

# Rock Opera Discovery of Archived ESI

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*In re In re Operadora DB Mex.*, 2009 U.S. Dist. LEXIS 68078 (M.D. Fla. May 28, 2009), is the story of an international legal dispute, arbitration and the Hard Rock Café. While all of that makes for an exciting feature act, we will rock out to the electronic discovery issues.

The Hard Rock Café was requested to produce electronically stored information and documents over 15 years, which included two changes in ownership and several document retention policies. The Hard Rock argued that such a request was unduly burdensome and costly. *In re In re Operadora DB Mex.*, 14.

Notwithstanding the electronically stored information, the Hard Rock Café explained their “undue burden” in that it would take 10 to 20 days to

review for responsive documents. Moreover, the existing staff would have to perform the search, as there was no regular staff to search for responsive documents. *In re In re Operadora DB Mex.*, 14-15.

## Unduly Burdensome & Costly ESI

The Court found the Hard Rock Café made a preliminary showing that the archived ESI could be “costly and unduly burdensome.” *In re In re Operadora DB Mex.*, 31. In separate litigation, the Hard Rock Café produced archived ESI and that the “opposing party incurred substantial costs in connection with searching same for relevant information.” *In re In re Operadora DB Mex.*, 31-32.

## Failure to State the Form of Production

The requesting and producing parties both failed to state a form of production. *In re In re Operadora DB Mex.*, 32. Pursuant to Federal Rule of Civil Procedure Rule 34, a responding party may specify the form of production. ” Fed.R.Civ.P. 34(b)(1)(C). If no form is specified, the producing party is required to state the form they intend to use. Fed.R.Civ.P. 34(b)(2)(D).

## Production of ESI Produced in Other Litigation

The Court's options in resolving the discovery dispute for the archived ESI and determining the form of production included, "the implementation of a detailed and appropriately tailored discovery plan, ordering deposition(s) of personnel with the most knowledge of [Hard Rock Café]'s electronic data storage, retrieval, and search capabilities, and/or shifting the costs of discovery to the requesting party." *In re In re Operadora DB Mex.*, 32.

The Court ordered the Hard Rock Café to produce the ESI that it had "readily available in electronic format" from the separate litigation, solving part of the discovery dispute. *In re In re Operadora DB Mex.*, 33.

### **Good Faith Meet & Confer for Archived ESI**

The Court stated it was premature to determine a form of production for the archived ESI. The parties were ordered to meet and confer on a form of production. *In re In re Operadora DB Mex.*, 33.

The meet and conference needed to address the following:

- A good faith disclosure of the archived data by [Hard Rock Café], including the medium on which the archived data is stored, the volume of the archived data, the practicability of searching the archived data for responsive data, the likely costs associated therein, and any other pertinent information available to [Hard Rock Café] regarding the most practical means and methods of facilitating a prompt and cost efficient search of the archived data files for information responsive to the subpoena;
- Each party shall have IT personnel or individual(s) with expertise or specialized knowledge in the mechanics and likely costs of such data extraction at the good faith conference;
- After [Hard Rock Café]'s disclosure, the parties shall jointly evaluate the costs associated with discovery of responsive archival data versus the need for said data at the Arbitration; and
- The parties shall make a good faith effort to agree upon a resolution of the archived data discovery dispute without the Court's involvement.

*In re In re Operadora DB Mex.*,33-34.

### **Bow Tie Thoughts**

I am a proponent that Federal Rule of Civil 26(b)(2)(B)'s definition of "not reasonably accessible" does not automatically make "unduly burdensome" equal costly. In this case, part of the undue burdensome analysis included the lack of staff to conduct a search and the subsequently man hours lost in a review. While this would ultimately have a dollar sign attached to it (because time equals money), showing up to court with an estimate from a vendor for preservation, collection or processing is not the only way to show ESI is not reasonably accessible.

It is also worth noting that the parties were required to have at the meet and confer "IT personnel or individual(s) with expertise or specialized knowledge in the mechanics and likely costs of such data extraction." *In re In re Operadora DB Mex.*,33-34. This was not

meant to sound as a holiday gift card to an e-Discovery service provider, but an acknowledgment that the electronically stored information can require specialized knowledge to resolve ESI issues.