

1 SECOND JUDICIAL DISTRICT COURT
2 COUNTY OF BERNALILLO
3 STATE OF NEW MEXICO

4 District Court No. CV-2005-07921

5 MESCALERO APACHE TRIBE,
6 a Federally Recognized Indian Tribe,

7 Plaintiff,

8 v.

9 KENNETH J. WOODLEY, ET AL,

10 Defendants.

11 TRANSCRIPT OF PROCEEDINGS

12 On the 1st day of June 2007, at approximately
13 9:20 a.m., this matter came on for hearing before SPECIAL
14 MASTER SUSAN M. CONWAY, 5121 Masthead St. NE, Albuquerque,
15 New Mexico 87109-4367.

16 The Plaintiff, MESCALERO APACHE TRIBE, appeared by
17 Counsel of Record, GREGG VANCE FALLICK, Attorney at Law, 201
18 Third Street NW, Albuquerque, New Mexico 87102.

19 The Defendants, LEAVITT GROUP ENTERPRISES, ET AL,
20 appeared by Counsel of Record, RUDOLPH A. LUCERO, MILLER
21 STRATVERT, P.A., P.O. Box 25687, Albuquerque, New Mexico
22 87125; and STEPHEN E. CROFTON, SALMON, LEWIS & WELDON,
23 P.L.C., 2850 East Camelback Road., Suite 200, Phoenix,
24 Arizona 85016
25

1 The Defendant, KENNETH J. WOODLEY, appeared by Counsel
2 of Record, CHRISTOPHER T. SAUCEDO, Attorney at Law, 20 First
3 Plaza # 725, Albuquerque, New Mexico 87125-0245.

4 At which time the following proceedings were had:
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DIRECT EXAMINATION BY MR. FALICK

19

Q. Do you still deny that you coached Tawnya Davis to
20 lie?

21

A. Yes, I deny it.

22

Q. Do you still deny that you urged Tawnya Davis to
23 change her testimony?

24

A. I did not urge her to change her testimony. She asked
25 me about the process for providing a clarification or

1 correction, and I explained that process to her.

2 Q. Is that a yes?

3 A. I answered the question the best I could, Mr. Fallick.

4 Q. The question was, do you still deny that you urged
5 Tawnya Davis to change her testimony?

6 A. Maybe it's semantics, Mr. Fallick, but I repeated to
7 her that she should tell the truth, and if she thought that
8 she made a misstatement, it would be best for her to clarify
9 and correct it.

10 Q. A lawyer with 25 years of experience, do you know a
11 yes or no question when you hear one?

12 A. I think so.

13 Q. Do you still deny that you urged Tawnya Davis to
14 change her testimony? It's a yes or no question.

15 A. Mr. Fallick, I have tried to answer that to the best
16 of my ability.

17 Q. So you are unable to answer yes or no to that
18 question. Was that your testimony today?

19 A. I guess so.

20 Q. You are able to answer that question yes or no?

21 A. I'm sorry, I thought you asked me if I was unable to
22 answer yes or no.

23 Q. Are you able to answer the question: Do you still
24 deny that you urged Tawnya Davis to change her testimony?
25 Yes or no?

1 A. No, I did not urge her to change her testimony.

2 MR. FALLICK: Your Honor, may I approach the
3 witness?

4 SPECIAL MASTER: Yes, to bring exhibits, I think.

5 MR. FALLICK: Yes, Your Honor. If I may, Your
6 Honor, this is a copy of what we have marked as Exhibit 1.

7 SPECIAL MASTER: Okay.

8 Q. (By Mr. Fallick) Mr. Crofton, I place in front of you
9 the document that has been marked as Plaintiff's Exhibit 1.
10 Do you recognize that document?

11 A. Yes.

12 Q. That is a Registration Certificate of Nonadmitted
13 Lawyer that you filed with the State of New Mexico?

14 A. Yes. I believe that was filed with the State Bar of
15 New Mexico.

16 Q. That is your signature over on the right corner?

17 A. Yes.

18 Q. You were required to sign Exhibit 1 as a condition of
19 appearing as counsel in New Mexico?

20 A. That is my understanding.

21 Q. Your signature was a promise to comply with the New
22 Mexico Rules of Professional Conduct, true?

23 A. Yes.

24 Q. Your signature also was a promise to abide by the
25 other provisions governing the practice of law in New

1 Mexico?

2 A. I believe so.

3 Q. You signed Exhibit 1 in order to obtain the privilege
4 of appearing as counsel here?

5 A. Yes.

6 Q. But you never had any intention of honoring this
7 promise, did you?

8 A. I absolutely intended to honor my promise.

9 Q. Is it your testimony today that you'll always honor
10 this promise?

11 A. I believe I have, to the best of my ability.

12 Q. You understand that the Rules of Professional Conduct
13 in New Mexico include the duty of candor to the tribunal?

14 A. I do understand that.

15 Q. And you understand that that duty applies to each and
16 every representation that you make to the Court?

17 A. Yes.

18 Q. You understand that a lawyer can't disregard that duty
19 for any single representation any more so than for any other
20 representation?

21 A. Yes.

22 Q. You also understand that a witness's duty to tell the
23 truth under oath applies to each and every answer?

24 A. Yes.

25 Q. And you understand that a witness cannot provide a

1 false answer under oath in response to any question, any
2 more so than response to any other question?

3 A. Yes.

4 Q. It's your testimony today, subject to penalty of
5 perjury, that you fully honored the promise as you made in
6 Exhibit 1?

7 A. I believe I did.

8 Q. In May 2006, Mescalero filed a Motion to Revoke your
9 privileges here, right?

10 A. Yes.

11 Q. The motion alleges that you tampered with Ms. Davis's
12 testimony?

13 A. I think that was the -- just part of the motion, yes.

14 Q. Mescalero's Omnibus Motion, later filed, incorporates
15 by a reference to the Motion to Revoke?

16 A. I believe so.

17 Q. Plaintiff's Omnibus Motion again alleges you tampered
18 with Ms. Davis's testimony, true?

19 A. I think so.

20 Q. You defended against this allegation of witness
21 tampering on multiple grounds, correct?

22 A. I deny any witness tampering, yes.

23 Q. Well, one of your principal lines of defense was that
24 I asked misleading questions that confused two audits in
25 order to elicit inaccurate testimony from Ms. Davis,

1 correct?

2 A. I don't remember the exact language of our filing, but
3 we did feel that some of the questioning was likely to lead
4 to some confusion by the witness.

5 Q. Your response to the Motion to Revoke was filed in May
6 of 2006, correct?

7 A. May or June, I don't recall the exact date.

8 SPECIAL MASTER: It was May 26.

9 THE WITNESS: Thank you, Your Honor.

10 A. Then you are correct, Mr. Fallick.

11 Q. (By Mr. Fallick) I want to hand you a copy of that
12 response.

13 MR. FALLICK: Do you have yours handy, Judge?

14 SPECIAL MASTER: Yes, I do.

15 MR. FALLICK: Counsel, do you have one handy?

16 MR. LUCERO: Actually, I don't.

17 MR. FALLICK: I have one.

18 (Note: Mr. Fallick provides Mr. Lucero a copy.)

19 Q. (By Mr. Fallick) Please turn to Page 5 of the Motion to
20 Revoke -- I'm sorry -- to the Response to the Motion to
21 Revoke that is in front of you, to the last sentence under
22 heading B. Doesn't that sentence assert that I asked
23 "questions that were premised upon a blatant and confusing
24 mischaracterization of a letter the defendant Dane Leavitt
25 had written to the tribe and, therefore, had the effect of

1 seeking to trick Ms. Davis into giving testimony that
2 plaintiff's counsel knew or should have known was
3 incorrect"? Did I read that correctly?

4 A. Yes.

5 Q. I asked you about this contention at your May 14
6 deposition, didn't I?

7 A. I don't recall for certain, but I think you probably
8 did.

9 Q. Do you recall testifying that you could not read my
10 mind?

11 A. I think I said something to that effect, yes.

12 Q. Do you also testify -- excuse me. Do you also recall
13 testifying whether I actually intended to trick Ms. Davis
14 was between me and my conscience?

15 A. I think I said something like that, yes.

16 Q. Do you also remember that you stood behind these
17 representations to the Court as fair and candid advocacy?

18 A. I believe so.

19 Q. You believe so or you are sure? Because I have a
20 transcript that I can show you if you need to see.

21 A. Without looking at the transcript, I would not be able
22 to say for certain.

23 MR. FALLICK: And, Your Honor, again, if I may
24 approach. I have a copy of this transcript with the
25 exhibits and the index as well.

1 SPECIAL MASTER: Yes.

2 MR. FALLICK: Thank you.

3 Q. (By Mr. Fallick) Mr. Crofton, please turn to Page 31 --

4 MR. FALLICK: Do you need a copy of that, Mr.
5 Lucero?

6 Q. (By Mr. Fallick) -- and begin on Line 5.

7 SPECIAL MASTER: He doesn't have to read it
8 outloud.

9 MR. FALLICK: Okay, Your Honor.

10 Q. (By Mr. Fallick) Does that refresh your recollection,
11 through Page 32, Line 1, that you stood behind this
12 representation to the Court as fair and candid advocacy?

13 A. I apologize, Mr. Fallick. Could you repeat the section
14 that you want me to read?

15 Q. Page 31, Line 5, through Page 32, Line 1.

16 SPECIAL MASTER: You mean, Page 32, Line 8? You
17 said Line 1.

18 MR. FALLICK: Yes, Your Honor, Line 8. Thank you.

19 SPECIAL MASTER: Uh-huh.

20 A. I have read the passage. Could you repeat the
21 question for me?

22 Q. (By Mr. Fallick) Did you testify in your deposition
23 that you stood behind this language as fair and candid
24 advocacy?

25 A. I testified that I believe that it is a fair

1 statement, yes. That's on Page 32, Line 1.

2 Q. As you sit here today, is it your testimony that that
3 is fair and candid advocacy?

4 A. Yes, I think so.

5 Q. Now, please turn to Page 6 of your response to the
6 Motion to Revoke, the second and third sentences under
7 heading D, which referred to the allegation of witness
8 tampering. And the brief says, "Those outrageous -- excuse
9 me. Let me start over.

10 It says, "Those outrageous accusations are false. The
11 irony is that it was plaintiff's counsel who sought to
12 induce Ms. Davis to give testimony he knew or should have
13 known is not true." Do you stand behind that as fair and
14 candid advocacy?

15 A. Yes, I do.

16 Q. Now, please turn to Page 8 and look at the first
17 little paragraph that starts with the word "During." The
18 first sentence says, "During the subsequent deposition of
19 Ms. Davis, plaintiff's counsel, in blatant disregard of the
20 plain language of the September 29 letter, sought to induce
21 the witness to agree that Mr. Leavitt, in the letter, had
22 characterized her as being the lead of the account
23 (misrepresentation) audit." Did I read that correctly?

24 A. Yes, you did.

25 Q. Do you stand by that as candid advocacy?

1 A. Yes.

2 Q. Based on the party's competing contentions, at that

3 point, Judge Baca took the matter for advisement pending

4 further development of the record, correct?

5 A. Yes, I believe so.

6 Q. The Court entered an interim order?

7 A. Yes.

8 Q. The interim order granted leave to exceed the

9 applicable page limits?

10 A. That is one of the things provided, yes.

11 Q. The interim order permitted the parties to create a

12 complete record on disputed issues they consider necessary,

13 didn't they?

14 A. That's my understanding.

15 Q. Mescalero then filed a pending Omnibus Motion?

16 A. Eventually, yes.

17 Q. The Leavitt defendants responded to that on or about

18 February 28, 2007?

19 A. Yes, we did.

20 Q. The Leavitt defendants' response reiteration of

21 defense, that I asked misleading questions that confused two

22 audits in order to elicit inaccurate testimony from Ms.

23 Davis, true?

24 A. What you just said is obviously a paraphrase. I think

25 it's basically accurate.

1 Q. That was more than a full year after Ms. Davis's
2 February 15, 2006, deposition testimony?

3 A. Yes.

4 Q. I will hand you a copy of your response to the Omnibus
5 Motion.

6 MR. FALLICK: Mr. Lucero, do you have a copy of
7 that?

8 MR. LUCERO: I have that.

9 MR. FALLICK: Your Honor, do you need a copy of
10 that?

11 SPECIAL MASTER: Yes, I think.

12 MR. FALLICK: This is the response.

13 Q. (By Mr. Fallick) Mr. Crofton, here is your response.
14 Please turn to Page 4 of that response, the first full
15 paragraph, first sentence, that reads: "The allegations in
16 the Omnibus Motion of perjury and subornation of perjury are
17 not only pure nonsense. They are outrageous." Is that fair
18 advocacy?

19 A. I believe so.

20 Q. And it's candid with the Court?

21 A. I believe so.

22 Q. And then you go on to say in that same paragraph, "By
23 asking questions premised upon a blatant mischaracterization
24 of a key document, which had already been brought to his
25 attention verbally and in writing, plaintiff's counsel

1 managed to temporarily confuse a young and inexperienced
2 witness. Despite the efforts of plaintiff's counsel, the
3 witness herself quickly realized that she may have
4 inadvertently answered certain questions incorrectly. On
5 her own, she promptly clarified her answers, which was
6 entirely appropriate and, indeed, was her obligation. It is
7 a common occurrence during depositions and should be
8 applauded." Is that fair and candid advocacy with the
9 Court?

10 A. Yes, I think so.

11 Q. And you stood by that language in your deposition
12 under oath as well, correct?

13 A. I think so.

14 Q. Based in part on this line of defense, you asked the
15 Court to deny the Motion to Revoke in its entirety, correct?

16 A. Yes. We absolutely believe that it should be denied
17 in its entirety.

18 Q. And you asked Judge Baca to admonish me, for which the
19 Court is on, didn't you?

20 A. I think a statement to that effect was included in the
21 Response to the Motion to Revoke, yes.

22 Q. Also based in part on these defendants, you went on
23 the offense, didn't you?

24 A. Can you elaborate?

25 Q. You accused me of professional misconduct for

1 Mescalero's filing?

2 A. I don't think we ever used that terminology, no.

3 Q. Let me ask you if this terminology sounds like, I

4 think, what you used. You said the motion papers were

5 frivolous, ripe with inaccuracies, mischaracterizations,

6 half truth, speculation, baseless, a calculated litigation

7 tactic to deprive the Leavitt defendants, or their counsel

8 of choice, preposterous, irrational, false, based on the

9 pattern of misstating the record, specious, devoid of merit,

10 nonsense, outrageous, based on blatant mischaracterization,

11 simply not true, disingenuous, and a calculated effort to

12 use false allegations of unethical and criminal activity to

13 gain tactical advantage in the civil case. You accused me

14 of all of that in your papers, didn't you?

15 A. You are basically asking me to either remember

16 verbatim what we wrote a year ago or to accept your

17 representation that that long list of terms was accurately

18 quoted from the response, so I don't know quite how to

19 answer your question. Are you asking me to go through the

20 response and find all of those words?

21 Q. Well, we could do it that way. I mean, I've got it

22 all here to do that. To cut through it, I can tell you,

23 does any of that sound like something you didn't say?

24 A. No.

25 Q. Do you agree that those are all accurate and candid

1 assessments of plaintiff's papers?

2 A. Yes. I believe we can justify all of that
3 characterizations.

4 Q. Now, at your deposition under oath, you swore that
5 your statements to the court were justifiable responses to
6 my baseless and inflammatory accusations. That's what you
7 said in your deposition; is that true?

8 A. I believe so.

9 Q. Is that a yes? Or do you need to look at the
10 transcript to be sure?

11 A. I guess I would have to look at the transcript to be
12 absolutely sure, but I think I did use that terminology.

13 Q. Do you have the transcript still in front of you?

14 A. Yes.

15 Q. Would you look at Page 31, Line 23, through Page 32,
16 Line 1.

17 A. Yes. I said that as a piece of advocacy responding to
18 the very inflammatory and baseless accusations by opposing
19 counsel. I think this was a fair statement.

20 Q. When you talked about the inflammatory and baseless
21 accusations by opposing counsel, you are talking about the
22 allegations in Mescalero's Motion to Revoke and Mescalero's
23 Omnibus Motion; is that accurate?

24 A. Yes, since specifically the allegations that Tawnya
25 Davis perjured herself, and then I suborn perjury.

1 Q. You repeatedly have represented to the Court for more
2 than a year now that I elicited inaccurate testimony from
3 Ms. Davis by asking misleading questions, correct?

4 A. I believe we have argued in our papers to the effect
5 that some of your questions were premised upon a clear
6 mischaracterization of Dane Leavitt's letter.

7 Q. As you sit here today, is it your testimony that I
8 elicited -- let me start over.

9 As you sit here today, is it your testimony that I
10 elicited inaccurate testimony from Ms. Davis by asking
11 misleading questions?

12 A. I believe so.

13 Q. Is that a yes?

14 A. I believe you did.

15 Q. So that is a yes?

16 A. I'm sorry, could you repeat your exact question?

17 Q. Yes. The question is, as you sit here today, is it
18 your testimony that you believe I elicited inaccurate
19 testimony from Ms. Davis by asking misleading questions?

20 A. Yes.

21 Q. On February 15, 2006, Ms. Davis testified that she was
22 the lead auditor on the Mescalero account audit that
23 actually was conducted, correct?

24 A. Mr. Fallick, that's not my recollection of her
25 testimony on that. If you want to point me to specific

1 passages in the transcript that you think she said that,
2 I'll be happy to look at them. My recollection was that she
3 testified at one point that --

4 Q. You can stop, 'cause you said you need to look at the
5 transcript. I will get it for you. Is that transcript of
6 Ms. Davis's first session of her deposition in front of you
7 still?

8 A. Yes.

9 Q. Please turn to Page 43 and Page 44 of the transcript.

10 A. Okay.

11 Q. And please read beginning on Page 43, Line 22, just to
12 yourself, and on Page 44, Line 17, and please let me know
13 when you are done.

14 A. (Complies.) I'm done.

15 Q. How do you understand that testimony?

16 A. I understand exactly the way it is. First of all, she
17 was asked: "Was there a lead auditor on this internal
18 audit?" The question was not, or you, Ms. Davis, must be
19 the auditor. Her answer was, "As Dane characterized it in
20 the letter, I was characterized as the lead auditor." And
21 then she testified about her understanding of what Dane's
22 characterization was.

23 Q. That is the testimony that Ms. Davis later said was
24 inaccurate, right?

25 A. That's not -- that's not my recollection of what she

1 was changing. I think she had testified in the morning that
2 she did not know whether she was the lead auditor or not.
3 She testified about what her functions were, the things that
4 she had done, what her knowledge was, and so forth, and I
5 believe she testified at one point that she did not know
6 whether that made her the lead auditor. Then after she
7 said --

8 Q. Let me stop you, because you are not answering my
9 question anymore. The question was, "Is that the testimony
10 that Ms. Davis later corrected -- no, that wasn't the
11 question. The question was, "Is that the testimony that Ms.
12 Davis later said it was inaccurate?"

13 Is your answer to that question no?

14 A. Again, my recollection was the testimony that she
15 specifically addressed, after the last, that she said was
16 clarifying was her previous testimony that she did not know
17 whether she was the lead auditor. And on Page 76, she says,
18 "I was not the lead auditor in the audit that was
19 completed." And then she went on in that same paragraph to
20 say, "But the audit that talked about a review of the
21 invoices and payments that is normally done every six months
22 I was going to take a lead in that audit." Now --

23 Q. Is that a no?

24 A. If you are asking me how I interpreted her testimony
25 that I just read --

1 Q. No. I'm asking you, is the testimony, on Page 43
2 through 44, the testimony that Ms. David later said was
3 inaccurate?

4 A. The reason I'm hesitating is that I don't recall
5 offhand that Ms. Davis ever testified that previous
6 testimony she had given was inaccurate.

7 Q. Really?

8 A. If you can point me to that in her transcript, I'll be
9 happy to look at it. Again, my recollection was that
10 she was saying --

11 Q. Let me stop you, because that is not what I asked, and
12 I will go ahead and get you the transcript, as you need it,
13 and there is a copy.

14 MR. FALLICK: And Your Honor --

15 A. I'm sorry, were you talking about her --

16 MR. FALLICK: Stop. I will ask you another
17 question.

18 MR. FALLICK: I didn't give you, Your Honor, the
19 Davis's deposition transcript. I don't think I did.

20 SPECIAL MASTER: I don't have it.

21 MR. FALLICK: There you go, Your Honor.

22 SPECIAL MASTER: Thanks.

23 Q. (By Mr. Fallick) Please turn to page -- well, actually
24 before that --

25 MR. FALLICK: If I can just have a few moments. I

1 thought I have everything, but I didn't anticipate this.

2 Q. (By Mr. Fallick) Please turn to Page 20, Mr. Crofton.

3 A. All right. I think you confused me before by some of
4 your questions. I thought all your previous questions
5 related to the February 2006 transcript.

6 Q. I need you to wait for a question before you start
7 talking, because you are a witness right now.

8 A. The question you just asked me, which transcript? You
9 are talking about the May 14, 2006?

10 Q. I will ask you a question. Off witness right now.
11 You have to wait for a question, and then you get to answer.

12 Please read what Ms. Davis said on Page 20 of the May
13 14, 2007 transcript, beginning on Line 5 and then on Line
14 16. Do you understand -- I'm sorry, I didn't realize you
15 are still reading.

16 A. Okay.

17 Q. Do you understand that to mean Ms. Davis saying that
18 on February 15, 2006, she had testified inaccurately on Page
19 44, beginning on Line 22?

20 A. Yes, I understood it that way, and that was part of
21 what I was going to add previously when you cut me off in
22 one of my responses.

23 Q. So does that mean, as you sit here now, today, you do
24 understand that the testimony on Page 43 and Page 44 of the
25 February 15, 2006 transcript is the testimony that Ms. Davis

1 later said was inaccurate?

2 A. My understanding of her testimony was that she was
3 correcting her previous testimony to the extent that she, in
4 February, in the morning, had indicated an understanding
5 that Dane had characterized her in her September 29 letter
6 as being the lead auditor in the account audit, as opposed
7 to invoice and payment audit?

8 Q. Is that a yes?

9 A. I was unable to answer your question with simply a yes
10 or no because you asked about the entirety of the testimony
11 on Pages 43 and 44. My understanding was that the part that
12 she was clarifying or correcting was Lines 2 and 3 on Page
13 44.

