

1 CAUTIONS IN USING A REALTIME PARTIALLY EDITED TRANSCRIPT

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3 IN A REALTIME PARTIALLY EDITED TRANSCRIPT, YOU MAY  
4 SEE THE REPORTER'S RAW SHORTHAND NOTES. CONSEQUENTLY, YOU  
5 MAY SEE ERRORS IN CAPITALIZATION AND PUNCTUATION,  
6 MISSPELLINGS, SMALL WORDS MISSING (SUCH AS "THE," "IT,"  
7 "A"), TRANSPOSED WORDS, DOUBLE WORDS, CONTEXTUAL HEARING  
8 MISTAKES, HEARING MISTAKES OF SOUND-ALIKE WORDS, POSSIBLE  
9 INCORRECT SPEAKER IDENTIFICATION, AND AT TIMES STENO  
10 OUTLINES THAT HAVE NOT BEEN TRANSLATED.

11 BE ASSURED THAT IN THE FINAL EDITED VERSION OF THE  
12 TRANSCRIPT, ALL ERRORS ARE CORRECTED. AN UNEDITED OR  
13 PARTIALLY EDITED TRANSCRIPT REPRESENTS A FIRST DRAFT AND  
14 SHOULD BE USED ACCORDINGLY.

15 THEREFORE, IT IS NOT RECOMMENDED YOU RELY ON THE  
16 UNEDITED VERSION AS YOU WOULD A FINAL EVIDENTIARY CERTIFIED  
17 TRANSCRIPT. ALTHOUGH AN UNEDITED OR PARTIALLY EDITED  
18 TRANSCRIPT WILL BE VERY READABLE AND MOSTLY ACCURATE, IT  
19 SHOULD BE USED WITH GREAT CARE.

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1 GABRIELINO-TONGVA TRIBE VS. STEIN

2 TRIAL TESTIMONY OF WILLIAM MILLS

3 10:22 AM

4 THE COURT: Gabrielino versus Stein, BC361307.

5 Good morning counsel. Please make your appearances.

6 MS. IBARRA: Delia Ibarra on behalf of plaintiff  
7 Gabrielino-Tongva Tribe.

8 MR. FORDYCE: Good morning Your Honor. Niall  
9 Fordyce on behalf of Mr. Stein and law offices of Jonathan  
10 Stein.

11 THE COURT: Thank you.

12 MR. STEIN: Jonathan Stein on behalf of SMDC and  
13 the Crane Group.

14 THE COURT: Okay thank you. I wanted to ask --  
15 and we have Mr. Mills on the witness stand, I wanted to ask  
16 Mr. Fordyce if he had any questions.

17 MR. FORDYCE: No Your Honor I think Mr. Stein  
18 covered it very well thank you.

19 THE COURT: All right thank you.  
20 Cross-examination.

21 MS. IBARRA: Sure.

22 Q. BY MS. IBARRA: So good morning Mr. Mills?

23 A. Good morning.

24 Q. Before we get into the substance of your report, I  
25 just wanted to ask you a few general questions about the  
26 substance of your report. And one of them being the key  
27 question which is how you create an attorney-client  
28 relationship, right?

1 A. Right.

2 Q. So you talked about two things, two ways that it's  
3 done, express or implied, by an express agreement or an  
4 implied agreement, correct?

5 A. Yes express includes a writing and express could  
6 be oral, as well.

7 Q. So the implied agreement does not include oral?

8 A. That's right.

9 Q. So is another way to state that is the express  
10 agreement includes words, whether they be in writing or  
11 orally and implied just includes conduct.

12 MR. STEIN: Objection compound.

13 THE COURT: Yeah sustained.

14 MS. IBARRA: Okay let's take it in stepped.

15 THE COURT: Yeah steps.

16 Q. BY MS. IBARRA: So an express agreement would  
17 include words, right?

18 A. I would assume, yes, it would include words.

19 Q. I knee it's basic I just want to take it through  
20 the steps, so a written agreement would include words?

21 A. Yes.

22 Q. And an oral agreement would include words?

23 A. Yes.

24 Q. And an implied the difference is it doesn't  
25 include any words.

26 MR. FORDYCE: Objection unintelligible, how can be  
27 possibly not contain words.

28 MS. IBARRA: Okay it doesn't contain words of

1 specific agreement just conduct of agreement that exhibits  
2 agreement?

3 A. I'm not sure I understand what you're -- may I --  
4 if I may?

5 Q. Sure.

6 A. An implied agreement is generally implied from  
7 circumstances as well as conduct, those circumstances could  
8 include words but they don't have to and there are other --  
9 obviously circumstances are much broader than -- than  
10 words, just words.

11 THE COURT: Circumstances can include writings, I  
12 mean you would include?

13 A. Sure.

14 THE COURT: Everything to figure out whether or  
15 not an attorney-client relationship was established?

16 A. That's correct.

17 Q. BY MS. IBARRA: So that's what I'm getting at. So  
18 what is the difference between an oral agreement and an  
19 implied agreement?

20 A. An oral agreement in general would be an express  
21 agreement much like a written agreement except it's not in  
22 writing, it's conveyed orally. Client says to the lawyer  
23 I'd like to hire you, lawyer says I'll agree I will be your  
24 lawyer. That will establish an oral agreement.

25 MS. IBARRA: Right there's no agreement in writing  
26 but there was an agreement between the parties that was  
27 expressed verbally between them.

28 A. Correct.

1 Q. But an implied agreement would not include those  
2 same terms, that it would just shall you know the course of  
3 conduct between the them and their relationship, right.

4 MR. STEIN: Objection vague or incomplete  
5 hypothetical whichever.

6 THE COURT: Overruled?

7 A. I'm not sure -- I'm not sure I adopt the  
8 characterization.

9 Q. BY MS. IBARRA: Okay. Can you recharacterize it?

10 A. I'll try. An implied agreement, implied  
11 agreements generally not just between lawyers and clients,  
12 but implied agreements recognized in contract law are when  
13 the elements required for the creation of a contract are  
14 satisfied, consideration, offer, acceptance, those kinds of  
15 things are implied, are accepted by implication of conduct  
16 or the circumstances. We never say anything, we never do  
17 anything but I or -- that's directed at one another but you  
18 ask -- you make an offer which I accept by performing, by  
19 performance, that could be a contract depending on what the  
20 offer was.

21 Q. So it would just be offering something and then  
22 the other person accepting it?

23 A. It could be.

24 Q. So if somebody offers legal advice and somebody  
25 else symptoms the legal advice is that sufficient to form  
26 an implied relationship given -- well actually you said the  
27 totality of circumstances so there would have to be other  
28 things?

1           A.     That's correct but one of the -- the aspects of  
2     the -- if we were to apply it in this context is that you  
3     never get to discussing implied contract where there is a  
4     writing as there is in this case, the SMDC agreement says  
5     there is no attorney-client relationship, the SMDC  
6     agreement says that the terms of the SMDC agreement cannot  
7     be modified or amended without a writing, exchange between  
8     the parties so that sort of eliminates the whole concept of  
9     implied contract because if you're trying to apply an  
10    attorney-client relationship where the contract expressly  
11    says there is no, that would require a written modification  
12    executed by the parties and so it kind of -- it shuts out  
13    all the light that you might otherwise have had if there  
14    were no such terms and no such requirement that the  
15    agreement be in writing.

16           Q.     Okay. Well let's return to this concept then  
17    because I want to explore some more things about the  
18    implied contract but since you bring up the SMDC agreement  
19    and so let's go back to an express contract?

20           A.     All right.

21           Q.     So if there is a contract where a lawyer tells a  
22    client or just a potential client that he or she will do  
23    legal work for them and will supervisor others who will do  
24    legal work for them isn't is this an express agreement.

25           MR. STEIN:  Objection.

26           MR. FORDYCE:  Incomplete hypothetical.

27           THE COURT:  Sustained, there's an offer there but  
28    it's inn complete so sustained.

1 Q. BY MS. IBARRA: So if a lawyer -- so is that an  
2 offer, that is an offer for legal services.

3 MR. STEIN: Objection vague.

4 MR. FORDYCE: And --.

5 THE COURT: Overruled?

6 A. I'm not sure, is what an offer for legal services.

7 MS. IBARRA: Oh I'm sorry so let's assume that  
8 there is a contract where a lawyer tells a client or a  
9 potential client that he or she will do legal work for them  
10 and will supervise other people who will do legal work for  
11 them, is that an offer for legal services for an offer to  
12 create an attorney-client relationship?

13 A. In the context --

14 MR. FORDYCE: Those are two different, objection  
15 those are two different things, incomplete hypothetical  
16 first at a minimum.

17 THE COURT: Objection sustained.

18 MR. FORDYCE: And compound.

19 THE COURT: Which are you asking did it create an  
20 attorney-client relationship or was it an offer to create  
21 an attorney --

22 MS. IBARRA: Which question was is that an offer  
23 to create an attorney-client relationship?

24 A. In the hypothetical circumstance that you're  
25 describing, that kind of thing happens all the time when a  
26 lawyer and client are negotiating whether or not they're  
27 going to have an attorney-client relationship. So the  
28 answer, it could be, it could be but where one party is a

1 lawyer and one party is not a lawyer and they're not  
2 bargaining over an attorney-client relationship, they are  
3 just -- I'm selling you my car because I'm a lawyer doesn't  
4 mean that I know you fiduciary duties because I say I will  
5 check title or do something that a lawyer might do.

6 Q. .

7 Q. Okay but that really wasn't my question. My  
8 question was that the contract that the lawyer is offering  
9 is for legal services not to buy and sell a car. Let's  
10 just assume that it's just for that?

11 A. Just for legal services, all right.

12 Q. Then that is an offer to create an attorney-client  
13 relationship right?

14 A. Sure.

15 Q. Now let's make it more complicated. Now it's an  
16 offer that is same thing, to enter into an agreement to  
17 provide legal service and to supervise another others who  
18 will provide legal services and to do other more  
19 complicated business development work. So is that still,  
20 even though there's additional services that are being  
21 offered pursuant to this offer to enter into this  
22 agreement, is that still an offer to enter into an  
23 attorney-client relationship?

24 A. Not necessarily.

25 Q. Okay. Can you explain why not?

26 A. Sure. If it is a -- normally you would separate  
27 the two, that is.

28 Q. Right normally you would?



1           A.    A client would hire a lawyer pursuant to a written  
2   retainer agreement and separately if they're going to do  
3   business together, the client and lawyer would have -- that  
4   is non legal work the client and lawyer would have a  
5   separate agreement about those kinds of activities.  So  
6   when they're combined without any -- I don't want to call  
7   them December disclaimers but without any provisions within  
8   the agreement that specifies or alleviates any confusion as  
9   to whether or not the lawyer is providing legal services or  
10  not or whether or not there is a fiduciary relationship or  
11  not, absent those kind of disclaimers, there could be an  
12  attorney-client relationship established as a result of  
13  that document, yes.

14           Q.    Okay but that is -- but it is an offer -- you  
15  did -- I'm not sure that it's responsive because my  
16  question was whether that was an offer to create an  
17  attorney-client relationship, is your answer yes.

18           THE COURT:  Okay so --?

19           A.    I said it could be.

20           Q.    BY MS. IBARRA:  It could be and so your  
21  qualification is that it would not be when there's no  
22  disqualifiers?

