

**KENNETH M. SIGELMAN & ASSOCIATES**  
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Attorneys for Plaintiff

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF**

_____ , an Incompetent Person,	)	CASE NO.
by and through his Guardian ad Litem,	)	
_____ ,	)	<b>PLAINTIFF'S MOTION <i>IN LIMINE</i></b>
	)	<b>PRECLUDING TESTIMONY OF</b>
Plaintiff,	)	<b>DEFENSE EXPERT _____ ;</b>
v.	)	<b>DECLARATION OF KENNETH M.</b>
	)	<b>SIGELMAN</b>
_____ , M.D., et al.,	)	<b>[NO. OF ]</b>
	)	<b>TRIAL DATE:</b>
Defendants.	)	<b>TIME:</b>
	)	<b>DEPT:</b>
_____	)	<b>JUDGE:</b>

**TO THE ABOVE-ENTITLED HONORABLE COURT, AND TO THE**  
**DEFENDANTS AND THEIR ATTORNEYS OF RECORD:**

Plaintiff hereby moves the Court for an Order *in Limine* precluding the testimony of defense expert \_\_\_\_\_, an annuity salesman, on the grounds that \_\_\_\_\_'s proposed testimony, which involves the cost of an annuity for Plaintiff, does not constitute proper expert testimony, is irrelevant to any issue properly before the jury in this case, and thus lacks probative value, but would create a substantial danger of undue prejudice, of confusing the issues, and of misleading the jury.

I.

**FACTS**

This case involves a young man who suffered serious, permanent brain damage as the result of the Defendants' mismanagement of his diabetes at the time he underwent eye surgery at \_\_\_\_\_ Hospital on April 9, 1999. On November 17, 2000, all parties served their designations of expert witnesses. Each of the Defendants designated \_\_\_\_\_ as a retained expert.

**A. Declarations of Defense Counsel Regarding \_\_\_\_\_'s Proposed Testimony.**

Counsel for defendants \_\_\_\_\_, M.D. and \_\_\_\_\_ stated in his declaration accompanying their designation of expert witnesses (Exhibit 1) that:

\_\_\_\_\_ is an annuitist and designs structured settlements. \_\_\_\_\_ is expected to testify on the issue of monetary damages and issues relating to life expectancy. Upon due notice, \_\_\_\_\_ will be sufficiently familiar with this action to submit to a meaningful deposition.

Counsel for Defendants \_\_\_\_\_, M.D. and \_\_\_\_\_, M.D., a Professional Corporation stated in her declaration accompanying \_\_\_\_\_'s designation of expert witnesses (Exhibit 2) that:

“\_\_\_\_\_ is an annuitist and designs structured settlements. \_\_\_\_\_ will be called to testify in regard to the issues of monetary damages and issues related to life expectancy and further will respond to issues raised by experts designated by the plaintiff. \_\_\_\_\_ will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that he is expected to give at trial.”

Counsel for Defendant \_\_\_\_\_ stated in her declaration accompanying the hospital's designation of expert witnesses (Exhibit 3) that:

\_\_\_\_\_ is an expert in the area of structured settlements. \_\_\_\_\_ is expected to testify with regard to Plaintiff's ability to obtain his claimed damages through a structured settlement. I have not personally spoken with this expert, but understand from counsel for co-defendant that \_\_\_\_\_ has agreed to testify at trial and upon due notice, will be sufficiently familiar with the action to submit to a meaningful deposition.

**B. \_\_\_\_\_'s Deposition**

Upon receipt of the Defendants' designations of experts, Plaintiff served notice of \_\_\_\_\_'s deposition on November 30, 2000. (Exhibit 4.) That deposition notice requested that \_\_\_\_\_ produce at his deposition, among other things:

- (1) All documents or writings of any kind or nature, as described in the California Evidence Code section 250, supplied to him by any party, including but not limited to correspondence, instructions, memoranda, deposition summaries, depositions, pleadings and medical records or charts of any kind regarding Plaintiff \_\_\_\_\_;
- (2) All original reports, notes, documents, diagrams, or writings of any kind, as described in Evidence Code section 250, prepared during the course of his consideration of the subject matter;
- (3) Copies of all articles, studies, and/or research considered, and/or relied upon in arriving at his opinion and/or in preparing his report in this matter; and
- (4) His curriculum vitae.

