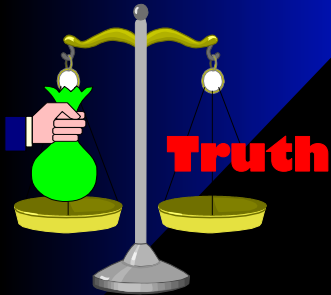


# Ethics for Brain Injury Rehabilitation in Medicolegal Situations

Independent Skinnerian Examination (ISE)



PART III:

*Possible Solutions*

**New York Academy of TBI, 2004**

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## Applying General Medical Ethics to the Medicolegal Arena

- ➔ Based on the primary ethical principle of Respect for Others, four core bioethical principles (*Beauchamp & Childress, 1994*):
  - ➔ **Autonomy**: *Self-determination re: healthcare-related decisions*
  - ➔ **Non-maleficence**: *Doing no harm*
  - ➔ **Beneficence**: *Patient welfare promotion*
  - ➔ **Justice**: *Equitable distribution of the burdens & benefits of care*

## OBSTACLES TO ETHICAL BEHAVIOR

- ❑ Poor Understanding, esp. in medicolegal contexts; inadequate training in Grad/Prof School
- ❑ Reluctance of Practicing Experts to Write
- ❑ "CREEPING ADVERSARIALISM"
- ❑ Financial Incentive in MC age (*continuum*)
- ❑ COMPLEXITY: Multiple Obligations
- ❑ COGNITIVE DISSONANCE

## ETHICAL GUIDES

- A.P.A. 2002: Ethical principles & code of conduct
- Bush (2004) NP Ethics Casebook
- A.P.A. Div41 (Psy & Law, 1991) Specialty Guidelines
- Sweet et al (2002) in Bush, Ethics in Clinical NP Book
- Martelli, Bush, Zasler (2003) IJFP Paper, Free Access
- Martelli, Zasler & Zasler, Martelli, 2002, 2001, 1999
- Binder & Thompson, 1995
- C.P.A. 2000
- AAPM&R (1992) Expert Witness White Paper
- Neurology Expert Witness Guides
- AMA, Council on Ethical & Judicial Affairs (1996) Code of Medical Ethics: Current Opinions with Annotations.

## P100. Patient-Physician Relationship in the Context of Work related and Independent Medical Examinations \*\*

### □ Unaltered Responsibilities and Obligations

- Despite their ties to a third party, the responsibilities of IEPs and IMEs are in some basic respects very similar to those of other physicians. Physicians in this context have the same obligations to conduct an objective medical examination, maintain patient confidentiality, and disclose potential or perceived conflicts of interest.

### □ Altered Responsibilities and Obligations

- A physician is obligated to divulge important health information to the patient which the physician discovers as a result of the examination.
- *AMA: Center for Ethical and Judicial Affairs, 1999*

## APA Ethical Principles of Psychologists & Code of Conduct, 2002

Principle	
A: Beneficence & Non-malificence C: Integrity E: Respect for Peoples Rights & Dignity	B: Fidelity & Responsibility D: Justice
Standard	Title
1.01 (Resolving Ethical Issues) 1.02, 1.03 1.04 1.05, 1.07	Misuse of Psychologist's Work Conflict - Ethics & Law / Organizational Demands Informal Resolution of Ethical Violations Reporting Ethical Violations, Improper Complaints
2.0, 2.03 (Competence) 2.04	Boundaries of Competence, Maintaining Competence Bases for Scientific & Professional Judgements
3.04 (Human Relations) 3.05 3.06 3.07 3.10	Avoiding Harm Multiple Relationships Conflict of Interest Third-party Requests for Service Informed Consent
4.02 (Privacy & Confidentiality) 5.01 (Advertising, Public Statements)	Discussing Limits of Confidentiality Avoidance of False or Deceptive Statements
6.01 (Record Keeping & Fees) 6.06	Documentation of Professional & Scientific Work Accuracy in Reports to Payors and Funding Sources
9.02 (Assessment) 9.03, 9.04 9.06, 9.11	Use of Assessments Informed Consent in Assessments, Release of Test Data Interpreting Assessment Results, Maintaining Test Security

