



Bennett Weighs in on Trademark Tussle

Story by Jesse Greenspan. Reprinted by permission of Law360, www.law360.com.

On April 16 of this year, Denton County's own Tamera Bennett, contributed her perspective in Law360's article, "Stage Set For Tussle Over 'Octomom' Trademark." The complete article follows.

A dispute could be brewing between a video game company and Nadya Suleman, who became famous in January when she gave birth to octuplets, with both seeking to trademark her media nickname — "Octomom."

In a pair of April 10 filings with the U.S. Patent and Trademark Office, Suleman said she wanted to use the Octomom name on disposable diapers, cloth diapers, dresses, pants, shirts, and entertainment in the nature of ongoing television programs in the field of "variety" [sic].

But Austin, Texas-based Super Happy Fun Fun Inc. had already filed an application on March 12 seeking to use the Octomom name in connection with computer game software; downloadable mobile entertainment software such as ring tones, screen savers and wallpaper graphics; toy action figures and accessories; puppets; balloons; chess sets; golf balls; snowboards; and even Christmas tree ornaments.

Tamera H. Bennett, founder of the Bennett Law Office PC, a boutique copyright, trademark, and entertainment law firm, said the Texas company gained a big advantage by

filing first.

"Because the Texas folks were first to file, anything that comes subsequent to them should be initially refused a registration or suspended," said Bennett, who is not representing either party in the matter.

If Super Happy Fun Fun does get the mark approved, then it will have 36 months to file a statement of use, she added.

Suleman, meanwhile, has a number of options. She could file an injunction to try to stop Super Happy Fun Fun from using the mark, she could file an administrative proceeding in opposition to the trademark if it got approved, she could reach a settlement with Super Happy Fun Fun, or she could simply abandon the Octomom name, according to Bennett.

She said it would probably be six months before either application is reviewed by an examiner.

"Part of what comes into play... is the subjective reasoning of the trademark examiner," Bennett said. "That's the person who's just randomly assigned to review these applications."

She doubted, however, that Super Happy Fun Fun's mark would get refused on descriptiveness grounds.

When reached by telephone, an attorney for Suleman simply said, "Registering a trademark which is a nickname of a living person requires the consent of the living person."

A call to Super Happy Fun Fun, which markets such video games as "DUI: The Long Drive

Home," "Notorious B.I.G: Gettin' Paid" and "Magic 8-Ball," was not immediately returned on Thursday.

On its Web site, the company describes a game called "Fertile Myrtle (Formerly Octomom)" for iPhone and iPod Touch.

"How many babies can Fertile Myrtle have!?" the description says. "Press down on Fertile Myrtle's swollen belly, and another adorable bundle of joy will be brought into the world," the description adds. "The babies must be caught by Fertile Myrtle's mother. Hold down on Fertile Myrtle's belly to charge, which shoots

Octomom continued on page 5.



Tamera Bennett

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From the President

It's hard to believe that school is back in session. I hope that all of you are settling down into the fall routine. For your bar association, fall means FOOTBALL! That's right, our tailgate party at The University of North Texas is fast approaching. We will be gathering to tailgate on Saturday, September 26 from 3:00 PM to game time in conjunction with Phi Alpha Delta this year. There will be activities, food, and fun for all. Watch your email inbox so that you can RSVP and we will know how many tickets to buy for you and your family!

As President, I have two goals this year for DCBA. One was to pay some much needed attention to the infrastructure of the bar, which your board spent a lot of time working on from April to June. The other thing I would like to accomplish is the creation of some long-range planning goals, and plans to reach those goals. Our bar association has grown large enough to support long-range planning; in fact, at the Bar Leaders' Conference this year, a familiar theme among bar associations of our size was

how to move forward with long-term goals. The primary long-term goal discussed, over and over again, was the purchase or building of a facility to house the bar association and in which to hold its activities.

I deeply believe that a permanent facility is a part of Denton County Bar Association's future. I also believe that determining when we will do this and how we strategize the accomplishment are some of the most serious decisions we can make as a bar, because the timing and execution will play heavily on our success or failure at the venture.

As the year progresses, the long-range planning committee will begin looking at these issues. We need to look at timing (i.e., is a facility a goal for next year, five years from now, or fifteen years from now). We also will be looking at how to get there logistically, which will include working up plans for financing, which will of course vary widely depending on the timing options.