23           A.    No it would depend on -- I've never seen a  
24  document that resembles what you're just describing.

25           THE COURT:  Does it have to be a document though?

26           A.    But these she's talking about a writing so I  
27  don't -- I think that's part of her.

28           THE COURT:  Did you mention a writing.

1 MS. IBARRA: I was talking about an express  
2 agreement so it could be a writing or it could be an oral  
3 offer?

4 A. Okay. I think if it were oral, then the offer by  
5 the lawyer to perform legal services and acceptance by the  
6 client to accept those legal services would establish an  
7 attorney-client relationship.

8 THE COURT: So just to I'm clear so it doesn't  
9 matter whether there's this other business relationship or  
10 service that's are offered by the lawyer?

11 A. Correct and it would require compliance with 3-300  
12 because of the other things, not because of the the things  
13 that deal just with the attorney-client relationship.

14 Q. BY MS. IBARRA: So it would require compliance  
15 with 3-300 but that does not mean that it's not an  
16 attorney-client -- an offer to create an attorney-client  
17 relationship, right?

18 A. Correct.

19 Q. And if it's accepted it creates an attorney-client  
20 relationship?

21 A. It could, yeah sure.

22 Q. It could not?

23 A. Well it's a hypothetical so.

24 Q. Right I see.

25 A. So yes it could.

26 Q. Okay. So and the fact that it was coupled with  
27 all these other services doesn't defeat the attorney-client  
28 relationship?

1           A.    By themselves, no.

2           Q.    And the fact that it did comply or did not comply  
3 with the 3-300 disclosures, doesn't defeat whether it is or  
4 is not an attorney-client relationship?

5           A.    That's right.

6           Q.    It just brings up other issues?

7           A.    The lawyer has an obligation to do certain things  
8 and if he fails to do those things, then there are  
9 consequence that's result from a failure to satisfy 3-300  
10 but it doesn't mean that there's no attorney-client  
11 relationship.

12          Q.    Got it.  Okay so returning back to the question  
13 about an implied agreement, versus -- all right difference  
14 between an implied agreement agreement or oral agreement,  
15 your opinion is that an entity only acts through official  
16 action right?

17          A.    That's right.

18          Q.    So how does an entity create an implied  
19 attorney-client relationship that's an not express  
20 agreement where there is no writing and there is no oral  
21 offer or agreement, or you know oral -- an express  
22 attorney-client relationship?

23          A.    I'm sure I could think of a way to accomplish it,  
24 I'm not sure I would want to, if I went through such an  
25 effort to create one I would want to have a writing that  
26 reflected it, but you probably -- you under the right  
27 circumstances could if there is no writing governing the  
28 relationship, if a lawyer is doing work for an organization

1 and the arrangement is never formalized, then the  
2 collection of the members of the organization might be  
3 sufficient to raise an issue of whether or not there was an  
4 implied contract, but I'd have to have a better sense of  
5 what the lawyer is trying to avoid by making the argument  
6 that he's not the lawyer and what the client is trying to  
7 gain by arguing that the lawyer is the lawyer. Is the  
8 lawyer trying to protect confidential information? I mean,  
9 excuse me, is the client trying to protect confidential  
10 information which you might expect if there were  
11 disqualification issues, is the lawyer trying to have get  
12 paid for work that was performed, you know just so there  
13 are different issues but like I said, it's not something  
14 that I -- where in a corporate context, I believe that it's  
15 probably -- it's certainly bloat the standard of care to  
16 permit that kind of thing to happen because it's confusion  
17 that creates peril and risk for the lawyer on a  
18 professional basis.

19 Q. Okay. So you're saying it's just so that I  
20 understand what your testimony s you're saying it would be  
21 nor complicate today do so in that context but you're  
22 not --?

23 A. More complicated than what?

24 Q. More complicated than if it's an individual, an  
25 individual and a lawyer who are creating an implied  
26 attorney-client relationship?

27 A. I believe that's the I am [PHREFT] way.

28 Q. Yeah.

1           A.    If the between one individual and one lawyer, you  
2 can gauge what the lawyer is thinking and the client is  
3 thinking by asking them.

4           Q.    And they might memorialize it in e-mails?

5           A.    Or not at all.

6           Q.    Right.

7           A.    But when a corporate entity -- if a member hires a  
8 lawyer to do work, but it's not authorized, the lawyer will  
9 contend that -- authorized by the rest of the board, the  
10 lawyer will intend he's entitled to get paid because he was  
11 hired by a member of the board and the boards position will  
12 be you're not our lawyer was we didn't hire you because by  
13 corporate action, by vote -- noticed leading in a vote and  
14 a resolution authorizing someone to sign a retainer  
15 agreement.  Whether it's signed or not that's the way it  
16 would be handled.  So I don't know if that's responsive to  
17 your question but --.

18          Q.    Well no.  What I'm trying to get at you're not  
19 precluding the idea that an entity could create an implied  
20 relationship with a lawyer, an implied attorney-client  
21 relationship are you?

22          A.    I'm subpoenaing-g that there are circumstances in  
23 which it is possible certainly but as I said earlier where  
24 there is a writing that expressly says they are and are  
25 not, then that creates that wall that I mentioned before  
26 that can't be scaled or penetrated accidentally or by  
27 implication, it has to be -- you have to respect the terms  
28 of the agreement.  And the -- if -- in order to undo or to

1 modify the phrase that's basically say there is no  
2 attorney-client relationship, modifications only happen  
3 under the agreement under certain ways it and that way, the  
4 primary way is by a writing executed by both parties.

5 Q. So you're actually speaking about the situation  
6 here?

7 A. Correct judge right? You're saying it couldn't  
8 happen here because there was already an express agreement?

9 A. That's right.

10 Q. Okay but that express agreement did say that SMDC  
11 would provide legal services and would supervise legal  
12 professionals who would provide legal services.

13 MR. FORDYCE: Misstates the document.

14 MR. STEIN: Objection that's.

15 A. What the SMDC agreement says at all.

16 MR. FORDYCE: Join.

17 THE COURT: Judge don't you show him where it says  
18 that.

19 MS. IBARRA: Yeah why don't we go to the SMDC  
20 agreement, 569.

21 THE COURT: 569, do you have 569, madam clerk, I  
22 think there's a stack of exhibit there, yeah you're going  
23 to have to look.

24 THE CLERK: Oh sorry.

25 THE COURT: And it's already in evidence so you  
26 have don't have to --?

27 A. Which book should I look at.

28 MS. IBARRA: It's the blue one and it should be

1 the first.

2 THE COURT: And we'll try to keep them in order?

3 A. The first one says Exhibit 1 of four, one through  
4 16 one.

5 MS. GOAD: It's volume one.

6 MR. STEIN: First volume at the back.

7 THE COURT: Thank you Mr. Stein.

8 THE COURT: Madam clerk just try to keep those in  
9 order and then I will give them back to you because they're  
10 all kept in order, I just want 569?

11 A. Which one is it.

12 MS. IBARRA: 569 and then the language is --.

13 THE COURT: It's an agreement?

14 A. I've got 569.

15 Q. It's actually was in your -- it was in your  
16 declaration you referred to your language, or maybe it was  
17 in the SMDC agreement.

18 THE COURT: Thank you. What payment are you  
19 looking at.

20 MR. STEIN: And Your Honor I don't know if it's  
21 relevant I don't want to change things but exhibit 250 was  
22 the Rae Lamothe legal agreement that said she would do all  
23 the legal work.

24 THE COURT: Okay we'll get to that but we're  
25 talking about 569 right now.

26 MR. STEIN: Very good.

27 THE COURT: Thank you counsel. We're talking  
28 about 569, what page are you referring to here? Developers

1 responsibilities or something else.

2 MS. IBARRA: I think it's where it disclaims the.  
3 I need to look for it specifically, it was referenced in  
4 opposition to the motion for summary judgment. Let's move  
5 on for now while we look for that.

6 Q. BY MS. IBARRA: So let's go to issues having to do  
7 with 3-300?

8 A. All right.

9 Q. So is one of the key issues that the client must  
10 retain independent counsel?

11 A. No.

12 Q. That they must be given the opportunity to retain?

13 A. They -- 3-300 among other things requires that the  
14 attorney or the member give -- advise the client that he  
15 has the right to seek independent counsel and give the  
16 client a reasonable opportunity to seek independent  
17 counsel, that's the requirement.

18 Q. Okay. So if the lawyer doesn't give the client a  
19 copy of the agreement to take home with them, would that  
20 impede the clients ability to get independent counsel.

21 MR. FORDYCE: Vague and ambiguous.

22 THE COURT: Overruled.

23 MR. STEIN: Incomplete hypothetical.

24 A. If the lawyer doesn't.

25 MR. STEIN: Incomplete hypothetical.

26 THE COURT: Overruled.

27 Q. BY MS. IBARRA: So if the lawyer shows them a copy  
28 of the agreement but doesn't give them a copy to take with



1     them home or to their place of business or to another  
2     lawyer they just physically take a copy, would that impede  
3     the clients ability to consultant with independent counsel.

4             MR. FORDYCE: Your Honor vague and ambiguous what  
5     agreement are we talking about are we talking about a  
6     hypothetical agreement are we talking about SMDC agreement.

7             MS. IBARRA: Yeah I'm talking about a  
8     hypothetical.

9             MR. FORDYCE: Are we talking about the  
10    attorney-client agreement are we talk about the development  
11    agreement it's vague and ambiguous and incomplete  
12    hypothetical.

13            MS. IBARRA: It's an agreement that has a 3-300  
14    provision.

15            THE COURT: Well let's talk about what in this  
16    case you were talking about. I was assuming you were  
17    talking about 569.

18            MS. IBARRA: Yes.

19            THE COURT: Because you just referenced it so.

20            MS. IBARRA: Well there has been testimony that  
21    they were unable to take it home with them.

22            THE COURT: Okay well Ms. -- that's not the  
23    question.

24            MS. IBARRA: So I don't want to state testimony  
25    because I know there's going to be objections to it but  
26    assuming that -- let's just to assume that there has been  
27    testimony that they weren't able to take home the SMDC  
28    agreement, would that impede the clients ability to retain

1 independent counsel.

2 MR. FORDYCE: Assumes facts not in evidence.

3 THE COURT: Overruled?

4 A. It is customary for a client to be permitted an  
5 opportunity to review with independent counsel if that's  
6 what the client wants an agreement. I'm not sure I  
7 understand what you mean by impede the ability to retain to  
8 consultant with outside counsel because the client could  
9 very easily have summarized portions or the significant  
10 portions of the agreement having reviewed it themselves, I  
11 have no idea, would it impede it, I don't understand what  
12 you mean by impede.

13 Q. BY MS. IBARRA: So you think it's reasonable --  
14 well do you think it's reasonable that somebody, a client  
15 can take this agreement 569 and remember all the complex  
16 provisions having to do with you know the compensation and  
17 third party professionals and integration clause and all  
18 this stuff, [KOUFRPBG] a non lawyer could reasonably  
19 take -- review it and then not have a copy of it and then  
20 go to a lawyer and say will you be my lawyer and this is  
21 what the agreement generally is if they don't physically  
22 have a copy of the agreement?