# Applying General Medical Ethics to the Medicolegal Arena

- ➔ Based on the primary ethical principle of **Respect for Others**, four core bioethical principles (*Beauchamp & Childress, 1994*):
  - ➔ **Autonomy**: *Self-determination re: healthcare-related decisions*
  - ➔ **Non-maleficence**: *Doing no harm*
  - ➔ **Beneficence**: *Patient welfare promotion*
  - ➔ **Justice**: *Equitable distribution of the burdens & benefits of care*

## NOVEL SOLUTIONS *(cont.)*

### *Changes in Relevant Ethical Standards: 2002*

#### **New Principle D (Justice)**

- Expands & focuses emphasis on individual professional responsibility & efforts to ensure our processes, procedures & services are just (i.e. not biased), equitable & fair in terms of access and benefit)
- More stringently enjoins taking active precautions to ensure that potential biases (*& limitations of competence, expertise and measures*) do not lead to or condone unjust practices.
- Applies to neuropsychologists conducting work in increasingly restrictive environments where dwindling reimbursement adds strong financial incentives for forensic work, and where these incentives inherently conflict with objectivity.

## NOVEL SOLUTIONS *(cont.)*

### *Changes in Relevant Ethical Standards: 2002*

#### **9.02, 9.06** *(Assessment Procedures, Interpretation)*

- Tightening of procedures, Increased Accountability, Transparency
  - More specifically call for use of reliable and valid instruments for the specific pop. (9.02b) being examined
  - More specifically describe strengths & limitations when these have not been established.
  - More specifically consider various situational, personal, cultural, other factors & characteristics of persons that might affect inferences or reduce accuracy of interpretations (9.06)
  - More specifically document any potential limitations, not just examiners concerns
  - Combines standards for forensic and clinical assessment

## NOVEL SOLUTIONS *(cont.)*

### *Changes in Relevant Ethical Standards: 2002*

#### **3.06** *(Conflict of Interest)*

- More specifically calls for precautions in taking on roles where personal, scientific, professional, legal, financial, or other interests or relationships could be expected to impair objectivity or expose the person to risk of harm.
- Includes clinicians dependent on insurance companies for payment for clinical treatment and neuropsychologists dependent on adversarial advocates from last good reimbursement source

#### **GENERAL**

- Increasing emphasis on empirical methods, accountability and transparency
- Moves psychologists toward the need to exercise informed judgment

## NOVEL SOLUTION EFFORTS *(cont)*

- ➔ **Change Environmental Contingencies:**
  - ➔ Reinforce adaptation and Wellness; Remove adversarial treatment barriers and anxiety provocation; Remove financial disincentives
- ➔ Court Hired Experts
- ➔ Conjoint Opposing Expert Conferences with Judge
- ➔ Utilization of Performance Criteria for Competence  
Credibility Ratings Offered to Courts
- ➔ Science Intensive Litigation
- ➔ Colorado Approach
- ➔ Etc.

## NOVEL SOLUTION EFFORTS

*(cont)*

**Incidence & claim closure speed of Whiplash injury after change to no-fault in Saskatchewan, CA** *(Cassidy, et al, 2000)*

- More Valid Conclusion: removal of financial disincentives and medicolegal associated treatment barriers and anxiety provocation has a facilitative effect on post-injury recovery.

**Longitudinal study of PI MVA litigants** *(Evans, 1994)*

- **Strongest predictors of successful outcome were**
  - Receipt of immediate intervention, with return to work (RTW) treatment focus
  - Inclusion of psychological services in the Tx plan
  - RTW at reduced status or modified duties
  - Prompt Medical Bill Payments

## NOVEL SOLUTION EFFORTS:

### EXPERT OPINION: COMPETENCY / CREDIBILITY WEIGHTING (Last Three Years)

➔ Professional Organization Memberships, Meeting Attendances and Presentations (Total N)	
➔ Professional Journal Subscriptions, Reading (Total N)	
➔ Publication Record	
➔ Talks and Presentations in Relevant Area of Expertise	
➔ Specialty Clinical Treatment Experience	

## Professional Expert Qualifications Checklist

### Knowledge Competence Base (APA Ethics):

	Yes /No
<input type="checkbox"/> Remains aware of general trends in the relevant neuropsychological literature and incorporates current knowledge into regular practice	
<input type="checkbox"/> Uses up to date neuropsychological tests and norms and considers important demographic characteristic of individuals in making interpretations	
<input type="checkbox"/> Appropriately acknowledges limitations in current knowledge	
<input type="checkbox"/> Seeks rigorous peer review to ensure competence	
<input type="checkbox"/> Can discuss relevant research literature accurately, without notes	

## Professional Expert Qualifications Checklist

### Knowledge Competence Base (APA Ethics):

	Yes /No
<input type="checkbox"/> Limits practice to boundaries of competence, seeking consultation as appropriate.	
<input type="checkbox"/> Is fully trained in a specialty or has earned a diplomate of a specialty board in Clinical Neuropsychology, and is qualified by experience or demonstrated competence in the subject of the case.	
<input type="checkbox"/> Is familiar with the clinical practice of the specialty or the subject matter of the case at the time of the occurrence, and has been actively involved in the clinical practice of the specialty or the subject matter of the case for three of the previous five years at the time of testimony.	