14 Q. So, now that we understand each other, that on Page
15 44, Lines 2 through 3, Ms. Davis later identified that
16 testimony as inaccurate. Do we agree on that?

17 A. I believe so.

18 Q. And that inaccurate testimony was elicited by me by
19 asking misleading questions. Is that your testimony today?

20 A. I believe that her testimony about "As Dane
21 characterized in the letter" resulted in part from the way
22 you asked your questions and assumptions or definitions that
23 you had asked her to use, yes.

24 Q. So that's a yes?

25 A. Mr. Fallick, I believe I have answered your question

1 to the best of my ability.

2 MR. FALLICK: I'm trying to get in the answer.

3 SPECIAL MASTER: He did say yes at the end.

4 MR. FALLICK: Thank you, Your Honor.

5 Q. (By Mr. Fallick) On May 14, 2007, I asked Ms. Davis to
6 review the February 15, 2006, transcript line by line from
7 the beginning, didn't I?

8 SPECIAL MASTER: The record will reflect that you
9 did.

10 Q. (By Mr. Fallick) I asked Ms. Davis to identify the
11 references to the audit that never was performed, didn't I?

12 A. I believe that's correct.

13 Q. Ms. Davis did review the February 15, 2006 line by
14 line until I asked her to stop?

15 A. I think so. There was something to that effect.

16 Q. Do you remember that I asked her to stop on Page 50?

17 A. I don't recall the exact page that you asked her to
18 stop, but I can check the transcript if you'd like.

19 Q. Do you still have that in front of you?

20 A. I do have the transcript, yes.

21 Q. Would you look at Page 50.

22 A. Mine doesn't --

23 Q. I'm sorry. That question was -- I objected, cause it
24 was wrong. Please turn to Page 26, Line 17 of that
25 transcript through Page 27, Line 7.

1 A. Okay.

2 Q. Is that where I asked Ms. Davis to stop looking for
3 references in my questions to the invoice and payment on it?

4 A. In effect, yes. You said, "I think we can move on."

5 Q. I think you said we can move on. Ms. Davis testified
6 that before her testimony on February 15, 2006, Pages 43 and
7 44 of the transcript, that my questions made no mention,
8 whatsoever, of the audit that was never conducted, correct?

9 A. I believe so.

10 Q. You also said that in your deposition, didn't you?

11 A. I think so.

12 Q. Do you need to look at your transcript to know for
13 sure?

14 A. I guess I would.

15 Q. Would you please turn to Page 42 of your transcript
16 from Line 12 through 23?

17 A. I'm sorry, Mr. Fallick, what was the page?

18 Q. Your transcript --

19 A. Yes.

20 Q. -- Page 42, Line 12 through 23.

21 A. Okay. I have reviewed that testimony.

22 Q. Did you testify that none of my questions leading up
23 to Ms. Davis's February 15, 2006 testimony, on Pages 43 and
24 44 of the transcript, asked about the audit that was never
25 conducted?

1 A. I testified that I did not go through page by page,
2 line by line. Offhand I don't recall any questions up to
3 this point where you expressedly were asking her about an
4 invoice and payment audit.

5 Q. Pretty important question, did you do anything between
6 now and then to confirm your offhand understanding of the
7 facts on May 14?

8 A. Not specifically, no.

9 Q. As you sit here today, do you agree that none of my
10 questions leading up to Ms. Davis's February 15, 2006
11 testimony, on Pages 43 and 44 of that transcript, asked
12 about the audit that never was conducted?

13 A. As far as I can recall, you had not expressedly asked
14 up to that point about the audit that was not conducted.

15 Q. Ms. Davis also testified on February 15, 2006 that you
16 were the first lawyer to make any reference to the audit
17 that was never conducted, didn't she?

18 A. You are speaking about during the deposition?

19 Q. Let me ask you a better question. I will ask you a
20 question about what Ms. Davis said on May 14. Do you
21 understand that?

22 A. Yes.

23 Q. On May 14, Ms. Davis testified about the transcript
24 from September 15, 2006, correct?

25 A. Yes.

1 Q. That was the prior transcript of her testimony,
2 correct?

3 A. Yes.

4 Q. On May 14, 2006, did Ms. Davis testify that in the
5 prior transcript of her testimony, you were the first lawyer
6 to make any reference to the audit that was never conducted?

7 A. I think you may have misspoken. If I heard you
8 correctly, your question just referred to the May 14, 2006.

9 Q. Let me try it again.

10 A. Maybe I misheard.

11 Q. Ms. Davis testified three times in this case, correct?

12 A. If you are referring to the two-day session in 2006 or
13 her affidavit and then her testimony earlier this month, I
14 guess I reviewed that.

15 Q. Let me break it down more clear. There is a
16 transcript of Ms. Davis testifying on February 14, correct?

17 A. Yes.

18 Q. There is a transcript of Ms. Davis testifying on
19 February 5, 2006, correct?

20 A. Yes.

21 Q. There is a transcript of Ms. Davis testifying on May
22 14, 2007, correct?

23 A. Yes.

24 Q. Can we agree we'll forget about February 5, 2006 for a
25 moment?

1 A. Sure.

2 Q. So now we've got two transcripts. We've got an '06

3 transcript and an '07 transcript. Is that fair?

4 A. Yes.

5 Q. In the '07 transcript, did Ms. Davis testify that in

6 referring to the '06 transcript, you were the first lawyer

7 to make any reference to the audit that never was conducted?

8 A. Offhand, I do not recall.

9 Q. Please turn to Page 26 of Ms. Davis's May 14, 2007,

10 transcript.

11 MR. LUCERO: What page and line?

12 SPECIAL MASTER: Page 26 --

13 MR. FALLICK: -- Line 1.

14 Q. (By Mr. Fallick) And read through to Page 27, Line 4.

15 Please tell me when you are done.

16 MR. FALLICK: Your Honor, I need to remove my

17 jacket.

18 SPECIAL MASTER: Sure. Anybody who wants to, go

19 ahead.

20 Q. (By Mr. Fallick) Have you read that, Mr. Crofton?

21 A. I'm sorry, yes.

22 Q. I'm sorry, I didn't hear you. Does Ms. Davis there

23 testifying that you were the first person in the '07 -- let

24 me start over.

25 Does Ms. Davis, on those two pages of the '07

1 transcript, testify that in the '06 transcript, you were the
2 first lawyer to mention the audit that was not conducted?

3 A. My interpretation of her testimony was that I had made
4 references to the invoice and payment audit prior to your
5 first mention of the invoice and payment audit, according to
6 her understanding.

7 Q. Is that a yes?

8 A. Well, your question asked about whether she testified
9 about an audit that was not conducted. That's not the
10 terminology she used. She talked about, you know, testimony
11 here on 26 and 27, the invoice and payment audit, so I was
12 simply using the testimony here that she used.

13 Q. You understand that the invoice and payment audit is
14 the audit that was not conducted, correct?

15 A. Yes, at least in terms of the time frame that I
16 assumed you are interested in.

17 Q. So when you talked in your papers repeatedly, and we
18 have gone through it in great detail, about my questions
19 confusing two audits, the two audits you are talking about
20 are the Mescalero account audit that actually had been
21 conducted and the invoice and payment audit that had never
22 been conducted; is that correct?

23 A. I don't think there has been any testimony that had
24 never been conducted. It was not conducted in that time
25 frame of late 2005.

1 Q. I mean, you understand that the testimony before Judge
2 Conway at the depositions there are repeated references to
3 the audit that was never conducted, and we established that
4 everyone understood, in the context of that testimony, that
5 the audit that was never conducted was the invoice and
6 payment audit offered by Dane Leavitt to President Chino in
7 the letter dated September 29, 2005, correct?

8 A. I believe so in that context, yes.

9 Q. So that's the context we were in. Let's talk about
10 the audits that are at issue in this hearing today and in
11 this lawsuit, which is the audit that never was conducted of
12 invoices and payments and the audit that was conducted of
13 the Mescalero accounts. Can we agree that we are talking
14 about just those two audits and not any others today?

15 A. I'll agree to that.

16 Q. So those are the two audits that you talked about.
17 And when Ms. Davis talks about an audit dealing with
18 payments and invoices throughout her testimony on May 14,
19 what she is talking about is the invoice and payment audit
20 offered by Dane Leavitt in his September 29, 2005 letter
21 that was never conducted. Isn't that what she is talking
22 about?

23 A. Mr. Fallick, I apologize. I lost part of your
24 question. If you could repeat it.

25 Q. All right. How many audits was Ms. Davis talking

1 about on May 14, 2007?

2 A. Two.

3 Q. What were the two?

4 A. The so-called account audit that was conducted in
5 September 2005 and the invoice and payment audit that was
6 offered in Mr. Leavitt's September 29, 2005 letter.

7 Q. I mean, it took us all this time to get to that. Were
8 you kidding us or you were just serious that you really
9 didn't understand what we are talking about?

10 A. I don't think I indicated I did not understand what we
11 are talking about. At least that was not what I was
12 intending to get across.

13 Q. I mean, having asked, you know, 50 questions to get
14 the answers to two, is that a tactic, as you sit up there
15 today, to try to prevent the truth from coming out or did
16 you really need all those clarifications?

17 MR. LUCERO: Objection, Your Honor.
18 Mischaracterizes the testimony, and argumentative.

19 SPECIAL MASTER: Sustained.

20 Q. (By Mr. Fallick) On May 14, 2007, we understand that Ms.
21 Davis was talking about the two audits referenced in the
22 September 29, 2005 letter from Mr. Leavitt to President
23 Chino, but one audit that is the subject of virtually the
24 entire letter and the other offer to conduct an audit that
25 was never conducted, that's what Ms. Davis was talking

1 about, true?

2 A. Yes.

3 Q. And when you made your objections on September 15,
4 2005 about confusing different audits and when you made your
5 arguments in all of the papers that you filed with the
6 court, the two audits you were talking about were those same
7 two audits, correct?

8 A. Yes, the two audits referenced to Mr. Leavitt's
9 letter.

10 Q. And your objections were -- let me start over. Your
11 objection that my questions were confusing two audits, we're
12 talking about confusing those two audits, correct?

13 A. Yes.

14 Q. And the statement she is saying you briefed to the
15 Court about mischaracterizing two audits and resulting
16 inaccurate testimony, that was these two audits, correct?

17 A. Correct.

18 Q. One of those audits --

19 MR. FALLICK: May I have a moment, Your Honor?
20 Because I have no idea what my point was, and I'll get back
21 to it.

22 THE WITNESS: Your Honor, while he is looking, can
23 I get a drink of water?

24 SPECIAL MASTER: Absolutely.

25 THE WITNESS: Thank you.

1 Q. (By Mr. Fallick) In her '07 deposition, Ms. Davis
2 testified that in the '06 deposition, you were the first
3 lawyer to talk about the audit that was not conducted,
4 correct?

5 MR. LUCERO: Your Honor, I object. Asked and
6 answered.

7 SPECIAL MASTER: Sustained.

8 Q. (By Mr. Fallick) You agree, as you sit here today, that
9 in the '06 transcript, you were the first lawyer to make any
10 reference to the audit that was not conducted, correct?

11 A. I thought I already testified about that to the best
12 of my ability, that my recollection was that up to that
13 point in the testimony, you had not expressly asked her
14 about invoice and payment audit.

15 Q. Please look at Ms. Davis's '06 transcript, beginning
16 on Page 45, Line 23 -- I'm sorry, let me start all over.

17 Please turn to the '06 transcript, Page 45, Line 24.
18 Isn't it a fact that beginning on that line through
19 including Page 49, Line 20, you consumed 36 of the 97
20 transcript lines?

21 A. I'm willing to take your word for it if you counted
22 them.

23 Q. I have counted. Do you want to double check it, or
24 does that sound about right?
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Q. (By Mr. Fallick) Do you agree, Mr. Crofton, that you
consumed 36 of the 97 transcript lines between Page 47, Line

1 24, and Page 29, Line 20 of the September -- no. Let me
2 start again.

3 Do you agree that you consumed 36 of the 96 transcript
4 lines from Page 45, Line 24 through Page 29, Line 20 of the
5 February 15, 2006, transcript of the deposition of Tawnya J.
6 Davis?

7 A. I have not counted the total number of lines in that
8 section or the number of lines where I was speaking.
9 Looking at it here, I would say that that looks like it's
10 probably about right.

11 Q. And I'll represent to you that that is true, and that
12 is 37 percent of that portion of the transcript. And let me
13 ask you this: You used more than 37 percent of the
14 transcript in that part of the transcript to inject your
15 factual contentions into the record, true?

16 A. No, I would not agree with the way you put it.

17 Q. You used 30 percent of that record repeatedly to coach
18 the witness about your factual contentions, didn't you?

19 A. No, I would not agree with that either.

20 Q. You repeatedly were speaking objections at that point
21 to inject an audit, that never was conducted, into the
22 witness's testimony about the audit that was conducted,
23 didn't you?

24 A. No. I made objections that I felt were appropriate
25 because I thought the questions were vague and ambiguous and

1 had the effect of being misleading, particularly in the
2 context of the exhibit that you had just placed in front of
3 her that led into that section of the transcript.

4 Q. All of your objections and comments on Pages 45
5 through 49 of the transcript came before I said a single
6 word about the audit that was not conducted, didn't they?

7 A. In terms of the statements that you made in the
8 February 15, 2006 transcript in that section, I think that's
9 true. Again, that was just immediately proceeding that you
10 have presented an exhibit in which it was your language that
11 you had just asked her to read. It was an e-mail that you
12 had sent to me in which you had made various assertions and
13 references to both audits.

14 Q. So I want to be clear what it is you are saying before
15 I move forward on this.

16 MR. FALLICK: May I ask Your Honor, does your
17 transcript of the first session of the deposition have the
18 exhibits?

19 SPECIAL MASTER: Yes.

20 MR. FALLICK: May I approach the witness, Your
21 Honor?

22 SPECIAL MASTER: You may.

23 Q. (By Mr. Fallick) Show me the exhibit you are talking
24 about.

25 A. Exhibit 2 to the deposition on February 15, 2006. It

1 was an e-mail that you sent to me.

2 Q. So what you are saying is that before you made your
3 comments about the two audits, I had handed Ms. Davis
4 Exhibit 2 to her February 15 '06 deposition, which is a
5 November 30, 2005 e-mail from me to you with a carbon copy
6 to Mr. Silva, and that that e-mail refers to a passage from
7 Dane Leavitt's September 29, 2005 letter. Is that what you
8 are saying?

9 A. In part, yes.

10 Q. Well, what else are you saying?

11 A. You asked Ms. Davis, on Page 45 of the transcript,
12 beginning with Line 25 -- well, you placed it in front of
13 her, and you pointed out that it had highlighted language,
14 and you said she should feel free to read the whole e-mail,
15 that you are going to ask her questions about the
16 highlighted language, and then you asked her whether she had
17 a chance to review Exhibit No. 2, and she said yes. And
18 then your question was, referring directly to the language
19 that is highlighted exhibit in front of you, "Is that a fair
20 and accurate statement regarding your role in the audit?",
21 and that's when I objected.

22 Q. So all of that comes after Ms. Davis's testimony on
23 Lines 2 and 3 of Page 44 that you agree she later identified
24 as inaccurate, correct?

25 A. I think she characterized it as a clarification, if I

1 recall correctly, but I may be incorrect about that without
2 checking the transcript.

3 Q. So without going back to all the exhibits that you
4 looked at before, as you sit here today, you can't say, yes,
5 Lines 2 and 3 on Page 44 is testimony that the witness later
6 identified as inaccurate?

7 A. That's correct. I don't think -- well, again, I
8 cannot not recall specifically whether she expressedly
9 identified it as being incorrect. I interpreted her, from
10 her later testimony, as being in effect a correction about
11 whether Dane Leavitt had characterized her as being the
12 person that would take the lead on the audit that was
13 conducted, the account audit.

14 Q. The first reference in any of my questions to anything
15 other than the one audit that was performed and reported in
16 Exhibit No. 1, begins on Page 50, Line 7. Is that true?

17 A. I did not interpret it that way, because of the way
18 you asked questions, that we just talked about relating to
19 Exhibit No. 2. You had asked her to review the highlighted
20 language in Exhibit No. 2, which, in part, included your
21 quote from Dane Leavitt's letter, the quote being the
22 "auditor who is assigned to lead this matter is Tawnya
23 Davis," etc.

24 And then you asked her, on Page 45, referring directly
25 to the language that is highlighted on the exhibit in front

1 of you, "Is that a fair and accurate statement regarding
2 your role in the audit?" My position, the defendants'
3 position, as we have explained in the briefs, is we believe
4 that was very clear that Mr. Leavitt's statement in his
5 letter was referring to the invoice and payment audit. But
6 the way you asked your question, you were asking her to
7 agree that that statement referred to the account audit.

8 Q. Now, you understand that one page before that in the
9 transcript, she had just said it was about the audit that
10 was conducted, right?

11 A. Well, again, I think her testimony was that she said
12 "As Dane characterized it in the letter, I was characterized
13 as the lead auditor."

14 Q. Do you still have Ms. Davis's May 14, '07 testimony in
15 front of you?

16 A. Yes.

17 Q. Please turn to Page 24, Line 16, and read to yourself
18 through Page 25, Line 6.

19 A. Okay.

20 Q. Did you understand Ms. Davis there to be saying that
21 when she testified on Pages 43 and 44 of the '06 transcript,
22 at that point in time she understood that she was the lead
23 auditor in both audits?

24 A. No. I think she says here, "I would not say I believe
25 at that time." She says, "I had just associated it, and

1 that's where I made the statement." But she says, on Page
2 24, Line 22, "I wouldn't say I believe it at that time."

3 Q. Well, let's go to that even further. At the top of
4 Page 22, we are talking about a critical testimony where,
5 "As Dane characterized in the letter, I was characterized as
6 the lead auditor," do you see that on Page 22?

7 A. Yes.

8 Q. Then I asked her, "When you gave that answer, did you
9 understand the question to have changed gears, and for the
10 first time to be asking you about the invoice and payment
11 audit...", and she asked the question, "Can you repeat it?"
12 And then she says, "What I remember is, at the time, for one
13 reason or another, I had combined the two, even though, you
14 know, you had said it only refers to the first audit, by
15 reading that initial part of how I talked about my role in
16 the invoice and payment audit, that, then, when you asked
17 this question, my mind just slipped to how I had read that,
18 and that's why I responded the way I did."

19 So that is the part of the transcript where I first
20 started trying to ask her how she understood the facts on
21 Pages 43 and 44 of the transcript. Is that the way you
22 understand it?

23 A. No. I apologize, Mr. Fallick, but I don't have
24 off-the-cuff recollection of all her testimony on May 14,
25 2007.

1 Q. You don't have that right in front of you?

2 A. I have the transcript, yes. Are you asking me to go
3 back now and review -- I'm telling --

4 Q. I understand.

5 A. -- I don't have all the testimony that she gave on May
6 14 in mind, such that when you asked me the question, "was
7 that the first time she said that?", so I can't give you a
8 yes or no under oath. That's what I'm saying. If you want
9 me to go back and look through the transcript, I'll do that.

10 Q. I understand. I'll ask you a different question.

11 You agree that beginning on -- I'm trying to get -- let
12 me start over. You believe that the question on Page 22,
13 Line 9, was an attempt to understand what the witness was
14 thinking when she testified on Pages 43 and 44 of the '06
15 transcript, true?

16 A. Yes. I think that's fair.

17 Q. And you understand that that's the gist of all of the
18 testimony through Page 25, Line 5, correct?

19 A. You know, I think the question speaks for itself. I
20 guess that's probably a fair paraphrase of the gist of what
21 you are asking about in those sections.

22 Q. And at the end of that, she says, "At that time, I had
23 lumped the two audits together." Did I read that correctly?

24 A. Yes.

25 Q. And the question that led to that was, "So you

1 understood that characterization by Dane Leavitt to apply to
2 both audits, as of the top of Page 44, is that true?" Did I
3 read that correctly?

4 A. Yes.

5 Q. Do you agree that that is Ms. Davis testifying, after
6 four pages of trying to get there, that as of the top of
7 Page 44, she understood herself to have been the lead
8 auditor of both audits?

9 A. I can't read -- I don't know. Ms. Davis -- I can't
10 read Ms. Davis's mind. That was not what I understood that
11 she said she was saying, because, again, just a couple lines
12 earlier, she said, "I wouldn't say I believe it at that
13 time."

14 SPECIAL MASTER: Let's take a short recess, ten
15 minutes, okay, and then we'll come back at 20 after 11:00.
16 (Note: Court in recess at 11:10 a.m. and reconvenes at
17 11:30 a.m.)

18 SPECIAL MASTER: Okay. Mr. Crofton?

19 Q. (By Mr. Fallick) Mr. Crofton, when I asked Ms. Davis on
20 May 14, 2007 to identify any questions she considered
21 misleading, up to and including her testimony on Page 44,
22 she testified that not a single one of my questions prior to
23 that was misleading, didn't she?

24 A. She testified, on Page 23, Line 17, "Whether or not
25 you had meant them to be misleading, I was misled."

1 Q. Well, please turn to Page 24, Line 9.

2 "Q. Please, if there is a question in the first 43
3 pages of this transcript that you believe is misleading,
4 please point it out by page and line.

5 "A. Just thinking through, I don't think there was one
6 question that was misleading, but just how it flowed in my
7 mind I became -- whether it was meant to be confusing or
8 misleading, I was" -- that was her testimony, right?

9 A. Correct -- well, that was part of her testimony, yes.
10 That was her testimony right there.

11 Q. That plainly is a witness who intends to testify that
12 she was misled, correct?

13 A. I don't think I would agree with that.

14 Q. Well, it's also plainly the testimony of somebody who,
15 while they are saying they were misled, is also saying that
16 not one of my questions was misleading. Isn't that true?

17 A. She didn't say there was not one of your questions
18 that was misleading. She said, "I don't think there was one
19 question that was misleading, just how it flowed in my
20 mind." I think that's different.

21 Q. So when I asked her to identify one question, any
22 question by page and line that she considered misleading,
23 you don't think that testimony is an admission that there
24 was not one single question she could point out as being
25 misleading? You don't think that admits not a single

1 question was misleading?

2 A. You know, I can't read her mind. Your paraphrase of
3 it differs a little bit from the actual testimony that she
4 gave here.

5 Q. Now --

6 A. To me, she was saying the overall effect was
7 misleading. She may not be able to point to a single -- you
8 know, to isolate a question and say, this question was
9 misleading. That was the way I interpreted her testimony.