23 A. I try never to underestimate the intelligence of  
24 my clients but I -- as I schedule, think it's customary in  
25 my practice to provide the client a copy of our retainer  
26 agreements or other agreements that we -- that have a 3-300  
27 implication and I -- and to assure that they have what the  
28 outside world would consider to be a reasonable

1 opportunity, not necessarily based on time but a reasonable  
2 opportunity to consult with counsel. And if the client  
3 having been warned as they are in the SMDC agreement that  
4 they should seek independent counsel, you know it's  
5 presumed if they sign it that that's what they've done.

6 Q. Do you also think that it's reasonable in your  
7 practice that somebody -- that there would be time  
8 constraints in the amount of time they could spend with the  
9 agreement?

10 A. There usually are, yes.

11 Q. There usually are time constraints?

12 A. Of course.

13 Q. But more than a few hours, right?

14 A. It depends on the circumstance I depends on the  
15 clients need, it depends on lots of things. I mean there  
16 is no rule of thumb as to how long you let a thumb  
17 consider -- it's an offer and the amount of time that it  
18 takes to execute the agreement as often especially if I'm  
19 the lawyer and the client says that they're in a rush but  
20 they don't want to sign the retainer agreement immediately,  
21 that gives me some concerns, even where they are requires  
22 to seek independent counsel, you know they could telephone,  
23 they could -- and if they phone someone, the lawyer can ask  
24 for it, I don't know that -- I understand that there was a  
25 lawyer involved who ultimately reviewed the agreement but  
26 may not have been fully retained to advise the client, I  
27 have no idea what he discussed with the tribe in this  
28 context but -- so I -- I don't -- I don't think you can

1 assign a specific oh you have an hour to do this or you  
2 know -- or walk away. They're adults, they know what the  
3 importance of this thing is, they could have asked for more  
4 time if they felt they needed it, so I mean there are lots  
5 of ways that can go so there's no rule of thumb about time.

6 Q. So that your understanding is that -- is it Steve  
7 Otto who you -- that's your understanding?

8 A. That name sounds familiar, yes.

9 Q. Okay can we look at Exhibit 16 which actually  
10 going to be in the Blue Book sorry. We'll return to this  
11 one so maybe you can keep this one open, yeah the Otto  
12 letter?

13 A. 16. All right I've got it.

14 Q. Mr. Mills have you reviewed this letter?

15 A. I have. Not recently but yes.

16 Q. So I want to give you another opportunity to  
17 review it and see if this still comports with your  
18 understand that long Mr. Otto reviewed the SMDC agreement.

19 THE COURT: Why don't you direct them -- it's a  
20 long letter, why don't I direct him to a portion that you  
21 want him to read and then he can.

22 Q. BY MS. IBARRA: So can you go to the third  
23 paragraph and can you read that.

24 THE COURT: You have mean read it to himself or  
25 read it out loud.

26 MS. IBARRA: Can you read it out loud, please.

27 THE COURT: It was a long paragraph. Can you give  
28 him somewhere to start.

1 MS. IBARRA: Yes. As reflected by my  
2 correspondence?

3 A. The first sentence, okay. As reflected by my  
4 correspondence of February 6, 2001 and again on March 1,  
5 2001, I did not review the purported agreement with Santa  
6 Monica development company LLC, Jonathan Stein in  
7 parenthesis, on behalf of tribe nor did I advise the tribe  
8 in that regard. Do you want me to keep reading.

9 Q. BY MS. IBARRA: Yeah just the next sentence?

10 A. At the meeting not February 25, 2001 during which  
11 meeting the tribal council extensively reviewed my  
12 qualifications in considering whether to retain me, the  
13 tribal council agreed that additional time was needed to  
14 consider the qualifications in considering whether to  
15 retain me. The tribal council agreed that additional -- oh  
16 I'm sorry.

17 THE COURT: Yeah?

18 A. To consider the agreement with Santa Monica.

19 THE COURT: Well let's see the tribal council  
20 agreed that additional time was needed to consider the  
21 agreement with Santa Monica?

22 A. Santa Monica development company slash Jonathan  
23 Stein, that I should prepare written comments concerning  
24 the proposed agreement and the associated tribal council  
25 resolutions that had been prepared by Mr. Stein's office or  
26 by Mr. Stein's counsel. In fact during that discussion I  
27 told the tribal council I would need to have review the  
28 agreements and resolutions to prepare the comments. And I

1 should forward those comments h written comments to the  
2 tribal council for its consideration so that the agreement  
3 and resolutions could be adequately considered by the  
4 tribal council. All right.

5 Q. BY MS. IBARRA: Okay. So it's pretty unambiguous  
6 that he didn't actually do that, right?

7 A. That's what he says, sure.

8 Q. Okay. And we have another letter from him that  
9 was introduced and was in evidence, it's 240 and that's the  
10 March 1 letter that he's reviewing.

11 THE COURT: What exhibit is it.

12 MS. IBARRA: It's exhibit 240.

13 THE COURT: In the defense book.

14 MR. FORDYCE: No Your Honor that's the Plaintiffs.

15 THE COURT: Is that in the Blue Book.

16 MS. IBARRA: It's in the blue books, it was one of  
17 the -- it was the first one that was introduced that was  
18 after -- that wasn't on the exhibit list so it would be on  
19 the --.

20 THE COURT: Probably, madam clerk. Do you  
21 remember what number it was.

22 MS. IBARRA: It was 240.

23 THE COURT: 240?

24 A. This book only goes to 239.

25 THE COURT: Yes I know, I can give you have the  
26 one we have up here. Well while she's looking let's use  
27 your copy, you can come right up to the witness and you can  
28 share that, can you do that, or are you going to need your

1 notes.

2 MS. IBARRA: It's a very short letter we can  
3 review it together.

4 THE COURT: And it's called exhibit 240.

5 MS. IBARRA: 240.

6 THE COURT: 240.

7 MS. IBARRA: And can you identify it.

8 MR. STEIN: I'd like to see it as well.

9 MS. IBARRA: Sure.

10 THE COURT: Sure?

11 A. It appears to be a Devon from Steven Otto to  
12 Velasquez, to earnest -- to Jim earnest Velasquez of the  
13 tribal council.

14 Q. And then it's re: ?

15 A. Re: Proposed representation of Gabrielino-Tongva  
16 Tribe.

17 Q. And can you just read the first -- the first  
18 sentence?

19 A. To confirm my earlier telephone conversation with  
20 chair mile an hour Velasquez and my e-mail correspondence  
21 of February 26, two Then In 2001, please be advised and  
22 accept my regret that I am unable to represent the  
23 Gabrielino-Tongva the tribe as counsel and in connection  
24 with the Saint Monica development company Jonathan Stein  
25 proposal slash agreement my withdrawal from the reputation  
26 you approved only last Sunday February 25, 2001 which  
27 approval which subject to any submission and approval --  
28 submission of your approval of a written attorney contract

1 should not be revealed as a comment in pay on the proposed  
2 [TKPWREPLT] [AOE] attorney reviewed or commented upon the  
3 proposed agreement on the tribes [PHRAOEPT] I wish the  
4 tribe every success in connection with this venture.

5 MR. FORDYCE: Objection hearsay she's using for  
6 the truth.

7 THE COURT: Overruled.

8 MR. STEIN: And may I see it.

9 MS. IBARRA: Yeah this is the one that Patricia  
10 Neminski, Dianna Semintal brought in when she came in to  
11 testify and it's specifically referenced in Exhibit 16.

12 MR. STEIN: And Your Honor can I comment outside  
13 of the hearing of Mr. Mills? I don't want to --

14 THE COURT: Yeah, no. You can have an objection,  
15 you state the objection and the ground.

16 MR. STEIN: Yeah, and that's what I want to do,  
17 but let me finish reading.

18 MS. IBARRA: Okay so -- well counsel.

19 MR. STEIN: Okay forgive me, forgive me.

20 THE COURT: Okay continue.

21 Q. BY MS. IBARRA: So getting back to the requires of  
22 3-300, if there's no attorney that had an opportunity to  
23 review it or reviewed it and there was no -- assume that  
24 they weren't able to take copies home with them, do you  
25 think that it complied with the independent review -- or  
26 review of an independent counsel?

27 A. As I said before, 3-300 requires that the attorney  
28 advise the client that they have the right to seek



1 independent counsel and to give them an opportunity to  
2 consultant with independent counsel it doesn't require --  
3 they can't control what the client did you see with that  
4 opportunity.

5 MR. STEIN: And Your Honor I wish to state is  
6 that --.

7 THE COURT: What's the objection.

8 MR. STEIN: The objection is that the letter shows  
9 that he was actually --.

10 THE COURT: Well no [WHAOER] not asking what it  
11 actual [SHRAOE] shows you need to state an grounds for the  
12 objection.

13 MR. STEIN: Incomplete hypothetical.

14 THE COURT: Overruled.

15 MR. STEIN: Very good.

16 THE COURT: No speaking objections, okay.

17 MR. STEIN: Nods.

18 THE COURT: We have too many of those.

19 MS. IBARRA: Yes.

20 Q. BY MS. IBARRA: So let's get back to the SMDC  
21 agreement.

22 THE COURT: Do you have a copy.

23 MS. IBARRA: That's the white one.

24 THE COURT: We're giving a copy to everything in  
25 case had you didn't get it because it doesn't seem like--  
26 it was brought up but it look like maybe it wasn't  
27 circulated so we're going to give a copy to anybody.

28 MR. FORDYCE: Yeah I'm a little puzzled I don't

1 see a hard copy or electronic so it would be helpful.

2 MS. IBARRA: Just what happened she came in and  
3 brought that copy and then we made one copy of it.

4 MR. STEIN: And the exhibit number on this.

5 MR. FORDYCE: 240.

6 MS. IBARRA: We had copies for everybody.

7 MS. GOAD: Uh-huh.

8 MS. IBARRA: She brought extra copies.

9 MR. FORDYCE: That's fine we have it now.

10 THE COURT: It's an Otto letter, what date with re  
11 giving it.

12 MS. IBARRA: It's March 1, 2001.

13 THE COURT: Okay March 1, 2001 Otto letter,  
14 there's a couple Otto letters so.

15 MS. IBARRA: Oh and it has an enclosure which he  
16 is returning the check from Sam Dunlap to Steve Otto.

17 MR. STEIN: Can we have a copy for the witness  
18 placebo please, I'll give them mine.

19 MR. STEIN: Yeah (Ditto).

20 THE COURT: Don't interrupt please, if you need a  
21 copy let us know, okay do you agree?

22 A. I will.

23 THE COURT: Okay thank you. There's an enclosure,  
24 a copy, Sam Dunlap, go ahead.

25 Q. BY MS. IBARRA: So continuing on with this -- with  
26 some of the 3-300 issues.

27 THE COURT: Well what is the enclosure it's a  
28 return of the check to whom, to Otto.

1 MS. IBARRA: Yeah it's a 2,500 thousand dollars  
2 check from Steve Otto -- to Steve Otto and it looks like  
3 it's from professional native culture resource monitors and  
4 I don't actually see.

5 THE COURT: Well the memo lines says services  
6 rendered buzz then it sews void.

7 MS. IBARRA: Void, yeah it's a void-d check and  
8 it's a returned. So we think that Sam Dunlap's company but  
9 we don't --.