## Professional Expert Qualifications Checklist: Neuropsychology

### Professional Organizations: (A) Current Memberships (B) Current Committee Memberships

	Yes /No
<input type="checkbox"/> National Academy of Neuropsychology	
<input type="checkbox"/> International Neuropsychological Society	
<input type="checkbox"/> APA: Division 40	
<input type="checkbox"/> APA: Division 22 ( <i>secondary relevance</i> )	



## Professional Expert Qualifications Checklist: Neuropsychology

### Specialty Conference Attendances:

(A) # Attendances at Last Three Meetings of...?

(B) # Presentations at Last Three Meetings of...?

	Yes /No
<input type="checkbox"/> National Academy of Neuropsychology	
<input type="checkbox"/> International Neuropsychological Society	
<input type="checkbox"/> APA: Division 40	
<input type="checkbox"/> APA: Division 22 ( <i>secondary relevance</i> )	

## Professional Expert Qualifications Checklist: Neuropsychology

### Professional Journal Familiarity:

(A) Do You Currently Subscribe to...?

(B) Have You Read "... " (Latest Issue Article in)...?

	Yes /No
<input type="checkbox"/> Journal Of Clinical & Experimental Neuropsychology	
<input type="checkbox"/> Archives of Clinical Neuropsychology	
<input type="checkbox"/> Neuropsychology Review	
<input type="checkbox"/> The Clinical Neuropsychologist	
<input type="checkbox"/> Applied Neuropsychology	
<input type="checkbox"/> Neuropsychology	
<input type="checkbox"/> Neuropsychological Rehabilitation	
<input type="checkbox"/> Journal of Forensic Neuropsychology	
<input type="checkbox"/> Journal of the International Neuropsychological Society	

## Recommendations for Promoting Ethics & Objectivity in Expert Testifying Witnesses

- 1. Avoid or resist attorney efforts at enticement into joining the partisan attorney-client team.
- 2. Respect role boundaries and do not mix the conflicting roles of treating doctor, expert, and trial consultant.
- 3. Spend sufficient time directly evaluating and treating both the examinee and the examinee population for whom expert testimony is given.
- 4. Avoid cutting of corners, be thorough, insist on adequate time and rely on standardized, validated, well normed and well-accepted procedures and tests. Only use specific, appropriate norms, take into account symptom base rates and consider all competing explanatory factors for symptoms.

### *(Cont)*

- 6. Review all available information before arriving at opinions, always include and consider contradictory facts and evidence and never arrive at opinions which are inconsistent with the plaintiff's records, test data, and behavioral presentation.
- 7. Balance cases from plaintiff and defense attorneys and resist specialization in an adversarial legal system.
- 8. Ensure against excessively favoring the retaining side/party.
- 9. Ensure against excessive black and white findings; Recognize the limitations of scientific, medical and neuropsychological opinion, fewer findings are black or white or attributable to a single event (e.g., Ockam's Razor).
- 10. Make efforts to both guard against motivational threats to assessment validity. Always attempt to facilitate response validity and always assess response bias.

## Recommendations for Promoting Ethics & Objectivity in Expert Testifying Witnesses (*cont.*)

- 11. Routinely perform critical self examination (e.g., Sweet and Moulthrop's (1999) questions) in every medicolegal case. Keep running statistics and strive for balance in ratios relating to favorability of findings to retaining party, defense vs. plaintiff referrals and black-white vs. mixed findings.
- 12. Develop an Ethical Behavior Habit. In addition to #11, Keep ethical standards, case books and reports, and a collection of articles in a handy place for frequent review. Consult colleagues frequently about ongoing potential ethical issues. Strive for objectivity and a reputation for such.
- 13. Dispute opinion of other experts only in pursuit of objectivity, in the context of complete & accurate representation of the other expert's findings, inferences and conclusions.