\_\_\_\_\_ was not produced for his deposition on the date for which the deposition was originally noticed. Defense counsel ultimately agreed to produce \_\_\_\_\_ for his deposition on March 28, 2001, whereupon plaintiff served an Amended Notice of Taking Deposition of \_\_\_\_\_ and Request for Production of Documents and Things

(Exhibit 5) requesting that \_\_\_\_\_ produce exactly the same materials as had been requested in the original notice of his deposition.

On March 28, 2001, \_\_\_\_\_'s deposition took place. He testified that his formal education consists of a bachelor's degree in teaching and general education which he obtained in 1972. He has no other formal education. He does not purport to be an economist, an accountant, an actuary or an underwriter. He has never had any kind of academic appointment, never authored any publications in his field, and has never done any kind of research in his field. He does have a "life and disability" license from the State of California, which allows him to sell life and disability insurance and annuities. The requirement for obtaining that license was completion of a three (3) day course which consisted of an explanation of "life products, annuity products, disability products" and training regarding the ethics of sales. Since 1980 \_\_\_\_\_ has run \_\_\_\_\_, an insurance brokerage of which he is the president. \_\_\_\_\_ limits its business to providing annuities to personal injury plaintiffs; all of its income comes from the commissions it obtains from the insurance companies who sell the annuities to those personal injury plaintiffs. He has testified at trial as an expert witness once.

\_\_\_\_\_ 's involvement in the present case began when he was contacted by defense counsel and asked to provide some "annuity quotes." He was then provided with some records by defense counsel which he forwarded to various insurance companies to find out what "rated age" each of them would assign to \_\_\_\_\_. \_\_\_\_\_ did not bring those records with him to his deposition (although they were requested in the request for production served with the notices of \_\_\_\_\_'s deposition) and he could not recall what those records consisted of. Additionally, \_\_\_\_\_ could not remember the names of most of the insurance companies he sent the records to. He testified that he had records that would reflect that information, but he did not bring those records with him to his deposition. He further testified that he thought that there were twenty two of them.

\_\_\_\_\_ then received faxes from the life insurance companies whose medical underwriters had established a life expectancy for plaintiff, stating the “rated age” each of those companies had assigned to plaintiff, but no other information. He did not bring those faxes with him to his deposition, and could not recall what most of the faxes said. All he could recall about them was that the company who had given plaintiff the highest rated age was \_\_\_\_\_, and it had given him a rated age of 58. \_\_\_\_\_ communicated that information to defense counsel, and denied doing any other work on the case (other than attending two voluntary settlement conferences) up until his deposition. He denied having any conversations with any defense attorneys at any time regarding the subjects they would like him to address at the time of trial.

\_\_\_\_\_ testified that as an annuitist, the only things he is qualified to testify about would be what it would cost to buy a certain stream of payments for a male or female with a certain “rated age”, or, conversely, what payments could be obtained for a male or female with a certain “rated age” given a certain amount of money with which to buy an annuity. The way he learns the cost of an annuity, once an insurance company has provided a “rated age” for a particular plaintiff, is by consulting a computer disc provided to him by each of the insurance companies with whom he does business. There is nothing else that he does in order to learn the cost of an annuity. The quotes he gets from these insurance companies are good for only seven days.

\_\_\_\_\_ initially stated that other than stating that plaintiff’s “rated age” from \_\_\_\_\_ was 58, he has no other opinions which he plans to express in this case. There were no other topics which he had discussed with defense counsel, no notes or reports which he had prepared, and nothing else he had been asked to do.

\_\_\_\_\_ did also testify that if an annuity had been purchased from \_\_\_\_\_ for plaintiff as of the date of \_\_\_\_\_’s deposition, for each \$1,000 per

month to be paid out to \_\_\_\_\_ for the remainder of his life, the annuity would cost \$130,174.94. This price quote would be good for seven days – i.e., it will no longer be good as of the date this motion is heard.