Ultimately, our long-range planning will benefit the entire bar association. However, it will also affect the entire bar association, since at some point, funds will need to



Darcy Loveless, President

be raised, perhaps directly, perhaps through pledges. We also want to make sure that whatever decisions are reached, they are the best decisions for our membership as a whole. In considering our options, we want to take into account the goals of our individual members.

If you have thoughts on when it might be an appropriate target date for our association to buy/build a facility, or if you have thoughts on some ways to approach issues of location and financing, we would welcome hearing from you. Don White (dwhite@hbwvlaw.com) and I (darcy@cmloveless.com) look forward to your input. Stay tuned for information on our long-range planning as it develops.

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DCBA Membership Your DCBA Membership includes

- Free and discounted CLE programs
- Monthly luncheon & happy hour
- Networking opportunities
- Listing on the bar website, including photo, two practice areas, and a link to your website

Your DCBA Sections

- Trial Lawyer's Association
- Family Law Section
- Greater Denton County Young Lawyers Association
- Real Estate, Trust, and Probate Law Section

For more information see our website: <http://dentonbar.com>

Retained Experts and Their Testimony: Credible or Not?

By John A. Zervopoulos, Ph.D., J.D., ABPP, www.psychologylawpartners.com.

Rule 702 of the Texas Rules of Evidence establishes that the purpose for admitting expert testimony into evidence is to “assist the trier-of-fact to understand the evidence or to determine a fact in issue. . . .” Despite this condition, lawyers often deride retained testifying experts as “hired guns” tainted by fees or personal biases. The Texas Supreme Court also worried that some experts were more concerned for their fees than to assist the trial court with testimony based on data generated from reliable methods. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995).

Given these perceptions and the adversarial context of legal proceedings, many conscientious mental health professionals (MHPs) wrestle with offering assertive testimony that reflects professional integrity without appearing to be advocacy-oriented. That is, can retained MHPs testify without appearing beholden to the retaining lawyer? Some MHPs wrestle so much with the challenge that their testimony results, at best, in ambivalent and vague conclusions and recommendations that assist no one. Other MHPs manage this challenge well; their testimony is well-informed, clearly reasoned, and perceived as impartial. Still other MHPs offer biased testimony couched in words that are, at best, thinly-veiled attempts to convince the court that their testimony is professional and impartial. The lawyer’s biggest

challenge is to distinguish between the two MHP types most likely to influence the court: MHPs whose testimony will properly assist the court versus biased MHPs who couch assertive testimony in professional-sounding language.

How might lawyers make these distinctions? In a 2003 article, Shuman & Greenberg claim that experts’ professional integrity versus advocacy dilemma is a false choice. Instead, experts will most likely assist the court when their testimony rests on five credibility-based principles: competence, relevance, perspective, balance, and candor. Daniel W. Shuman & Stuart A. Greenberg, *The Expert Witness, the Adversary System, and the Voice of Reason: Reconciling Impartiality and Advocacy*, 34 *Prof’l Psychol.: Res. & Prac.* 219 (2003).

Shuman & Greenberg’s principles provide a framework by which lawyers may highlight their own expert’s credibility or cross-examine an opposing expert’s methods and reasoning. First, they consider each principle separately, and then integrate the expert’s responses to illustrate the level of trust the trier-of-fact may bestow on the expert’s opinions.

Competence, the first principle, is a central concern in both psychology and law. MHPs should identify how their competence allows them to offer expert opinions on specific issues on which they are testifying; this demand is an ethical requirement. For example, MHPs untrained in medications are not competent to



offer an opinion about the effects of medicine doses with a depressed child. The Texas Supreme Court has a similar requirement for reliable testimony: “Trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion.” *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996).

Relevance demands that the expert consider and disclose only information that applies to the issues about which the expert will offer opinions. For example, MHP invoking a 35 year-old mother’s poor relationship with her father when she was an adolescent to support an opinion that the mother cannot now adequately parent her child is not basing that opinion on relevant data. Of course, the law looks to Rules of Evidence 401 and 402 to address this concern.

Perspective encourages MHPs to examine evidence that might support or refute each litigant’s view. MHPs enhance their professional integrity by examining issues from all reasonable perspectives, actively

Credible continued on page 7.

From the Sections

Monthly Meetings

Collaborative Professionals

DCCP will meet at **12:00 PM** on Tuesday, **September 1** at Oakmont Country Club located at 1901 Oakmont Dr. in Corinth.