10 Q. Isn't that the testimony of someone who came in to
11 insist you have been misleading -- strike that. Well, let
12 me start over.

13 Isn't that the testimony of someone who came in
14 prepared to insist that she had been misled, but was unable
15 to find a single place in the transcript to support that
16 contention? Isn't that this testimony?

17 A. No, I disagree with you. As you may recall, I believe
18 she testified that I was not involved in preparing her, so I
19 don't -- I don't have any knowledge about what you are
20 asking in terms of what her intent was when she came into
21 this deposition.

22 Q. Well, at your deposition, we went through all of the
23 critical questions leading up to Page 44, Line 2, correct?

24 A. You know, I may be mistaken about this, but for some
25 reason, it sticks in my mind that you had asked me to start

1 at that particular place, maybe in the 20's, and then go up
2 to 40 or something.

3 Q. Well, you admitted many critical questions were not
4 misleading at your deposition. Do you agree with that?

5 A. I think I probably said that, looking at a particular
6 question in isolation, something like that, that it would
7 not be misleading. And again, if you like to have me review
8 a particular testimony, I'd be happy to do that.

9 Q. We've been litigating for a year now whether or not I
10 asked questions blatantly mischaracterizing a key document
11 that misled a witness to provide false testimony that I
12 should have known was false; isn't that true?

13 A. That's probably in the ballpark.

14 Q. And we repeatedly have filed briefs about that,
15 haven't we?

16 A. Obviously, the Motion to Revoke and the Omnibus Motion
17 have both been briefed.

18 Q. And you were inadmittedly involved in defending your
19 own by participating in the preparation of the Leavitt
20 defendants' documents, defending against those accusations,
21 true?

22 A. True.

23 Q. And if you rate a lawyer with 25 years experience, you
24 have written lots of briefs?

25 A. Quite a few.

1 Q. And you understood that these briefs were fairly
2 important, given that we have accused you of unethical and
3 criminal conduct, true?

4 A. I consider that important, yes.

5 Q. And a lawyer who is AB rated with 25 years experience,
6 who has written as many briefs as you have, and who is
7 defending against the accusation -- let me break this down a
8 bit.

9 Someone with your skills and experience, who is
10 claiming that false testimony was intentionally elicited by
11 using questions that blatantly mischaracterized a key
12 document, would want to review the transcript to try to
13 identify questions supporting that position, wouldn't you?

14 A. Well, first of all, not to quibble with you, Mr.
15 Fallick, but I don't consider any of Ms. Davis's testimony
16 to be false in the sense that it was intentionally
17 incorrect, as opposed to some testimony that she was
18 confused about, and I think she has done her best to try to
19 clarify both on February 15 and more recently.

20 Q. Let me try again. I'll ask, I hope, a better
21 question. When the Motion to Revoke was being briefed, you
22 understood what was going on, right?

23 A. Obviously, I understood what you had filed and what
24 you said. What I understood was going on was what I
25 considered to be an improper attempt and an intimidation. I

1 was obviously very upset, and I think everybody on the
2 Leavitt team and the people I work at Miller Stratvert was
3 also very upset. So, yes, we understand what was going on.
4 We thought that this was a very improper strategic tactic.

5 Q. Anything else you want to say about that right now,
6 about the impropriety and the tactics? Because I would like
7 you to have the full opportunity to explain. Anything you
8 want to say about that without taking a lot of time to
9 review documents?

10 A. I will not try to be exhaustive on that. That's one
11 of the main topics that we'll be covering in the remainder
12 of the hearing, and we are prepared for that. I think
13 that's a more appropriate way to do that. But I would say
14 that Exhibit 2 to the deposition, the e-mail that we
15 referred to earlier --

16 Q. -- Exhibit 2 to Tawnya J. Davis's February 15, 2006
17 deposition transcript; is that correct?

18 A. Correct. You asserted there that your client's
19 statement to me, that Tawnya Davis was not in charge of the
20 audit, and so forth, was contrary to what was represented to
21 my client, colleagues, and me at the meeting at Mescalero.
22 With everything I know, there was never any statement made
23 during that meeting that Tawnya Davis was in charge of the
24 audit. And my understanding is that you were present at
25 that meeting, Mr. Fallick, and I think to have made that

1 statement, your statement here in this e-mail, and then to
2 use it in the deposition, also went beyond the line,
3 particularly when you then went on in that same document and
4 highlighted language from Dane Leavitt in his letter talking
5 about the auditor who is assigned to lead this matter and so
6 forth, I think you knew or should have known that
7 Mr. Leavitt's statement in his letter dealt with the invoice
8 and payment audit; and I think when you took that statement
9 and put it in this e-mail and showed the witness and then
10 were continuing to ask her questions about the "audit,"
11 which you had previously defined for her, asking her to
12 assume, that as you used the term in her deposition, you
13 meant the audit of the accounts was, in fact, misleading,
14 and again, in my view, you went over the line.

15 Q. Are you planning on presenting testimony this
16 afternoon for somebody who is present at the September 29,
17 2005 meeting about what was and wasn't represented regarding
18 Tawnya Davis at that meeting?

19 A. Not beyond the testimony that is already in the
20 record, which is, as I understand it, is testimony from the
21 Leavitt people that that was not represented and no refuting
22 testimony from anyone on the plaintiff's side.

23 Q. I look forward to your pointing out that testimony
24 this afternoon because of my lack of recollection, and that
25 is not in evidence. But let's move on.

1 My question was, originally, that led us down this
2 road, a lawyer with your skill and experience, claiming an
3 important matter, that a question by opposing counsel
4 blatantly mischaracterized a key document in order to elicit
5 inaccurate testimony from a witness, you would want to
6 review the transcript to identify the questions you were
7 referring to that blatantly mischaracterized the document,
8 wouldn't you?

9 A. If that's what we had in mind by the characterization,
10 yes.

11 Q. You would want to be able to quote in your papers
12 exactly what you were talking about when you say all these
13 things you said about opposing counsel blatantly
14 mischaracterizing the document, wouldn't you?

15 A. You know, you are bent down on the circumstances, but
16 we -- it's important we certainly feel that the statements
17 made in the briefs are supported by the record.

18 Q. When there is disputed portion in the record, and with
19 your experience and with your skill, you like to point out
20 to the Court a place in the record to support your position,
21 don't you?

22 A. Yes, if there is a dispute about the record.

23 Q. And you -- and none of your papers point to anything
24 in the transcript to support your characterization of my
25 questions as misleading, do you?

1 A. I would not agree with that.

2 Q. Show me. You have the response to the Motion to
3 Revoke in front of you, right, and the response to the
4 Omnibus Motion in front of you, right?

5 A. Our response also included statement of facts that you
6 have not put in front of me.

7 Q. You understand that the response that goes to both of
8 those motions is sort of an important document, right?

9 A. Sure.

10 Q. Let's start there. Could you point to any record
11 references in either of those responses supporting your
12 characterization of my questions?

13 A. Just so I have your question clear in my mind, as I
14 read through these responses, you are asking whether there
15 are specific references in the responses to pages and lines
16 of the transcript?

17 Q. I am asking you -- and I'll ask you again to make sure
18 you are clear exactly what the question is -- I'm asking
19 you, is there any reference to any page and line of the
20 transcript from Tawnya Davis's September 15, 2006 transcript
21 that support your contention that I blatantly
22 mischaracterized a document and, therefore, misled the
23 witness into providing inaccurate testimony?

24 MR. LUCERO: Your Honor, I will object on a couple
25 of grounds: One, it is a waste of time. The documents

1 speak for themselves and, of course, are before the Court.
2 Number two, it's beyond the scope of what the testimony of
3 counsel had stipulated would be presented entails.

4 SPECIAL MASTER: Mr. Fallick?

5 MR. FALLICK: I mean, it's cross-examination, and
6 I'm trying to get this witness to identify for the Court
7 anything that supports the positions taken about the
8 questions being misleading and mischaracterizing a document.
9 And I don't want to ask him to read a 300-page deposition as
10 we sit here; I want him to answer that question, and I'm
11 trying to find ways to get an answer. You know, one of the
12 questions before the Court is: Ultimately, as you sit here
13 today, can you point to any place in the transcript, without
14 reading it through, that supports that contention? First,
15 I'm trying to sort of set the stage for -- he ought to be
16 able to point it. I mean, he had written all these briefs,
17 so he ought to be able to point it.

18 And, I think, with a little more leeway, I will
19 establish that there is nothing in this paper, and he can't
20 point to it today, and that is not because he needs to read
21 a 300-page transcript, but it's because it isn't there. And
22 a lawyer as experienced as Mr. Crofton would have found it
23 in the last year if it was there. That's the point, and I
24 think that's directly on point as to what we are trying to
25 establish.

1 SPECIAL MASTER: The objection is overruled, but
2 after this question is answered, let's move on.

3 MR. FALLICK: Yes.

4 SPECIAL MASTER: Maybe you should be asking
5 Mr. Crofton that question, did he have any specific language
6 in mind?, perhaps. I don't know who exactly wrote the
7 responses, but they are signed by different people.

8 MR. FALLICK: If I can get this answer, I'd like
9 to get it, and then I'll ask that question. I'll ask him if
10 he can point to it now without reading the transcript, and
11 then I'll move on.

12 SPECIAL MASTER: Okay.

13 A. In the May 2006 Response to the Motion to Revoke, the
14 main portion of the brief that addressed the alleged
15 corruption and distortion of the record, or what you call
16 "perjury" and "subornation or perjury" or words to that
17 effect, begins on Page 6, and then it goes to Page 9. It
18 gives the factual background, first of all, of the September
19 25 letter, Mr. Leavitt's letter, the fact that there was
20 nothing in that letter that implies that Ms. Davis was the
21 leader or would be the leader of the account audit. At the
22 bottom of Page 7, it talked about your efforts, including
23 your November e-mail to -- in which you asserted that the
24 Leavitt defendants have represented to you and others that
25 Tawnya Davis was in charge of the account audit, addresses

1 my December 5, 2005 response to you. Then it goes into the
2 deposition on Page 8 and asserted that during deposition,
3 you sought to induce Ms. Davis to agree that Mr. Leavitt, in
4 the letter, had characterized her as being the leader of the
5 account audit and asked her questions about the November 30
6 e-mail as well. That appears to be the specific discussion
7 that we had in that particular response.

8 Q. So, is that correct, with respect to the Motion to
9 Revoke, your answer is no. There is no question cited to in
10 that brief that supports your characterization of my
11 questions as blatantly misleading and mischaracterizing a
12 key document?

13 A. We did not cite to specific pages and lines or
14 specific questions. The point we were trying to get across
15 to the Judge was that the overall effect of the questioning,
16 including asking her to assume throughout the deposition,
17 that every time you used the term "audit," she was supposed
18 to think of it as the account audit, had the effect of
19 confusing her, misleading her, particularly when you then
20 began to ask her questions based on the language in Dane
21 Leavitt's letter, which was talking about a different audit.

22 Q. So that's a no? There is no record reference in that
23 Motion to Revoke?

24 A. Again, it was a more -- a general and overall effect
25 rather than saying, this question on this page.

1 Q. Is that true, the omnibus response, there is no
2 specific question that brief points to that says, this
3 question was misleading?

4 A. I see that we referred, on the bottom of Page 17, to
5 the confusion that resulted during the day of this
6 deposition because of the reference to the language
7 concerning the audit. We discussed it more on Page 19 of
8 the response beginning on the middle of the page. We said:
9 "As he had done in his November 30, 2005 e-mail, plaintiff's
10 counsel, through the plaintiff's deposition, asked questions
11 about the Leavitt defendants' account audit by referring to
12 the language of the September 29 letter discussing the
13 payment on it. This caused the witness's confusion, which
14 is obvious, upon reviewing the deposition transcript."

15 Q. Is there any page or line cited to in that response
16 that you claim is an example of a question that blatantly
17 mischaracterizes a key document or is misleading?

18 A. Again, I think what we are trying to explain on Page
19 19, and following, was that asking the witness to make an
20 assumption throughout the deposition that all the references
21 to the audit would mean the account audit, and then mixing
22 that later with questions that I have asked her about, for
23 example, the statement from Mr. Leavitt's letter, did have
24 the effect of confusing the witness, and that was our
25 position.

1 Q. A lawyer with your skill and experience in this
2 context understands that it would be helpful to your cause
3 to point in the transcript to a place where I asked the
4 question that blatantly mischaracterized the document,
5 correct?

6 A. Yes, I think that's probably true.

7 Q. And a lawyer with your skill and experience
8 understands that it would be helpful to your cause to
9 identify a question in the transcript that was misleading,
10 correct?

11 A. I think that is generally correct.

12 Q. And after a year of litigating this issue and filing a
13 response to the Motion to Revoke and attending a hearing on
14 that motion and negotiating an interim order on that motion
15 and filing a Response to the Omnibus Motion and filing a
16 Statement of Facts in Response to the Omnibus Motion and in
17 attaching an inch or more of documents to the Statement of
18 Facts in the Omnibus Motion and in filing an additional
19 pleading to add further exhibits to the record in response
20 to that motion and in preparing to have your deposition
21 taken and preparing to testify today and in preparing to
22 represent your clients at this hearing today, you can't
23 point to a single question in the Davis's transcript from
24 February 15, 2006 that you contend either mischaracterized a
25 document or blatantly misled the witness. Isn't that true?

1 A. I think, for example, on Page 20, when we quoted one
2 of your questions, "Please state in detail what role you
3 personally played in the internal audit that's described in
4 Exhibit No. 1 that is in front of you," to me, that is an
5 example of where the question was misleading, because you
6 knew the letter referred to two different audits. You had
7 asked her to assume throughout the deposition that the audit
8 referred to only the account audit, and yet you had asked
9 her questions about the letter and Dane's language in the
10 letter as if Dane's reference to her taking the lead
11 referenced that same account audit.

12 Q. Can you identify that page and line again, please.

13 A. Page 12, beginning with Line 24, your question was,
14 "Please describe in detail what role you personally played
15 in the audit as described in Exhibit No. 1 that's in front
16 of you."

17 Q. Is there any other -- let me back up. Your answer to
18 my question is, no, I can't identify a question and answer
19 that I consider to have been misleading. And the question
20 on Page 21 -- I'm sorry; strike that. Your answer is,
21 first, yes, I can identify a question that I consider to
22 have been misleading; is that correct?

23 A. I'm saying that I believe that that question was
24 misleading in the sense that it asked about two -- and asked
25 as if there was one audit when, in fact, the letter talked

1 about two distinct audits. And it appears, I think, in
2 retrospect, from the testimony that we have, that that was
3 part of what led to Ms. Davis's confusion as she testified.

4 Q. Is that the only question, as you sit here today, that
5 you can point to that would be helpful to your case by
6 pointing out a record reference to support your
7 characterization of my questions as being misleading and
8 mischaracterizing a blatant document?

9 A. We talked previously about your question to her on
10 Page 45 about Exhibit 2. There you had placed in front of
11 her your e-mail, which essentially what it did was to take
12 your position, your representation to her that according to
13 you, the Leavitt defendants had represented in the meeting
14 in September 2005 that Tawnya Davis had been in charge of
15 the audit.

16 And then as part of your support or your position in
17 saying that the Leavitt defendants are now contradicting
18 their prior representation, you quoted the language from
19 Mr. Leavitt's letter about the auditor who is assigned to
20 lead this matter, I think by putting that quote in this
21 e-mail, in the context in which it was, and the point that
22 you were trying to make, that you were trying to give and
23 did give, the clear impression that Dane's letter was
24 referring to Ms. Davis as the person who would take the lead
25 in the account audit.

1 Q. And, of course, that's what she said one page earlier,
2 right?

3 A. She said, "As Dane characterized it in the letter, I
4 was characterized as the lead auditor."

5 Q. And you understand from the question before and after
6 that, that was clarified, and she was saying Dane Leavitt
7 characterized her as the lead auditor on the audit that was
8 conducted. That's what she said on Pages 43 and 44, isn't
9 it?

10 A. Well, she testified, on Page 44, about what that
11 characterization meant to her, and then you asked her, "An
12 audit you are referring to is the internal audit that was
13 conducted and reported in Exhibit 1?", and she said, "Yes."

14 SPECIAL MASTER: Mr. Fallick, we should probably
15 break for lunch. Why don't we reconvene at 1:30.

16 MR. FALLICK: Thank you, Your Honor. Can we stay
17 in the courtroom?

18 SPECIAL MASTER: Can you stay in the courtroom?

19 MR. FALLICK: Yes. Is that okay?

20 SPECIAL MASTER: Sure, if you want to. Okay.

21 Thank you.

22 (Note: Court in recess at 12:00 p.m.)
23
24
25

1 (Note: Court in session at 1:31 p.m.)

2 THE COURT: All right. Then, Mr. Crofton, would
3 you retake the stand, please.

4 THE WITNESS: Thank you, Your Honor.

5 Q. Let's pick up where we left off, Mr. Crofton. I was
6 asking you to identify pages and lines in Ms. Davis's
7 testimony supporting your contention that I elicited
8 inaccurate testimony from Ms. Davis by asking misleading
9 questions and/or questions that blatantly mischaracterize
10 the view document. Is that your recollection of where we
11 were?

12 A. I believe so.

13 Q. You identified page 12, line 21 of the February 15,
14 2006, transcript, correct?

15 A. Yes.

16 Q. That was the only page and line you identified before
17 Ms. Davis's testimony on pages 43 and 44 of that transcript,
18 correct?

19 A. Did you say page 12, line 21?

20 Q. Correct.

21 A. I think what I had referred to was page 12, line 24.

22 Q. Give me one moment.

23 THE COURT: Well, both of the questions need to be
24 taken into account, because it was a restatement supposedly
25 of the question on line 21.

1 A. Yes.

2 MR. FALLICK: Thank you, Your Honor.

3 Q. And the answer -- well, it was those questions on line
4 21 through 22 and 24 of that page through the next page,
5 line one that you identified; is that right?

6 A. Yes.

7 Q. And that was the only page and line that you identified
8 before Ms. Davis's testimony on pages 43 and 44; is that
9 correct?

10 A. I believe I also had referred to the fact that asking
11 her to use your definition of "the audit" throughout the
12 deposition as meaning only the account audit also lead to
13 confusion on the part of the witness.

14 Q. Let me go back to that in a minute, but let's start
15 with page 12, beginning on line 21. Now, Ms. Davis
16 testified at her '07 deposition that as of the top of page
17 44 of the February 15, '06, deposition all of my questions
18 related to the audit that actually was conducted, right?

19 A. Mr. Fallick, I want to make sure that I have your
20 question correctly in mind. Would you mind asking it again.

21 Q. On May 14th, 2007, Ms. Davis testified about her
22 February 15, 2006, deposition transcript, correct?

23 A. Yes.

24 Q. And on May 14, 2007, Ms. Davis said that on February
25 15th, 2006, as of the top of page 44 of that transcript, all

1 of my questions related to the audit that actually was
2 conducted?

3 MR. LUCERO: Objection, Your Honor. I believe it
4 mischaracterized her testimony, and it's been asked and
5 answered several times, I believe.

6 THE COURT: Sustained.

7 MR. FALLICK: May I ask, Judge, did you consider
8 that to have mischaracterized the record or asked and
9 answered?

10 THE COURT: Asked and answered.

11 MR. FALLICK: Thank you.

12 Q. Would you turn to Exhibit 1 to Ms. Davis's February 15,
13 2006, deposition?

14 A. I'm there.

15 Q. That is Dane Leavitt's September 29, 2005, letter
16 including attachments, and it is 20 pages, correct?

17 A. Yes.

18 Q. There is no reference in that letter to the invoice and
19 payment audit other than in the bottom paragraph on page
20 three and the top paragraph on page four, correct?

21 A. I believe the section that begins near the bottom of
22 page three that says, "Request for information," and
23 includes the first two full paragraphs on the top of page
24 four would be the portion of the letter that talks about the
25 invoice and payment audit.

1 Q. And that's it, right?

2 A. I believe so. I haven't gone back and read the entire
3 letter, but that's my recollection. I mean, there are some
4 references; like, for example, at the very top of page two,
5 that indicates the structure of the letter and refers to the
6 fact that it will include a discussion of the request for
7 information, but the substantive discussion about the
8 invoice and payment audit is on the two pages I mentioned as
9 far as I can recall.

10 Q. Let's go back to page 12 of the transcript and actually
11 one more page. Go back to page 11, line 8, and at that
12 point I ask the following question and Ms. Davis gave the
13 following answer:

14 "QUESTION: Does this document refer to an audit
15 regarding the Mescalero/Apache Tribe?

16 "ANSWER: Yes."

17 Did you object to that question?

18 A. No.

19 Q. You did not object to that question, because it was
20 clear, unambiguous and unobjectionable; isn't that true?

21 A. It's not clear as to whether you literally meant an
22 audit in the singular as opposed to whether the audit --
23 whether the letter refers to multiple audits, but I did not
24 object to the question.

25 Q. And now, please look at line 24 on page 12. The

1 question is:

2 "QUESTION: Please describe in detail what role you
3 personally played in the audit that's described in
4 Exhibit Number 1 that's in front of you?

5 "ANSWER: I was involved from the beginning of the
6 audit and helped throughout the different stages, so
7 I was the one that was aware of all different
8 things that occurred."

9 Did you object to that question?

10 A. No.

11 Q. You did not object to that question, because it was
12 clear, unambiguous, and unobjectionable; isn't that true?

13 A. I think it would have been legitimate to make an
14 objection to that question given the way it was phrased, but
15 I think I assumed that you were referring to the account
16 audit when you asked your question.

17 Q. The witness then makes it clear from page 12, line 24
18 through page 13, line 4 that she understood exactly what I
19 was talking about, and that was the audit that was
20 conducted, correct?

21 A. I interpreted her answer on page 13 as referring to the
22 account audit that was conducted.

23 Q. You also said that it was misleading for me to have
24 defined the audit the way I did at her -- let me start over.
25 This afternoon you said it was misleading for me to have

1 characterized my questions referring to a single audit the
2 way I did in the February 15, 2006, deposition; is that your
3 testimony this afternoon?

4 A. What I'm saying is that by defining -- by asking the
5 witness to assume that the term "the audit" as used in any
6 questions you would ask referred only to the account audit
7 ended up contributing to her confusion when some of the
8 subsequent questions were asked including the way that you
9 presented Exhibit 2 to her.

10 Q. Now, I asked you about those questions at your
11 deposition, right?

12 A. You're referring to the last question you asked me or
13 to a longer series? I just want to make sure I understand
14 which.