## Recommendations for Promoting Ethics & Objectivity in Expert Testifying Witnesses (*cont.*)

- 14. Identify Personal Values & Biases, anticipate possible effects in medicolegal work, and monitor every case accordingly
- 15. Attempt to develop and employ formal mechanisms for monitoring objectivity, the validity of diagnostic and prognostic statements against external criteria, and receipt of objective feedback from peers.
- 16. Promote increased awareness within the forensic professions of relevant issues relating to ethics and scientific objectivity (e.g., promoting use of professional ethical standards by courts in assessing admissibility of evidence (Shuman & Greenberg, 1998).
- 17. Promote increased awareness within graduate training programs in the expert professions.
- Adapted from Martelli, Zasler, and Grayson (1999) and Blau (1992)

## Method for Addressing Ethical Violations

*(Diedan & Bush, 2002)*

- Identify the problem or dilemma.
- Identify the relevant ethics code and the relevant sections of the code.
- Identify and consider applicable laws and regulations.
- Consider the significance of the context and setting.
- Identify the obligations owed to the subject, referral source, etc, including confidentiality issues.
- Consider the role played by your beliefs and values, including personal feelings toward the colleague.
- Consider the significance of the violation.
- Consider the strength of the reliability and persuasiveness of the evidence.
- Consult written resources.

## Method for Addressing Ethical Violations

*(continued)*

- Consult knowledgeable and experienced professionals or ethics committees of relevant organizations.
- Consult knowledgeable and experienced professionals or ethics committees of relevant organizations.
- Consider possible solutions to the problem, with informal resolution a first choice except in more serious situations.
- Consider the potential consequences of various actions, both positive and negative.
- Choose a course of action.
- Implement the decision at the appropriate time.
- Assess the outcome.
- Consider and implement additional/alternative courses of action as needed.

## Medicolegal Aspects of the IME: Adversarial Exam and Critical Responses\*

### Plaintiff Atty Arguments. *Witness Would Ensure:*

- Justice: Exam not conducted "in secret" (ind. constitutional right to open court process)
- Justice: For insurance company required exam with selected, highly paid expert accountable only to them
- No inquiries into illegitimate scope matters
- Procedure, tests, & results reported accurately
- Exam doesn't become taking of a deposition re: facts & issues
- IME examiner's attitude, tone, behavior are professional
- Minimally invasive, as possible, consistent with case nature
- Monitor what questions asked, not, tests, not, etc.
- Reassure client re: procedures/ testing to prevent misinterpretation

*\*Why would anyone want to invade our assessments...  
or sit for 8 hours of testing?*

## BOTTOM LINE

### Work Hard & Make Active Efforts to Ensure:

- Avoidance of Harm; Promote Benefit
- \*Objectivity: Maintain Vigilant Guard, Critically Evaluate and Actively, Systematically, Transparently Address *Possible* Bias/Limitations/Threats to:
  - Competence & Expertise
  - Measures & Procedures
  - Interpretations

\* cf Research Reports!

# CONCLUSION

## Work Hard & Make Active Efforts to:

- ❑ Avoid Harm; Promote Benefit
- ❑ Be Competent (*Critically Evaluate, Hone*)
- ❑ Be Objective (*Actively, Vigilantly Guard Against Potential Sources of Bias*)
- ❑ Be Transparent in Addressing and Reporting Potential Limitations in:
  - ❑ Competence, Expertise
  - ❑ Measures & Procedures
  - ❑ Interpretations

## VIA ---> ESSENTIAL BIAS BUSTING TOOLS

- ❑ Systematic, Ongoing Use of:
  1. De-Biasing Strategies
  2. Objectivity Ratios
    - A. Referral Favorability
    - B. Plaintiff/Defense; etc.
  3. Competency Criteria
  4. Program Evaluation / Continuous Quality Improvement (CQI)
  5. Do Independent Skinnerian Exam on Self (Where are your pellets?)
  6. Objective Lit. Review Habit (Skilled Disconfirmatory Searches)
  7. Peer Review from those with Disparate Opinions
  8. Transparency
  9. Write Assessment reports like Research Reports (limitations section)
  10. Develop Reliable, Efficient Resources
    - ★ [KSPope.com](http://KSPope.com); [Villamartelli.com](http://Villamartelli.com)
  11. Conduct Education re: Ethical Norms
  12. Guides for Responding to Ethical Threats