10 THE COURT: Ms. Ibarra just ask the questions  
11 okay.

12 MS. IBARRA: I'm sorry, I'm done with that one  
13 actually.

14 Q. BY MS. IBARRA: So turning to the issues actually  
15 having to do with the 3-300 disclosures, if you reviewed a  
16 lot of the resolutions that amended the SMDC agreement?

17 A. Yes.

18 Q. If those resolutions did not include a copy of the  
19 original SMDC agreement, would that have cured any defects  
20 if -- so in other words the resolutions only attached the  
21 amended language not the original contract, would that be a  
22 problem?

23 A. May have I ask a question?

24 Q. Yes.

25 A. Just so I understand the to not connection.

26 MS. IBARRA: Was the SMDC agreement attached to a  
27 resolution at any point.

28 Q. It was originally.

1           A.    Okay.  Then subsequent affirmations, approvals of  
2 the contract, I don't think you need to attach the --  
3 anything other than the language that changed.  That's not  
4 so much an ethics issue as it is a transactional,  
5 procedural issue.

6           Q.    Okay.  So what about if the members of the tribal  
7 council changed, so the people who are affirming it  
8 affirming any amendments through those resolutions didn't  
9 actually -- weren't present when the original agreement was  
10 entered into and approved through resolution.

11           MR. FORDYCE:  Assumes facts not in evidence lacks  
12 foundation.

13           THE COURT:  Overruled.

14           MS. IBARRA:  Assuming.

15           THE COURT:  Yeah assume?

16           A.    Corporate entities are -- I'm sure there's some  
17 quote pithy quote that I have read that says some fact that  
18 corporations are created to last for an indefinite period  
19 of time and they're not bound by the memories or the  
20 limitations of individual members or officers, that's why  
21 there is a requirement that corporations keep corporate  
22 minute books of corporate action and their stock  
23 certificates and other things so that subsequent leadership  
24 will have something to go back with so they don't have to  
25 call someone who retired five years earlier to find out  
26 what they remembered back on a specific day because ifs  
27 that's that's all they've got it probably doesn't amount to  
28 very much.

1 Q. Would it be proper to restrict the access to those  
2 corporate minute books and records.

3 THE COURT: Who is restricting what and where so  
4 you have need to be more specific.

5 MS. IBARRA: Okay. So would it be customary for a  
6 lawyer to restrict the access to those corporate books and  
7 records such as a resolution affirming contracts?

8 MR. STEIN: Objection; this is irrelevant to the  
9 current case?

10 THE COURT: No, overruled.

11 A. Restricted -- I need to understand what you by  
12 restrict.

13 MS. IBARRA: Restricted to the governing body  
14 whether it's like the board or the council?

15 A. Typically the only individuals who have the  
16 ability to -- who have the statutory right to examine the  
17 corporate records are officers of the corporation,  
18 shareholders don't even have that right. So --.

19 Q. So an officer would. Wouldn't you consider a  
20 tribal council similar akin to an officer?

21 A. Absolutely.

22 Q. So they would have ordinarily have access to those  
23 records?

24 A. They would have a right to -- their rights of  
25 inspections and I don't know what -- I'm not aware of that  
26 being an issue or there being a statutory request or an  
27 informal request for that matter for the records but you  
28 know they are typically corporate records are maintained by

1 the secretary of the corporation, that's the secretaries  
2 primary function and the secretary can delegate that  
3 responsibility to their lawyer, they can delegate it to  
4 someone else but they remain in control and so I -- but I'm  
5 not aware of any communications to the sector to any other  
6 officer regarding restrictions on the corporate books.

7 Q. So getting back to the idea that there was an  
8 implied attorney-client relationship, you said that it  
9 would be very difficult, earlier in your testimony you said  
10 that it would be difficult to sort of poll all of the  
11 tribal council members?

12 A. I don't think I said it was difficult, I said even  
13 if you did, because they are required to act as a body,  
14 that I mentioned that they're getting together and polling  
15 them informally might be a violation of the brown act.

16 Q. Brown act? In this case do you mean?

17 A. No I'm just saying it meeting, I've experienced  
18 that with non profits and with others, I don't know whether  
19 this entity is bound by the brown act but anyway my point  
20 is that polling them informally is irrelevant to the actual  
21 activities that the corporation formally is engaged with.

22 Q. You don't think that actually polling them  
23 informally would actually go to the totality of the  
24 circumstances that creates an implied attorney-client  
25 relationship?

26 A. That's right, I do not.

27 Q. So even if they all believe the same thing that  
28 they an attorney-client relationship with one person and

1 that person was giving them advice as an entity, you think  
2 that's irrelevant.

3 MR. FORDYCE: Vague and ambiguous as to time,  
4 misstates testimony.

5 THE COURT: Overruled?

6 A. I think that the -- that the tribal council could  
7 only act through formal action in order to have -- and I  
8 mentioned earlier that I believe that there's really no --  
9 there's no room between the terms of the SMDC agreement  
10 which are required -- which as far as I know govern and are  
11 unrelated to the issues that have been present today me at  
12 least and the notion that -- and those provisions expressly  
13 state that there is no attorney-client relationship and  
14 they expressly state that the provisions cannot be modified  
15 except in writing so poll informally or formally the  
16 members if they take no corporate action would be  
17 ineffective to modify that and it would not be effective or  
18 reasonable for them to believe that there was an implied  
19 contract when they haven't taken any formal action when  
20 they know they're required to take formal action. If we  
21 take it a step further and they actually vote and say that  
22 Mr. Stein is their lawyer, they still need two other  
23 things, they need to authorize someone as a signer of the  
24 agreement who actually signs, let's call that one thing  
25 although you might did he divide it up into several acts  
26 and then you'd have to get Mr. Stein's agreement on behalf  
27 of SMDC to modify the agreement to modify the terms that  
28 there is no attorney-client relationship, those two things,

1     however you measure it did not occur.

2           Q.     Okay.  Moving on to your opinions as to if  
3     there -- so you made an assumption that there was an  
4     attorney-client relationship at some point and I understand  
5     that that's not your primary opinion but that is just an  
6     assumption you've made for purposes of your opinion?

7           A.     Purposes of analyzing the issues to support my  
8     ultimate opinion yes.

9           Q.     I get it.  So that was one of the assumptions that  
10    you make and then for your analysis you say -- and you  
11    quote several cases that talk about recovery being -- once  
12    there's a violation of 3-300, right?

13          A.     Yes.

14          Q.     And that's established then recovery limited to  
15    quantum meruit?

16          A.     That's right.

17          Q.     Okay.  Did you review any cases that said that  
18    recovery even is limited even as to quantum meruit?

19          A.     I think I did qualify the statement in exhibit --  
20    my tab one to say that there are -- there are cases on both  
21    sides certainly.

22          Q.     So there's cases -- more recent cases, right that  
23    says quantum meruit is not allowed?

24                 MR. FORDYCE:  Objection more recent than what?

25          A.     More recent --

26                 THE COURT:  Sustained; sustained.

27                 MS. IBARRA:  The ones that you cited in your  
28    brief?



1 A. Pringle versus La Chapelle was 1999.

2 Q. Yes.

3 A. There are newer cases that say both, I mean that  
4 say that they -- that you can't do quantum meruit and there  
5 are other cases that say you can.

6 Q. Okay. But there are cases that say that quantum  
7 meruit is not allowed?

8 A. Correct, but most of those cases say that quantum  
9 meruit is not allowed where there's a serious violation.

10 THE COURT: Isn't it the case really that what the  
11 court of appeals is saying that the court has discretion to  
12 either order nothing for quantum meruit or full  
13 reimbursement for quantum meruit isn't that sort of --?

14 A. I'm not sure that's the issue.

15 THE COURT: Objection?

16 A. Certainly quantum meruit -- the reasonableness of  
17 services is a determine that the court makes, so if the  
18 court determines that there are reasonable services then  
19 the court establishes that value it could be zero or a  
20 number. I think the point that.

21 THE COURT: The cases in --?

22 A. Those case that's she's referring to on both sides  
23 talk about for the of the Sunday fundamental issue of  
24 whether or not a lawyer violates his ethical duty should be  
25 required to have collect any compensation at all.

26 THE COURT: Oh at all?

27 A. That's right. And that's compensation, as I have  
28 mentioned my testimony earlier in the week though cases

1 that deal with that issue all deal with.

2 THE COURT: Fraud or something like that?

3 A. They're mostly 3-310 case that's deal with whether  
4 a lawyer has violated the conflict rules and should be  
5 required or should not -- not be permitted, be compensated  
6 while he's under the violation of 3-310.

7 Q. BY MS. IBARRA: Buff aren't they really  
8 terminating what is void or voidable meaning if it's void  
9 or voidable then why are you entitled to -- I mean  
10 attorneys get paid by the hour anyway so giving them  
11 quantum meruit just men's that they still quest the benefit  
12 of their bargain usually?

13 A. Not necessarily because -- well the debate within  
14 the context of a quantum meruit determination is whether or  
15 not the hourly rate is reasonable, whether the time spent  
16 was reasonable, whether the lawyers complied with 200 200  
17 on conscienability, I mean there are lots of things that go  
18 into a quantum meruit determination by the Court, it isn't  
19 just void or voidable, as I said, that's why it's a -- it's  
20 a topic that is hotly debated within the ethics community.

21 Q. But that's the statute, void and voidable it's not  
22 case law?

23 A. 3-300.

24 Q. Yes that's right 3-300.

25 THE COURT: So void would be no quantum meruit you  
26 loans on that claim for quantum meruit, voidable means  
27 quantum meruit may be void-d but it may range from zero to  
28 whatever number the court determines?

1           A.    Right.  But we're talking 3-300 applies again to  
2 transactions between lawyers and clients and if the lawyer  
3 hasn't fully complied -- and usually the determine of 3-300  
4 usually begins at the -- goes to have the out outset of the  
5 relationship, as I think I said -- I'm sure I said on day  
6 one, that because the violations appear to have occurred  
7 after September 2003 when all of the sins have been  
8 forgiven if there were any, that everything earned before  
9 then is not -- is inapplicable -- 3-300 doesn't apply to  
10 that.  And 3-300 doesn't really apply at all because there  
11 was no new negotiation of the arrangement so as you look at  
12 the others, a violation, it doesn't really make a lot of  
13 sense to me to penalize a lawyer if Mr. Stein were acting  
14 as a lawyer to have a violation found or created in 2006  
15 that would wipe out his entire entitlement for everything  
16 he had been earning before then so --

17           Q.    So why do you use that point of September 2003?

18           A.    Because that's when the Resolution 46 was approved  
19 and determined on the advice of Rae Lamothe to have been  
20 valid and binding -- valid, binding, and enforceable.

21           Q.    So you think that cures any defects?

22           A.    That's right.

23           Q.    That had been performed?

24           A.    I'm not saying there were any defects but if there  
25 were -- there's an argument advanced that there were  
26 defects prior to that time, that the approval with the  
27 advice of counsel satisfies all the of the requirements of  
28 3-300?

1 A. Okay.

2 Q. So back do 569 and the language we were looking  
3 for?

4 A. All right.

5 Q. It's at '04 78?

6 A. Seven --

7 Q. So that's the -- there are several Bates stamps,  
8 that's the one that's furthest down, '04 78 is the page  
9 number?