Family Law

Family Law will meet at **5:30 PM** on Monday, **September 28**, location to be announced.

GDCYLA

GDCYLA will meet at **11:45 AM** on Thursday, **September 3** at Fuzzy's Taco Shop located at 115 Industrial Dr. in Denton.

GDCYLA will meet for happy hour at **5:00 PM** on Thursday, **September 10** at The Abbey Inn located at 101 W. Hickory St. in Denton.

Paralegals

DCPA will meet at **12:00 PM** on Tuesday, **September 22** at Oakmont Country Club located at 1901 Oakmont Dr. in Corinth.

REPTL

REPTL will meet at **5:30 PM** on Wednesday, **September 16** at Oakmont Country Club located at 1901 Oakmont Dr. in Corinth.

DCPA Sponsoring Advanced Discovery Seminar

Date:

September 25, 2009 2:30–4:30 PM

Location:

Denton Courthouse on the Square, Denton, TX
Commissioner's Court Room

Details:

The 2009 Advanced Discovery Techniques focuses on providing higher-level discovery procedures.

Registration:

Please contact Vicki Schimdt at vicki@cmlloveless.com for registration information. \$10.00/person.

Texas Advanced Paralegal Seminar

Date:

October 14–16, 2009

Location:

South Shore Harbor Resort
League City, TX

Registration:

For registration, please go to www.txpd.org.



The How-To Adoption Day Training for Attorneys

Date:

September 11, 2009
9:00–11:00 AM

Location:

Denton County Courthouse
Central Jury Room

Registration:

To RSVP please contact Michelle Houston at mhouston@dentonbar.com or 940-320-1500.



5th Annual Collaborative Training

Date:

September 23-25, 2009

Location:

Belo Mansion, 201 Ross Avenue, Dallas TX

Registration:

Possible 22.5 hours CLE. Please register online at <http://collaborativelaw.us/events.php>.

Accessing Civil Hearing Docket in Public Feature of Odyssey

Public access for the civil court dockets has been changed due to new Odyssey software used on www.dentoncounty.com.

You can retrieve the same information that was once accessible on the "Legacy" page by:

1. Going to <http://justice.dentoncounty.com>.
2. Selecting Family/Civil/Probate Hearing Records.
3. Selecting the type of search you would like to perform.
4. Entering your search criteria.
5. Clicking Search.

Please keep in mind that judges are listed by name. If you have any questions regarding the new process please contact Sandra Handy, Senior District Court Administrator.

Continuing Legal Education Committee Update

By Joeseph F. Zellmer, Joseph F. Zellmer, P.C.

Membership in the Denton County Bar Association is a great value, in part because of the CLE opportunities each month. In addition to the monthly CLE, there are other CLE opportunities provided throughout the year. Our goal is to provide enough CLE so that attorneys can get all required credits locally each year. The CLE Committee has speakers scheduled into 2010. Recently Tadd Bednar of Austin Lane Technologies has been providing technical support to speakers by assisting with laptops and projectors.

Upcoming CLE

On September 11th, the annual Adoption Day attorney training will take place. At the membership luncheon, David Moore will speak on intellectual property law.

DCBA will sponsor the Denton County Paralegal Association's annual seminar on September 25th from 12:30-4:30 PM in the Commissioner's Court at the Courthouse-on-the-Square. This year's seminar "Advanced Discovery Techniques" features presentations by Brian Cartwright, David Margulies, and Malcolm Wells. Cost is \$10 for four hours of CLE, including 1 hour of ethics credit.

In October, we will have a presentation by Errol Summerlin, CEO of Legal Aid of Northwest Texas about local pro bono opportunities in observance of National Pro Bono Week October 26-30. Our regular CLE speaker will be Coby Waddill discussing family violence laws.

In November, Mark Johnson of ERISA Benefits Consulting in Grapevine will give us a course in ERISA 101.

In December, accountants Devona Simpson and Ronnie McClure will present "Financial Decision-Making in Divorces."

On January 8, 2010, our luncheon speaker will be Grace Weatherley of Wood, Thacker & Weatherly on pattern jury charges.

February will feature a speaker provided by the Real Estate, Probate & Trust Law Section.

In March, the Family Law Section will provide a full-day seminar. We will provide more information as it becomes available.

In April, Gene Major of the State Bar of Texas will bring us all the latest news on advertising rules. This topic will qualify for ethics credit so you don't want to miss it.