\_\_\_\_\_ has no expertise regarding the safety of annuities as opposed to other investment vehicles. He has no opinion regarding the amount that would have to be invested in any kind of United States government securities to get the same payments to the plaintiff. He has no opinion regarding the relationship between the concept of present cash value and the cost of annuities.

## II.

### \_\_\_\_\_’S “OPINION” REGARDING PLAINTIFF’S LIFE EXPECTANCY, AND ANY MENTION OF PLAINTIFF’S ‘RATED AGE’, SHOULD BE EXCLUDED

At the time of his deposition, \_\_\_\_\_ testified that he has formulated an opinion in this case regarding plaintiff’s life expectancy, which was: “There are two life expectancies for \_\_\_\_\_. One would be that of a healthy 35-year old male. The other would be a life expectancy, as supplied by \_\_\_\_\_, of a 58-year-old man.” In order to determine the life expectancy for a healthy 35 year old male, \_\_\_\_\_ merely looked at a chart prepared by the United States Bureau of Health and Life Statistics.

Apart from his erroneous assumption as to Plaintiff’s age (\_\_\_\_\_ is actually 30 years old), \_\_\_\_\_’s testimony makes it clear that he has no expertise with respect to the life expectancy of the plaintiff, or anyone else. He does not claim to have any special education or training that would make him competent to render an opinion regarding life expectancies. He did not formulate any expert opinion of his own, he simply read a figure out of a table, and read a fax sent to him by some unknown underwriter at \_\_\_\_\_ stating an “age rating” based upon unknown information, calculated in an unknown manner, by an unidentified person.

Based on this information, \_\_\_\_\_ should not be permitted to testify that \_\_\_\_\_'s life expectancy has been shortened by 28 years, nor should he be permitted to testify that some unspecified person at an insurance company has decided that plaintiff's life expectancy has been shortened by 28 years. Any such information would be inadmissible hearsay which is not subject to any exception to the hearsay rule. It lacks foundation, since there is no available information regarding what that rated age is based on, the identity of the person who originally came up with that figure, or how it was arrived at. Moreover, allowing testimony regarding the rated age of 58, under circumstances where this differs from the opinions of the medical experts regarding plaintiff's life expectancy, creates a danger of confusing the issues and misleading the jury, while the probative value of such information is low; any such testimony should therefore be excluded pursuant to Evidence Code section 352. Finally, defendants are apparently planning to have their medical experts testify regarding life expectancy. Thus, allowing additional testimony from this defense witness regarding life expectancy would be cumulative.

For all of these reasons, \_\_\_\_\_ should be precluded from expressing any opinions regarding plaintiff's life expectancy, or from mentioning to the jury the fax he received from \_\_\_\_\_ stating that plaintiff's "rated age" is 58, or the faxes he received from any other insurance company giving a "rated age" for plaintiff.

### III.

#### **\_\_\_\_\_ SHOULD BE PRECLUDED FROM MAKING ANY COMMENTS REGARDING THE OPINIONS OF EXPERTS DESIGNATED BY PLAINTIFF**

Counsel for Dr. \_\_\_\_\_, in her declaration, stated that \_\_\_\_\_'s expected testimony includes his response "to issues raised by experts designated by plaintiff." However, any such "response" should be precluded at the time of trial. First of all, \_\_\_\_\_ was not provided by defense counsel with any of the depositions of any of plaintiffs' experts; and was

not provided with the “Summary of the Analysis of the Economic Losses Sustained by \_\_\_\_\_” prepared by plaintiff’s economist, \_\_\_\_\_, although \_\_\_\_\_’s deposition was taken by the defense over a month prior to \_\_\_\_\_’s deposition, and the transcript has been available since March 5, 2001. (Declaration of \_\_\_\_\_, par. 8.) Moreover, \_\_\_\_\_ stated that he was not prepared at the time of his deposition to express any opinions about any issues raised by any of the experts designated by the plaintiff. He should therefore be precluded from expressing any such opinions at the time of trial pursuant to Kennemur vs. State of California, (1982) 133 Cal.App.3d 907.

