

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

AMERICAN NATIONAL FIRE,)	
INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	Docket no. 2:06-cv-200-GZS
v.)	
)	
YORK COUNTY,)	
)	
)	
Defendant.)	

ORDER ON MOTIONS IN LIMINE

Before the Court is Plaintiff’s Motion in Limine to Exclude Testimony of Gene Libby (Docket # 74) and Defendant’s Cross Motion in Limine to Exclude Testimony of David Dowd (Docket # 84). By this Order and for the reasons stated herein, the Court DENIES both Motions.

Plaintiff American National Fire Insurance Company (“ANFIC”) seeks to exclude Attorney Gene Libby, who represented York County in this matter until April 1, 2008, from testifying at the upcoming bench trial in this matter. ANFIC’s Motion is based on Defendant’s failure to list Libby as a person with discoverable information in accordance with Federal Rule of Civil Procedure 26(a)(1)(A) & (e). In response to ANFIC’s Motion, Defendant York County argues that if Attorney Libby is excluded from testifying, the Court should similarly exclude Attorney David Dowd, who remains as counsel of record for ANFIC, from testifying. According to York County, Libby and Dowd are essentially similarly situated in that both have served as counsel of record in this matter, both may be witnesses at upcoming trial and both were not listed in their client’s own initial disclosures.

There is no dispute that York County did not list Gene Libby in their January 16, 2007 Initial Disclosures (Docket # 74-2.) York County's Initial Disclosures did list David Dowd. For its part, ANFIC in fact listed Gene Libby as a person likely to have discoverable information in its own January 18, 2007 Revised Initial Disclosures (Docket # 77-2) but did not list David Dowd. On the record before the Court, it does not appear that either party supplemented their initial disclosures to add Libby or Dowd. Ultimately, neither Libby nor Dowd were deposed during discovery. On January 28, 2008, both parties filed final pretrial memoranda (Docket # 55 & 56). Via these submissions, each side identified both Gene Libby and David Dowd as witnesses. Following the final pretrial conference, this Court ruled that it would allow reciprocal post-discovery depositions of Libby and Dowd but it would not order Libby to appear for deposition in the absence of an agreement by the parties. (See March 20, 2008 Report of Tel. Conf. (Docket # 69).)

Rule 37 makes clear that a party is not allowed to use information that it fails to disclose in accordance with Rule 26 (a) or (e) "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). In the Court's opinion and on the unique record presented, the Court believes that the failure of both York County and ANFIC to list their respective counsel in their initial disclosures is harmless. Given the factual background of the case and the correspondence readily available to each side during discovery, Plaintiff and Defendant were well aware of the fact that Libby and Dowd possessed discoverable information. The fact that both sides chose to forego depositions of Libby and Dowd during discovery was an understandable strategy given the focus on contract interpretation, the various attorney-client privilege issues and the

availability of other witnesses. However, this strategy was not without risk. In any event, each side was explicitly notified via the January 28, 2008 pretrial submissions that the opposing side considered Libby and Dowd to be potential witnesses in light of the issues that remained for trial.

The fact that the parties have been unable to reach some agreement on this issue in the intervening three months is unfortunate. However, the Court will not apply the default exclusionary principle of Rule 37 when both sides were clearly aware of the potential for Libby and Dowd to be witnesses thereby making the failure to disclose harmless. Rather, under these circumstances, fairness dictates allowing each side to call either of these witnesses at the upcoming bench trial. For this reason, the Motions in Limine be and are hereby are DENIED.

The Court does not anticipate any delay of the bench trial due to this ruling. However, the Court hereby directs Attorney Dowd to District of Maine Local Rule 83.3(d) & (h). Pursuant to this Local Rule, Attorney Dowd is under an obligation to review and ensure that he is in compliance with the Maine Bar Rule 3.5(b)(1).

SO ORDERED.

/s/ George Z. Singal
Chief U.S. District Judge

Dated this 6th day of May, 2008.

Plaintiff

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