15 Q. The questions that defined the term "the audit" for
16 further questioning at her deposition on February 15th,
17 2006, I asked you about those questions at your deposition
18 on May 14th, 2007, didn't I?

19 A. Is there a particular page and line you'd like my to
20 look at?

21 Q. Well, the answer is unless I do that, you don't know?
22 You can't just answer that without a page reference? I'll
23 withdraw the question.

24 A. I have a recollection that there were some questions
25 along that line, but sitting here, I don't recall exactly

1 what they were.

2 Q. Well, look at page 35, line 1, through page 38, line 1,
3 and isn't it a fact that all those questions that you now
4 are saying were misleading you said then were not
5 misleading; isn't that true?

6 A. On page 37 when you asked me about one of your
7 questions, I said, "I did not feel that the question as
8 asked on page 27 was objectionable, so I did not lodge an
9 objection," and at the bottom of page 37, I said, "Viewed in
10 isolation as the question was asked at that point in the
11 deposition, I did not think it was objectionable." And then
12 on 38 I said, "I think that, again, based on how you
13 subsequently asked some of your questions, including the
14 questions that related to Exhibit 2, that it did lead to
15 some confusion."

16 Q. Is that a yes, you testified that none of those
17 questions were misleading?

18 A. Again, I said I felt that some of those questions lead
19 to some of the confusion by the witness.

20 Q. Do you still have the omnibus motion -- excuse me. Do
21 you still have the response to the omnibus motion in front
22 of you?

23 A. Yes.

24 Q. You know, I'm going to cleanup a little there, so it's
25 a little less confusing on your desk.

1 A. Again, I don't have the statement of facts, but if
2 you're referring to the body of the response, I have that.

3 Q. That's what I'm referring to. I'm just going to pile
4 all these things up for you here so they're handy but so
5 that they're not in your way.

6 Please turn back to page four of that response. That's
7 where you say, "Despite the efforts of Plaintiff's counsel,
8 the witness, herself, quickly realized that she may have
9 inadvertently answered certain questions incorrectly. On
10 her own she promptly clarified her answers, which was
11 entirely appropriate and indeed was her obligation, is a
12 common occurrence during depositions and should be
13 applauded." Did I read that correctly?

14 A. Yes.

15 Q. That was a deliberate attempt to mislead a busy court
16 about voluminous record, wasn't it?

17 A. No.

18 Q. I asked you at your deposition to identify the first
19 page and line in Ms. Davis's February 15, 2006, deposition
20 transcript supporting your contention that Ms. Davis, on her
21 own, promptly clarified her answers; do you remember that?

22 A. I think so.

23 Q. You testified that the first testimony supporting your
24 contention begins on page 54 of the September 15, 2006,
25 transcript, didn't you?

1 MR. LUCERO: Which page are we on?
2 MR. FALLICK: I'm sorry?
3 MR. LUCERO: Which page are we on?
4 MR. FALLICK: In his transcript on May 14th?
5 MR. LUCERO: Yes.
6 MR. FALLICK: Page 51, line 18.
7 A. I believe your question to me at my deposition related
8 to the portions of Ms. Davis's February 15, 2006, transcript
9 beginning on page 43, line 22, and I see in my response on
10 the bottom of page 51, I referred to page 54 of Ms. Davis's
11 transcript.
12 Q. Is that a yes?
13 A. Your question was whether page 54 was the first page
14 that I referred to in my deposition that was responsive to
15 your question?
16 Q. Correct.
17 A. It appears that way from pages 51 and 52.
18 Q. In fact, I spent five pages starting at the transcript
19 of your deposition on page 46 and going all the way through
20 to line 3 of page 52 to try and get that answer, right?
21 A. I think the question that you asked me on page 46 was
22 to identify the page and line where Ms. Davis promptly
23 clarified her answers on her own.
24 Q. Is that a yes?
25 A. On page 49 I referred to testimony by Ms. Davis that

1 was given on page 53 and was in response to a question you
2 asked on page 52. So I believe it was the testimony on page
3 53 that I identified during the deposition as being a --
4 during my deposition as being a clarification by Ms. Davis
5 after page 43 of her February deposition.

6 Q. Well, let's look at some of the things you said before
7 that testimony on page 53. Please turn to page 45, line 24.
8 At that point you say, "I'm going to object to the form as
9 being vague and ambiguous and misleading. The term 'the
10 audit' as used by Mr. Fallick this morning has apparently
11 been referring at least for the most part to the audit
12 concerning quotes and proposals associated with the account
13 as referenced on page four of Exhibit 1. So his question is
14 vague and ambiguous and misleading, because he's now mixing
15 different audits including an audit dealing with payments
16 and invoices, and his email seems to be talking only about
17 the type of audit that pertains to the quotes and
18 proposals."

19 You made that speaking objection before Ms. Davis on
20 her own promptly clarified her answers, right?

21 A. I made the objection that you just read from pages 45
22 to 46.

23 Q. Do you deny that that's a speaking objection?

24 A. I don't know exactly how to define a "speaking
25 objection." This one obviously included more explanation

1 than some other objections.

2 Q. Please turn next to your response to the motion to
3 revoke, page five, under the heading Alleged Speaking
4 Objections. Second sentence says, "With few exceptions,
5 each objection interposed by Mr. Crofton was identified with
6 no more than a few words such as 'vague, ambiguous, lacks
7 foundation, calls for speculation, misstates prior
8 testimony, or calls for a legal conclusion.' Such
9 objections are fully consistent with the rules and are
10 commonly asserted by New Mexico attorneys."

11 You understand that the objections you describe in that
12 language are not speaking objections, correct?

13 A. I do not think of objections falling within those
14 categories as being speaking objections.

15 Q. And when you filed the response to the motion to
16 revoke, you understood the difference between a speaking
17 objection and an objection that wasn't a speaking objection,
18 because you described it in the response, didn't you?

19 A. I understand that there are objections that are
20 sometimes categorized as being speaking objections, and
21 there are other objections that are considered not to be
22 speaking objections. I don't claim to know exactly where --
23 how to draw the line in every -- in every case to say
24 whether a particular objection is a speaking objection or
25 not.

1 Q. Please turn to page 47, line 13 of Ms. Davis's February
2 15, 2006, deposition. You say, "Same objections,
3 particularly that the question is vague and ambiguous
4 regarding what is meant by 'the audit' in the context of the
5 pending question and, therefore, is misleading."

6 You lodge that objection before Ms. Davis on her own
7 promptly clarified her answers, right?

8 A. I made that objection on page 47 before Ms. Davis
9 responded to the question.

10 Q. That's a yes?

11 A. I think so.

12 Q. Then on page 48, line 12, you interrupted me and said,
13 "The phrase 'the audit' was not" -- before the court
14 reporter then interrupted you, right?

15 A. It appears that way from the -- from the transcript. I
16 don't know whether I interrupted you or if you had stopped.
17 It indicates that you withdrew the question. I don't recall
18 whether you had already stopped or if I literally
19 interrupted you.

20 Q. I mean, you don't recall that the court reporter there
21 interrupted you to say, "Mr. Crofton, I can't take both of
22 you talking out at the same time?" You don't remember that?

23 A. No, I don't.

24 Q. Now, please turn to page 49, line 1, and there you
25 say --

1 THE COURT: Let me ask you a question,
2 Mr. Fallick. I mean, all of this is on the record. Do you
3 think it's more helpful to you -- for you to simply make an
4 argument rather than going, taking the witness through all
5 of this and saying, did you say that and does he think
6 that's a speaking objection? It's not really his opinion
7 that counts.

8 MR. FALLICK: Okay. Let me move on. If it's not
9 helpful, then there's no point in doing it, and this may not
10 be helpful either. Let me -- I'll do it quick.

11 Q. And then on that same page, lines 10 through 20, where
12 you talk -- you don't even --

13 A. I'm sorry. Which page are we on now, 48 or 49?

14 Q. Page 49, lines 10 through 20.

15 A. Okay.

16 Q. None of that -- you don't even use the word "objection"
17 in any of that, do you?

18 A. No.

19 Q. That's -- I mean, do you deny that you're not even
20 pretending to make an objection there? You're just coaching
21 the witness with a detailed statement of your factual
22 contentions?

23 A. My comments were directed to you, Mr. Fallick, and I
24 was trying to obtain clarification of your -- of your
25 questions.

1 Q. And the correction -- well, strike that. Let me start
2 over. The clarification you're talking about that then came
3 promptly on page 53 and page 54, at that point still doesn't
4 even deny that she was the lead auditor on the audit that
5 was conducted. It just at that point says, ultimately on
6 page 54, line 5, "Whether or not that qualifies me as the
7 lead auditor, I'm unable to say," right? So at that point
8 she's still not denying she was the lead auditor, was she?

9 A. I think it would depend on the definition of "the lead
10 auditor", because she -- I think she had testified earlier
11 that she was not the person in charge of the audit, and so,
12 for example, in Exhibit 2, when you referred to her as being
13 not in charge of the audit, I think if that's the definition
14 that you were intending by "the lead auditor," then I think
15 she had previously said that she was -- she was not in
16 charge, which would be the equivalent of saying she was not
17 the lead auditor. What she was saying on page 54 was she
18 did not know whether being the person who had the greatest
19 knowledge of what was going on and the information that was
20 gathered whether that made her the lead auditor.

21 Q. Was that a "no"?

22 A. It was my best attempt to respond to the question as
23 you phrased it.

24 Q. Do you deny that the first time Ms. Davis denied that
25 she was the lead auditor on the audit that was conducted was

1 on page 75 at line 24, a full two hours and 20 minutes after
2 her testimony on page 43 of the transcript?

3 A. Did you say 43?

4 Q. Let me break it down. Was page 75, line 24 the first
5 time she denied she was the lead auditor on the audit that
6 was conducted?

7 A. Using the term or the phraseology "the lead auditor",
8 to the best of my recollection that was the first time in
9 her deposition that she said, "I was not the lead auditor."

10 Q. That was 2:04 p.m. and 44 seconds?

11 A. The way my transcript is bound I can't see the full
12 time along the left margin.

13 Q. How about this one?

14 A. It appears from the bottom of page 75 that the time
15 when she began her testimony on line 24 was at 2:04.

16 Q. That was after lunch?

17 A. Yes.

18 Q. And the testimony on line 2 and 3 on page 44 was at
19 11:44 in the morning?

20 A. Yes.

21 Q. Do you stand by all of your deposition testimony in
22 this case?

23 A. I didn't receive the transcript until Tuesday, and I
24 have not had an opportunity to review it. I was just able
25 to glance at a portion of it and then, of course, the

1 sections that you brought to my attention today.

2 Q. Can you see anything that looked wrong?

3 A. No. It occurred to me that -- this is the only page I
4 looked at on my own. On page 4, on line 12, you asked me
5 about being present on May 14 during the depositions of
6 Ms. Davis and Mr. Chidester, and then your very next
7 question was, "Do you, as you sit here today, agree that
8 Ms. Davis changed her testimony over the course of the
9 deposition regarding her role in the audit?"

10 And I said, "Yes." I was referring in my answer to her
11 deposition in February, 2006, and not to the deposition that
12 was referred to in your previous question.

13 Q. Thank you. As you sit here today testifying under
14 penalty of perjury, is it your testimony that Ms. Davis on
15 her own promptly clarified her testimony on February 15,
16 2006?

17 A. Based on the portions of the transcript that you have
18 asked me about in my testimony, I would say that there --
19 there were some objections that I had asserted, and so as to
20 those particular sections, you know, I can't say, because I
21 can't read Ms. Davis's mind, and I haven't asked her whether
22 clarifications or changes that she made in her testimony
23 were prompted by objections that I made or things that you
24 asked or from her looking further at some of the exhibits.
25 What I was -- my understanding of what we were referring to

1 in the brief when we included that language was the fact
2 that she had raised a question with Mr. Chidester and me
3 over the -- over the lunch hour.

4 Q. Are you now backing off your contention that the first
5 full paragraph on page four was a candid representation to
6 the Court?

7 A. Well, I would certainly agree with you that as to some
8 portions of the transcript, there were instances in which I
9 made objections and then she gave her responses, and I
10 suppose you could argue that it's not clear whether those
11 responses were on her own or influenced in some respect by a
12 variety of factors including possibly some of the
13 objections. I do think there were instances where she
14 clarified on her own. So I think this statement on page
15 four of the -- of the response is true to the extent that
16 there were at least some instances where she did clarify on
17 her own.

18 Q. Isn't it a fact that the first full paragraph on page
19 four is a deliberate attempt to confuse and mislead a busy
20 court about the state of the record?

21 A. No, that is not true.

22 Q. As you sit here today under penalty of perjury, is it
23 your testimony that this sort of thing is a common
24 occurrence in your depositions?

25 A. It certainly has been a common occurrence for me over

1 the course of my career in depositions, whether taking or
2 defending, to have a witness clarify or amend or change
3 testimony.

4 Q. As you sit here today testifying under penalty of
5 perjury, is it your testimony that this sort of thing should
6 be applauded?

7 A. I think it is appropriate and admirable for a witness
8 when he or she realizes that for whatever reason they gave a
9 -- gave testimony that was incorrect, that they should
10 correct it promptly, yes.

11 Q. You offered in your response to the omnibus motion to
12 answer any questions that the special master may have about
13 your conduct in this case, right? Without looking at a
14 specific reference, do you remember that you made that
15 offer?

16 A. The only reason I hesitate is I don't recall whether we
17 said that specifically in the context of the allegations of
18 perjury and subornation or if we made it globally for all of
19 the issues.

20 Q. Please turn to page 29 of your response. Look at the
21 last line of your response. Does that refresh your
22 recollection that you offered to present -- to respond to
23 any questions the special master may have?

24 A. Yes.

25 Q. Judge Conway told you at the April 20, 2007,

1 preliminary conference that you were not required to offer
2 any testimony, didn't she?

3 A. I don't recall whether she put it in exactly those
4 terms, but I think the -- the gist of it was that each party
5 would be able to decide which witnesses to call.

6 Q. Do you remember Judge Conway saying you were free to
7 rely on your papers and argue that Mescalero had not met its
8 burden. Do you remember Judge Conway telling you that?

9 A. I think so.

10 Q. But even though you weren't required to do it, you
11 chose to present testimony supporting your denial of
12 subornation of perjury, correct?

13 A. My recollection is that on April 20, after Judge Conway
14 indicated that the way she wanted to proceed would be for
15 the parties to choose the witnesses, if any, that they would
16 present, that the Leavitt Defendants said that we would call
17 Mr. Chidester to testify, and I believe you responded to
18 that by saying that you then wanted to depose not only
19 Mr. Chidester but Ms. Davis and me about the lunch hour
20 conversations, and I believe in the course of jointly
21 drafting the stipulation that would address that and address
22 the associated nonwaiver of privilege issues, the Leavitt
23 Defendants indicated that they would also reserve the right
24 to call Ms. Davis and/or me to testify.

25 Q. Judge Conway told you if you wanted to say, "Forget it.

1 We don't want to put on any testimony. We're just going to
2 rely on the papers in the documentary record," that that was
3 your choice, and you determined to put on testimony about
4 what was said over the lunch hour, right?

5 A. As to Mr. Chidester, yes.

6 Q. And you could have said, "Forget it. We're not going
7 to put Mr. Chidester on, because we don't want my deposition.
8 We don't want Tawnya's deposition taken. If those are the
9 rules, forget it. We're not going to put on any testimony."
10 You were completely free to say that at the time, correct?

11 A. I think so.

12 Q. And you made the calculated decision to present
13 perjured testimony in the hope of lying your way out of
14 this, didn't you?

15 A. No.

16 Q. You've been consistent in your advocacy throughout this
17 litigation, haven't you?

18 A. Are you referring to all the issues that have been in
19 the case, or are you talking specifically about the things
20 that have been the subject of my testimony?

21 Q. I'm talking about your advocacy, your style of
22 advocacy, your level of of candor to the Court. That's been
23 consistent throughout, correct?

24 A. I've certainly tried to be candid with the Court
25 throughout.

1 Q. I mean, you didn't say, "Well, I'm going to lie to the
2 Court about this stuff, but I'm going to be truthful about
3 something else?" I mean, you applied a consistent standard
4 throughout your advocacy in this case; is that true?

5 A. I never lied to the Court, and I never said I was going
6 to lie to the Court. I never thought to myself, "I'm going
7 to lie the Court or, you know, I'm going to tell the truth."
8 I always intend to tell the truth. I always try to tell the
9 truth.

10 Q. Next, I'm going to place in front of you the exhibits
11 to the Motion to Compel Discovery and Sanctions, the omnibus
12 motion. I'm going to take all these things away, because I
13 think we may be done with them all, and if it turns out we
14 need them, we'll have them.

15 Please turn to page three -- I'm sorry. Please turn to
16 Exhibit A and then turn to page three, and under your
17 response to Request Number 1, second sentence, you say,
18 "Without waiving the aforementioned objections, LGE is
19 producing the nonprivileged documents pertaining to
20 Plaintiff or one of its affiliated entities that were
21 reviewed by the internal audit team as part of its audit of
22 accounts of Plaintiff or its affiliated entities;" is that
23 correct?

24 A. Yes.

25 MR. LUCERO: Your Honor, I'm going to object to

1 the line of questioning as it goes beyond the, again,
2 stipulated topic and scope of the testimony that was agreed
3 to at the preliminary hearing both as to the depositions and
4 as to this hearing.

5 MR. FALLICK: It's one last credibility point,
6 Your Honor, and I think I can do it pretty efficiently and
7 finish up.

8 THE COURT: It will go just to credibility.
9 Overruled.

10 Q. And you signed that document, the response, on behalf
11 of your clients, correct?

12 A. Yes.

13 Q. You did so under New Mexico Rule 11?

14 A. That was my understanding.

15 Q. You understood that you were obligated under Rule 11 to
16 have a good faith basis to make this statement?

17 A. Yes.

18 Q. At all times from December 30, 2005, the date of this
19 response, through and including your statements at the
20 January 30, 2007, hearing before Judge Baca, you repeatedly
21 represented to a busy Court that you had produced all
22 nonprivileged documents related to Mescalero and its
23 affiliated entities, didn't you?

24 A. As best I can recall, there were some statements in
25 some of the Court filings by the Leavitt Defendants to the

1 effect that they had produced the nonprivileged documents
2 pertaining to the Plaintiff and its entities.

3 Q. And that's what you told Judge Baca personally in open
4 court on January 30, 2007, right?

5 A. That certainly is possible. I don't believe I've
6 looked at that transcript in quite sometime.

7 MR. FALLICK: May I approach, Your Honor?

8 THE COURT: Yes.

9 A. That's why It would be difficult for me to -- without
10 looking at it to testify under oath that I absolutely did or
11 did not.

12 Q. I'm placing in front of you a transcript of the January
13 30, 2007, hearing before Judge Ted Baca. Please turn to
14 page 29.

15 THE COURT: Is there anything that you're going to
16 be pointing us to that was the subject of redaction by the
17 Court?

18 MR. FALLICK: No, Your Honor.

19 THE COURT: Okay.

20 Q. On the bottom of page 29, you say, "First of all, none
21 of these confidential documents are from the Leavitt
22 Defendant files for the Mescalero accounts. All the
23 responsive documents from those files, from Mescalero files
24 that were nonprivileged were produced without designating
25 those as confidential." Did I read that correctly?

1 A. Yes.

2 Q. Next, "The documents that we're dealing with here are
3 those that relate to nonparties including other Indian
4 tribes at least some of whom are competitors or potential
5 competitors of the Plaintiff." Did I read that correctly?

6 A. Yes.

7 Q. And then further down on line 11, "In addition, I think
8 it's fair to say that the Plaintiff's written discovery
9 requests encompass virtually every document and other
10 information including computer data relating to any or all
11 of the Defendant, LGA's clients. There are approximately 60
12 bankers' boxes worth of these documents that we believe
13 would be responsive to this request."

14 Does that refresh your recollection that you told Judge
15 Baca on June 30, 2007, what you've said in your document
16 response that's Exhibit A and also in your papers that you
17 had produced all documents related to Mescalero from our
18 account records?

19 A. What I said at the bottom of page 29 was that all of
20 the responsive documents from the Mescalero files that were
21 nonprivileged had been produced without designating them as
22 confidential.

23 Q. Was that a "yes"?

24 A. Well, I think your question was somewhat broader, so
25 actually I guess my answer would be, no, that I referred to

1 producing only the responsive documents.

2 Q. Well, under Request Number 1, the sentence about what
3 you're going to give us, that's responsive documents, too,
4 right?

5 A. Yes.

6 Q. And in all of the papers where you tell the Judge that
7 you're giving us everything that relates to Mescalero,
8 that's responsive documents, too, right?

9 A. What we said in the document response, your Exhibit A,
10 and what I said in the hearing was that we were producing or
11 had produced the documents that were responsive to Mescalero
12 discovery requests. Your request had not asked us for any
13 and all documents relating to the Mescaleros. Your request
14 involved certain documents either reviewed by the audit team
15 or otherwise relating to the audit. So when I say
16 responsive documents, I'm referring to the ones that we felt
17 fell within the request as initially framed or in some cases
18 as subsequently narrowed through negotiations between The
19 parties.

20 Q. You know, I hesitate to quote Ronald Reagan, but I
21 mean, there you go again, Mr. Crofton. Let's back up a
22 little bit.

23 THE COURT: Mr. Fallick, you shouldn't be
24 commenting on the witness' testimony.

25 MR. FALLICK: Thank you, Your Honor. I apologize.

1 Q. The part you just read, when you're talking about the
2 60 bankers' boxes worth of documents, you say, "We believe
3 they would be responsive to the request;" isn't that what
4 you said?

5 A. We believe that the -- what I was told was that the 60
6 boxes contained documents at least some of which were
7 responsive. As far as I can recall, I was never told and
8 never represented that every document in the 60 boxes would
9 be responsive. You may recall part of our point as we went
10 through lengthy discussions and briefing and so forth over
11 how to deal with those documents was that the Leavitt
12 Defendants did not want to incur the expense of going
13 through a page by page, line by line review of all of those
14 papers in the 60 boxes.

15 Q. Do you deny that you have repeatedly said throughout
16 the record, in correspondence, emails, filings and in your
17 statement to Judge Baca on January 30, 2007, that you
18 repeatedly have said, "These 60 boxes of documents are
19 responsive to the request." Do you deny that?