**IV.**

**SHOULD BE PRECLUDED FROM TESTIFYING REGARDING THE  
COST OF AN ANNUITY**

\_\_\_\_\_’s testified at his deposition that after providing \_\_\_\_\_ with some unidentified materials regarding plaintiff, and after receiving a fax back from \_\_\_\_\_ assigning plaintiff a “rated age” of 58, he looked up the cost of an annuity from that insurance company for plaintiff on a computer disc provided to him by \_\_\_\_\_. Apparently, the defense plans to call \_\_\_\_\_ testify as an expert what an annuity would cost at the time of trial, based on his having looked up this information a computer disc. Any such testimony should be precluded, for several reasons.

First, any such testimony is irrelevant to any issue properly before the jury. Defendants apparently wish to suggest that it is somehow relevant to the question of the present cash value of \_\_\_\_\_’s future lost earnings and future care needs. However, annuities have nothing to do with present cash value. It should therefore be precluded pursuant to Evidence Code Section 350.

The law relating to present cash value is set forth in BAJI 14.70 (1996 Rev.):

An [award for] [finding of] future economic loss must be only for

its present cash value.

Present cash value is the present sum of money which, together with the investment return thereon when invested so as to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts, and for the period that you find such future benefits would have been received.

The present cash value will, of course, be less than the amount you find to be the loss of such future benefits.

[In the event you have occasion to determine the present cash value of future constant annual economic losses, there is handed to you a table the correctness of which the court takes judicial notice and from which you can determine the present cash value of such losses by following the instructions printed thereon.]

Second, \_\_\_\_\_'s testifying that he has contacted an insurance company which has informed him what it would charge for an annuity is not proper opinion testimony.

Third, any such testimony is clearly prejudicial to plaintiff, as is the inference which defendants hope the jury will make, which is that the cost of annuity can be used in place of present cash value to measure Plaintiff's future damages. Such an approach is clearly contrary to applicable law as set forth in BAJI 14.70.

Fourth, there is a substantial danger that the introduction of such evidence could confuse the issues and mislead the jury. As discussed above, the cost of annuity is not relevant to the issues before the jury. Allowing evidence of the cost of an annuity to be presented can only suggest to the jury that they should be taking it into account in some manner – thus substantially confusing any issues properly before them. Again, the evidence should be precluded pursuant to

Evidence Code Section 352.

V.

**CONCLUSION**

For all of the reasons stated above, it is apparent that there is no part of's proposed testimony which is admissible. His testimony should therefore be excluded in its entirety.

DATED:

Respectfully submitted,

KENNETH M. SIGELMAN & ASSOCIATES

By \_\_\_\_\_  
KENNETH M. SIGELMAN  
PENELOPE A. PHILLIPS  
Attorneys for Plaintiff

**DECLARATION OF KENNETH M. SIGELMAN**

I, Kenneth M. Sigelman, declare:

1. I am an attorney licensed to practice before all of the courts of the State of California. I have personal knowledge of all of the facts set forth in this declaration, and if called upon as a witness, I could and would competently testify to them.
2. Attached hereto as Exhibit 1 is a true and correct copy of the First Designation of Expert Witnesses by Defendants \_\_\_\_\_, M.D. and \_\_\_\_\_.
3. Attached hereto as Exhibit 2 is a true and correct copy of the Expert List of Defendants \_\_\_\_\_, M.D. and \_\_\_\_\_, a Professional Corporation.
4. Attached hereto as Exhibit 3 is a true and correct copy of Defendant \_\_\_\_\_ First Designation of Expert Witnesses.
5. On November 30, 2000, plaintiffs served defendants with notice of the deposition of \_\_\_\_\_. A true and correct copy of that notice of deposition is attached as Exhibit 4.
6. On March 21, 2001 plaintiffs served an amended notice of \_\_\_\_\_'s deposition. A true and correct copy of that notice is attached as Exhibit 5.
7. I have reviewed a rough ASCII transcript of the deposition of \_\_\_\_\_ taken on March 28, 2001. \_\_\_\_\_ testified to the following: his formal education consists of a bachelor's degree in teaching and general education which he obtained in 1972. He has no other formal education. He does not purport to be an economist, an accountant, an actuary or an underwriter. He has never had any kind of academic appointment, never had any publications in his field, and has never done any kind of research in his field. He does have a "life and disability" license from the State of California, which allows him to sell life and disability insurance and annuities. The requirement for obtaining that license was completion of a three (3) day course which consisted of an explanation of "life products, annuity products, disability

