal models may be necessary to explain the personality system in a particular Multiple.

d. Demeanor Exudes Self-Confidence and Credibility

Because a Multiple's demeanor exudes self-confidence and credibility due to confabulation and memory hardening, a jury's observation alone will not uncover

\textsuperscript{579} The complexity of the Multiple's personality system is yet another reason why effective cross-examination of a Multiple is impossible. The attorney will never have a complete understanding of the Multiple's personality system. In addition, assuming the attorney conducting the cross-examination of the Multiple has a limited knowledge of the Multiple's personality system, the average lay juror will lack this knowledge. Therefore, the jury will neither appreciate nor understand the cross-examination, thereby rendering it ineffective.
\textsuperscript{580} See PUTNAM, supra note 8, at 126.
\textsuperscript{581} See id.
\textsuperscript{582} See id.
\textsuperscript{583} Id.
\textsuperscript{584} See id.
\textsuperscript{585} See id.
\textsuperscript{586} See id. at 210-11.
\textsuperscript{587} See id. at 126.
whether a Multiple’s testimony is truthful and accurate. A Multiple may be described as a super witness. Confabulation allows a Multiple to fill in memory gaps with fantasy or suggestion, and because memory hardening allows him to believe with extreme confidence that his memories are accurate, a Multiple will testify with “unshakeable conviction” that his false memories are accurate. A juror observing a Multiple’s testimony will observe no outward sign, either verbal or nonverbal, that would indicate that the testimony is unreliable. In contrast, when a non-Multiple is testifying to inaccurate or uncertain memories, he will often communicate that his testimony is unreliable by showing hesitancy, expressions of doubt, and body language indicating a lack of certainty. Jurors often rely on these verbal and nonverbal cues to assess the reliability of a witness’s testimony. Because these cues are not present in a Multiple, the jurors’ observations will be inadequate to assure the reliability of the Multiple’s testimony. Therefore, the jury will be misled into believing that the Multiple’s testimony is reliable based on the Multiple’s self-confidence and conviction, when in fact it may be unreliable confabulation.

C. Summation

Courts should adopt a per se exclusion for a Multiple’s testimony. As discussed above, a Multiple’s testimony is testimony presented while under hypnosis. To date, all courts have excluded, per se, testimony while under hypnosis. Therefore, a Multiple’s testimony, as testimony presented while under hypnosis, is per se inadmissible under the Frye test for scientific evidence. In addition, the Multiple’s testimony is per se inadmissible because it will always be more prejudicial than probative. None of the traditional safeguards for reliability—the oath, cross-examination, and the jury’s observation—are effective to assure the reliability of a Multiple’s testimony. Courts that wish to proceed thoughtfully and cautiously will recognize that a per se exclusion is the only way to assure that fairness is secured in the judicial process, and that controversies are justly determined using only reliable evidence.

588. See supra notes 466-483 and accompanying text.
589. See BLISS, supra note 12, at 78-81 (stating that a hypnotic experience is often indistinguishable from reality).
590. See Diamond, supra note 359, at 338-39 (opining that hypnosis significantly adds to a witness’s confidence, removing traditional indicators of uncertainty upon which a jury relies).
591. See WEINSTEIN’S MANUAL, supra note 402, § 14.01[1], at 14-2.
592. See id.
593. See supra notes 248-55 and accompanying text.
594. See supra notes 168-81 and accompanying text.
595. See supra notes 423-592 and accompanying text.
VIII. RECOMMENDATIONS

A. To the Practitioner

1. Request a Competency Hearing in Advance of Trial

Once counsel learns that a witness for the opposing party is a Multiple, counsel should immediately request a competency hearing. A competency hearing is necessary to preserve the issue for appeal. Thus, even if the trial judge denies the request for a competency hearing, the issue of competency is raised and preserved for appeal. If the trial judge denies a pretrial competency hearing, it would be wise for counsel to demand a separate competency hearing each time a new alter emerges on the stand.

2. Request that the Oath be Separately Administered to Each Alter Personality Who Will Testify

The minimum threshold of competency requires that each witness be sworn and understand the obligation to testify truthfully. It is counsel’s responsibility to bring any errors in the administration of the oath to the court’s attention in a timely fashion. Counsel’s failure to do so may result in a waiver of the error, precluding him from raising the defects on appeal. In addition, because many alters who emerge could be children, it is necessary to assure that they understand the oath and their duty to testify truthfully.