20 A. You know, as far as I can recall -- and obviously this
21 would be subject to potential correction based on exact
22 language of filings or transcripts, but as far as I can
23 recall, we have not represented that every page in the 60
24 boxes would be responsive. And, in fact, I thought that in
25 at least one email that I sent or another member of the

1 Leavitt side had sent had said we were not sure whether all
2 of those documents had been reviewed by the auditors.

3 MR. FALLICK: I'll do that, the argument, Judge.

4 Q. As you sit here today, do you deny that there are
5 14,004 reasons why you're representations to the Court about
6 the completeness of your document production are false?

7 A. As I understand it, during the course of production of
8 the 60 boxes, it was discovered that there were many, I
9 think somewhere around 14,000 -- I don't recall the exact
10 number, but what you said, 14,004 sounds right to me -- that
11 there were that many pages that were found in the 60 boxes
12 that do refer to the Mescalero.

13 Q. Solely to Mescalero, because there was a small category
14 of other ones that referred to more than Mescalero, but
15 14,004 pages you produced without designating as
16 confidential, because they related solely to Mescalero?

17 A. I believe that's correct.

18 Q. And they were in the 60 boxes that you told Judge Baca
19 included no such documents, true?

20 A. Based on the information that had been provided to me,
21 yes, I told Judge Baca that -- that we had produced the
22 responsive documents already, and it turned out that we were
23 mistaken.

24 Q. And in defense --

25 A. Let me just say, when I say "we", I don't mean me

1 personally, because I was not involved in any of that
2 review. I was simply using the information that had been
3 provided to me by the people that thought they had accurate
4 information regarding the content of those boxes, and I
5 think we have provided I believe an explanation as to how or
6 why the Leavitt Defendants believe that that mistake may
7 have been me.

8 Q. You were responsible for signing Exhibit A under New
9 Mexico Civil Rule 11, correct, Exhibit A to the omnibus
10 motion?

11 A. Yeah, I think I already answered that I did.

12 Q. And do you remember representing to the Court more than
13 once that, "LGE and its counsel spent many hours
14 conscientiously developing the document responses engaging
15 in such tasks as gaining an accurate understanding of the
16 nature and volume of documents falling within the request?"
17 Do you remember making that representation to Judge Baca?

18 A. Yes.

19 Q. Remember you did it twice?

20 A. We probably did, and it was accurate.

21 Q. Now, the way that we found these 14,004 documents was
22 first, Judge Baca ordered you to return the 60 boxes of
23 documents to the jurisdiction after you had removed them
24 from the jurisdiction while the requests for production were
25 pending, correct?

1 A. When you say "you", who are you referring to?

2 Q. The Leavitt Defendants.

3 A. Yes, he entered an order that required the Leavitt
4 Defendants to return -- I believe there were about 50 boxes
5 that had been moved to the Cedar City headquarters when the
6 LGA office was closed here, and he ordered them to return
7 those documents to Albuquerque, which they did.

8 Q. And the reason he ordered you to do that was because
9 you refused to do it before he ordered you to do it, right?

10 A. As I recall, one of the things we said in the course of
11 arguing the issues was that we thought it would be prudent
12 to determine where the documents would be imaged first, so
13 that we wouldn't end up shipping them at considerable
14 expense to Albuquerque and then end up having to ship them
15 somewhere else to have the imaging work done, and that is,
16 as you know, what has happened, that the documents that have
17 been imaged ended up -- were shipped to another city.

18 Q. So the answer is, yes, you refused to bring them back
19 voluntarily at your expense until Judge Baca ordered you to
20 do it?

21 A. We did not, as I recall, state a refusal to the Court.
22 Again, I think we suggested to the Judge that we thought it
23 would be premature to decide where the documents should be
24 shipped when it had not been determined whether there was a
25 qualified vendor in Albuquerque to do the work, and we had

1 understood that you were just going to want all the
2 documents to be imaged, and so we were suggesting that it
3 would make sense to figure out where the imaging would be
4 done and ship the documents to that location.

5 Q. We requested the documents to be produced on October
6 17, 2005, correct? That's when our request was served?

7 A. That sounds right. I don't think I have the request,
8 itself, in these papers that you gave me.

9 Q. We repeatedly tried to get you to bring those back, and
10 ultimately after Judge Baca's March 23, 2007, letter ruling,
11 they came back, correct?

12 A. My recollection of what I was told by the Leavitt
13 Defendants is the documents were in these 60 boxes,
14 including the 50 that we were talking about a few minutes
15 ago; that all of those documents were in Albuquerque until
16 sometime in January of 2006 and were shipped to Cedar City
17 after the LGA Office closed, and then the two sides had
18 extensive communications about the appropriate contents of a
19 confidentiality order that would apply to the documents that
20 related to tribes other than Mescalero and affiliated
21 entities. And I -- I would have to check some of the
22 correspondence including exhibits that have been submitted,
23 but I believe there was some discussion in the early months
24 of 2006 about making those documents -- producing those
25 documents and having them imaged and so forth.

1 Q. Once the documents came back following Judge Baca's
2 March 23, 2007, letter ruling ordering you to bring them
3 back, you know that I spent ten minutes with those documents
4 and found dozens of documents of the type you told Judge
5 Baca didn't exist in the 60 boxes, correct?

6 A. That's my understanding. I think I saw an email or
7 something from you that indicated that you had not spent
8 very long looking at them, and you came across documents
9 that referred to Mescalero. I think you found like 20 or 25
10 or something like that, and so then you requested that the
11 Leavitt Defendants go through the boxes page by page and try
12 to identify all the ones that pertained to Mescalero, and
13 the Leavitt Defendants did that and then tagged all those
14 and segregated them.

15 Q. And you know it was about ten minutes, because we were
16 on a conference call from that conference room with
17 Mr. Lucero mid-afternoon, and after that conference call, I
18 asked Kelsey Green to make copies of the dozens of documents
19 I found, and I went back to my office and confirmed all that
20 the same day that we had just been having our conference
21 call prior to me reviewing those documents. So not only do
22 you know it because I put it in an email, you know it
23 because you were part of the sequence of events that
24 afternoon that included my ten minutes with these 60 boxes
25 of documents, correct?

1 A. My recollection is we did have a conference call,
2 Mr. Lucero and you and me in the afternoon, and sometime
3 later in the afternoon, you sent an email saying that
4 following the call you had spent relatively few minutes
5 looking at the documents -- I don't remember if you said
6 ten, but you probably did -- and that you had come across
7 some documents, roughly 20, 25 that referred to Mescalero,
8 and you had requested to have those copied and provided to
9 us. That's what I know about the timing that afternoon.

10 MR. FALLICK: No further questions, Your Honor.

11 THE COURT: Thank you.

12 MR. LUCERO: I don't know if I have any questions.
13 Let me just ask Mr. Crofton whether he would prefer to
14 explain the whole story about what happened with all the
15 confidential documents. They're under oath, since the
16 direct testimony was under oath, or is that something you
17 are prepared to simply offer as an explanation to the Court?
18 Which would you prefer to do?

19 THE WITNESS: Maybe a mixture of both. I mean,
20 Your Honor --

21 MR. LUCERO: Then would you please explain.

22 THE WITNESS: Notwithstanding that I've been on
23 the stand for quite a while today, but if you would prefer
24 that I tell you what I know about it and what my involvement
25 was under oath, I would be happy to do that. Most of the

1 information would better come from Mr. Chidester who is --
2 who is here as to what they, you know, think happened as to
3 why they believed in good faith for a long time that those
4 60 boxes did not contain Mescalero documents, and then when
5 they actually got reviewed at Mr. Lucero's firm, it was
6 discovered that there -- that there were some documents in
7 there. Whether they were in there all along, whether they
8 got in there during the course of other activities in the
9 case, I'm not sure that the Leavitt Defendants know at this
10 point.

11 I guess the main point I would make to you is, yes, I
12 signed the response, and I made statements to Judge Baca
13 based upon the information that I had from the Leavitt
14 Defendants. The information was very specific. It appeared
15 to me to be accurate. I asked questions that satisfied me
16 that the responses were correct. I have never personally --
17 let me make sure I explain this in a way that will be
18 accurate sequentially.

19 Prior to late March or whenever it was that these 60
20 boxes were made available at Miller, Stratfort for review, I
21 had seen only a few documents that came or may have come
22 from those 60 boxes. The ones I saw that came from or may
23 have come from those boxes did not reference Mescalero.
24 Bottom line is there was nothing that I saw, no information
25 that I was given that caused me to believe for a moment that

1 there was anything inaccurate about the representations that
2 had been made.

3 Once we were told that there were some Mescalero
4 documents in those boxes, I urged the Leavitt Defendants to
5 take action as quickly as possible to determine the
6 circumstances and determine whether there were, in fact,
7 additional documents in those boxes referring to Mescalero.
8 I don't recall exactly how long it took, but I believe a
9 team of four people, I believe, was dispatched, and they,
10 from what I'm told, went through those 60 boxes within
11 roughly ten days, two weeks, something like that, and I
12 believe they have now identified all of the documents that
13 pertain to Mescalero, and we have turned those over, and
14 Mr. Fallick arranged to, as I understand it, have those
15 documents imaged and he selected a vendor in Phoenix to do
16 that.

17 I do know that the Leavitt Defendants told me that they
18 believe none of those 14,000 documents are of any
19 significance in the case in their view, and in a sense they
20 have put their money where their mouth is by not asking for
21 copies of any of those 14,000. I think beyond that, it
22 would be better to have Mr. Chidester who is more directly
23 involved and was the source of almost all of my information
24 in this area to address more specifically what the company
25 believes may have happened that resulted in those 60 boxes,

1 including numerous documents referring to the Mescalero.

2 THE COURT: Thank you.

3 MR. LUCERO: I have no questions, Your Honor.

4 THE COURT: Thank you.

5 MR. FALLICK: One, Judge.

6 REDIRECT EXAMINATION BY MR. FALLICK

7 Q. You've repeatedly emphasized in emails that you reserve
8 the right to obtain a set of copies of the images of the
9 14,004 documents that at this point we have only obtained,
10 and you ensured yourself that the imaging service would
11 maintain those documents on their system, so you could
12 obtain them at any time, correct?

13 A. Right. We wanted to be sure that if we for some reason
14 needed the documents, that hopefully we'd be able to get the
15 images that we wanted, whether it was all of them or some of
16 them quickly and at only 50 percent of the cost, and so that
17 was why I informed the vendors that we would like them to
18 keep an archival copy of the images, so that upon request,
19 they would be able to make duplicates for us and wouldn't
20 have to start over and do the imaging and charge us 100
21 percent. We don't anticipate, as far as I know, needing
22 them, but yes, we did as a precaution ask them to keep a
23 set.

24 MR. FALLICK: No further questions, Your Honor.

25 THE COURT: Thank you. You may step down.

1 don't we take a recess until 3:15.

2 (Note: Court in recess at 3:02 p.m.

3 and reconvened at 3:14 p.m.)

4 THE COURT: Okay. Mr. Fallick.

5 MR. FALLICK: Your Honor, there was one clause, I
6 wanted to admit -- is that okay?

7 MR. LUCERO: Yeah.

8 MR. FALLICK: This is a paper that you don't have,
9 Judge, and I haven't done a redaction or a review of it, and
10 we've agreed that I can just read into the record --

11 THE COURT: Sure.

12 MR. FALLICK: -- the portion that I wanted to
13 without admitting the document or adding a document to your
14 record. It's in the Court record. This is a November 20,
15 2006, filing, and it's entitled Motion by Defendants Leavitt
16 Group of Albuquerque, Leavitt Group Enterprises, Kelly
17 Russell and Dane Leavitt for discovery conference regarding
18 confidential documents, and on page six, it includes the
19 following two sentences: "In addition, they have identified
20 approximately 60 boxes of documents that are responsive to
21 Plaintiffs document requests and have expressed a belief
22 that some of those documents contain confidential
23 information. All of the confidential materials referenced
24 in this paragraph involve Indian tribes unrelated to
25 Plaintiff and its affiliated entities." And that quote,

1 Your Honor, referring to "they have identified" is referring
2 to the Leavitt Defendants have identified.

3 And with that, Your Honor, subject to making sure that
4 everything is in the record in the way that the Court
5 ultimately thinks makes the most sense and relying upon all
6 of the documents we provided to the Court, the May 14, 2007,
7 deposition, depositions, and the testimony today, Mescalero
8 rests, Your Honor.

9 THE COURT: Thank you.

10 Mr. Lucero.

11 MR. LUCERO: Your Honor, I stated earlier we don't
12 intend to call any witnesses.

13 THE COURT: Then I'll take your final arguments,
14 and basically what I'm hearing from Mr. Fallick is, Judge,
15 you've got everything you need to decide the omnibus motion
16 and its incorporated motion to revoke, and from Mr. Lucero's
17 objections, with respect to the scope of the evidentiary
18 portion of today's hearing, I understand your objections to
19 be that what we were doing today was focusing on the claim
20 of suborning perjury.

21 MR. LUCERO: Your Honor, that's the way I thought
22 we had agreed at the preliminary conference. That was the
23 way -- that's what I thought we were agreeing to when we
24 drafted that order and tried to make it clear. I think
25 that's a plain reading of the language. So that's why --

1 yes, I think both the deposition and the testimony here went
2 further than what we had thought everyone was agreeing to
3 and was being recommended and was, in fact, ordered by Judge
4 Baca, but that's --

5 THE COURT: Okay. What do you think that I should
6 have in front of me or I should hear before I make a
7 decision on the omnibus motion? What other proceedings
8 should we have?

9 MR. LUCERO: Your Honor, from our perspective, I
10 think just argument on the motion.

11 THE COURT: And you're not prepared to do that
12 this afternoon?

13 MR. LUCERO: We are.

14 THE COURT: You are prepared to do that? Okay.
15 Then let's do it.

16 Okay. Mr. Fallick.

17 MR. FALLICK: Thank you, Your Honor. Before I
18 turn to the -- you know, the primary point of my argument, I
19 just want to make a few points about some of the evidence
20 from today or a few things that were arguments in the
21 cross-examinations that I moved on from and wanted to make
22 them as arguments. One is -- and this didn't happen because
23 Ms. Davis wasn't here. Ms. Davis testified at her
24 deposition, and the way I understood that testimony is she
25 was saying that on page 43 and 44 of her deposition, on

1 February 15, 2006, she understood at that time that she was
2 the lead auditor on both audits. She had them lumped
3 together.

4 Later on, her testimony is she realized she was
5 mistaken and that she is now quite clear that she was not
6 the lead auditor in the audit that was conducted, but that
7 on page 30 -- excuse me, on page 43 and 44 of her first day
8 of deposition, she had understood it differently. Her
9 understanding changed. Her understanding changed. So her
10 testimony changed, and that is contrary to her affidavit.

11 Now, she said that she didn't draft it. Somebody else
12 drafted it. She signed it, but what she says in her
13 deposition about her understanding at that moment, that
14 morning, page 43 and 44 is contrary to this on paragraph
15 seven of her affidavit, which is attached as Exhibit 1 to
16 her May 14, 2007, deposition. She says, "At all times
17 starting in September, 2005, and continuing today, I have
18 understood and believed that" -- and then going to part B,
19 B, "I was never assigned to lead the internal audit
20 referenced in the September 29th letter and did not consider
21 myself to be leading that audit."

22 Well, her testimony is that that is false, and I didn't
23 get to ask her why she signed it, and I was guessing that
24 the reason she signed it was because it was put in front of
25 her, and that's a pretty long sentence. So when you get all

1 the way from, "At all times," starting in, it's four lines
2 down before you get to, "I was never assigned to the lead
3 internal audit." So if you assume that she did not
4 intentionally misrepresent the facts in this affidavit, then
5 that would kind of be an explanation. That's a long
6 convoluted sentence, and by the time you get there, you
7 know, maybe she doesn't realize what the reference is, and
8 she didn't intend to sign a false affidavit, but somebody
9 prepared that who's a lawyer who did understand it and who
10 did know what they were saying and who repeatedly make
11 reference to that in their papers, but not only make
12 reference to that but even go beyond that and say, the
13 lawyers had nothing to do with it. That's what they say.
14 Her affidavit said it doesn't go that far, but it still goes
15 farther than is accurate, and I think that's an important
16 point.

17 Another important point, and I think the Court can take
18 judicial notice of this, at least this was my recollection
19 of what happened on April 20th, 2005, Mr. Crofton denied to
20 you that Ms. Davis had changed her testimony, and then he
21 sat through Ms. Davis's testimony on May 14th, and he sat
22 through Mr. Chidester's deposition testimony on May 14th,
23 and he decided that he better not say that any more. He
24 said that she did change her testimony, and that was the
25 first time he had done that after -- you know, a year after

1 they had the transcript, more than a year after they all
2 went to lunch and agreed that they were going to change her
3 testimony, and he stuck to that throughout, right up until
4 we had our preliminary conference here until he changed
5 that.

6 And, of course, he had the right to be there and listen
7 to the other two witnesses testify as counsel of record. He
8 chose to exercise that right, even though Mr. Lucero was the
9 one who was there representing the witnesses, making
10 objections, making arguments. He sat there and listened,
11 and that's his right. He exercised it, and it gave him an
12 advantage Mr. Chidester didn't have or other witnesses
13 typically don't have; gave him the advantage of knowing he
14 better not say that. And when I asked him -- and this is on
15 page 13, line 17. It was his transcript:

16 "QUESTION: At the preliminary conference before Judge
17 Conway on April 20, 2007, you contended that there
18 was no change in Ms. Davis's February 15th, 2006,
19 deposition testimony regarding her role in the audit;
20 is that true?"

21 And his answer was:

22 "ANSWER: I don't recall putting it quite that way, no.
23 If I did, I misspoke."

24 And based on all the other evidence in this case, I
25 think it's fair to construe that to mean, "It's totally fine

1 if I intentionally mislead the Judge as long as I'm careful
2 about how I put it, and I was careful how I put it, so it's
3 totally okay." And it's not okay.

4 Your Honor, the New Mexico Judiciary has been a
5 national leader in promoting professionalism for nearly 20
6 years. In 1989, New Mexico's one of the first handful of
7 states to publish standards of professionalism when New
8 Mexico promulgated the Creed of Professionalism, and our
9 Supreme Court has made it a priority ever since to foster
10 professionalism in the Bar.

11 Putting aside for a moment the ethical and criminal
12 prohibitions that relate to the evidence the Court has
13 heard, the sort of unprofessional behavior exhibited by
14 nonadmitted counsel from start to finish in this case is
15 poisonous to professionalism, and I'd like to share just one
16 example of that with the Court.

17 About a year ago I received telephone calls from two
18 lawyers at the Miller Firm; first, a young lawyer and then a
19 more senior lawyer, requesting that I grant nonadmitted
20 counsel an extension of time to respond to the motion to
21 revoke. Now, first of all, I'd never met either of those
22 lawyers. I've met them since, but I'd never met either one
23 of them, and I certainly would not do something for a senior
24 lawyer that I wouldn't do for a junior lawyer. I do the
25 same for both. I think there's this perception that maybe I

1 wouldn't, and that's why I got the second phone call, and I
2 typically grant extensions without hesitation, and that's
3 what our creed of professionalism says you should do, but in
4 this case, already a year ago, I felt a professional
5 obligation to my client to refuse. I didn't like doing
6 that, particularly with two lawyers from a firm who I deal
7 with who I didn't know but probably will end up dealing with
8 again.

9 Sometimes I request extensions, and I appreciate it
10 when other counsel are gracious about that, which almost
11 uniformly they are. But I couldn't let nonadmitted counsel
12 continue to use my professionalism as a weapon to beat my
13 client over the head. I mean, I just couldn't agree with
14 that any more, and my perception was -- and I believe that
15 Exhibit B to our omnibus motion demonstrates this -- is that
16 every time I did what the creed of professionalism says to
17 do, my client suffered. My client's case was delayed. My
18 client was lied to. My client spent more money, and the
19 next time I went down to report to my client about what was
20 going on, I was like a broken record. "I've accomplished
21 nothing for you except making your bank account thinner, but
22 we'll keep working on it." So I refused.

23 And that's an unfortunate consequence of nonadmitted
24 counsel's misconduct, which in my opinion should not be
25 overlooked. But for better or for worse, we wouldn't be

1 here if that's all we were talking about. If we were just
2 talking about a lawyer from out of state who comes in,
3 they're unprofessional and they don't follow our creed and
4 they make it a penalty to my client that I'm following the
5 creed, if that's all we're talking, about as insidious as
6 that is, of course, we wouldn't be here. Now, but of
7 course, it's much worse than that.

8 At nonadmitted's counsel insistence, the record before
9 this Court is extraordinarily voluminous, and that was a
10 tool of obfuscation. A year ago we filed a motion to
11 revoke. We followed the rules. We did it within 10 pages.
12 We attached 25 pages of exhibits. I mean, we showed the
13 same thing then we showed now that he corrupted the factual
14 record, and you didn't need all the rest of it to do it.
15 You could just look at that, and that's what the rules
16 anticipate. Find a way to present the issues to the Court
17 that respects the fact that the Court's got a thousand cases
18 on its docket, and we need to present things in a way that
19 is concise and that allows the issue to be heard without
20 every single thing under the sun being dragged into and file
21 hundreds pages of papers. The system would grind to a halt
22 if everybody did that.

23 So that's what our motion to revoke did, and they said,
24 "Judge, you can't make a well-informed decision. You need
25 everything, and by the way, opposing counsel deliberately

1 withheld the record from you to try to deceive you about
2 what happened." And, you know, I'm not saying that Judge
3 Baca thought that I was trying to deceive him, but he did
4 take them at their word that we needed everything, and he
5 said, "Give us everything. So we gave him everything," and
6 that's what we have now.

7 And they opposed our request to try to get Judge Baca
8 some help. I mean, everything -- after everything that's in
9 Exhibit B to our omnibus motion, they told Judge Baca he
10 didn't really need any help, because there really wasn't
11 anything to fight about. We really -- his one ruling on
12 work product really resolved everything, and that we were
13 misleading him by suggesting that he really needed more and,
14 "By the way, you know, if you get a special master, you
15 really just end up doing it twice. You have to do it all
16 over again when the special master gets done." Well, of
17 course, that's wrong. That's not what the rule says.

18 And, of course, Exhibit B shows -- what do you mean
19 there's nothing to fight about? I mean, the reason no
20 motions were filed is because you kept dragging your feet
21 and saying, "We're going to get back to you. We're going to
22 get back to you." And when we kept saying, "These are the
23 issues, and we need to either resolve them or we need to get
24 the Judge to decide them, and let's go."