10 A. Yes go ahead.

11 Q. And there's developer agreement and then Number 2  
12 recital Number 2.

13 MR. STEIN: I'm sorry B.

14 MS. IBARRA: I'm sorry. D.

15 A. D, The Tongva and the developer wish to enter into  
16 an independent contractor relationship and not an  
17 attorney-client relationship. Developer may, however,  
18 supervise one or more lawyers or law firms or work with  
19 tribal counsel to accomplish tasks which may be legal in  
20 nature.

21 Q. So I go nor that first sentence I have mean I know  
22 that is key for you if you just have the second part of it,  
23 if you have you've lawyer entering into a agreement that  
24 says that they will be performing task that's are legal in  
25 nature and will be supervising law firms, do you think that  
26 is an agreement that is partially an attorney-client  
27 relationship?

28 A. No.

1 Q. Why not?

2 A. If we can take it -- a clause at a time.

3 Q. Sure H?

4 A. Beginning with supervised or one or more lawyers  
5 or law firms, anyone, any non lawyer can supervise one or  
6 more lawyers or law firms.

7 Q. Of course.

8 A. So it doesn't -- you cant assign, it's not  
9 required for a lawyer to that and it happens all the time.  
10 Work with the tribal counsel, not necessarily having any  
11 legal activity, I know the next clause says to accomplish  
12 tasks which may be legal in nature, that especially given  
13 the fact that there was a highly regulated activity, that  
14 is gaming and the tribe itself and sort of the -- it's  
15 permeated with legal issues but I think the purpose of this  
16 especially read in connection with Paragraph B that the  
17 Tongva acknowledge that they have never sought or received  
18 any legal advice from or had any attorney-client  
19 relationship with Jonathan Stein or the law firm Arter &  
20 Hadden, take those plus all the other ones that confirm,  
21 including the prior sentence that there's no  
22 attorney-client relationship, it's clear to me that the  
23 purpose of that sentence was to identify the possibility  
24 that someone might ultimately say hey you're -- because  
25 you're a lawyer and you're working with things that are  
26 legal in nature that there might be an attorney-client  
27 relationship established and the agreement says there's  
28 still no attorney-client relationship and that's entirely

1 proper.

2 Q. Do you think there's an ambiguity between those  
3 two clauses, on the one hand they will be -- they will  
4 accomplish tasks that are legal in nature and will  
5 supervise lawyers, there's no other statement here saying  
6 that the developers are not going to use their legal judgment  
7 or you know substitute their legal judgment for that of the  
8 legal professionals they're going to hire. So it's  
9 possible that they could be doing that if they're  
10 supervising them?

11 A. I'm not even sure what that means.

12 MR. FORDYCE: Objection unintelligible.

13 THE COURT: Well sustained, vague maybe?

14 A. If you don't mind can you rephrase that.

15 MS. IBARRA: Sure.

16 Q. BY MS. IBARRA: Do you think that there's an  
17 ambiguity between B and C -- and D when you read them  
18 together?

19 A. No.

20 Q. So asking a different question is if an attorney  
21 prepares an agreement like this, saying that they're not  
22 going to provide legal advice but then they in fact do  
23 provide legal advice, what's the effect of that?

24 A. Well this agreement doesn't say he's not providing  
25 legal advice, it says he's not acting as the tribes lawyer.

26 Q. Oh I see. And you think it's possible to do that,  
27 to not act as somebody's lawyer but to provide legal advice  
28 anyway?

1           A.    The notion of what is legal advice and what isn't  
2 legal advice is -- could we could spend a week debating  
3 that, and that's why a statement that you have chose to  
4 separate the first sentence which ends in not an  
5 attorney-client relationship is so important because you  
6 may view something that was done as giving legal advice  
7 where another lawyer including myself would argue that's  
8 not legal advice and so to the extent that anyone  
9 interprets an ambiguity into that relationship it's  
10 clarified by saying there's no attorney-client  
11 relationship.

12           Q.    Okay?

13           THE COURT:   So I have a question, so if you say in  
14 an agreement you have know there's no attorney-client  
15 relationship, I'm not providing you any legal advice here  
16 or forever?

17           A.    Right.

18           THE COURT:   But the attorney in fact does, let's  
19 just assume he does provide legal advice?

20           A.    Okay.

21           THE COURT:   By the your definition whatever it is,  
22 is that written comment effective to basically terminate  
23 any attorney-client relationship.

24           A.    It's all about the clients reasonable reliance.

25           THE COURT:   Okay?

26           A.    Okay?  If this deprives a person from thinking  
27 that being reasonable in thinking that the lawyer is  
28 actually acting as their lawyer even if he is communicating

1 information that sounds like legal advice.

2 THE COURT: No I'm saying assume he did, assume he  
3 or she provided line items?

4 A. The point is normally it would be from the clients  
5 perspective, the person receiving that information, so no  
6 matter what the lawyer is thinking doesn't matter whether  
7 he did or whether he didn't.

8 THE COURT: Right forget what the lawyer thinks if  
9 the agreement expressly says there's inform attorney-client  
10 relationship I'm providing new legal advice now never will  
11 add infinite hum but in your opinion if in fact legal  
12 advice was given does that mean there's no attorney-client  
13 relationship.

14 A. Yes.

15 THE COURT: Simply because the contract says  
16 there's no attorney-client relationship I'm not giving you  
17 legal advice now or forever?

18 A. That's right.

19 THE COURT: All right?

20 A. It's about whether the client can reasonably rely  
21 on the fact that that is legal advice.

22 THE COURT: So you're saying no -- it's not  
23 reasonable for a client -- I'm kind of trying to recast  
24 what you're saying and tell me if that's right, it's not  
25 reasonable for the client to assume or believe there's an  
26 attorney-client relationship because there's a writing that  
27 says there's not?

28 A. That's right.



1 THE COURT: Even if the lawyer does give legal  
2 advice?

3 A. Because again you interpret it so broadly that  
4 anything could be interpreted as legal advice and you  
5 follow -- lawyers, you just couldn't operate without clear  
6 boundaries.

7 THE COURT: Okay.

8 MS. IBARRA: What about if -- and I'm not saying  
9 this is exactly the case here but let's say there's this  
10 disclosure that they're not providing legal advice buffer  
11 then they represent the entity in litigation and they're  
12 attorney of record in litigation.

13 MR. FORDYCE: Objection.

14 MR. STEIN: Objection irrelevant to this case.

15 MR. FORDYCE: And assumes facts.

16 THE COURT: No wait a minute overruled on  
17 relevance.

18 MR. FORDYCE: Assumes facts -- in fact assumes  
19 facts directly contradictory to what are in evidence.

20 MS. IBARRA: No but my question is as I understand  
21 the testimony is that there's a lot of gray area here is  
22 that correct? Because there's ambiguity as to what people  
23 might say.

24 MR. STEIN: Objection misstates the testimony.

25 MS. IBARRA: In legal advice.

26 THE COURT: No overruled?

27 A. What I was trying to say.

28 MS. IBARRA: So I want to establish a bright line,

1 like where would it be clearly legal advice it is  
2 contradicted by a written statement?

3 A. My point is that your interpretation of legal  
4 advice might be different did not what is lifer and my  
5 interpretation of what might be legal advice might be  
6 different, that is true of everyone in the room. And so  
7 when you put in the statement that no matter what I say or  
8 do is not legal advice, that means that it's not legal  
9 advice whatever -- however we might interpret it because to  
10 interpret it otherwise would be inconsistent with the  
11 agreement that we're both bound by.

12 Q. And there's no conduct --.

13 THE COURT: So it wouldn't matter if an attorney  
14 represented that very entity in litigation later, I'm not  
15 saying that's what happened here, I'm not representing that  
16 to you -- all I'm saying is that hypothetically if you have  
17 an agreement where you say I'm not attorney never have been  
18 never will be and I will not provide legal advice, never  
19 have and will never will?

20 A. But then he does.

21 THE COURT: But later -- buff then he later shows  
22 you up in litigation as representing that entity, you're  
23 saying it doesn't matter because there's a writing that  
24 says you're not my lawyer?

25 A. No no no.

26 MR. STEIN: All right.

27 MS. IBARRA: Okay?

28 A. Under those circumstances, it is entirely possible

1 that outside the scope of the SMDC agreement that the law  
2 offices of Jonathan Stein could be retained to represent  
3 the trial brief on something else. With as much care as  
4 Mr. Stein took in drafting this particular document, I  
5 doubt he would permit that to happen without some writing  
6 that clarified that the fact that that engagement was  
7 separate and apart from the prior one, so I don't think he  
8 would permit an implied relationship but if he were to do  
9 that I don't think what you could say that because he  
10 represented the tribe on a completely separate litigation  
11 that that somehow means that he's giving legal advice in  
12 connection with the SMDC agreement.

13 THE COURT: Well the question is would the tribe  
14 have a reasonable expectation I'm saying?

15 A. I still think no.

16 THE COURT: All right.

17 Q. BY MS. IBARRA: And you're working under the  
18 assumption that Mr. Stein drafted the SMDC agreement?

19 A. No I'm assuming that Mr. Stein participated in the  
20 drafting of the agreement and I don't know -- formally I  
21 don't know who did the initial draft, don't know who  
22 commented on it, don't know other than he signed it but I  
23 assume that his signing of it means that he's taken some  
24 ownership of it.

25 Q. So moving on to a different topic, does the fact  
26 that an attorney doesn't get paid for his legal services  
27 affect his liability for making a mistake within the scope  
28 of the practice?

1 A. Absolutely not.

2 Q. So he's still liable for malpractice or whatever?

3 A. Well he -- the duty as a lawyer owes to a client  
4 do not depend on whether he is compensated.

5 Q. And it's entirely possible to have more than one  
6 lawyer, right, in various situations, more than two people  
7 representing --

8 A. The same client sure.

9 Q. And it happened all the time right?

10 A. Yes.

11 Q. So specifically in this case, if Ms. Rae Lamothe  
12 was performing legal services for the tribe and separately  
13 Mr. Stein was performing legal services for the tribe, they  
14 could both be the tribes attorney?

15 A. Hypothetically, yes but the question is in the  
16 context of -- are we still on 3-300.

17 Q. Just generally but if you want to talk more  
18 specifically about 3-300 we can?

19 A. I don't know that that's necessary but I was just  
20 wondering whether you want to. But in general if there are  
21 two lawyers have independent obligations to the client and  
22 so they're not evaluated where they are independent,  
23 they're -- those obligations are not evaluated together,  
24 they're evaluated separately, so if Mr. Stein fulfilled an  
25 obligation that is owed by Ms. Lamothe, that might be lucky  
26 and reduce the harm to the client but it doesn't alleviate  
27 Ms. Lamothe from not having complied herself and vice  
28 versa.

1 Q. Moving on to a different issue, did you review the  
2 testimony by the Indian law expert in this case?

3 A. I did not.

4 Q. The Plaintiffs Indian law expert or any  
5 declarations submitted in the underlying case by the Indian  
6 law on behalf of the tribe.