3. Make a Timely Objection on the Record and Move to Strike if the Multiple is Permitted to Testify

“[E]rror cannot be predicated on a ruling admitting evidence unless ‘a timely objection or motion to strike appears of record stating the specific ground of [the] objection’ . . . .” Therefore, if the trial court determines that the Multiple is permitted to testify, counsel should make timely and specific objections to the

---

596. See FED. R. EVID. 103(a)(1).
597. See id.
598. See id.
599. WEINSTEIN’S MANUAL, supra note 402, § 2.03[2][a], at 2-19 (quoting FED. R. EVID. 103(a)(1)).
testimony, and move to strike the testimony in its entirety. In addition, if the court allows the testimony, counsel may wish to question the court regarding the basis of its ruling. "[Q]uestioning in response to an objection may clarify a situation that may otherwise be unclear to the reviewing court."^{600}

4. Make an Objection to the Multiple's Testimony on Hearsay Grounds

Whenever the host testifies regarding the experiences of an alter, or whenever an alter testifies about the experiences of the host or another alter, the testimony is arguably hearsay. Therefore, if there is an attempt to introduce the testimony, a prompt objection on hearsay grounds will preserve the issue for appeal.

5. Make an Objection Based on Lack of Foundation

At least one court has held that an appropriate objection to hypnosis testimony is an objection for lack of foundation. A separate objection for lack of foundation may be required because it has been held that an objection based on lack of reliability is insufficient to cover inadequate foundation.

6. Bring a Motion to Suppress or a Motion in Limine to Exclude Testimony From the Multiple

Counsel confronted with a Multiple should bring a motion to suppress or a motion in limine to exclude the Multiple's testimony. If the judge admits the testimony, counsel should demand the opportunity to demonstrate at trial the possible effects of self-hypnosis on the Multiple's testimony and its accuracy.

7. Request an Instruction to the Jury Regarding the Credibility of the Multiple's Testimony

Counsel should request a jury instruction that the jury, in assessing the credibility of the Multiple's testimony, may consider the fact that the Multiple's testimony is

---

600. Id. § 2.03[2][a], at 2-18 & n.4.
601. See Dorsey v. State, 426 S.E.2d 224, 227-28 (Ga. Ct. App. 1992) (recognizing that a hearsay objection to a Multiple's testimony would be valid if counsel was not given the opportunity to cross-examine the specific alter who made the statement while in a dissociative state).
602. See United States v. Adams, 581 F.2d 193, 199 (9th Cir. 1978).
603. See id.
605. See id.
hypnosis testimony. Such an instruction is helpful because jurors are generally unaware of the factors to consider when evaluating testimony.

8. Request the Multiple’s Psychological Records

Counsel challenging the reliability of a Multiple’s testimony should request all of the Multiple’s psychological records. The Multiple’s psychological records are helpful during both the pretrial and trial stages of litigation. At the pretrial stage, the records help the attorney prepare for the Multiple’s deposition. In addition, the records are helpful for attacking the Multiple’s credibility during a pretrial competency hearing. At the trial stage, if the Multiple is permitted to testify, the records are crucial during cross-examination. The expert hired to challenge the Multiple’s credibility will also need access to the Multiple’s records. These records will help the expert to identify the extent to which the therapy process itself may have suggested or implanted memories and beliefs of prior life experiences. Also, these records help the cross-examiner understand the internal model and make-up of the Multiple’s personality system.

9. Hire Expert(s) to Assist When Attacking the Reliability of the Multiple’s Testimony

Counsel will need expert assistance to attack the reliability of a Multiple’s testimony, both at the pretrial and trial stages, if the Multiple is permitted to testify. Experts on both hypnosis and MPD are helpful. These experts can assist with pretrial discovery, including the Multiple’s deposition, as well as with competency hearings and trial.

606. See id. (noting that if hypnosis testimony is admitted, counsel is entitled to a jury instruction that in assessing the testimony’s credibility they can consider the fact of hypnosis). Arguably, the same jury instruction should be given in cases involving Multiples.

607. See WEINSTEIN’S MANUAL, supra note 402, § 2.07[3], at 2-58.

608. See Loftus, supra note 382, at 121. The practitioner should try to gain access to
[a]ny and all counseling and or therapeutic records pertaining to psychiatric, psychological, therapeutic or any other mental health counseling of [the Multiple from the first session] to the present, including but not limited to the following:
1. Any notes, correspondence or memoranda generated by [therapists];
2. Any audiotapes, videotapes, or drawings generated during counseling sessions or at the request of [therapists];
3. The titles, authors, and publishers of any books, articles, videotapes provided [by therapists to the Multiple] for reading and/or consultation.