## TOOLS: Selected References

1. **De-Biasing Strategies:**
  - ▶ Sweet JJ & Moulthrop MA (1998). Self-examination questions as a means of identifying bias in adversarial assessments. *Journal of Forensic Neuropsychology*, 1, 73-88
2. **Objectivity Ratios:**
  - ▶ Brodsky, S.L. (1991). *Testifying in court: Guidelines and maxims for the expert witness*. Washington, D.C.: American Psychological Association.
  - ▶ Martelli, M.F., Bush, S.S. and Zasler, N.D. (2003). Identifying and Avoiding Ethical Misconduct in Medicolegal Contexts. *International Journal of Forensic Psychology*, 1, 1, 1-17. Online; link at <http://villamartelli.com>
3. **Competency Criteria**
  - ▶ See <http://villamartelli.com> (**Neuropsychology, Brain Injury, Chronic Pain, General**)
4. **Program Evaluation / Cont. Quality Improvement (CQI):**
  - ▶ Martelli, M.F., Zasler, N.D., & LeFever, F. (2000). Preliminary consumer guidelines for choosing a well suited neuropsychologist for assessment and rehabilitation of acquired brain injury. *Brain Injury Source*, 4 (4), 36-39. Available online at <http://villamartelli.com>
5. **Do Independent Skinnerian Exam on Self (Where are your pellets?)**
  - ▶ Martelli, M.F. (2004). Ethics for Brain Injury Rehabilitation in Medicolegal Situations: An Independent Skinnerian Exam. Presentation at the New York Academy of TBI, New York, NY. Slides available online at <http://villamartelli.com>

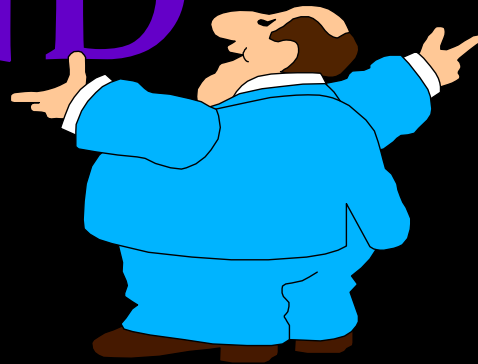
## TOOL REFERENCES (cont.)

6. **Objective Literature Review Habit**
  - ▶ Including efforts to identify and consider all, including disconfirmatory, evidence
7. **Peer Review: Disparate and/or Critical Opinions**
8. **Transparency**
  - ▶ A.P.A. 2002: Ethical principles & code of conduct; Bush, 2004: NP Ethics Casebook
  - ▶ Martelli, MF (in press). Ethical issues in the neuropsychology of pain, part I. Bush (Ed.), *Casebook of ethical challenges in Neuropsychology*.
9. **Cf Research Reports (limitations section)**
10. **Develop Reliable, Efficient Resources**
  - ▶ <http://KSPope.com>
  - ▶ <http://Villamartelli.com>
11. **Conduct Education re: Ethical Norms**
  - ▶ Shuman, D.W., & Greenberg, S.A. (1998). The role of ethical norms in the admissibility of expert testimony. *The Judge's Journal*, winter issue
  - ▶ Martelli, M.F., Bush, S.S. and Zasler, N.D. (2003). Identifying and Avoiding Ethical Misconduct in Medicolegal Contexts. *International Journal of Forensic Psychology*, 1, 1, 1-17. Available Online at <http://villamartelli.com>
12. **Guides for Responding to Ethical Threats**
  - ▶ Bush, S. & Drexler, M. (Eds.). (2002). *Ethical issues in clinical neuropsychology*. Lisse, NL: Swets & Zeitlinger.
  - ▶ Martelli et al (2003). Identifying and Avoiding Ethical Misconduct... *International Journal of Forensic Psychology*, 1, 1, 1-17. Available online at <http://villamartelli.com>

# THE

That's all Folks!!