7 MR. STEIN: Objection.

8 THE COURT: Yes and your objection is.

9 MR. STEIN: There was -- there was no such  
10 testimony in this case by Judith Shapiro.

11 THE COURT: No we're talking about.

12 MR. STEIN: She's saying something about who  
13 doesn't exist.

14 THE COURT: No I think we're talking about the  
15 expert who testified here is that right.

16 MS. IBARRA: Yes we're talking about Mr. fill Hoag  
17 an.

18 MR. STEIN: He's not an Indian law expert He's an  
19 expert on --.

20 THE COURT: Don't argue with counsel, state as I  
21 said objection ground, okay.

22 MR. STEIN: Yes Your Honor.

23 THE COURT: That's the last time it's going to  
24 happen and I'm going to row strict cross-examination or any  
25 redirect if you continue to do that. Go ahead.

26 Q. BY MS. IBARRA: So if there was a deficiency in  
27 the development agreement, the SMDC development agreement  
28 in the event that the tribe became federally recognized.

1 THE COURT: I'm sorry repeat your.

2 Q. BY MS. IBARRA: So assume there is a deficiency in  
3 the SMDC agreement that would become apparent in the event  
4 that the tribe became federally recognized, it's not  
5 apparent knew but if it became federally recognized it  
6 would be a deficiency in this contract. Assume that Mr.  
7 Stein was aware of that deficiency and the tribe was not.  
8 Did Mr. Stein have an obligation to disclose that  
9 deficiency to the tribe?

10 MR. FORDYCE: Objection goes beyond the scope of  
11 this experts designation.

12 MS. IBARRA: It's standard of care.

13 THE COURT: Overruled?

14 A. Let me make sure I understand. There is a  
15 deficiency that's not apparent before federal recognition.

16 Q. BY MS. IBARRA: Exactly.

17 A. Well it had to be apparent to someone I suppose  
18 but you're suggesting Mr. Stein was aware of it even though  
19 it wasn't otherwise apparent?

20 Q. Well apparent is not the right word.

21 THE COURT: The hypothetical just wants you to  
22 assume those facts?

23 A. Well all right. If there is a -- you're  
24 suggesting a defect that itself.

25 Q. A defect is a better word yes?

26 A. A defect in the document that gives rise to a  
27 breach of duty because of something, because he made a  
28 mistake or it can be viewed as something that's harmful to

1 the client?

2 Q. Well it's actually harmful to -- assume this:  
3 Assume that the defect would cause harm to the lawyer and  
4 not to the tribe because it would restrict his ability to  
5 collect on the compensation that is agreed to in the  
6 contract.

7 MR. FORDYCE: Your Honor assumes facts.

8 THE COURT: Overruled -- well yes, it does, she's  
9 asking him to assume facts, right? So overruled. Assume  
10 that there's a defect such that --?

11 A. It affected Mr. Stein's compensation if he's the  
12 lawyer.

13 THE COURT: Right his compensation under the fact  
14 is the lawyer.

15 MS. IBARRA: It's Mr. Hoag.

16 MR. FORDYCE: She's calling him a lawyer?

17 A. Is it compensation as a lawyer or is it as a  
18 compensation as a developer under the SMDC agreement.

19 Q. As a developer under the SMDC agreement?

20 A. So I guess I need you to finish.

21 Q. So assume that there's -- assume that in the event  
22 that the tribe achieved federal recognition there would be  
23 a defect in the contract that would restrict Mr. Stein's  
24 ability to collect the compensation which he's promised  
25 under the contract. So there's that. And he never  
26 disclosed that to the tribe, is that a problem, in your  
27 view?

28 A. I don't know -- I'm not -- I'm not here to -- I

1 don't know is that a problem, I'm not sure what that means.

2 THE COURT: Well is it a violation of ethics I  
3 guess is what it means.

4 MS. IBARRA: Yes is it a violation of ehtics.  
5 You're here as an expert so --

6 A. We're assuming Mr. Stein is what in that context.

7 Q. BY MS. IBARRA: Well usually tour -- so your  
8 opinion is based on in part a hypothetical that he was a  
9 lawyer, right? So --?

10 A. Opinion one is --.

11 Q. Yeah.

12 A. He's not there their lawyer.

13 THE COURT: We know what opinion one but assuming.

14 MS. IBARRA: Moving on to else their lawyer?

15 A. He is their lawyer in this case.

16 Q. We're working under that assuming, not your first  
17 opinion but the subsequent opinions that he is a lawyer and  
18 he participates in drafting this agreement, that there's a  
19 defect in the contract so that such that in the event that  
20 the tribe ever achieved federal recognition Mr. Stein is  
21 not going to be able to collect on the full promise of his  
22 compensation under the contract. Is there a an ethical  
23 violation in that case?

24 A. I'm not hearing one an ethical violation.

25 Q. Even if he's a lawyer?

26 A. I don't know whether that term would be material  
27 to the client under 305 hundred he's required to  
28 essentially notify -- or disclose to the client material



1 things under the -- in the context of the engagement.

2 THE COURT: And being paid isn't material or --?

3 A. Material to the client not necessarily material to  
4 him, if he decides.

5 THE COURT: Well if the client isn't obligate  
6 today pay would that not be material?

7 A. I'm sorry that may be beyond me, it sounds like  
8 something that has to be determined after -- you know  
9 you're assuming that that -- that a court has determined  
10 that --

11 THE COURT: No no no?

12 A. Clause is --.

13 Q. BY MS. IBARRA: So what about shall.

14 THE COURT: There hasn't been a corporate  
15 determination about that?

16 A. But you're saying the fact that there might be an  
17 issue, I think there -- you know you have to map out the  
18 consequences of every clause of every agreement, I don't  
19 know that that would be required.

20 Q. So let me just go one step further, so still under  
21 the same assumption, he's the lawyer, there's a defect if  
22 the contract, in the event of the federal recognition he  
23 wouldn't be able to collect and then he advises to not  
24 pursue federal recognition, to just go with the state  
25 recognition only so that they abandon all efforts at  
26 federal recognition and do a casino under some other theory  
27 understate law and he still never advises the tribe that he  
28 wouldn't be able to collect under the contract if they

1 achieved federal recognition.

2 THE COURT: And the question is.

3 Q. BY MS. IBARRA: Is that an ethical violation?

4 Sorry?

5 A. You're assuming that he has information that he is  
6 using that information in a self interested way.

7 Q. Yes.

8 A. In order to gain some advantage over the client by  
9 having the client pursue state rights rather than  
10 federal -- state recognition rather than federal  
11 recognition.

12 Q. Yes?

13 A. I think that could probably be a 3-310 violation.

14 THE COURT: Why would it be though I guess is the  
15 question, what is the problem with that?

16 A. 3-310 says that anytime a lawyer -- a lawyer  
17 cannot accept or continue representation if he becomes --  
18 and this is again a compilation of things, if he becomes  
19 aware of facts or information that may affect the clients  
20 interest in the matter that he's pursuing and that might be  
21 what we're talking about here.

22 THE COURT: You mean if their interests are  
23 adverse is what you're saying?

24 A. That's right.

25 THE COURT: So would he have an obligation to put  
26 his interest above his is the question because clearly  
27 that's accurate?

28 A. If he is the lawyer yes.

1 THE COURT: If that's accurate you accept all  
2 those things, whether it's true or not it's up to the court  
3 to decide whether any of those assumptions are accurate?

4 A. Right.

5 THE COURT: Buff if we assume all that is accurate  
6 and there is a conflict between the interest of the tribe  
7 and the interest of Mr. Stein, then Mr. Stein's obligation,  
8 remember we're assuming he's an attorney would require him  
9 to tell the tribe about that or would it require him to  
10 immediately withdraw or what would happen under those  
11 circumstances or what should the attorney do?

12 A. It would be interpreted as representing himself,  
13 his own interests and he's not required to do any harm to  
14 his own interests so he would be required to withdraw at  
15 that point.

16 THE COURT: So it wouldn't be enough to tell the  
17 client, you would have to withdraw entirely?

18 A. That would be an option.

19 THE COURT: What would be an option?

20 A. To withdraw, the other option would be to tell the  
21 client he doesn't have to.

22 THE COURT: And get some kind of waiver or  
23 something?

24 A. Exactly. If he's not willing to do that he should  
25 probably withdraw.

26 Q. BY MS. IBARRA: And if you're making -- so you're  
27 also saying one of the options should be a disclosure,  
28 should that disclosure be in writing?

1 A. 3-310 requires written disclosure.

2 Q. So does it also require withdrawal?

3 A. No.

4 Q. It doesn't require it?

5 A. On its face it does not.

6 THE COURT: It's just an option but he doesn't  
7 have to as long as he makes a full disclosure?

8 A. If you have get disclosure, that would probably be  
9 3-310 C you would probably have to get consent d or  
10 disclosure and consent and under those circumstances he  
11 could continue the representation but both would have to be  
12 in writing.

13 THE COURT: Let me ask you this: If he just  
14 simply withdraws is that good enough or does he have to  
15 advise about the problem and then withdraw or can he just  
16 say I withdraw?

17 A. Again he's representing potentially two clients,  
18 his own interests and those of the tribe. So if he's  
19 representing two clients he doesn't -- he's not permitted  
20 to -- he's not required -- he's not permitted under  
21 California law to make what we call a noisy withdrawal, he  
22 doesn't have an obligation to disclose.

23 THE COURT: So he does not.

24 A. He doesn't have to do it just has to get out.

25 THE COURT: he doesn't have to telephone the  
26 client why he's leaving or that the agreement was not  
27 beneficial to him or anything, he just needs to get out?

28 A. That's right. But what is he getting out of, is

1 he getting out of the SMDC agreement or is he getting out  
2 of the attorney-client relationship and that kind of where  
3 the hypothetical breaks down because there's to -- the only  
4 thing he's got is the SMDC agreement and there's no other  
5 relationship that he would withdraw from so withdraw from  
6 the SMDC agreement, you have know.

7 THE COURT: Uh-huh?

8 A. The point obviously the tribe already his general  
9 counsel to monitor their healthcare with respect to this  
10 agreement and other things.

11 Q. BY MS. IBARRA: So they did have general counsel  
12 but --.

13 THE COURT: I believe you're.

14 A. Testifying.

15 MS. IBARRA: I'm sorry I'm not testifying.

16 Q. Assuming that they had general counsel but  
17 assuming that that general counsel was not always present  
18 in meetings with -- the tribal council meetings but Mr.  
19 Stein was always present, assume that?

20 A. Okay.

21 Q. And Mr. Stein was answering legal questions during  
22 that those tribal council meetings, would that give rise to  
23 an attorney-client relationship?

24 A. No.

25 Q. Why not?

26 A. Because of the express terms of the SMDC  
27 agreement.

28 Q. And just to circle back, you said that if an

1 attorney entered into -- and I'm not saying that happened  
2 here, I'm just saying assuming, assume that an attorney has  
3 a contract that says not an attorney-client relationship  
4 but then showing up in litigation representing that same  
5 entity with whom he has that contract, you're saying no  
6 attorney-client relationship?

7 A. I would argue that it's a completely accept  
8 engagement, litigation d SMDC agreement doesn't contemplate  
9 litigation at all, so I would argue that representing the  
10 tribe is something else like litigation would be a  
11 completely separate engagement and not part of the SMDC  
12 agreement.

