MondayMonday

Chris Christie Need Not Apply

February 17, 2014

When it comes to loving Shirley Temple, our love is of the late-blooming variety. Shirley Temple was the darling of our little sister in the 1950's, not us. We watched war movies on the Early Show, she watched "Captain January."

Yet, in the years that passed, years that found us working on appellate briefs in the wee small hours of the morning, for some inexplicable reason, we reached a new appreciation for Shirley. She spoke of a world in black and white where the colors were, somehow, far brighter than those in ours. Perhaps, that's what she did for a country mired in the Depression, where nothing of any value was available to the average American except a smile. In Shirley's world, which is the same now as it was then, there was always a smile; a smile which could solve the worstest problems you could ever imagine, like trying to find your Confederate officer father in a Union army hospital. Why, just smile, and no less than Abraham Lincoln would help your cause. Just like that.

Dealing with a cantankerous brief at 3 a.m., Shirley would tell us that nothing was impossible and that being a meany wouldn't really

solve anything. At 3 a.m., the sound of her 5-year old voice calmed us, helped us see our way clear, and produced more than one brief for the printer by morning.

The beauty is that nothing will change. The Shirley Temple that has passed is not the Shirley Temple that still lives. She'll be talking us off the ledge for years to come.

We all understand the obligations of Article 31. Discovery is the right of every party and modern litigation cannot proceed with cases tried on the back of envelopes. Now, we also have come to understand that this discovery obligation can sometimes seem a bit unbalanced, with defendants adept at avoiding the production of anything that smacks of evidence helpful to a plaintiff's cause of action.

Governmental bodies have developed what is called the "public interest privilege" to the production of certain evidence. Like Omerta, the privilege applies to "confidential communications between public officers and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged." *Matter of World Trade Ctr. Bombing Litig.*, 93 N.Y.2d 1, 8 (1999). That material, however, must be "extremely sensitive material" that has been under the "special shield of confidentiality." *Id.*

In *Ren Zheng Zheng v. Bermeo*, 2014 NY Slip Op. 00979 (2d Dep't 2/13/14), the Appellate Division finds that only an *in camera* examination of the documents as to which the privilege is claimed can justify the assertion of the public interest privilege. How else could the trial court make a determination on the merits and, even more critical, how can the Appellate Division review that determination on the record? Furthermore, the governmental entity must first be required to provide the court with a detailed privilege log under CPLR 3211, "'specify[ing] the nature of the contents of the [subject] documents, who prepared the records and the basis for the claimed privilege.'" *Id., quoting Matter of Subpoena Duces Tecum to Jane Doe*, 99 N.Y.2d 434, 442 (2003).

It would seem to be wise to carefully examine the privilege logs first, recalling that the privilege applies to communications (i) between and to public officers; (ii) in the performance of their duties; (iii) where public interest requires such confidentiality.