25 And they said, "Oh, gee whiz, I don't know what he's

1 talking about. We've got a bunch of disputes? We don't
2 have any disputes."

3 THE COURT: What's your position on the effect of
4 Judge Baca's ruling on the work product doctrine application
5 here?

6 MR. FALLICK: Well, my interpretation of that
7 ruling is that any time -- at this moment in time without
8 further development, and there's going to be further
9 development, that you should assume that every time he
10 objects on work product, that that objection should be
11 sustained, and that there's no -- no misconduct in making
12 the objection. So every single time he says, "Objection,
13 work product, don't answer," that's -- you should assume as
14 fine, and I tried hard in our papers -- because I referred
15 to a bunch of questions, answers, obstruction, to skip all
16 those things, and I don't believe our papers rely on any of
17 the work product objections as examples of misconduct. If I
18 did, it was a mistake, and they're not examples of
19 misconduct at least not right now.

20 THE COURT: Then how do you deal with the
21 Defendants, the Leavitt Defendants argument that, listen,
22 this is all about discovery of things that you really don't
23 have a right to anyway. I mean, this is a tempest in a
24 teapot, and your problems with this audit, for example, and
25 the whole deposition of Ms. Davis was about this audit, and

1 I've determined and Judge Baca's determined that the
2 underlying documents and questions about how it was done,
3 that it's protected by the work product doctrine.

4 MR. FALLICK: I didn't mean to go that far in what
5 I was conceding, and let me be clear. They did not object
6 to all the questions based on work product. They conceded
7 that some of the questions we asked to Tawnya Davis were
8 discoverable, seeking discoverable information. They were
9 clear about when they were asserting work product, and it's
10 those specific objections, but the idea that Tawnya Davis
11 and her testimony in its entirety is off limits, they didn't
12 even contend that. They -- every question that she answered
13 that did not -- well, every question she answered and that
14 -- too which they did not assert the work product doctrine
15 and tell her not to answer is all fair game, and Judge Baca
16 never said anything different than that. They tried to say
17 the whole thing is irrelevant. You know, that's a trial
18 issue, but I mean, it's wrong.

19 I mean, first of all, when we ask -- I mean, what they
20 did was they did what they called an audit of our account,
21 and they disclosed it to us. So certainly we get to ask
22 questions about certain aspects of it, which we did, and
23 they allowed it. I mean, we're going to identify -- we're
24 going to find documents that are responsive. I mean, they
25 didn't say, "We're not going to respond to Request Number 1,

1 which seeks all the documents that the auditors reviewed."
2 They said, "We're going to give you all the stuff about you,
3 and we're going to give you the stuff about everybody else
4 subject to a confidentiality order." So I mean, that's part
5 of the audit, what they looked at, and that's important in
6 us -- being able to identify what is out there in terms of
7 witnesses and documents is important.

8 And what happened at the meeting on September 29th,
9 2005, are important, and Ms. Davis's credentials to be
10 somebody who's brought in in March, to sit down on September
11 29th, 2005, and presented to us as an auditor, that's
12 important. And what's happened since, Judge Conway -- and
13 it's interesting that you raised this, because my
14 understanding is that Judge Baca's going to be contacting
15 you to ask you if you'd be willing to do some more work in
16 the case other than the omnibus motion and it's going to be
17 about work product.

18 And what happened at the last hearing -- and there were
19 a few things that happened, but one of the most significant
20 things that happened -- and Chris has left, and I already
21 talked about his client -- is that we took -- they filed a
22 motion for protective order, Chris and Ben, that we
23 shouldn't be able to take Mr. Woodley's deposition, and that
24 was denied. There's no criminal investigation. I mean,
25 it's the weakest case for a state that you could think of,

1 and Judge Baca denied it, and we took Mr. Woodley's
2 deposition. He took the Fifth 400 times, but he didn't take
3 the Fifth to every thing, and we established that he had
4 spent -- I'm guessing, so this could be wrong. So, you
5 know, full disclosure, this could be wrong, but I'm
6 guessing, he said that between 40 and 50 hours, when he was
7 still employed by the Leavitt Group, he spent meeting with
8 them to tell them everything they needed to know to
9 understand, at least to the extent that he was truthful, you
10 know, what they needed to understand to conduct their audit,
11 and he took the Fifth about all those questions to us, but
12 he didn't take the Fifth when it came to a halt and to meet
13 with them, he said, I think 40 to 50 hours.

14 And then he said that he met with them again after he
15 was terminated, and Mr. Leavitt's letter says that he was
16 working under contract, meaning you have a fact witness,
17 he's not your employee, you're paying him for his testimony
18 to provide you with information -- I mean, you're paying him
19 to sit down and explain stuff to them, which I don't think
20 you can do, because you're paying a witness, and then they
21 tell us that we can't know what he told them either when he
22 was the employee or even after he was fired and getting paid
23 by the hour I guess to give them information. And he takes
24 the Fifth about all that.

25 And they ask him at his deposition to assert the work

1 product doctrine in response to questions I ask him about
2 things he did after they fired him and reported him to the
3 insurance department, because they say that he was within
4 their work product privilege, and that, in my view, is
5 nonsense. I mean -- but the Judge didn't get to all that.
6 What he got to was, "Wait a minute. This guy met with you
7 for somewhere between 40 and 80 hours and he told you all
8 this stuff that you said in here was instrumental to your
9 understanding of the case, he's taking the Fifth to them,
10 and you don't think they get to know what he said or what
11 the document were for whatever?" He said, "That's not
12 right," and he said that -- and we haven't done an order
13 yet, and I don't remember exactly the parameters. He said
14 he was wasn't going to go real far on that. He was going to
15 ask them to look at some documents and provide some things
16 in-camera.

17 But I mean, what Mr. Woodley said in his deposition was
18 that he got a bunch of documents from them, and there's
19 other documents that shows on the privilege log that it's
20 based on things he told them, and so we think we're going to
21 get all that stuff, and we think Judge Baca's already sort
22 of indicated we're going to get it, and when I went the next
23 step and said, well, how about -- because they didn't put
24 everything in writing. I mean, I want to take their
25 depositions on what Woodly said. "Don't I get to do that?"

1 And he said, "We're not going to go there yet." And
2 then he said, "I entered that work product order, because my
3 understanding was you were conceding it was all work
4 product."

5 And I said, "Well, not exactly. I mean, what I was
6 conceding was that you could do an internal investigation,
7 and it would be work product if you kept it all
8 confidential, and you didn't share it. You didn't crow
9 about it to the press, and you don't disclose it to the
10 regulators and you didn't rely on it with us." Certainly,
11 you can do an internal investigation that would be
12 privileged and work product, but that's not what they did.

13 And I said so -- and the Judge said, "Well, I
14 understood you to concede that."

15 And I said, "If I did, I didn't mean it, and let me
16 look at the transcript."

17 And then ultimately he said, "I don't need this" --
18 because I was going to try to point out things in the
19 transcript that I -- the caveats, and he says, "Forget it.
20 You don't have to do that. I'm not going to hold you to
21 that. I mean, if what you're saying is that you want to be
22 able to contend that stuff isn't work product, you're going
23 to be allowed to do that, and I'm not -- I'm not
24 reconsidering my waiver ruling yet, but we're going to start
25 basically get some cracks in that dyke. You're going to get

1 some documents, stuff about Woodly, and any time they assert
2 the work product privilege where you say waiver or no
3 waiver, that one is not a valid assertion of the privilege.
4 You're going to be able to contend that. You're going to be
5 able to argue that. You're going to be able to argue that as
6 to questions. You're going to get to argue as to
7 documents."

8 And I said, "Judge, that's going to be a very
9 fact-laden issue. It's going to be very burdensome. We've
10 got about a 300-page transcript of Tawnya Davis's
11 deposition. We've got, you know, 80 documents on the
12 privilege log. This is something in my opinion that you
13 could use help with, because I just think it's too much.
14 It's going to be very fact-laden, and you know, we'd like
15 you to have help." And he -- "and would you ask" -- and I
16 said, "But would you extend your order to have Judge Conway
17 do that?"

18 And he said, "Not without asking her I'm not going to."
19 And that's sort of where that was, and I actually called
20 Judge Baca's Chambers this week to say, you know, "I'm
21 swamped, and I'm getting ready for this hearing, and I
22 haven't done an order yet, but I wanted to know whether
23 Judge Baca had called Judge Conway, because, you know, I'd
24 like to be able to put it in the order if he did."

25 And so she called me back and said, "No, and what you

1 need to do is send a letter to the Court with that carbon
2 copies to all parties identifying clearly what it is you
3 want us to ask Judge Conway, and the other side will have a
4 chance to respond, and we'll take it from there." And they
5 said, "And, yes, you can do it next week if you were too
6 busy to do it this week. So that's sort of where that is.
7 So that's a lot more information maybe than you wanted,
8 Judge, but my take is --

9 THE COURT: Yes.

10 MR. FALLICK: And I apologize.

11 THE COURT: That's okay.

12 MR. FALLICK: For today's purposes the bottom line
13 is we believe today any question where he says, "Ms. Davis,
14 don't answer that question based on work product," should be
15 presumed valid.

16 THE COURT: Okay.

17 MR. FALLICK: And that any other part of the
18 transcript is fair game for finding misconduct. That's our
19 position.

20 You'll like this, Judge. The extensive record speaks
21 for itself and, therefore, I intend to avoid belaboring the
22 facts that are already in the record. Of course, I'd be
23 pleased to answer any questions the Court has about that,
24 but otherwise, my intention is to be brief about the facts.

25 Nonadmitted counsel intentionally has tied documentary

1 discovery up in knots, and the evidence for that is Exhibit
2 B to the omnibus motion. He also intentionally has made as
3 big a mess out of it as possible in order to obfuscate his
4 noncompliance with our Civil Rule 34 to make it virtually
5 impossible for a busy trial Judge to get to the bottom of
6 it. And that, also, I believe is supported by Exhibit B and
7 the motion papers.

8 In addition, nonadmitted counsel has obstructed the
9 deposition process successfully denying Mescalero a fair
10 opportunity to question witnesses, and when the Tribe
11 actually was able to obtain some helpful testimony,
12 nonadmitted counsel tampered with the witness and corrupted
13 the record in an effort to nullify damaging admissions.

14 And that really has stopped deposition practice in its
15 tracks, because what's the point. I mean, what's the point
16 in going in and spending a lot of money to go take
17 depositions when you can't get a question answered. You --
18 and if you happen to get lucky and get a question answered
19 and he doesn't like the answer, you're going to lose that,
20 too. What's the point? So we felt we needed to get to the
21 bottom of this before spending a lot of the client's money,
22 taking a lot more depositions, and that's why we turned to
23 Mr. Woodley figuring that, you know, we'll get -- we may get
24 a lot of Fifth Amendment objections, but we're going to be
25 able to ask our answers and get answers or privileges, and

1 we did, and but even then, you know, Mr. Crofton's asserting
2 work product to -- I mean, we asked Mr. Woodley a question,
3 "Is there anything that you can tell us about Mr. Leavitt
4 having a lack of integrity without asserting your Fifth
5 Amendment privilege?" And there was work product to that.
6 So, I mean, work product is any time you don't like the
7 question and you don't think you're going to like the answer
8 you assert work product and, you know, we'll get to that.
9 So that's why we went to Mr. Woodley, and we'll maybe go to
10 third-party depositions until we get all of this sorted out.

11 Worst of all, nonadmitted counsel repeatedly has lied
12 to a busy court about the voluminous record and the hope of
13 hiding his misconduct under a blanket of deception, and
14 nonadmitted counsel elevated cheating to an art form in this
15 case, which essentially displaces the roles of honest fact
16 finding and advocacy in our judicial system.

17 More than 25 years ago, in a case involving really
18 something that wasn't anywhere near as bad as this, our
19 Supreme Court recognized the need to punish bad faith
20 misconduct severely in order to preserve, "The integrity of
21 the truth seeking function of the trial court." I'd like to
22 elaborate briefly on this principal with a view from the
23 trenches. If nonadmitted counsel's brand of advocacy were
24 permissible, justice could be defeated by any lawyer willing
25 to cheat, period. You cannot -- at a minimum you're not

1 going to get the speedy justice you're entitled to, because
2 you're going to have to fight your way through endless
3 misconduct if the lawyer's willing to cheat.

4 So as a practical matter, any lawyer, any officer of
5 the Court in any case can destroy the other side's right to
6 justice if they want to. They have that power. And if that
7 were permissible, honor in our profession could no more
8 survive than the Queensbeery rules of boxing could survive
9 in a knife fight. It just -- you can't -- you just couldn't
10 do it. Professionalism would be a quaint anachronism
11 reserved for the naive counsel of losing parties who soon
12 would be extinct, because they wouldn't have any clients,
13 and our Supreme Court would be powerless to prevent that in
14 the trenches. Only the trial court's enforcement of our
15 Supreme Court's directives can preserve the integrity of our
16 profession.

17 The fact that nonadmitted counsel has been permitted to
18 practice law for 25 years, and he claims without ever having
19 been disciplined, speaks volumes about how difficult it is
20 to weed out the bad apples in our profession. It is
21 extremely expensive and burdensome for parties in litigation
22 to stand up to this sort of relentless misconduct, and the
23 resulting multiplication of proceedings places an inordinate
24 strain on a busy court.

25 This lawsuit is the rare exception in which the amount

1 in controversy dwarfs the legal fees, and Plaintiff has the
2 wherewithal to stay the course. Countless more times than
3 not, lawyers like nonadmitted counsel get away with it,
4 because opposing parties give up. They settle for whatever
5 they can get, and they have a stiff drink, and they move on,
6 because they just can't continue to put up with that painful
7 process that it takes to get what they're supposed to be
8 able to get under our rules.

9 And the result of that is in 25 years, one unethical
10 lawyer can deny hundreds of parties and perhaps even
11 thousands of parties their right to the just, speedy and
12 inexpensive adjudication of their claims, and for the most
13 part, courts don't even know about it. It happened in the
14 deposition room. It's happening in emails and letters, and
15 the cost to bring that before the Court and fight about it,
16 you can't justify it.

17 That is one reason why New Mexico appellate decisions
18 regarding sanctions as well as the decisions in other
19 jurisdiction emphasize the need for severe sanctions to
20 address this sort of misconduct when it finally does come
21 before the Court, and when a lawyer completely disregards
22 the applicable legal, ethical and professional rules
23 governing our profession and when he then denies his
24 misconducts and tries to lie his way out of it and file
25 briefs with the Court that misrepresent the circumstances

1 and continues to do that until the bitter end, anything less
2 than severe sanctions would be inadequate to deter future
3 misconduct.

4 The Estrada case is the most recent benchmark from our
5 Supreme Court against which the misconduct here must be
6 measured, and you know, I know Michelle Estrada, and I
7 always thought she was a good lawyer, and I can't believe
8 that she would intentionally engage in misconduct. That's
9 my personal opinion, and the record in that case is very
10 ambiguous, and I question the application of it to Michelle,
11 but the principle is clear. I mean, based on the Estrada
12 court's treatment of the far less-extensive and far
13 less-egregious conduct in that case of a licensed New Mexico
14 attorney, there is no doubt that the Court would be appalled
15 by nonadmitted counsel's misconduct in this case. I mean,
16 that case was a case where you can look at it. It was a
17 couple of isolated things that appeared to have been serious
18 errors in judgment by counsel, but it was not this, not, you
19 know, just from beginning to end, you know, "We promise you
20 we'll do this, this and this," and then when you tell them,
21 "Gosh, you promised us this, and what are you doing," and
22 they say, "Go jump in lake." I mean, that's basically what
23 happened for 18 months and then subornation of perjury. So
24 I mean, there is just no comparison in the fact pattern in
25 Estrada to this. This is by many orders of magnitude worse.

1 Nonadmitted counsel's bad faith conduct in its entirety
2 as well as his stubborn insistence that all of his conduct
3 has been completely unassailable and even laudable
4 demonstrates that only the revocation of his privileges
5 under our Civil Rule 89.1 will permit this case to begin to
6 proceed the way it should under our rules.

7 In addition, the other sanctions requested by Mescalero
8 are necessary to compensate the Tribe for the burden and
9 expense it's been forced to endure to get here.

10 THE COURT: So let me ask a question. I
11 understand that you want the Court ultimately and the
12 special master today to decide whether to revoke the
13 privilege of nonadmitted counsel, and you want -- you want
14 monetary sanctions.

15 MR. FALLICK: Yes, Your Honor.

16 THE COURT: Is there any of the written discovery
17 you've requested that you haven't got that you still need?

18 MR. FALLICK: Yes, Your Honor. I mean, we want
19 what we asked for I think in April of last year. Let me
20 pull that out. We asked for amended responses that -- and
21 it's in our -- more distilled in our papers, but this is
22 Exhibit B, page 32, and we reiterated that request
23 throughout, but we simply want amended responses to the
24 document requests. We want them to, A, state whether a
25 diligent search of all potentially responsive materials has

1 been conducted, and if not, identify what potentially
2 responsive materials have not been searched and why. We
3 want them to identify whether responsive materials exist.
4 We want them to state whether all responsive items have been
5 produced. We want them to identify the control numbers of
6 all items that were produced in response to specific
7 requests, and I'm going to come back to that one in a
8 minute, Your Honor.

9 If applicable, we want them to state what materials
10 they're withholding in addition to what's been identified in
11 the privilege log. And if applicable, we want them to
12 identify the specific basis for withholding any such
13 materials.

14 Now, the most expensive part of that for them to
15 respond to is to identify the control numbers of all items
16 that were produced in response to this to the specific
17 request. They have produced 32,000 documents. That would
18 require quite a bit of work to do that. In April of '06, if
19 they had said, "We told you everything," but that -- we
20 would have said sure. We would like to see them. Do that
21 now. We think the fact that we've been held up for 18
22 months on this discovery and the fact that we have had to
23 plow through so much to where we're getting today, we think
24 that's a reasonable request, but if the Court disagrees, we
25 understand that that's the one most likely to drop out, and

1 we very much would like them to do that, but we're not
2 vigorously asserting that. Everything else we're vigorously
3 asserting in our motion. The end of our omnibus motion does
4 have a list.

5 THE COURT: Right.

6 MR. FALLICK: And that's our list.

7 THE COURT: That's your basic list.

8 MR. FALLICK: That's our basic list.

9 THE COURT: I just wanted to make sure since
10 filing this motion, you had received -- that's back in
11 January, you had not received additional material that would
12 obviate the necessity for a ruling.

13 MR. FALLICK: No, not that -- I'll defer to
14 Mr. Lucero. He thinks they say something different. I
15 don't have that in mind, but I wouldn't swear they didn't do
16 anything, but we haven't gotten those responses under Rule
17 11.

18 And by the way, we asked for that on April 6th, 2006,
19 and we asked for all the way up until including our final
20 efforts to try to get this all before we filed our omnibus
21 motion, and if they had done what we asked them to do on
22 April 6th, 2006, we would have gotten those 14,004
23 documents. We wouldn't have needed an order from the Judge
24 to bring them back for us to look at them, and now, we're
25 talking about another year's gone by before we've gotten

1 them. And, you know, do we have them. Yeah, we do. I
2 mean, we have the 14,004 documents, or at least if they're
3 not in my in box on DVD, they're on there way, but it did
4 take us a year, and we did have to fight for them, and it
5 just would have taken -- especially given the agreement that
6 they made right up front that what they were going to do and
7 what they were weren't going to -- I mean, in April they
8 could have said, "We'll do that. We aren't -- we're not
9 going to go through the Bates numbering, but we'll do the
10 rest," and if they had done that, we would have those
11 documents here now, and that's all just part of the same
12 pattern that brings us here today.

13 Of course, the Court's going to make credibility
14 determinations. The Court's going to decide, you know,
15 whether the Court agrees with our inferences, but here's the
16 way I see it. Mr. Crofton today put the cherry on top of
17 everything. He came in here, disassembled -- intentionally
18 tried to obstruct the ability to just get us a straight
19 answer; repeatedly gave false testimony, and finally kind of
20 almost acknowledged that at least one thing he said to the
21 Court in his papers wasn't candid but not exactly. And if a
22 lawyer who in November of '05 tells you, "You can trust me,
23 because I don't play those kinds of games," and then does
24 everything he's done in Exhibit B and everything he's done
25 in his deposition, all he's done in these briefs and

1 everything he's done today and that doesn't provide good
2 cause for revoking a nonadmitted counsel's privilege under
3 89.1, then nothing does. That's our perception.

4 Finally, Your Honor, the tribe would like to emphasize
5 that nonadmitted counsel's papers do not dispute the
6 governing legal principles. They don't even talk about
7 them, and they don't dispute that the sanctions we've
8 requested would be appropriate if all of our allegations are
9 true. I mean, they say what we've accused of them is
10 horrible. It's criminal. It's unethical, and you know,
11 that -- they don't -- and they say it didn't it happen, and
12 it's a misrepresentation by me. And, of course, if that's
13 true, then there would be no sanctions against them, but
14 they don't even -- they made a strategic decision not to
15 say, "And if it is all true, show mercy." They didn't ask
16 you to do that. And you shouldn't do that, because when a
17 party makes a decision, a tactical decision that they're
18 going to put all their eggs in one basket and they're going
19 to falsely deny wrongdoing and they're not going to talk
20 about sanctions. -- it's like a party in front of a jury who
21 just says, "We didn't do it. No damages. The damages are
22 zero," and then, you know, Plaintiff puts on the board, you
23 know, the damages are \$2 million, well, you know, that's
24 your -- you made that call, and the jury is going to pick
25 between zero and \$2 million. That's what the jury is going

1 to do.

2 And I read the record saying that's what they've asked
3 you to do. They've asked you to say, no sanctions, no
4 wrongdoing, and if you find that that's not credible and you
5 find our allegation's well-taken, we should get everything
6 we've asked for.

7 And my client has suffered economically as a result of
8 this case, not only because of what the Leavitts did to them
9 for ten years, but in their budget now, it's been -- it's
10 been a difficult budgetary issue for the tribe, and having
11 to spend getting close to \$300,000, Judge, to get to today
12 with very little to show for it, they should get their money
13 back. And then they have that money to finance the
14 litigation going forward.

15 So both because the sanctions requested by Mescalero
16 are fully justified and because the Leavitt Defendants have
17 not disputed their legal justification, they've only
18 disputed their factual justification, the Tribe respectfully
19 requests that the Court impose the requested sanctions in
20 their entirety. Thank you.