Id.

609. See supra notes 528-35 and accompanying text.
10. Closely Supervise Expert Testimony in the Pretrial Stage

The Federal Rules of Evidence and their counterparts at the state level have loosened the restrictions on the admissibility of expert testimony. Counsel should do several things to supervise the preparation of expert testimony at the pretrial stage. First, request “each party to identify the experts that it will use at trial and provide a summary of those experts’ expected testimony . . . .” Second, request the experts to provide a glossary of the terms they will use at trial. These definitions will assist both the judge and the jury. If the experts can agree on their terminology, it will be a great help to all involved. If they cannot agree, the list will be useful to avoid confusion. Third, request joint pretrial meetings between the judge and key experts for both sides, particularly if there is concern that an expert’s testimony is inappropriate. Fourth, request a list of the learned treatises upon which the experts will rely at trial.

A party intending to offer statistical data and analysis at trial should be required to provide the underlying records from which the data was collected. Counsel should be prepared well in advance of trial if he intends to object to the expert’s analysis.

11. If Necessary, Ask the Court to Appoint Expert Witnesses

Federal Rule of Evidence 706 authorizes the court to appoint expert witnesses. This rule applies in both civil and criminal cases. A court-appointed expert may be very helpful in assessing the competency of a Multiple because it is not uncommon for the parties’ experts to disagree, resulting in a “battle of the experts.” An expert who is not hired by the parties is less likely to reach a biased conclusion either for or against competency. Additionally, a party-controlled expert often leaves the court and trier of fact grappling with highly technical, diametrically
opposed testimony.\textsuperscript{620}

12. Request the Court to Compel a Psychiatric Examination of the Multiple

Counsel should request that the court order the Multiple to undergo a complete and thorough psychiatric examination immediately upon learning that the case involves a Multiple. The propriety of such an examination varies from state to state and within the federal system. Courts' approaches to these examinations generally fall into one of three categories. First, some courts take the position that a trial judge has no inherent power to compel a psychiatric examination.\textsuperscript{621} Other courts hold that a defendant has an absolute right to an order compelling a psychiatric examination of the complaining witness.\textsuperscript{622} Finally, some courts have held that a trial judge has discretion to order a psychiatric examination of the complaining witness where there is a compelling reason.\textsuperscript{623} In federal courts, under the common law psychotherapist-patient privilege, if the judge orders an examination of the Multiple's psychological condition, communications made in the course thereof are not privileged unless the judge orders otherwise.\textsuperscript{624}

B. To the Court

1. Recognize that a Multiple's Testimony is a Particularly Unreliable Form of Hypnosis Testimony

A Multiple's testimony is testimony presented while under hypnosis.\textsuperscript{625} A Multiple cannot differentiate between a true recollection, a fantasy, and memory that

\textsuperscript{620} See id. "By summoning its own witness where expert testimony is critical and the parties' experts are at loggerheads, the court seeks to procure a high caliber, less venal expert, and to help the court and parties reach a settlement or the jury to arrive at a sound verdict." Id.

\textsuperscript{621} See Gregory G. Sarno, Annotation, Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution, 45 A.L.R.4TH 310, 324-26 (1987) (listing cases which hold that a trial judge has no inherent power to compel a psychiatric examination).

\textsuperscript{622} See id. at 326 (providing cases which hold that the defendant has an absolute right to compel a psychiatric examination).

\textsuperscript{623} See id. at 317-20 (supplying cases that hold that the court has discretionary power to order the examination).

\textsuperscript{624} See WEINSTEIN & BERGER, supra note 384, § 504.07[6], at 504-22 (discussing Supreme Court Standard 504 which outlines the federal psychotherapist-patient privilege).

\textsuperscript{625} See supra notes 248-55 and accompanying text.
is the product of suggestion. Courts should apply the hypnosis precedent which universally recognizes that testimony given while under hypnosis should be excluded per se.

2. Per Se Exclude a Multiple’s Testimony

Once courts recognize the inherent connection between unreliable hypnosis testimony and a Multiple’s testimony, courts should adopt a per se exclusion for a Multiple’s testimony. This can be accomplished by using either of two methods. First, the court should exclude a Multiple’s testimony by utilizing the Frye test. Second, the court should exclude per se a Multiple’s testimony by ruling that it is always more prejudicial than probative. A Multiple’s testimony is always more prejudicial than probative because the three traditional safeguards of reliability are ineffective. These traditional safeguards are the oath, cross-examination, and the jury’s ability to observe the witness firsthand. Either of these methods is a sufficient basis for a court to adopt a per se exclusion of a Multiple’s testimony.