# END



## APPENDIX

- Slides A1 - A3:
  - On Violating Ethical Standards (KSPope.com)
- Slides A4 - A7
  - Professional Qualifications Checklists
- Slide A8
  - Diagnostic Realities in Assessment
- Slide A9
  - Decision Making (in Malingering Assessment)
- Slide A10
  - Debiasing Questions (Sweet & Moulthrop, 1999)
- 
-



## On Violating Ethical Standards

*Kenneth Pope, PhD: [KSPope.com](http://KSPope.com)*

- ❑ 1. It's not unethical as long as you or others don't talk about it (or ethics)
- ❑ 2. It's not unethical as long as you don't know a law, ethical principle, or professional standard that prohibits it: specific ignorance and specific literalization.
- ❑ 3. It's not unethical as long as you can name at least five other clinicians that do the same thing.
- ❑ 4. It's not unethical as long as none of your clients has ever complained about it.
- ❑ 5. It's not unethical as long as your client wanted you to do it.
- ❑ 6. It's not unethical as long as you did it to avoid potential legal conflicts

## On Violating Ethical Standards *(continued)*

- ❑ 7. It's not unethical as long as you weren't really feeling well that day and thus couldn't be expected to perform up to your usual level of quality.
- ❑ 8. It's not unethical as long as a friend of yours knew someone that said an ethics committee somewhere opined that it's okay.
- ❑ 9. It's not unethical as long as you're sure that legal, ethical, and professional standards were made up by people who don't understand the hard realities of medicolegal practice.
- ❑ 11. It's not unethical as long as it results in a higher income or more prestige.
- ❑ 12. It's not unethical as long as it's more convenient than doing things another way
- ❑ 13. It's not unethical as long as no one else finds out—or if whoever might find out probably wouldn't care anyway.

## On Violating Ethical Standards *(continued)*

- 14. It's not unethical as long as you're observing most of the other ethical standards.
- 15. It's not unethical as long as there's no awareness of / intent to do harm.
- 16. It's not unethical as long as there is no body of universally accepted, scientific studies showing, without any doubt whatsoever, that exactly what you did was the sole cause of harm to the client.
- 17. It's not unethical as long as you don't intend to do it more than once.
- 18. It's not unethical as long as no one can prove you did it.
- 19. It's not unethical as long as you're an important or well regarded and respected person.
- 20. It's not unethical as long as you're busy. .

## Professional Expert Qualifications Checklist

### Specialty Area Clinical Treatment Experience:

	Yes /No
<input type="checkbox"/> # Clinical Patients Personally Treated (excluding assessment; > 5 hrs) in the past 12 months	
<input type="checkbox"/> # Clinical Patients Personally Assessed (not technician; > 5 hours)	
<input type="checkbox"/>	
<input type="checkbox"/>	

## Professional Expert Qualifications Checklist: Brain Injury

### Professional Organizations: (A) Current Memberships (B) Current Committee Memberships

	Yes /No
<input type="checkbox"/> Brain Injury Association	
<input type="checkbox"/> International Brain Injury Association	
<input type="checkbox"/> State Brain Injury Association	
<input type="checkbox"/> American Psych Assoc., Div 40, 22 Only	

## Professional Expert Qualifications Checklist: Brain Injury

### Specialty Conference Attendances: (A) # Attendances at Last Three Meetings of...? (B) # Presentations at Last Two Meetings of...?

	Yes /No
<input type="checkbox"/> Brain Injury Association	
<input type="checkbox"/> International Brain Injury Association	
<input type="checkbox"/> State Brain Injury Association	
<input type="checkbox"/> American Psych Assoc., Div 40, 22 Only	

# Professional Expert Qualifications Checklist: Brain Injury

**Professional Journal Familiarity:**  
**(A) Do You Currently Subscribe to...?**  
**(B) Have You Read "...." (Latest Issue Article in)...?**

	Yes /No
<input type="checkbox"/> Brain Injury	
<input type="checkbox"/> Journal of Head Trauma Rehabilitation	
<input type="checkbox"/> NeuroRehabilitation	
<input type="checkbox"/> Archives of Neurology	
<input type="checkbox"/> Archives of Physical Medicine and Rehabilitation	
<input type="checkbox"/> Journal Of Neurologic Rehabilitation	

## Diagnostic Realities in Assessment of Impairment and Disability

**Real Disorder**  
(e.g., TBI, Pain)

- 1 Yes
- 2 Mixed
- 3 Indeterminate
- 4 No

4

X

**Residual Functional  
Impairments**

- Yes &  
Exaggerated
- Yes & Not  
Exaggerated
- No & Exaggerated
- No & Not  
Exaggerated

4

X

**Residual Testing  
Impairments**

- Yes & Not  
Exaggerated
- Yes &  
Exaggerated
- No &  
Exaggerated
- No & Not  
Exaggerated

4

= 64