We always strive to provide topics from a variety of areas of law. Please



email me at jfz@zellmerlaw.com if you have ideas for future topics. Also sections of the Denton County Bar can submit their monthly meeting speakers for CLE credit at no cost. Please contact me to discuss the information we need to apply for credit.

Kimberly Killebrew is Bench Bar Committee chair. She and committee members David Bouschor, Charla Conner, Vicki Isaacks, Elizabeth Nielsen, Robert Ramirez, and Jerome Stein will be working on a new format for the bench bar. More details coming soon.

CLE Committee members are Patricia Ryan, Elizabeth Nielsen, Robert Ramirez, and Jerome Stein. Patricia Ryan will be taking over as CLE Chair next year.

Octomom continued from page 1.

babies out faster and increases your chances of delivering twins! Tilt for better aim."

Each baby earns welfare money,

and having babies while the paparazzi is in the room earns a cash bonus. Money is used to buy fertility shots.

Tamera H Bennett practices trademark, copyright, and

entertainment law in Texas and Tennessee. Tamera blogs at www.createprotect.com and you can follow her on Twitter at www.twitter.com/tamerabennett.

From our Sponsors



UNT Tailgating Party

UNT Eagles vs. Middle Tennessee

Date:

September 26, 2009

Tailgating starts at 3:00 PM, Game starts at 6:00 PM

Location:

UNT Football Parking Lot

Registration:

Contact Michelle Houston at 940-320-1500.

Request for Mentors

We are looking for attorneys to mentor pre-law students. Any attorney interested in being a mentor, please contact J.P. LeCompte at 940-387-3518 or by email at jplecompte@hbvwlaw.com.



Denton County Property Records at Your Fingertips

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Title Resources of North Texas is opening its abstract plant to attorneys for non-insured, informational-purposes-only property research. Choose full service, assisted service or do-it-yourself research. Searches are available for current owner, names, deed, foreclosures, liens, historical title, mineral rights, document retrievals and more.

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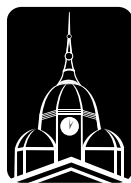
Credible continued from page 3.

seeking information that will differentially test plausible rival hypotheses or explanations—a critical thinking research-based approach that guards against quick and biased decisions. *Specialty Guidelines for Forensic Psychologists*, 15 *Law & Hum. Behav.* 655, 661 (1991).

Balance, the fourth principle, requires that the plausible rival explanations of issues about which opinions will be offered should be considered fairly. Shuman & Greenberg note that absence of such balance renders the expert an ineffective advocate for whatever opinions the expert reaches.

Candor, the final principle, refers to the forthright, honest manner by which MHPs present their opinions. Experts should not selectively disclose relevant information to aid or disadvantage a party. It is not the expert's role to advocate for a party or to offer testimony driven by a desire to reach a particular outcome. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 290 (E.D. Va. 2001).

In an upcoming issue we will address problems of the advocacy-oriented retained expert whose testimony does not conform to these principles.



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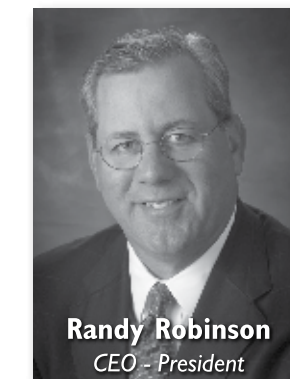
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DCBA in 2009-10

September Bar Luncheon

Date:

Friday, September 11, Noon
Meal included
0.5 CLE included

Location:

Oakmont Country Club
1901 Oakmont Drive
Corinth, Texas 76210

Program:

Intellectual Property

Speaker:

David Moore

October Bar Luncheon

Date:

Friday, October 2, Noon
Meal included
0.5 CLE included

Location:

Oakmont Country Club
1901 Oakmont Drive
Corinth, Texas 76210

Program:

Family Violence Laws

Speaker:

Coby Waddill

Announcing

The How to Adoption Day Attorney Training will be held on September 11, 2009, from 9:00-11:00 AM at the Denton County Courthouse located on McKinney Street in Denton. To RSVP please contact Michelle Houston at 940-320-1500 or email her at mhouston@dentonbar.com.

Condolences

DCBA would like to express our condolences to Ronnie Phillips on the passing of his son, Joshua T. Phillips, MD, on July 24, 2009.

To view the Monthly Meeting minutes, please visit www.dentonbar.com.