13 Q. Okay.

14 A. And if you make that assumption then it's easy for  
15 him to have that relationship whether it's implied or  
16 otherwise because the tribe would argue that he represented  
17 them, he have has duties, I don't think he would even did I  
18 say glee if he's representing them in court, it's kind of  
19 obvious.

20 Q. So we're talking in clear -- in clear cases where  
21 a person is acting as an attorney for somebody, it doesn't  
22 matter what the terms of the agreement are and what  
23 disclaimers they have, right?

24 A. I need you have to repeat that.

25 Q. Let's go back to the hypothetical.

26 THE COURT: Let me ask a question, so in that  
27 circumstance where there's -- if there is litigation, if  
28 there's no separate attorney like retainer, how would you

1 evaluate that, in other words somebody goes into the court  
2 and they're listed on the letterhead, they're filing  
3 pleadings, they're acting as a lawyer, but they have no  
4 written retainer agreement with the clients?

5 A. It happens all the time and it's not required of  
6 corporate entities.

7 THE COURT: So you're sighing that a rebel person  
8 who's being represented by that lawyer should understand  
9 that the litigation is something different and different  
10 terms govern that relationship and that litigation versus  
11 the SMDC or other contract?

12 A. I'm just telling you the arguments I would make.

13 THE COURT: I'm not asking for argument I'm asking  
14 what your opinion, I understand what the arguments are?

15 A. My opinion is that if Mr. Stein had represented  
16 the tribe in a separate litigation, it would depend on who  
17 he was representing, if he's representing the tribe, let's  
18 limit it to that in separate litigation, the argument would  
19 be that they --.

20 THE COURT: Well I want to know what your opinion  
21 is I don't want to know what the argument.

22 A. My opinion is that it would be a completely  
23 separate engagement because the SMDC is a universe unto  
24 itself that did not include litigation.

25 THE COURT: In the absence of my written retainer  
26 or written agreement or oral agreement?

27 A. Right.

28 THE COURT: The tribe is to understand that

1 they're separate?

2 A. The tribes understanding of what was happening in  
3 litigation isn't governed by the SMDC agreement.

4 THE COURT: All right.

5 A. What the tribe understand with respect to the SMDC  
6 agreement it can't be converted because he does other work  
7 in any way. It's sloppy but I don't think it creates the  
8 implication because of the express terms of the SMDC  
9 agreement.

10 THE COURT: Let me ask you this?

11 A. Sure.

12 THE COURT: Is the analysis done from the  
13 viewpoint of the clients? In other words it's what a  
14 reasonable client would believe creates an attorney-client  
15 relationship, right?

16 A. Right.

17 THE COURT: All right?

18 A. And as I said, that the reasonable client -- the  
19 reasonableness of the clients belief is measured by the  
20 terms of the SMDC agreement. So as long as --.

21 THE COURT: But not exclusively, correct?

22 A. Well with the hypothetical that is in a litigation  
23 that he's representing them, no it wouldn't be it couldn't  
24 be because they have nothing to do with one another but to  
25 the ex then the they say you're doing work for me here  
26 therefore, you're the tribes lawyer or something else. A  
27 lawyer can represent a client on separate matters and not  
28 represent them on other thing, that happens all the time



1 and it's usually, whether it's created by implication or  
2 expressly that is not an unusual circumstance.

3 Q. BY MS. IBARRA: Okay and I'm actually getting near  
4 the end so if there's any redirect we can probably do that.  
5 So but I want to turn to the issue of damages. Could  
6 foregoing an effort at federal recognition be damages in a  
7 malpractice action?

8 A. Damages in a malpractice action have to be based  
9 on non speculative facts. It would be -- you would have  
10 to -- and I don't -- I'm not an expert on quantifying those  
11 kinds of things obviously.

12 Q. Right but just the legal issues of malpractice and  
13 damages?

14 A. But damages could be -- if you could measure the  
15 difference between what they would have earned on a net  
16 basis under the federal recognition versus what they would  
17 have earned with just state recognition, I don't know that  
18 there is -- I don't know whether there would be a  
19 difference but if there were a difference that might be a  
20 measure of damage. There might be damages that -- it might  
21 turn out that it's less -- that they're sort of negative  
22 damages, that is you actually save money by not getting  
23 federal recognition because of taxes, because of regulatory  
24 adherence because of the need to hire more lawyers and  
25 others so without all that information, I couldn't -- I  
26 couldn't determine whether there were actually damages as a  
27 result of that because I just don't have enough  
28 information. Might it be a category of damages, sure but I

1 would be speculating.

2 Q. What about not getting a second tronch of money  
3 from investors, is that -- is that damage?

4 A. I need more information.

5 Q. Assuming that there is an agreement from an  
6 investor for \$21,000,000 and that they've only gotten  
7 \$2,000,000 of it and that they were scheduled to get Mormon  
8 Eiffe from the investor, if you could prove that wouldn't  
9 that be damages under -- that somehow the malpractice  
10 caused by the attorney led to that second tronch of money  
11 not coming in?

12 A. I'm not permitted to testify about proximate  
13 cause.

14 Q. I see.

15 A. So I don't understand -- and if you want me to --  
16 that's where it sounds like you want to head me in that  
17 direction and so I don't.

18 Q. And so what do you mean you're not permitted to  
19 testify about proximate cause?

20 A. That's an issue of law for the court so that's not  
21 a proper basis for expert testimony, but if you're  
22 suggesting that -- I still won't have enough information to  
23 even tell you whether or not there might be a basis for a  
24 standard of care and ethical violation because I don't have  
25 enough information about the terms of the agreement --  
26 investor agreements can be very complicated, they can be  
27 based on lots of things and whether a person invests or  
28 doesn't want to invest, was it based on something Mr. Stein

1 did or his mere withdrawal or was it something else, all of  
2 those things could end up with a different answer that are  
3 factual -- factual -- that are based on whatever facts.

4 Q. I get it. You can't opine about the proximate  
5 causation of it, but assume that there is, that's an  
6 appropriate issue of damages, right? Just assume that --

7 A. You're asking me to speculate now, I don't know.  
8 I don't have enough information to be able to respond to  
9 that question.

10 Q. Let's move to another issue, the fiduciary duties?

11 A. All right. Fiduciary duty as corporate officer?

12 Q. We'll take it in steps. So just first one is  
13 fiduciary duties as a lawyer?

14 A. All right.

15 Q. And you opined that he complied with his fiduciary  
16 obligations as a lawyer?

17 A. Based on the allegations as I understand them,  
18 yes.

19 Q. So assume that there [HARZ] been a finding that  
20 all of the money that was spent -- that Mr. Stein  
21 allegation was miss spent by the tribal council was not  
22 miss spent, it was spent appropriately, do you still feel  
23 like he complied with his fiduciary obligations?

24 A. Yes.

25 Q. Why?

26 A. Mr. Stein as a lawyer is required to use -- and  
27 this is a -- we talked about business judgment, we set  
28 aside that for a later conversation about his obligations

1 as a director but as a lawyer he is -- he has to use his  
2 judgment generally on what he thinks is best, in the best  
3 interest of the client and if he takes steps, especially  
4 those that done involve hisself interest, that is he's not  
5 trying to take the money and put it into his own pocket or  
6 convert to something he is personally interested and I  
7 understand he believes -- he's testified that he did, that  
8 his attempts to temporarily hold on to the money so a  
9 determination can be made as to whether that was in the  
10 best interest of the tribe, that's completely an  
11 appropriate conduct, it might even be privileged but again  
12 that's not my call.

13 Q. Moving on --.

14 THE COURT: So you're saying the fact that  
15 something later was determined to not -- in other words  
16 even though it was later found that the tribe spent the  
17 money appropriately, doesn't necessarily mean that at the  
18 time Mr. Stein did what he did based on the information he  
19 had he may have been acting appropriately at that time?

20 A. That's correct.

21 THE COURT: Based on what he knew at that time  
22 even though after the fact --

23 A. He could have been wrong and it doesn't matter.  
24 As long as he is acting appropriately, there's a certain  
25 level of judgment that he's entitled to make. As long as  
26 he's acting within the best interest of his client, then  
27 he's privileged to do that.

28 Q. BY MS. IBARRA: So what about his conduct as CEO

1 of the tribe or the various officer positions that he have  
2 had. Did anything he did become a breach of fiduciary  
3 duty.

4 MR. STEIN: Objection misstates evidence in this  
5 case.

6 THE COURT: Repeat the question, let me hear the  
7 question over.

8 Q. BY MS. IBARRA: Assuming that there -- okay let's  
9 just assume that Mr. Stein held officer positions with the  
10 tribe or with a tribal -- another closely related tribal  
11 entity, whether it might be tribal development officer or  
12 CEO, would he have -- does he have duties, fiduciary duties  
13 that he owes to the tribe?

14 A. The only -- the only formal duties that person's  
15 involved with corporate entities have are those assigned by  
16 statute and those are limited to president, secretary,  
17 treasurer and there might be one other, it might be vice --  
18 it might be chair or something like that but it's a  
19 relatively limited list, those the are the only ones who  
20 have formal fiduciary duties to the organization. The  
21 concept of a -- Mr. Stein as I understand it was a nominal  
22 director, that is a title that as I testified on yesterday  
23 or the day before he took as a convenience to be able to  
24 represent the tribes interest in various capacities but it  
25 didn't give him the obligation that's a director would have  
26 to the corporation.

27 Q. Okay let's back up a little bit then. How far is  
28 a fiduciary relationship formed? Is it just by title?

1           A.    It's not -- usually, well as I said, it's  
2 established by, for corporate entities by statute.

3           Q.    Okay. Is this a corporate entity though?

4           A.    Well I don't want to step into the -- the argument  
5 about whether it is or is not an unincorporated  
6 association. When I say corporate entity I mean in a small  
7 seed they're all governed by basically the same principles,  
8 they're image alleged by their governing board as I  
9 testified earlier and they can only act through that board  
10 through formal corporate action.

11          Q.    Do you -- but aren't fiduciary relationships also  
12 formed outside of corporate entities, I mean they're formed  
13 between individuals right?

14          A.    Sure all the time.

15          Q.    And are those all the confirmed by titles?

16          A.    The law assigned titles like trustee, lawyer.

17                THE COURT: Insurer?

18          A.    Well -- yeah I suppose so but they're titles that  
19 are conferred by statute.

20          Q.    BY MS. IBARRA: They also be assumed?

21          A.    They can be assumed by contract, sure, in written.

22          Q.    It needs to be a written contract?

23          A.    I believe so.

24                THE COURT: Some are established by common law too  
25 right, aren't some --?

26          A.    Yeah there's probably a common law basis for.

27                THE COURT: Like foster parent make?

28          A.    Trust and fiduciary -- I mean trustee and

1 beneficiary is probably common law or it has its basis in  
2 common law and foster parents are -- that's not a -- that  
3 example is not a good one because they are -- they're  
4 legally bound by a definition of what a foster parent and  
5 my bet is there aren't.

6 MS. IBARRA: So foster parents right hand  
7 guardians is that what you mean?

8 A. No I don't want to get into that.

9 THE COURT: We may be.

10 MS. IBARRA: Sorry.

11 THE COURT: I have guess what I'm trying to say?

12 A. I stick to the ones by statute.

13 THE COURT: Inn keeper or patron?

14 A. Those are all defined by a statute, originally  
15 common law but they are now did he [SPA0EUPBD], bail-er,  
16 Bailey, those kinds of things they're all defined by  
17 statute.