3. Conduct a Pretrial Competency Hearing

Notwithstanding the presumption in favor of witness competency, trial judges have an obligation to determine that the minimum standards of competency are met, and are afforded considerable discretion when making the competency determination. If the court does not per se exclude a Multiple’s testimony, the court should order a preliminary hearing to determine the Multiple’s competency. The court’s determination of competency will not be reversed on appeal unless it is an abuse of discretion.

4. Summing Up and Comment by the Court

If the court permits a Multiple to testify, the court should summarize and comment on the Multiple’s testimony. Supreme Court Standard 107, although not a part of the Federal Rules of Evidence, authorizes the trial court to summarize and comment on the evidence. Standard 107 states, in pertinent part:

626. See supra notes 449-65 and accompanying text.
627. See supra notes 168-81 and accompanying text.
628. See supra notes 414-22 and accompanying text.
629. See supra notes 423-595 and accompanying text.
630. See supra notes 423-592 and accompanying text.
631. See WEINSTEIN’S MANUAL, supra note 402, § 14.01[1], at 14-2; WRIGHT & GOLD, supra note 423, § 6011, at 124, 127.
632. See United States v. Gomez, 807 F.2d 1523, 1527 (10th Cir. 1986).
633. See WEINSTEIN’S MANUAL, supra note 402, § 2.07[1], at 2-53. “The text is consistent with long-standing federal practice; it was not enacted by Congress, however, because of opposition by attorneys trained in states where the trial judge does not have these powers.” Id.
After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge’s summation or comment.634

Standard 107 is consistent with longstanding federal practice. After closing arguments by counsel, the judge is authorized to summarize the evidence for the benefit of the jury.635 “By retaining this traditional power, the federal judicial system preserves one of the most effective tools the court has . . . to assist the jury in arriving at a just verdict.”636 Although the court cannot tell the jury whether it believes a particular witness is telling the truth,637 it is extremely helpful if the court advises the jury as to what factors to consider when evaluating a witness’s credibility.638 The court also has the power to comment on the probative value of the proof offered by the parties, and may give the jury an instruction limiting the application of evidence to its proper scope.639 The jurors will be forced to assess the credibility of the Multiple’s testimony. Therefore, the court’s summation should prove particularly helpful, especially because the Multiple’s credibility was probably the subject of conflicting expert testimony.

IX. CONCLUSION

In conclusion, courts should acknowledge the connection between hypnosis testimony and MPD testimony. MPD is a dissociative disorder perpetuated by the abuse of self-hypnosis. Courts are in agreement that testimony presented while under hypnosis is inadmissible per se. In addition, many courts per se exclude hypnotically refreshed testimony. However, courts refuse to utilize this hypnosis precedent when confronted with a Multiple’s testimony. A Multiple’s testimony is testimony given while under hypnosis.

634. Id. (emphasis added).
635. See id. § 2.07[2], at 2-54.
636. Id.
637. See, e.g., United States v. Anton, 597 F.2d 371, 372 (3d Cir. 1979) (noting that the trial court’s statement that it regarded the defendant as “devoid of credibility” deprived the defendant of his right to have his credibility determined by the jury).
638. See WEINSTEIN’S MANUAL, supra note 402, § 2.07[3], at 2-58 (stating that “jurors are . . . generally unaware of all the factors that should be taken into consideration when evaluating the testimony”).
639. See id. § 2.07[3], at 2-59 (explaining that “[t]he power of a trial judge to comment on the weight and sufficiency of the evidence is one of the tools for exercising substantial control over the admission and presentation of evidence”).
Moreover, because the primary mechanism of MPD is self-hypnosis, courts should rule that a Multiple's testimony is particularly unreliable. A Multiple's testimony should be excluded per se on two grounds. First, the Multiple's testimony fails to meet the Frye standard for scientific evidence which should be applied to a Multiple's testimony. Second, the probative value of a Multiple's testimony is minimal at best, and the extreme prejudice that arises if a Multiple is permitted to testify will always far outweigh the testimony's probative value. Either of these grounds is sufficient to support a per se exclusion of a Multiple's testimony. The best approach to assure that the truth is ascertained and proceedings justly determined is for the courts to adopt a per se rule of exclusion for a Multiple's testimony.