21 THE COURT: Thank you.

22 Mr. Lucero.

23 MR. LUCERO: Your Honor, I'm going to argue part
24 of the motion, and Mr. Crofton is going to argue part. The
25 portion that I'm going to do is going to be focused on the

1 Tawnya Davis deposition and the allegations of perjury and
2 subornation of perjury. And you're about to see my first
3 attempt to ever do a computer power point, but I did have
4 some preliminary general things I wanted to do, and maybe
5 while the projector is warming up, I can get through this.
6 I just push on, right?

7 MR. FALLICK: Your Honor, I apologize. I have
8 this horrible cramp in my foot, and I'm going to listen from
9 back here.

10 THE COURT: Just wander around.

11 MR. LUCERO: Your Honor, at the beginning of
12 proceedings today, Mr. Fallick made some remarks that sort
13 of teed up the controversy as, "Well, it's either I did
14 things wrong or Mr. Crofton did something wrong, and it's
15 one of the two of us, and the Judge is going to decide at
16 the end which of us is the bad actor." And I think that was
17 a smart strategy and good one, because to some extent we
18 have pointed to Mr. Fallick's conduct in defending his
19 allegations, but I think to no extent can it be turned on
20 those terms, because it's not a balanced playing field. I
21 mean, we didn't get to depose Mr. Fallick and ask him about
22 every statement he made in his briefs. We didn't get to put
23 him on the stand and ask him about disobeying Judge Baca's
24 order not to directly or indirectly bring before the Court
25 certain things that he invited the Court to go look at the

1 record at, the special master to look at the record and
2 endless things like that, because they weren't a part of
3 motion.

4 So while Mr. Fallick's conduct is indeed I think partly
5 at issue, this isn't simply a balancing or a contest, which
6 of the two of them has done the most wrong things or
7 improper things. I think if that were the focus, we could
8 put on a lot better case about all the things that had
9 happened.

10 I, as local counsel in this case, I've done more than I
11 sometimes do as local counsel. Sometimes as local counsel I
12 do very little, and I've been much more involved in this
13 case, but even so, I still am somewhat on the sidelines as
14 an observer watching this huge battle and tempest between
15 Mr. Fallick and Mr. Crofton brew and now reach this point
16 and had some general comments that I just felt as an
17 attorney, hired to represent the Leavitt Defendants, I need
18 to give my perspective and my comments on that, which is
19 that in 22 years of practicing, I just don't think I've ever
20 seen an attorney as aggressive, and in his credit, as
21 skillful as Mr. Fallick at creating issues over everything
22 that happens in a case. Every form of order, every email,
23 every conversation on the phone, everything is attacked
24 relentlessly.

25 I've litigated against some attorneys with some

1 representations, Mr. Durkovich, Mr. -- I mean, there's a
2 bunch of them, and I've just never seen anything. On a
3 personal level, it kind of makes me glad I'm not going to be
4 doing this if that of -- if that kind of side attack can be
5 made, I just think everyone in the Bar is vulnerable to an
6 attack like that. When someone is willing to spend the
7 money and focus -- to focus to every little thing you've
8 said or done, everything you've said in a hearing, because
9 it's so easy, as I think I'll show in the power point, to
10 say something and think you've said something and said
11 something different. Everybody does it.

12 But to draw attention specifically to this motion, when
13 I read the motion, both the first one and the omnibus motion
14 the thing that stood out the most to me was, "But what
15 discovery are they asking for?" I looked at their request
16 for relief and there wasn't any request for, "Well, Judge,
17 there's all these documents that we're entitled to get, and
18 they're not giving them to us," or, "Judge, we've asked
19 these interrogatories, and these are relevant questions, and
20 they haven't answered them." Or even that, "There are
21 certain things we asked Tawnya Davis, and we never got an
22 answer to that question, and here it is." There isn't even
23 that.

24 You know, I look at Rule 37, which I think is the
25 standard in terms of what sanctions are appropriate for a

1 Court to consider, and it sets forth the procedure which is
2 the procedure I've seen happen in 22 years in every case
3 except this case, which is that if a party does not feel it
4 has been provided the discovery it wants, it moves under 37A
5 for a motion compelling discovery. And if they're -- if
6 they're correct, then the Judge says, "You must produce
7 those documents or must produce them for an in-camera
8 review, or you must answer these interrogatories," et
9 cetera, et cetera. And then once an order is entered, if
10 the party fails to obey that, then there's a motion for
11 sanctions, and the attorney points out, "Judge, I didn't get
12 the discovery. We had the hearing. We had the motion. We
13 have an order, and the party did not obey the order."

14 In this case there has never been a motion to compel
15 leastwise a successful motion to compel. They have never
16 had to ask for any discovery, because they have all the
17 discovery, and if they didn't, I would assume that they'd
18 raise it in this omnibus motion. They'd point out to the
19 Court something that they don't have that they've asked for
20 even though they haven't moved to compel it before at least
21 to compel it now.

22 And even when the Court asked the question of
23 Mr. Fallick, he didn't ask about documents. It was about us
24 explaining yet further what we've done. And I believe
25 Mr. Crofton will go in great detail how we've explained all

1 that in emails, in letters, in correspondence, and I don't
2 think there's any question that Mr. Fallick has all the
3 documents. In fact, at the last hearing with Judge Baca, he
4 specifically asked, "Let me just ask you pointedly, do you
5 have all the documents you need to make your damage
6 calculations?"

7 Mr. Fallick said, "Yes, we have them." We produced all
8 the documents in the LGA files that the auditing reviewed
9 regarding the Mescaleros, and then we have these 60 boxes
10 that we thought were solely related to other tribes that we
11 never said we aren't going to produce, which is why I
12 question the insinuation in the questions to Mr. Crofton
13 about that there was anything nefarious about the mistake
14 when those boxes turned out to have Mescalero documents.

15 If that was our intent, if we were that kind of party
16 that Mr. Fallick is trying to point out, why would we have
17 agreed to produce these 60 document boxes day one as long as
18 we get a confidentiality order entered if we knew that in
19 there we were going to be proving ourselves to be hiding
20 documents and lying. It was just an honest mistake, and Mr.
21 Crofton explained that mistake, but the documents were -- we
22 agreed to produce them. It's simply we didn't realize that
23 they contained Mescalero files.

24 So when I look at this motion, I'm, again, as an
25 overall thing, just puzzled. Why isn't -- if things have

1 been so hogtied, why hasn't there been a single motion to
2 compel, leastwise one granted? If everything is so hogtied
3 and brought to a grinding halt by Mr. Crofton -- I'm not
4 going to call him nonadmitted counsel, and it bothers me
5 that an attorney can't refer to someone else by their name.

6 THE COURT: And I said that, and that was because
7 for a minute I blanked on Mr. Crofton's name, which I do
8 frequently, and so that's why I said it. Ordinarily I like
9 to extend the courtesy of recognizing counsel by name.

10 MR. LUCERO: I sort of assumed that. I could see
11 the pause. But let me get I guess specifically to the
12 Tawnya Davis deposition, because that to me was obviously
13 the most serious charge. Something like perjury is
14 something you just can't at all take lightly, and I think we
15 need to go through -- what I think I've done is got slides
16 of all the testimony and a few preliminary ones and a few at
17 the end, so we can just look at all the testimony that
18 existed, and I can explain the sequence. I push the left
19 one or this one? Okay.

20 Judge, I'm actually starting out not on the perjury but
21 another question that was brought up by Mr. Fallick at the
22 deposition, and he asked Ms. Davis, "Do you have a business
23 card?"

24 And she answered, "Not with me."

25 "What do they say?"

1 "Controller."

2 And then he asked, "Do you remember providing a
3 business card to the Mescalero/Apache Tribe on September
4 29th, 2005, that said 'internal auditor'?" And I want to
5 focus on that question.

6 Her answer was, "No."

7 And then he remembers, "Did you ever have a business
8 card that referred to you as an auditor? No."

9 Well, right after that deposition, we obviously --
10 well, I just highlighted the testimony. We asked them to
11 produce any business cards that were produced at that
12 meeting informally. He refused. So we filed -- we did a
13 request for production, and he agreed to produce them, but
14 for various reasons couldn't locate them or wouldn't give
15 them to us until we got this a couple weeks ago. And so
16 this is the --

17 MR. FALLICK: I object for whatever it's worth to
18 the characterization. I don't want to get into it, but I
19 don't agree with those characterizations.

20 THE COURT: Okay. If counsel's simply being
21 inaccurate from your perspective, you can wait.

22 MR. FALLICK: Thank you. I guess I should also
23 object. There's nothing in the record to support those
24 comments. I guess I should object on that ground.

25 MR. LUCERO: Your Honor, I do want to make -- that

1 is not of the record, because we got it after all the
2 documents had been presented to the Court, so I would like
3 to make that an exhibit, but what I want to point out is
4 that Ms. Fallick was at that meeting. He knew precisely
5 what business card Ms. Davis had given them. He knew it was
6 this business card, because he had it, and that it said
7 "controller". Yet, he's asking her a question, "Do you
8 remember providing a business card to the Mescalero/Apache,
9 Tribe on September 29th that said 'internal auditor?'" Your
10 Honor, if anything approached subornation of perjury in this
11 case, I think it was that. He knew that would be an
12 untruthful answer. He knew what the truth was, and it was
13 what her answer had been right above that her business card
14 said controller, and yet, he tried to get her to say
15 something that was not true that he knew was not true,
16 because he knew it would help his case. That was the, I
17 think, tenor of his questions throughout her deposition, but
18 this is the most pointed example I can come up with.

19 The next issue I'd like to go into were questions about
20 -- he asked questions -- and this case out at her
21 deposition, "What part of Dane Leavitt's letter that was
22 presented to the Tribe on the 29th did you write?" And
23 these are the questions later in the deposition after lunch,
24 and the question was, "What part of the Dane Leavitt's did
25 you write?"

1 She said, "I did not write any part of letter."

2 And Mr. Fallick said, "You testified this morning that
3 you wrote some of the language that appears in Dane
4 Leavitt's letter that's attached, that's marked as Exhibit
5 1, true?" Mr. Crofton objected that it misstated her prior
6 testimony.

7 And Mr. Fallick said, "You know, since we're getting a
8 lot of this, I'm going to ask you, court reporter, to find
9 that testimony." So the court reporter goes back and finds
10 this earlier testimony, and what Mr. Fallick reads to her
11 was the bottom portion, and he asks her, "Was this the
12 questions and answers you know made earlier? 'Did you write
13 any of the language that appears anywhere in the Exhibit 1
14 to your deposition and you answered yes.'"

15 Now, notice the difference between those two questions.

16 THE COURT: Yeah, one's the letter, and one's
17 Exhibit 1, which has all this other stuff.

18 MR. LUCERO: Correct. What he did not read to her
19 was her testimony right above there where she specifically
20 told him, "I did not write the letter," instead still trying
21 to trick her, he is hoping that she is somehow confused
22 about the difference between Exhibit 1 and the letter is
23 intimated by being read testimony earlier in her deposition,
24 but again, what struck me was the way he asked that
25 question. He was clearly implying to her that she had

1 testified earlier that she had written some part of that
2 letter and was trying to get her to admit that, and that
3 just wasn't true. The truth was she did not write any of
4 the letter, but she wrote some of the attachments to it.

5 Moving to the sort of main issue in the case, I wanted
6 to point out that at the start of the deposition Mr. Fallick
7 invited her, Tawnya Davis, that if she realizes an earlier
8 answer was incorrect, that he was going to give her the
9 opportunity to correct or supplement that; "Do you
10 understand that? Yes." So she was invited to do what she
11 later did and what now is being teed up as an accusation of
12 subornation of perjury.

13 Moving to the testimony that the issue about lead
14 auditor first surfaced in this manner. The first thing that
15 happened was Deposition Exhibit Number 1 was marked, which
16 is Dane Leavitt's letter.

17 THE COURT: And attachments.

18 MR. LUCERO: And the attachments; yes, Your Honor.

19 THE COURT: See, we can all make that mistake.

20 MR. LUCERO: I do it all the time. That's what
21 makes it so scary, and the question is, "Does this document
22 refer to an audit regarding Mescalero/Apache Tribe? Yes.
23 Is there any reference to you in this document? Yes, there
24 is. Would you read the reference to you in this document?"
25 And what she reads is, among other things, "The auditor who

1 is assigned to lead this matter is Tawnya Davis." Now, I've
2 asked myself and maybe it's just I'm not smart enough to
3 think about it, but why would you ask a deponent to do this?
4 It's not for evidentiary value. You have the letter. You
5 know what it says. Why do you want her to read that?

6 The only thing I can think of is to create the
7 confusion that ultimately happened, to implant in that
8 witness' mind a sign to lead this matter, Tawnya Davis.

9 Now, earlier there was a lot of question and argument
10 about whether there were blatant attempts to mislead. This
11 was not a blatant attempt. This was an incredibly subtle
12 and incredibly clever attempt to mislead, but if anyone can
13 think of another reason why you would ask the witness this
14 question, I'd like to hear it. That's why I think the
15 question was asked.

16 Then the next thing that moved on -- I'm sorry we can't
17 see the larger ones, but the highlighted --

18 THE COURT: That's okay. I think I've memorized
19 the deposition.

20 MR. LUCERO: Yeah. The next Tawnya topic was
21 asked was, "Describe your role? How was your role described
22 to President Chino and the other tribal members at the
23 meeting?" And she answered, "To my recollection, it was as
24 an auditor of the audit that was performed." I see nothing
25 untruthful. She says nothing about lead auditor. She was

1 represented as simply an auditor. Then it says -- the next
2 question is, "Please describe in detail what role you
3 personally played in the audit that's described as Exhibit 1
4 that's in front of you?" Again, I think a nonobjectionable
5 question, not a leading question, a question that's
6 open-ended.

7 And her answer I think we've never contended is
8 anything but accurate. "I was involved from the beginning
9 of the audit and helped throughout the different stages. So
10 I was the one that was aware of all the things that
11 occurred." That's -- no one disputes that.

12 The next question was, "I'm going to ask you a series
13 of questions about the internal audit that's referenced in
14 Exhibit 1, and I'm going to use just the term 'this audit'.
15 If I do that, do you understand what I'm doing?" So what
16 he's doing is establishing that ground rule, which again, I
17 think an attorney is entitled to do. That's part of an
18 adversary system. That's part of the litigation strategy.
19 It turns out I think to be very confusing when you start
20 referring to documents that talk about the audit, and the
21 confusion is, does that same ground rule apply to the
22 documents that referred to the audit or just when you used
23 the words "the audit", but I'll get to that when we come to
24 it, but I have no problem basically with this question.

25 And the next one does the same thing. "For the rest of

1 this deposition, unless I specifically say otherwise,
2 everything I -- everything -- all my references are to the
3 audit," which means the audit for the Mescalero Tribe, and
4 she understands that.

5 Your Honor, before I go on, I want to go back to the
6 very first question which was for her to read that part of
7 the letter that referred to her, because almost the entire
8 Tawnya Davis deposition and a substantial portion of the
9 testimony here today was focused on whether Mr. Fallick had
10 ever asked prior to her making the mistake about the
11 characterization of Dean Leavitt -- or Dane Leavitt, whether
12 he had ever asked about the audit that did not occur. And,
13 again, he worded his questions very carefully.

14 There were no questions that specifically asked about
15 that audit, but what he had her done was have her read a
16 document that talked about that audit, and so when he asked
17 Tawnya and when he asked Mr. Crofton or any other witnesses,
18 you know, "Find for me in the transcript where I used a
19 question that used the word 'payment and invoice audit?'"
20 You don't find it, or "audit that did not occur," you don't
21 find it, but he had referenced that audit, not directly but
22 indirectly but having her read that passage, and I forgot to
23 point that out when we went through, but I think it's
24 important because of the length of time he spent
25 establishing that fact, which I don't think is accurate, but

1 anyway, moving to this one, this was just again establishing
2 those ground rules.

3 The next time it came up, "He asked was there a lead
4 auditor on this internal audit team?" Mr. Crofton made an
5 objection, and here's where the witness made what I consider
6 to be the mistake in her deposition.

7 She said, "As Dane characterized it in the letter, I
8 was characterized as the lead auditor." A couple of things
9 I want to point out. Number one, she didn't say, "I was the
10 lead auditor." She said, "As Dane characterized it in the
11 letter, I was characterized as the lead auditor."

12 Now, what we're going to go to next is the letter, and
13 I'm assuming the Court has read that letter.

14 THE COURT: Well, yes, but after she said that,
15 then the next question was, "What does that characterization
16 mean to you?"

17 And she said, "To me that means that I was -- that I
18 was the one that followed through on -- followed through all
19 the different steps of the audit and compiled the
20 information."

21 MR. LUCERO: Absolutely.

22 THE COURT: And next question is, "Is this the
23 first audit? Is this is audit that was done?"

24 And she says, "Yes."

25 MR. LUCERO: Yes.

1 THE COURT: And then he says, "Is it fair to say
2 that you're the person most knowledgeable about the audits
3 of the Mescalero accounts? Yes." So in that context, then
4 it's immediately after the answer to that question that
5 Mr. Fallick shows her Exhibit Number 2.

6 MR. LUCERO: Correct, Your Honor.

7 THE COURT: So it's clear that even though she
8 referenced Number 1, right, she knew she -- I mean, even
9 though she referenced Exhibit 1, okay, and that
10 characterization that -- you know, Mr. Fallick has sort of
11 said, "Well, it's ambiguous," but it's not. I mean, it's
12 clear to me that in Exhibit 1, the reference to Tawnya
13 specifically, Ms. Davis, is that she would lead the payment
14 and invoice audit.

15 MR. LUCERO: Correct, Your Honor.

16 THE COURT: But she went on to make it clear that
17 she was the one who knew -- I mean, she was the one who knew
18 stuff, and then she was talking about, "If that makes me
19 lead auditor, then I'm the lead auditor."

20 MR. LUCERO: Correct. I agree with that, and I
21 will get to that, and I won't need to make this point,
22 because you just stated it, which is that there is no doubt
23 that this is a mistake. This testimony is a mistake. Dane
24 did not characterize her as the lead auditor in that letter
25 of the audit -- of the audit that was performed. I mean,

1 they're just -- and so when we're talking later about
2 correcting a mistake, we have to look at it in the context
3 that there was something that was wrong that was said that
4 needed to be corrected to make it truthful, not something
5 that was truthful that was said that then needed to be
6 corrected to make it untruthful.

7 THE COURT: I think the issue is that to the
8 extent that she's referring back to the letter as lead
9 auditor, that was a mistake, but all the other stuff she
10 said about how much she knew and she was the one who pulled
11 it all together -- I'm paraphrasing, okay.

12 MR. LUCERO: Let's get right to that.

13 THE COURT: Yeah.

14 MR. LUCERO: This is just the letter, and we don't
15 have to go through it, because it's just a hundred percent
16 clear, and this is exactly I think what you got to next, and
17 then Mr. Fallick asked, "What does that characterization --
18 strike that. In your mind, what does that characterization
19 mean?"

20 And, again, as the Court paraphrased quite accurately,
21 "To me it means I was the one that followed through on all
22 the different steps of the audit, compiled the information."

23 "And the audit you're referring to is the internal
24 audit?"

25 "Yes." Absolutely she was the one that in the internal

1 audit followed all the different steps and compiled the
2 information.

3 THE COURT: And was most knowledgeable.

4 MR. LUCERO: Yes, and was the one most
5 knowledgeable about the Mescalero -- now, this one, I don't
6 know if this is too subtle, but it says, "Knowledgeable of
7 the audits of the Mescalero accounts." Now, Tawnya was the
8 controller, and she's the one that did the periodic
9 six-month audits of the Mescalero accounts. I honestly do
10 not know how she interpreted that question, because the word
11 "audits" was used, whether -- whether that refers to the one
12 that was done in September in response to Mr. Fallick's
13 demand letter or the periodic six-month audits that she does
14 as controller all the time, but either way, I think it's
15 fair to say just from the one above that, that she's talking
16 about the audit that was done, and that she was the one that
17 followed through on all the different steps and compiled all
18 the information. And I think she says later she was the one
19 most knowledgeable about all the results, and that she put
20 it together.

21 THE COURT: Well, the greatest knowledge of what
22 was going on, which is not the same as results. I mean, we
23 are really doing a lot of Jesuitical parsing here, but --
24 and the information that was gathered.

25 MR. LUCERO: Correct. No dispute about that. No

1 one is disputing that. What I think the problem now that is
2 existing is, is that people are talking about two different
3 things when they use the word "lead auditor". As we'll see
4 when we look at Mr. Fallick's email and I think in some of
5 his other questions -- and maybe the natural inference when
6 someone says "lead auditor" is that Mr. Fallick was using it
7 as the person in charge, which is a very different thing
8 than the person that follows through on all the different
9 steps, compiles all the information. You know, in any one
10 of my cases it may very well be that a paralegal is the one
11 that is most knowledgeable about all the different steps and
12 compiles all the information. They're not the lead attorney
13 on a case. They're not directing what's going on. They're
14 not in charge, and so at this point, we -- we have a
15 deviation as to meaning where the witness is looking at
16 "lead auditor" as meaning something different than the
17 questioner is meaning and even that wants to be inferred
18 today.

19 I mean, I don't think what Mr. Fallick wants to prove
20 is that she's the one that did the most steps. He wants to
21 show that she was the one in charge of the audit, because he
22 wants to show that she was the relative of Dane Leavitt, so
23 she was put in charge. So that I think is the disconnect in
24 this testimony. We're not claiming that any of that was
25 incorrect, needed to be corrected, ever was corrected or

1 should be corrected. That's honest testimony.

2 Then we get to Exhibit 2. "I placed in front of you
3 Exhibit 2, which is a email I sent," et cetera, et cetera.
4 There's -- he had highlighted the exhibit, Judge, and as you
5 know, when you get a deposition copy with exhibits,
6 highlights don't come out. So I don't know exactly what was
7 highlighted, but I suspect that at least this was part of
8 the highlighting.

9 And that's, "Steve, I said in our telephone
10 conversation this evening your client's statement to you
11 that Tawnya was not in charge of the audit and would not be
12 the best person for some or all of the 30(B)(6) about the
13 audit is contrary to what was represented to my client and
14 colleagues at the meeting in Mescalero. We were advised she
15 was the auditor directly responsible," and there was even
16 some discussion about the extended hours she worked, et
17 cetera. Then he says, "Moreover, Dane Leavitts' September
18 29th letter states as follows, 'The auditor who is assigned
19 to lead this matter is Tawnya Davis,'" clearly associating
20 that isolated quote with his statement that they were -- she
21 was represented as the lead auditor. And so when we're
22 talking about blatant things -- and I don't know if
23 "blatant" is the right word, but that isn't fair. That is
24 to me very misleading and very confusing to the witness.