products” and training regarding the ethics of sales. Since 1980 \_\_\_\_\_ has run \_\_\_\_\_, an insurance brokerage of which he is the president. \_\_\_\_\_ limits its business to providing annuities to personal injury plaintiffs; all of its income comes from the commissions it obtains from the insurance companies who sell the annuities to those personal injury plaintiffs. He has testified at trial as an expert witness once. \_\_\_\_\_’s involvement in the present case began when he was contacted by defense counsel and asked to provide some “annuity quotes.” He was then provided with some records by defense counsel which he forwarded to various insurance companies to find out what “rated age” each of them would assign to \_\_\_\_\_. \_\_\_\_\_ did not bring those records with him to his deposition (although they were requested in the request for production served with the notices of \_\_\_\_\_’s deposition) and he could not recall what those records consisted of. Additionally, \_\_\_\_\_ could not remember the names of most of the insurance companies he sent the records to. He testified that he had records that would reflect that information, but he did not bring those records with him to his deposition. He did testify that he thought that there were twenty two of them. He then received faxes from the life insurance companies whose medical underwriters had established a life expectancy for plaintiff, stating the “rated age” each of those companies had assigned to plaintiff, but no other information. He did not bring those faxes with him to his deposition. He could not recall what most of the faxes said; indeed, all he could recall about them was that the company who had given plaintiff the highest rated age was \_\_\_\_\_, and it had given him a rated age of 58. He communicated that information to defense counsel, and denied doing any other work on the case (other than attending two voluntary settlement conferences) up until his deposition. He denied having any conversations with any defense attorneys at any time regarding the subjects they would like him to address at the time of trial. \_\_\_\_\_ testified that as an annuitist, the only things he is qualified to testify about would be what it would cost to buy a certain stream of payments for a

male or female with a certain “rated age”, or, conversely, what payments could be obtained for a male or female with a certain “rated age” given a certain amount of money with which to buy an annuity. The way he learns the cost of an annuity, once an insurance company has provided a “rated age” for a particular plaintiff, is by consulting a computer disc provided to him by each of the insurance companies with whom he does business. There is nothing else that he does in order to learn the cost of an annuity. The quotes he gets from these insurance companies are good for only seven days. \_\_\_\_\_ initially stated that other than stating that plaintiff’s “rated age” from \_\_\_\_\_ was 58, he has no other opinions which he plans to express in this case. There were no other topics which he had discussed with defense counsel, no notes or reports which he had prepared, and nothing else he had been asked to do. However, \_\_\_\_\_ did also testify that if an annuity had been purchased from \_\_\_\_\_ for plaintiff as of the date of \_\_\_\_\_’s deposition, for each \$1,000 per month to be paid out to \_\_\_\_\_ for the remainder of his life, the annuity would cost \$130,174.94. This price quote would be good for seven days – i.e., it will no longer be good as of the date this motion is heard. \_\_\_\_\_ has no expertise regarding the safety of annuities as opposed to other investment vehicles. He has no opinion regarding the amount that would have to be invested in any kind of United States government securities to get the same payments to the plaintiff. He has no opinion regarding the relationship between the concept of present cash value and the cost of annuities.

8. The deposition of plaintiff’s expert economist, \_\_\_\_\_, was taken by the defense on February 28, 2001, over a month prior to \_\_\_\_\_’s deposition, and the transcript has been available since March 5, 2001.

I declare under penalty of perjury that all of the foregoing is true and correct.

Executed this 30<sup>th</sup> day of March, 2001 at San Diego, California.

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KENNETH M. SIGELMAN, Declarant