

1. A ruling from the Southern District of Ohio granting sanctions for one party's failure to adequately prepare a corporate representative designated to testify in response to a Rule 30(b)(6) notice as to certain topics related to its collection and production of ESI.

In *Oro BRC4, LLC v. Silvertree Apartments*, 2021 WL 2373667 (S.D. Ohio. June 10, 2021), U.S. Magistrate Judge Elizabeth A. Preston Deavers imposed sanctions on one of the defendants for failing to adequately prepare a corporate representative designated to testify in response to a Rule 30(b)(6) notice as to certain topics related to its collection and production of ESI.

This opinion arose from a Rule 30(b)(6) deposition noticed and taken by plaintiff of a corporate representative of one of the defendants, relating (among other topics) to that defendant's collection and production of ESI during discovery. *Id.* at *1. The witness, Matthew C. Cook, who was defendant's head of information technology, testified during the Rule 30(b)(6) deposition that (1) he had received the deposition notice less than 72 hours before the deposition, (2) he did not review any documents other than his own emails in preparation for the deposition, and (3) he did not speak to or interview any of defendant's current or former employees. Cook also testified that he was not aware of an obligation to learn information regarding the topics from other employees of defendant and was testifying only as to his own personal knowledge. *Id.* at 1-2.

After the deposition, plaintiff filed a motion for sanctions, arguing that defendant failed to properly prepare Cook for the Rule 30(b)(6) deposition and seeking (among other relief) a second Rule 30(b)(6) deposition and attorney's fees and expenses to prepare for and conduct the first and second Rule 30(b)(6) deposition, plus an additional "\$10,000 award as a deterrent." *Id.* at *3. In response to the motion, defendant conceded that Cook "does not possess the best memory" but argued that Cook's "poor memory" did not equal sanctionable conduct.

Magistrate Judge Deavers began her analysis by surveying the relevant standards under Rule 30(b)(6), noting that "the duty to prepare a 30(b)(6) witness extends not only to the matters within the designee's personal knowledge, but also to all matters reasonably known by the corporation." A party, therefore, has the responsibility under Rule 30(b)(6) to prepare its designee "to the extent matters are reasonably available, whether from documents, past employees, or other sources." Specifically, the company is required "to make a good faith effort to find out the relevant facts possessed by the corporation — to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories."

Magistrate Judge Deavers also noted that "absolute perfection is not required of a 30(b) (6) witness," but producing an unprepared Rule 30(b)(6) witness is tantamount to a failure to appear, which may warrant sanctions under Federal Rule of Civil Procedure 37(d). *Id.* at *4. Rule 37(d) "provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default." The party seeking sanctions must make at least an initial showing — with record citations — suggesting that the designee's preparation was inadequate. Before imposing sanctions, courts should compare the testimony elicited in the deposition to the topics noticed under Rule 30(b)(6) to determine the adequacy of the witness' preparation. Magistrate Judge Deavers described the various sanctions available under Rule 37(b)(2) and noted that "the burden of proof is on the sanctioned party to establish that its failure to comply was due to inability and not to willfulness,

bad faith, or any fault of the party.” Furthermore, “[f]ault, in this context, includes gross negligence.”

Magistrate Judge Deavers found that the transcript from Cook’s deposition clearly demonstrated that Cook fell far short of the standards required by Rule 30(b)(6). *Id.* at *5. Cook testified that the only things he did to prepare included going through his own emails “to refresh his knowledge,” talking to counsel, and obtaining a police report. In addition, he testified that he did not talk to any other employees of defendant to obtain any information and repeatedly testified that he received the 30(b)(6) deposition notice only three business days prior to the deposition. Ultimately, Magistrate Judge Deavers agreed with plaintiff that Cook “failed to gather any memories but his own” in preparation for the deposition, which falls “far short of what was required of Mr. Cook” and defendant, namely to “designate a deponent who could testify about information known or reasonably available to the organization.” *Id.* at *6.

Magistrate Judge Deavers rejected defendant’s argument that Cook was the “most knowledgeable” employee to answer plaintiff’s questions and that his preparation was adequate. She found that “[t]his is not enough” because while it was undoubtedly helpful that Cook had the most personal knowledge of any employee of defendant, “it was not necessary for Mr. Cook to have any personal knowledge to have been adequately prepared to testify on behalf of” defendant: “Under Rule 30(b)(6), there is no obligation to select a person with personal knowledge of the events in question, so long as the corporation proffers a person who can answer regarding information known or reasonably available to the organization.”

Having concluded that Cook was unprepared for his deposition, Magistrate Judge Deavers next addressed the appropriate remedy under Rule 37(d). *Id.* at *7. Under Rule 37(d), sanctions may include any of the following orders listed in Rule 37(b)(2)(A)(i)-(vi): (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; or (vi) rendering a default judgment against the disobedient party. Magistrate Judge Deavers also noted that Rule 37(d) “mandates the award of attorney’s fees in most cases, regardless of what other sanctions are imposed.”

Magistrate Judge Deavers first ordered that plaintiff would be permitted to take a second Rule 30(b)(6) deposition as to certain of the topics in the original deposition notice. *Id.* at *8. She also found that defendant’s failure to prepare Cook was not substantially justified and ordered defendant to pay (1) plaintiff’s reasonable costs and expenses associated with attending the second deposition, including court reporter costs and the fees for plaintiff’s ESI consultant to attend, and (2) plaintiff’s reasonable attorneys’ fees associated with the motion for sanctions. Magistrate Judge Deavers also admonished defendant that if its next corporate representative was similarly unprepared for the second Rule 30(b)(6) deposition then she would impose more severe penalties, which may include additional monetary sanctions.