

# Secrecy in Courts

## *An Interview with Anthony D'Amato*

*Are there any confidential matters, intellectual property, trade secret, national security cases, etc., that would justify closed courtrooms, sealed papers, and the like?*

Hardly ever. Keeping things away from the people is not something that I . . . want. I don't want people to "protect me" by keeping information away from me.

In the Pentagon Papers case, for example, the government wanted to keep everything secret. But the Court finally said it should come out; it's part of our history, even though it embarrassed the administration. Now if the court had kept those papers secret, it would have been very difficult for our ability to understand the Viet Nam War and all the decisions that went into it.

Occasionally, there are trade secrets, but very rarely. Very rarely is a trade secret much of a secret. Very rarely is the name of a person going to jeopardize an agent in the field in a spying mission. These are very overrated kinds of examples.

I think the public has a right to know, and the public should decide what to do about these things. The courts shouldn't put a muzzle on anything. You can compare it to freedom of the press. With freedom of the press, won't the government get criticized, won't some people be embarrassed, etc.? Of course. But we lose much more by not having that

freedom.

*How frequently do you discover parties to lawsuits having ex parte contact with judges or other decision-makers?*

I think it happens in very small towns and places that have country clubs including judges and practitioners. In a large city, it doesn't happen very often. It's more of a problem where judges run for office, and practitioners contribute huge sums of money to their campaigns, as in Texas. I have no doubt that the judges there engage in payback when their contributors are involved in cases. On the whole, however, we're pretty good in this country for the amount of socializing that goes on between judges and lawyers. There is a lot less [ex parte contact] than one would think, simply because everyone is so afraid of doing it. So we're not too bad on that issue, I think.

*Have you ever heard of an example of a secret hearing in which only one side is allowed to attend, offer testimony without cross-examination, and no transcript is taken and the judge's findings are sealed from public view?*

I don't recall having heard of such a thing. Judges are not barred from talking with one side or the other. Usually, they're very careful

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about it—they let the other side know. In fact, they often talk with both sides privately when they are trying to effectuate a settlement in the case. But if the judge just talks with one side, how does the other side hear about it? I'm not likely to hear about it—if there is an *ex parte* communication, it's probably going to be kept pretty secret.

There was a judge in Chicago—Judge Holzer—who was convicted of bribery. He took bribes from attorneys while he was adjudicating their cases. So obviously, he had plenty of *ex parte* communication with those attorneys.

*Why aren't television cameras permitted to televise trials or proceedings? Why shouldn't we be allowed to view Supreme Court proceedings?*

Proceedings should be televised. There is nothing secret about a trial. It should always be open. I think the Supreme Court is just a little bit stuffy about televising its proceedings. The Justices want to maintain their dignity—they don't want some camera to catch them stumbling on their way to the bench or something like that. So they're very protective of themselves, but they are setting a bad example. No court should be closed. All judicial proceedings, all administrative hearings, all legislative sessions should be available to television reporting. The Soviets used to have secret trials. There is no room in this country for even starting that kind of thing.

*Is it ethical/moral for attorneys to enter into confidential settlements such as the early church sexual abuse settlements which were confidential and allowed abuse to continue for decades, and the Firestone early settlements which were kept confidential as tires continued to blow out and kill people?*

It is unethical, in my view, for the judge to

approve a confidential settlement. Judges shouldn't do that. Attorneys can make whatever deal they want for their parties—parties do it all the time. An insurance company will say, "Look, I'll pay you more money, but I don't want you to tell anyone about it, because then they'll all want more money." And a lot of people will react to this by thinking, "Well, heck, if you're putting more money in my pocket, what do I care about everybody else?" So, an attorney who is representing that party can't tell him *not* to do that. So you see, there will be examples of parties keeping settlements confidential. But it seems to me that judges should not give it a judicial imprimatur, such as using their contempt power to prevent the parties from revealing the settlement.

In order to facilitate settlement, the judge may sometimes have to agree to have the terms kept confidential. In my view, that's wrong. It should be public information. After all, the parties are using the courts as an instrument. The courts are part of our country, we own the courts, and we shouldn't be keeping secrets from ourselves.

*Should the code of ethics be changed to prohibit such secret settlements once litigation has begun and require the terms of all settlements to be put on the court record?*

I think a court would say that it will not condone a secret settlement; however, if the parties settle outside of court, the court just records that the case has been dropped. But the court certainly shouldn't issue a gag order on both sides not to disclose the terms of the settlement. That, I think, is wrong. It's using a public facility—the court—to withhold information from the public. That's not my conception of what a court should be like in a democratic country.

*In the recent cases of clergy abuse, the cleri-*

*cal leaders followed their counsel's advice to hide the wrongdoing, which proved to be a terrible mistake. Why do people put so much trust in lawyers with regard to secrecy versus openness, following their advice, which is usually bad in every way but legally (i.e., is usually bad from the standpoint of honesty, openness, and public relations), when law is such a secretive profession, filled with secretive people?*

I don't know. In this country, so many people *have* to put their trust in lawyers, because the lawyer is out there fighting for them. The church is entitled to a lawyer, too. The clients apparently approved these secret settlements. It's another case of "OK, we'll pay your million dollars, but don't tell anybody, because if you do, then a whole bunch of people will come out of the woodwork and want the same thing."

So the church is being immoral in doing that, the client is being immoral, but I don't see how you can throw the blame on the attorney, because what can the attorney say? After all, it is a settlement, and after all, the client wants these terms. If I were an attorney in the case, I would say to my client, "Look, it really makes me sad that you would want to withhold this information, because there are other people out there who have been harmed just like you have been harmed," but I obviously can't *stop* my client from doing it. I have no right to say no. The client would have a right to fire me if I tried to force him to reveal the terms of the settlement.

People who are plaintiffs in cases go along with the secrecy because the other side gives them more money. "We'll give you a million dollars, but it's hush money—you better shut up. Otherwise we'll give you one thousand, and we'll fight you all the way. We'll deny that we did anything wrong, we'll spend years in court, you'll lose your shirt, and you may or may not even get the thousand. But if you

want a million, if you want to become rich, then you've got to shut up."

The church is acting like any big corporation—they all do the same thing. Insurance companies do that. If they can shut the people up, they buy them off. Attorneys can't really do much about that, but courts shouldn't actively condone it by issuing gag orders as part of the settlement. After all, no one is forcing the judge to accept the settlement.

This is a situation where the judge should be looking out for other people who are harmed. If the judge issues a gag order against the parties when the issue is abuse of young boys by the clergy, then the judge knows that he or she is participating in a cover-up that will adversely affect the rights of other people. So judges, in my opinion, should not issue confidentiality orders in those cases. I suspect that the main reason judges go along with confidentiality orders is to get the cases settled and thus reduce their own docket of cases to deal with. If true, this is a very narrow minded, crabbed view of their judicial responsibility. ♦