25 Moreover, now, I think we have to go back. She's being

1 asked to look at an exhibit. Now, when that exhibit was
2 made and when Dane's letter was written, there was no
3 stipulation in the deposition that every time someone uses
4 the word "auditor", it's going to refer to a certain thing
5 and not to other things, but now, there's that admonition in
6 her mind, auditor means the internal audit that was
7 performed, but that's make no sentence in the context of an
8 exhibit where that wasn't the intent of it, and that's why I
9 think there was a lot of speaking objections right after
10 this.

11 And there were, and I think the reason was is as
12 follows: I think Mr. Crofton, sitting there, number one,
13 recognized she said something that was in error. She said,
14 "Dane characterized me in this letter as the lead auditor,"
15 and anyone who's read that letter knows that's wrong. So he
16 knows a mistake has been made. He knows the witnesses is
17 confused. He's not trying to get her to say something false
18 that was previously true. He knows she has said something
19 that is inaccurate. And now, we have this exhibit, which is
20 further heightening that error by bringing in an isolated
21 quote and pairing it together with the statement that she
22 was represented as the lead auditor to the Mescalero Tribe
23 in the audit that actually was conducted.

24 Then you couple that with the instruction that every
25 time you hear the words "the auditor", you're supposed to be

1 thinking of the internal audit that occurred when you can't
2 do that with Dean's letter -- Dane's letter, because that's
3 not the context it was written in, and so he makes
4 objections that it's ambiguous and misleading; that there's
5 two audits and that there's confusion about the --

6 THE COURT: Well, let me ask you about this. You,
7 of course, are familiar with current Rule 1-030(d), which
8 was -- which is effective for cases filed on or after May
9 1st, 2006, correct?

10 MR. LUCERO: Correct, Your Honor.

11 THE COURT: And you know what the current rule is
12 in New Mexico concerning speaking objections --

13 MR. LUCERO: Correct.

14 THE COURT: -- which is there ain't supposed to be
15 any.

16 MR. LUCERO: Absolutely.

17 THE COURT: Now, that order was published one
18 month after Ms. Davis's deposition, the order to promulgate
19 the rule. I mean, the rule -- the order was issued in
20 mid-March of 2006, but before that rule was changed by the
21 Supreme Court, you know that speaking objections that amount
22 to coaching a witness are improper.

23 MR. LUCERO: Your Honor, I think a couple of
24 things. Number one, yes, I'm aware that the rule changed,
25 and it changed after this deposition. I believe that --

1 here are my honest thoughts on that, Judge. I think quite
2 frankly that in an adversary process, the pendulum has swung
3 too far in favor of the deposing attorney so that they can
4 do things like we've seen Mr. Fallick do in this deposition,
5 and the defending lawyer is almost powerless, and it's not
6 that the defending lawyer wants to subvert the truth. He
7 wants the truth to come out but is powerless to stop errors
8 from being made.

9 That being said, I would agree with the Court that if
10 this -- these objections were made after the change in rule,
11 there would certainly be much stronger basis for criticism
12 of Mr. Crofton, because the rule is very specific what can
13 be said. Object as to form, and that's it.

14 It didn't say that before, and I think that left room
15 open for advocacy, and then I think it makes the more
16 difficult job of intent. Is the lawyer doing that, number
17 one, to coach the witness, or is he honestly trying to get
18 the attorney who is asking questions that are I think unfair
19 and confusing to ask a proper question? And how do you
20 separate out those two? Because once you've told the
21 attorney -- unless you ask the deponent to leave the room
22 and then just talk to the attorney -- I suppose that could
23 have been done. It wasn't, but -- and I think Mr. Crofton
24 was very honest and forthright. I think he's always been
25 honest and forthright, quite frankly, but even in his

1 testimony here today, he said, "I don't know. I don't know
2 when Tawnya heard that, that had some influence on her."
3 And I think -- to me that was incredibly telling in terms of
4 the way he approaches his duties of candor.

5 But was his intent to coach the witness or to get the
6 question clarified so that it became very clear now that
7 there were two audits and that that prior admonition and
8 this email, she was allowed to separate those out? I don't
9 know. And was her change in testimony because Mr. Fallick
10 later withdrew and actually clarified the questions as we'll
11 go through or because of the objections, again, I don't
12 know. But what I do know is that it wasn't -- it cannot
13 possibly be anyone trying to get a witness who has told the
14 truth to now tell a lie, because we know the mistake that
15 was made was a mistake. That was not the truth. Dane
16 Leavitt didn't characterize her as the lead auditor in that
17 letter, and that's the mistake that exists up to this point
18 in the transcript.

19 So I think can we question should he have been making
20 such a long objection? Yes. Is that something that --
21 perhaps after this rule certainly would have been much more
22 serious. Before this rule, a judge might say, "Mr. Crofton,
23 in the future, you're not going to be making those kinds of
24 objections. You're going to sit there and listen," perhaps.

25 But my own feeling in terms of the balance of the

1 litigation system and the adversary system is that I pointed
2 out to the Court and being mostly a defense lawyer, with
3 that change in rule, I do feel the pendulum has swung too
4 far in that what is coming out now is less truthful and less
5 accurate, because the defending attorney is so hamstrung to
6 prevent -- and lawyers are clever. They're good. They're
7 smart. They know how to get witnesses to say things that
8 aren't true that help their case. That's their job, and
9 that's the way I feel about it, Your Honor. That's all I
10 can say about that.

11 There was the series of objections, and I think we've
12 gone through those, but at any rate at some point
13 Mr. Fallick says, "I'm going to try and clarify this, so
14 that there's one less issue for the Judge." I guess not,
15 but then he says, "Okay. How many audits were there? There
16 were, you know, two audits," and he goes through the whole
17 thing. "And one was performed, and one wasn't performed,"
18 and he gets everything clear in her mind, and he says,
19 "Earlier today I asked you to agree on terminology. When I
20 said I was going to ask about the audit, I meant the audit
21 that was conducted?"

22 And she said, "My understanding was the audit that was
23 conducted."

24 He says, "Now, let's continue to talk about the audit
25 that was conducted and go back to Exhibit 2." Now, he's

1 explained -- now, I think he's made clear questions and
2 clearly separated the two audits and asked, "Based on that
3 understanding of the word 'the audit', is it fair to say
4 that Tawnya Davis was not in charge of the audit? Yes."
5 Unequivocally she said she was not in charge of the audit.

6 Again, focusing again on the difference in words, if
7 you say "lead auditor", it can be mean a lot of different
8 things to a lot of different people, but if you say "in
9 charge", she's never said she was in charge, ever. "Is it
10 fair to say that you were not in charge of the audit? Yes."
11 And that's where I think she was correcting her testimony
12 prior to lunch like we said in our papers, and --

13 THE COURT: Well, this is before lunch.

14 MR. LUCERO: This is before lunch, Your Honor.

15 THE COURT: Yes.

16 MR. LUCERO: And I think it came as soon as Mr.
17 Fallick went through, "Okay. There's two audits," and
18 again, got them clear in her mind, and you heard her
19 testify. I leave it up to you to be a judge of whether she
20 seemed honest or credible, but I certainly found her
21 explanation to be totally consistent with the written record
22 and credible that -- she just got stuck in her mind what she
23 had read earlier, Dane said she would take the lead in that
24 audit. It's certainly consistent with everything I've seen
25 here.

1 So then the next series of questions, I think the most
2 pertinent, "But you don't deny you were the lead auditor on
3 the audit that was conducted?"

4 And she said, "As we were performing the audit that was
5 conducted I was the person that had the greatest knowledge
6 of what was going on and the information that was gathered.
7 Whether or not that qualified me as the lead auditor, I am
8 unable to say." Again that's one of the testimony the Court
9 pointed out.

10 Again, we don't think there's anything incorrect about
11 that statement, and that was never corrected, and we never
12 meant it to be corrected, and that's the truth as far as I
13 know. She was all that. But does that make her lead
14 auditor? She actually points out here the confusion, which
15 I'm trying to make clear at this point. "Whether that
16 qualifies me as lead auditor, I'm unable to say." Well,
17 whether that does or not depends to what you define as lead
18 auditor. Do you mean the person in charge? No, she's
19 already said earlier she was never the person in charge. Do
20 you mean the person who had the greatest knowledge?
21 Perhaps, and that's just a difference that can occur in
22 words.

23 It always -- it always amuses me when attorneys say,
24 you know, "If you don't ask for clarification, I'll assume
25 that you understood what I asked, and that your answer is

1 answering the same question." You can make that assumption
2 all day, but you can be talking about two different things.
3 He's talking about who was in charge, and she talking about
4 who was involved in the most steps, and that's what I'm
5 seeing happening right here.

6 This is after lunch. Mr. Crofton brings up, "She has a
7 correction or a clarification or however you want to say."

8 And she says, "I thought about things that I said
9 earlier this morning. I just wanted to make clear as we're
10 talking while answering questions concerning the audit and
11 my position in the audit, during the letter, there's two
12 different audits that are discussed. I was not the lead
13 auditor in the audit that was completed but the audit that
14 talked about a review of the invoices and payments that was
15 normally done every six months I was going to take the lead
16 in that audit."

17 Ms. Fallick, "Do you recall when said this morning that
18 you were the lead auditor in the audit that was conducted?"
19 Got a pretty good question, suggesting that she had said
20 that. She hadn't said that. She says, "Without looking at
21 the transcript, I don't remember my different responses
22 exactly." Pretty good response, because I don't think
23 anyone can, and as we've gone through it and just memorized
24 them over and over, I think we can say now looking at the
25 transcript, she never did say that. She just said, you

1 know, "If what you mean is the most knowledgeable or
2 whatever, most involved in the most steps, then maybe that
3 would be the lead auditor."

4 And so Mr. Crofton objected, it mischaracterized her
5 testimony, which I think did. She did not say she had been
6 the lead auditor.

7 And then he says, "Well, assume for purposes of my
8 question that you did say that, and the transcript will
9 speak for itself, can you explain the basis for that change
10 in testimony?" Clearly an objectionable question. He's
11 asking her to assume that she said something that she really
12 didn't say and then explain why she said that. There's
13 simply no way a witness can answer a question like that, and
14 so I certainly think the objection to that one was proper.

15 These are just further questions to follow up. He was
16 -- Mr. Fallick was asking her to explain how it happened.
17 He asked, "In the time period, once you started to think
18 about it, the time period between the time we adjourned this
19 morning's session and now, is that the time period in which
20 you were thinking about it?"

21 "No."

22 "What was the time period in which you were thinking
23 about it?"

24 "It was during this morning's -- as we were going
25 through this morning."

1 And, again, I think when she testified a few weeks ago,
2 she said the same thing. By the time the break for lunch
3 had taken place, she was already aware in her own mind that
4 something had gone wrong. It didn't happen during the lunch
5 break.

6 Question by Mr. Fallick, "Did you testify this morning
7 that you were the person most knowledgeable about the
8 conduct of the audit that was conducted concerning
9 Mescalero/Apache Tribe accounts?" Repeating the question,
10 objection.

11 And then, "As I remember earlier, I did testify that I
12 was the most knowledgeable in the information, the results
13 that were provided." Again, I think that's an honest
14 statement by a witness trying her best to remember what she
15 had said earlier in that day.

16 The next time it was brought up, "Did you suggest to
17 Ms. Davis over the" -- okay. Now, I'm done with all the one
18 in her deposition. I put these up to show how easy it is
19 for even a very good, very experienced attorney or even a
20 special master or even a judge to say -- think they're
21 something and say something else, and here's a question
22 Mr. Fallick asked where he asks the wrong date, and you
23 bring up -- and Mr. Fallick, "Well, do you really mean that
24 date or do you mean a different date?"

25 And I think there was another instance in

1 Mr. Chidester's deposition where Mr. Fallick asked him if he
2 reviewed page fifty some of the audit, meaning -- and he
3 meant the deposition, used the word "the audit". This is
4 you, Judge Conway, talking when you were saying, "You mean
5 Mr. Leavitt is responsible under Rule 11 for what's filed."

6 And Mr. Crofton, "Oh, did I say Mr. Leavitt? I meant
7 Mr. Crofton."

8 THE COURT: That happens on a daily basis.

9 MR. LUCERO: It happens a lot, and that's why I
10 think -- that's why it's so hard when Gregg says, "Didn't
11 you say earlier in that deposition this or that?" And
12 you're like, "I don't even know -- remember tell what I
13 thought I said, what really came out of my mouth," and
14 that's why I think, Judge, I feel very, very confident that
15 Ms. Davis never lied either in her deposition, either in the
16 morning session or the afternoon session or the next day,
17 and there's been no evidence that she lied. And I think in
18 her deposition here a few weeks ago, she was incredibly
19 truthful and told the truth and everything.

20 Mr. Fallick just in his closing arguments, made a
21 statement, he said he thought that in her recent deposition
22 she testified that when she was testifying on pages 43 and
23 44 that she was the lead auditor, that she really believed
24 at that time that's -- that she was the auditor, and so I
25 tried to find that testimony in her deposition, because I

1 don't think that's an accurate characterization, and I found
2 it on page 24 beginning at line 16, and the question was:

3 "QUESTION: Your testimony today is that on top of page
4 44, that moment in time, you understood yourself to
5 have been the lead auditor for both audits; is that
6 true?

7 And the answer was:

8 "ANSWER: I -- as I said here, as Dane characterized it
9 in the letter, I was characterized as the lead
10 auditor. I wouldn't say I believed it at that time,
11 but I was taking it off of what I had stated in page
12 11, and I was saying, 'Well, if he characterized it,'
13 I had just associated that, and that's where I made
14 the statement.

15 "QUESTION: So you understood that characterization by
16 Dane Leavitt to apply to both audits as of the top of
17 page 44; is that true?

18 "QUESTION: At that time, I had lumped the two audits
19 together."

20 I don't see here anywhere her saying, "When I said
21 that, I did believe that I was the lead auditor on the audit
22 that did occur. What she's saying is, in fact, I wouldn't
23 say that I believed it at that time, but I had lumped it
24 together. I had become confused. I had lumped it together.

25 Judge, that's all I have on the what I guess is the

1 most serious charge against Mr. Crofton and would welcome
2 just if nothing else because of the seriousness of the
3 charge if there's question in the Court's mind or if there's
4 anything that you think Tawnya lied about that I could have
5 the opportunity to explain that, because I hope I can,
6 because I just don't believe that happened.

7 If there are no questions, I guess I would address
8 briefly the other objections made in the deposition. It
9 hasn't been a big point, but I guess I would have these
10 comments. Number one, all of the objections as to work
11 product where there was an instruction not to answer are not
12 part of this motion. We know that.

13 Then there were these specific ones that we've talked
14 about in detail, which I think some were speaking and some
15 may have crossed the line as to how much an attorney should
16 say but I think were done with good intention and with good
17 reason and purpose, because I think there were -- there was
18 confusion in the questions. And then there are a bunch of
19 other objections as to form, most of which are very brief,
20 and I think comply with the rule. They were -- you would
21 say, "Object as to form ambiguous, vague," that sort of
22 thing. I guess I -- it would take us forever to go through
23 every one of them.

24 My general comments are, number one, I think -- I think
25 Mr. Crofton was in a heightened sense of anxiety and

1 awareness because of everything that had gone on in the
2 deposition and before then. All the claims of waiver and we
3 knew the motion had not been filed yet claiming general
4 waiver of all work product, but that had already been
5 threatened. It had been talked about in letters, emails.
6 Our position had been criticised as baseless, frivolous, et
7 cetera, like everything else we've done, and I think he was
8 being put in a position -- I think he even suggested, "Let's
9 get a ruling from the Judge first before we do the
10 deposition, so we know where we stand." And that didn't
11 happen. And so he was being put in a position where in a
12 split second he had to make either an objection or waive it,
13 because objections as to form not made are waived and to
14 catch every single work product one or waive it, knowing
15 that the other attorney was going to be watching and reading
16 the transcript carefully for waiver arguments.

17 That being said, are there more objections in this
18 deposition than I usually see in a deposition? Yeah, I
19 think there are. Are there more than I ever see? No. Some
20 attorneys -- it's a matter of personal style. Some
21 attorneys seem to want to preserve their record as to form
22 on virtually every question. As long as I'm getting the
23 answer at the end of it, I figure they're just trying to do
24 their job, and that's the way they see they have to protect
25 their client, and I can understand it. If you waive

1 something for your client, that's an irrevocable mistake.
2 If you make an objection that overruled, you make an
3 objection that's overruled.

4 So -- but here I don't -- and again, they've not
5 pointed to any questions where they say, "You know, we still
6 need this information from Ms. Davis. We need X, Y and Z,
7 and we don't have it." It's just not -- they don't have.
8 So I think they got everything that they needed from that
9 deposition except the thing they're not raising, which is
10 the work product instruction not to answer. Thank you, Your
11 Honor.

12 THE COURT: Thank you. Mr. Crofton.

13 MR. CROFTON: Thank you, Your Honor. Let me say
14 first, Your Honor, that my intent throughout the case has
15 been to try to comply with New Mexico court rules to the
16 best of my ability and as I understand Them, and I, as
17 Mr. Lucero and other members of his firm know, have spent
18 lots of time on the phone with them including before the
19 Davis deposition attempting to understand and appreciate the
20 latitude that a lawyer would have in defending a deposition
21 and particularly with some of the kinds of questions that
22 were anticipated.

23 And similarly with respect to the document production,
24 our intent at all times has been to produce the documents
25 that the Plaintiff entitled to receive, and at the same

1 time, to protect within the rules, the rights and interests
2 of the Leavitt Defendants and the third parties, third
3 parties including individuals whose health or financial or
4 other information is included in some of those records,
5 interests of other tribes who can be viewed as competitors
6 of Mescalero and would not want all of their business
7 information that the insurance agency would have to be
8 available to other tribes and, also, to protect the
9 interests of an entity called commercial insurance services
10 that have purchased some of the accounts of LGA, Leavitt
11 Group of Albuquerque, and obviously had their own interest
12 in trying to maintain those clients and not have them
13 pirated by somebody that would have inside information about
14 the premiums and the exposures and so forth.

15 And I'll take some time to go through some of the
16 documents that we have provided to you. I feel a little bit
17 like Paul Harvey that Mr. Fallick has given you very
18 selective documents; for example, his email in early April
19 of 2006. What he did not provide to you was most of the
20 very detailed responses that we sent, such as the lengthy
21 letter in late April of 2006 that went through all of his
22 requests and accusations and so forth, or at least as far as
23 I can recall my letter was not included in what the
24 Plaintiff provided to you.

25 We also -- when I say "we" I mean myself, the people I

1 worked with at Miller, Stratvert, the people I worked with
2 at the Leavitt Group, I have felt that at all times were
3 trying to act in good faith, trying to act reasonably in
4 responding to discovery objections -- or discovery requests
5 and possible objections and trying to work out these work
6 product issues and confidentiality issues and never with an
7 intent to obstruct or to do anything improper, and I think
8 as we go through some of some of the paper trail in this
9 case, I think we'll be able to demonstrate that to you.

10 There's certainly were two major discovery disputes
11 relating to the document requests that have taken up
12 probably around 75 percent of the time and effort in this
13 case so far, and those were the work product issues and the
14 confidentiality disputes.

15 MR. FALLICK: Your Honor, I apologize for
16 interrupting. Can I ask how late the Court thinks we're
17 going to go, because I would like to take a brief break if
18 we're going to be here for quite a while, and if you're
19 planning on --

20 THE COURT: I hope not. I hope not. Mr. Crofton,
21 how long do you think you'll be taking? I don't want to
22 rush you, but it would be good to know.

23 MR. CROFTON: I guess it depends on -- you know, I
24 tried to go as fast as I can, but my best guess would
25 probably be maybe around 40 minutes, and that's somewhat of

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a guess.

THE COURT: Okay.

MR. FALLICK: Can we have a five-minute break?

THE COURT: Okay. Five minutes. That's it.

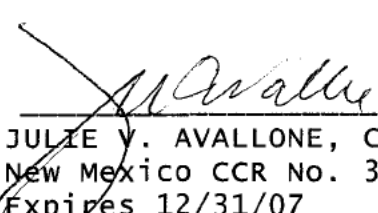
(Note: Court in recess at 4:58 p.m.)

1 STATE OF NEW MEXICO)
2)
3 COUNTY OF BERNALILLO)
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6
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ss

8 I, JULIE V. AVALLONE, Official Court Reporter for the
9 Second Judicial District of the State of New Mexico, hereby
10 certify that I reported the attached proceedings; that the
11 pages numbered 1 through 76, inclusive, are a true and
12 correct transcript of my stenographic notes, and were
13 reduced to typewritten transcript through Computer-Aided
14 Transcription; and that on the date I reported these
15 proceedings, I was a New Mexico Certified Court Reporter.

16 Dated at Albuquerque, New Mexico, this 26th day of June
17 2007.
18
19
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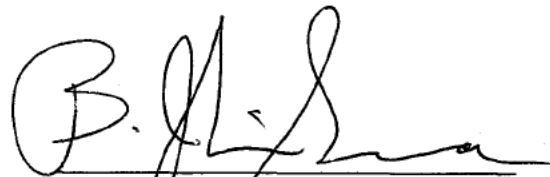
21 
22 JULIE V. AVALLONE, CCR, RPR
23 New Mexico CCR No. 39
24 Expires 12/31/07
25

JULIE V. AVALLONE, CCR, RPR
Official Court Reporter

1 STATE OF NEW MEXICO)
2 COUNTY OF BERNALILLO) ss

3 I, B. JULIAN SERNA, Official Court Reporter for the
4 Second Judicial District of the State of New Mexico, hereby
5 certify that I reported, to the best of my ability, the
6 proceedings, CV-05-7921; that the pages numbered 76 through
7 176, inclusive, are a true and correct partial transcript of
8 my stenographic notes, and were reduced to typewritten
9 transcript through Computer-Aided Transcription; and that on
10 the date I reported these proceedings, I was a New Mexico
11 Certified Court Reporter.

12 Dated at Albuquerque, New Mexico, this 29th day of
13 June, 2007.

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18 B. JULIAN SERNA
19 New Mexico CCR No. 206
Expires: December 31, 2007

20 The total cost of this
21 transcript is \$_____.