18 Q. BY MS. IBARRA: Is there any category that defined  
19 by common law?

20 A. I don't know. You have mean defined by common law  
21 and not defined by statute.

22 Q. Statute?

23 A. I don't know.

24 Q. So what about when a Laura assumes a fiduciary  
25 relationship, either by statute, you said you're not sure  
26 about common law but certainly if an attorney is a CEO or  
27 an officer of an entity, they would have fiduciary  
28 relationships, right and oh fiduciary duties?

1           A.    They have continue as an attorney but by virtue of  
2 their capacity as the president or secretary or treasurer.

3           Q.    I see.  Are you aware of case law that says that  
4 the rules of ethics apply to a lawyer acting as a fiduciary  
5 even if they're not acting as a lawyer?

6           A.    Yes.

7           Q.    So --?

8           A.    That's typically in the probate context or --  
9 probate and family because but yes, I am familiar with  
10 that.

11          Q.    So typically is it restricted only to that  
12 confession?

13          A.    I don't think it -- I think there are arguments to  
14 be made that it can occur outside that context, sure.

15          Q.    So assuming that in this case Mr. Stein wasn't  
16 acting as a lawyer, he was just acting as a fiduciary  
17 because by virtue of the fact that he was CEO or tribal  
18 development officer or had another title that clearly  
19 conferred a fiduciary obligation to the tribe, wouldn't the  
20 rules of ethics apply here?

21          A.    I don't -- well my analysis was I think it was  
22 opinion seven is that even if he were not -- if he were  
23 just an officer, whether nominal or otherwise, he fulfilled  
24 his duties, his fiduciary duties to the tribe based on the  
25 conduct that I am aware of.

26          Q.    So you're saying even if he did have fiduciary  
27 obligations --?

28          A.    No assuming that he did have fiduciary obligations



1 he satisfied those.

2 Q. Okay so but I'm asking in a situation where he  
3 clearly had -- assuming because I know it's disputed,  
4 assume that he clearly owed fiduciary obligations but he  
5 didn't oh -- he wasn't a lawyer for the [THRAOEUB] would  
6 the rules of ethics still apply here?

7 A. I think one or -- there is an argument that one or  
8 two may apply by confidentiality or loyalty but to extend  
9 all of them to -- to a lawyer who's not acting in his legal  
10 capacity with an entity and that's part of your  
11 hypothetical that he's not acting as a lawyer, then they  
12 would not all apply.

13 Q. So oh so you're saying they wouldn't?

14 A. Right.

15 Q. Just the duties of loyalty it confidentiality?

16 A. I think could you extent to to loyalty and  
17 confidentiality but I don't think those even apply I think  
18 it depends on the circumstance. The problem with ethics  
19 ending it the way you're trying to extend it is lawyers  
20 could never interact with anyone who was a non lawyer  
21 because the presumption would be that the lawyer is always  
22 acting in a fiduciary capacity and that's -- I'm seen that,  
23 I'm heard lawyers argue that in the past and it just is  
24 not --

25 Q. Well you could just not act in a fiduciary  
26 capacity just like you could not provide legal advice, I  
27 mean if somebody discuss you for legal advice and then  
28 they're not your lawyer.

1 MR. FORDYCE: Is counsel testifying or is  
2 counseling asking a question.

3 MS. IBARRA: No I'm saying is that an easy way of  
4 avoiding these problems?

5 A. I don't know that that's anything easy about it  
6 especially the way you described it. I think either you  
7 have -- Mr. Stein is not a lawyer, either you have  
8 fiduciary obligations or you have don't based on your title  
9 and there are certain fiduciary things that -- there's a  
10 certain fiduciary obligation like you've got a fiduciary  
11 obligation not to insure someone else that's a fiduciary  
12 obligation, okay, and it's not imposed on someone merely  
13 because someone's a lawyer it's because that's the basis of  
14 penal law.

15 Q. It's that duty of due care like don't go harming  
16 people?

17 A. It's spill a fiduciary relationship.

18 Q. I see.

19 A. But that's probably the thinnest, but you know as  
20 you expand beyond that it becomes very difficult if you  
21 assign lawyers greater responsibility than they would  
22 otherwise be entitled when they're not acting as lawyers  
23 and we would not be able to buy someone breakfast if -- if  
24 we were buying -- if we were doing it and we're responsible  
25 because they have an anaphylactic response to something  
26 that we didn't know about, okay? If [-R] [AOR] a lawyer  
27 you still might not but if you assign that because you  
28 should have of [known|no one] that the person might be

1 allergic to something and didn't you know it's just -- you  
2 could sort of expand that into sort of that's why it's  
3 defined by statute and that's why it is limited. Lawyers  
4 have a higher responsibility, there's no doubt when they're  
5 acting as lawyers that's why 3-300 applies, to assume that  
6 the deal is unfair between lawyer and client when we know  
7 that the lawyer acknowledges that he's potentially the  
8 clients lawyer and the client acknowledges that the lawyer  
9 that he's depositing a deal with his client. It's not  
10 required if they're two -- two people even if one is a  
11 lawyer when there's actual absolutely no relationship, so  
12 in this context there was never any obligation by Mr. Stein  
13 to comply with 3-300 just because he was a lawyer, okay?  
14 He was not contracted to provide legal services. The  
15 contract expresses numerous time times that there was no  
16 attorney-client relationship, I assume that that language  
17 is included out of an bun dance of caution so he wouldn't  
18 be in the situation he's in now where the issue of whether  
19 or not he was the tribes lawyer at any point in time was to  
20 the questioned.

21 THE COURT: I have a question. If the SMDC  
22 agreement also says there's no fiduciary duties created,  
23 does that mean that you have the same opinion that that's  
24 what controls?

25 A. There are certain fiduciary.

26 THE COURT: Kind of like now you said in the  
27 attorney-client context.

28 A. Yes.

1 THE COURT: If there's also a provision that says  
2 there's no fiduciary relationship?

3 A. I think it's very similar. Fiduciary duties  
4 are -- as I said they're defined by statute and there's a  
5 limitation on what you can and can't waive.

6 THE COURT: Oh okay?

7 A. And I think that you can -- there are certain ones  
8 that you can waive and certain ones that you can't, I don't  
9 know that you can waive willful misconduct and reckless, I  
10 don't know that you can wave fraud, okay.

11 THE COURT: So you're not sure [STP], the contract  
12 says that there's no fiduciary duties, no [TPAO\*EUDZ] were  
13 created, none owed [TK-FRPBLGTS]?

14 A. It doesn't mean, you're still be responsibility if  
15 there was fraud or willful misconduct regardless of what  
16 the agreement says.

17 MS. IBARRA: Okay I [TH\*EU] that's all I have.

18 THE COURT: Okay so let's do -- unfortunately I'm  
19 assuming you have redirect.

20 MR. STEIN: Yes so you'll have to come back.

21 Today is Friday.

22 MS. IBARRA: Today is Friday.

23 THE COURT: And I'm not coming back op Wednesday.

24 MS. IBARRA: And Ms. Aronson is coming back on  
25 Wednesday?

26 A. So you'll let me know.

27 THE COURT: Well Ms. Aronson may be hear for more  
28 than one day, I don't know, she's got a lot to say so I

1 would rather finish with him since you only have redirect  
2 since and finish with him on Wednesday.

3 MR. STEIN: Your Honor would it be helpful if we  
4 finish after exactly 60 minutes so Ms. Aronson would come  
5 up at 11:00 o'clock instead of 10:00 o'clock on Wednesday.

6 THE COURT: Well I don't know, I don't know if  
7 it's going to take an hour for redirect so let's just have  
8 her hear in the morning, okay.

9 MS. IBARRA: Yes.

10 THE COURT: And so I need you back on Wednesday  
11 but 10:00 o'clock?

12 A. 10:00 o'clock.

13 THE COURT: Thank you.

14 MR. FORDYCE: Thank you Your Honor?

15 A. [SWR] a good weekend Your Honor.

16 THE COURT: You too, thank you.

17 MR. STEIN: Your Honor before we go if I can just  
18 mention one thing we [SR-FPB] discussed with the court that  
19 we should is that Mr. Stein is listed apps the expert own  
20 Indian law so to the extent that it is apparently now an  
21 issue what the IGRA expert said we would have testimony by  
22 me but as an expert on IGRA and this is only to in rebuttal  
23 to the testimony of the expert and it was disclosed in the  
24 expert agreements.

25 MR. FORDYCE: It is.

26 MR. STEIN: In addition the court has indicated --  
27 so I have just wanted to give the court a head's up for  
28 that, that's different than what we talked about in the

1 past.

2 THE COURT: All right.

3 MR. STEIN: And we should have brought this --  
4 mentioned it in the past. That's why I'm mentioning it.

5 MS. IBARRA: And he was designated as the Indian  
6 law expert.

7 THE COURT: So what you're trying to saying is  
8 there is another area that wasn't addressed?

9 MR. STEIN: Yeah and I should have said that  
10 earlier.

11 THE COURT: All right. But apparently that was  
12 the case.

13 MR. STEIN: Second, will this court permit -- this  
14 court has expressed interest in the quantum meruit idea.  
15 And we have here in the brief it says very clearly all  
16 evidence is admissible, but the court keeps saying well how  
17 about expert testimony. Mr. Mills is qualified to be an  
18 expert on quantum meruit. He would be willing to prepare  
19 himself to be qualified for quantum meruit, but he was not  
20 disclosed and therefore we would have to have the court's  
21 permission for that.

22 MS. IBARRA: We have a lot of issues with that.

23 THE COURT: Yeah, I think it's too late to do  
24 that. So I think it's a little late for expert designation  
25 at this point but my inclination is to allow to you  
26 introduce whatever evidence you have.

27 MR. FORDYCE: Thank you Your Honor.

28 THE COURT: I think you -- as much as the court

1 can glean from it, a lot of it is redacted et cetera et  
2 cetera but my inclination would be to allow you to  
3 introduce them, say what you want to say about them, it's  
4 going to be difficult for the Court to really make much of  
5 it because the descriptions are apparently all redacted so  
6 [S\*] so.

7 MR. STEIN: Your Honor is very generous and the  
8 points that you're making are entirely correct, sure.

9 MS. IBARRA: Your Honor I think only only the  
10 unredacted parts.

11 THE COURT: I'm not hearing argument now.

12 MS. IBARRA: Okay.

13 THE COURT: I'm just letting you have know what my  
14 thoughts are.

15 MR. FORDYCE: Thank you Your Honor.

16 THE COURT: All right. I'll receive you have on  
17 Wednesday thank you.

18 MR. STEIN: And has the court had a chance to read  
19 the brief, would it be helpful to --.

20 THE COURT: I've read some of it, yeah h that's  
21 why I said any inclination is to allow it in although I  
22 don't know how helpful it's going to be because of the  
23 redaction.

24 MR. STEIN: And evident court is exactly right I  
25 think the case law shows item expert are very helpful about  
26 quantum meruit and would be very helpful here.

27 THE COURT: All right thank you.

28 MR. FORDYCE: Thank you Your Honor.

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MS. GOAD: Have a good weekend Your Honor. 12:04  
PM.