

**LETHAL PITFALLS  
IN DRAFTING GUN TRUSTS**

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**Presented**

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Mr. Healy has been an attorney in private practice in Tyler, Texas for more than 27 years. He is the lead author of the book *The Legal Guide to NFA Firearms and Gun Trusts*, written with Alan Gassman, Jonathan Blattmachr and several other attorneys, and published in 2016. This book was reviewed in the June, 2019 *American Rifleman*, a magazine which reaches over 2 million readers. It reached #1 on the list of Amazon Bestsellers in the category of Legal Self-Help. Mr. Healy authored a chapter on NFA trusts in the book *Texas Perspectives on Firearms Law* published by the Texas Bar Books in 2015. He authored two chapters in the book *Essentials of Texas Firearms Law* published by Texas Bar Books in 2020. He is the NFA Editor for Interactive Legal, working with nationally-renowned estate planning attorneys to provide NFA trust forms and supporting knowledge to lawyers throughout the country through their Interactive Legal Suite.

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Political Activities: Mr. Healy is a life member of the National Rifle Association and Second Amendment Foundation. He served for eighteen years on the East Texas Friends of NRA Committee. He also served on the Friends of NRA State Fund Committee for North Texas for thirteen years. Mr. Healy represented eight states on the Young Republican National Federation National Committee, and held numerous other state and local offices, including President of the Tyler Young Republicans. He has volunteered on a number of campaigns, served as a delegate to the Republican Party of Texas state conventions including in 2020, and served on the RPT Ballot Security Task Force during two elections. He has completed a number of campaign schools including the RNC Western Regional Campaign School and ballot security training. He has also served as Local Secretary (local President) and certified Proctor for East Texas Mensa. He served as a state officer for years for the Texas Junior Chamber of Commerce, and as President of the Tyler Jaycees. He served for seven years on the Board of Directors of Azleway, Inc. and its charter school Board of Trustees, including one year as Chairman of the Board. He is currently serving as Vice Chairman of the Smith County Republican Party.

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21. "It's All in the Math: Financial Mechanisms, Structures and Questions Under the Accountable Care Organization Proposed Regulations," ABA Health eSource, April 2011
22. Special Edition "Accountable Care Organizations Proposed Regulations Reveal Significant Financial Opportunities and Structural Requirements," ABA Health eSource, April 2011
23. "After Olmstead: Will a Multiple-member LLC Continue to Have Charging Order Protection?" The Florida Bar Journal, December 2010
24. "Unconventional Uses of 529 Plans Should Not Be Ignored by Taxpayers and Their Advisors," BNA Tax & Accounting, March 11, 2010
25. "Creditor Rights Under Private Annuities and Grantor-Retained Annuity Trusts in Florida," The Florida Bar Journal, July/August 2009
26. "Recent Adventures in Florida Tenancy by the Entirety — Important Developments," Leimberg Information Systems, Inc, June 18, 2009
27. "Mistakes Doctors Make Managing Their Practices and Investments," Leimberg Information Systems, Inc., May 20, 2009
28. "The Estate Planner's Guide to New Parent F Reorganizations," Estate Planning Magazine, May 2008

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**1. Introduction**

It comes as a surprise to many people that federal law permits civilians to own machine guns, suppressors, and similar items. Over the years, the NFA trust has become the best vehicle to allow civilian ownership of those items. Trusts have also become popular to own ordinary firearms such as rifles, pistols, and shotguns. With the increasing popularity of NFA firearms, and the increasing use of NFA trusts to own them, a robust market has arisen in drafting them. This paper will explain some of the basic legal principles that apply to this process, then describe some of the pitfalls in drafting gun trusts.

NFA trusts were created for two primary purposes. The first was to allow persons living in areas where their chief local law enforcement officers were unwilling to sign NFA applications to own NFA firearms. Until 2016, ATF's regulations required signatures of a CLEO on all civilian transfer applications (Forms 1, 4, and 5). This effectively prevented an individual from obtaining an NFA firearm if the CLEO refused to sign them. Forming a trust or business entity to hold the NFA items bypassed this requirement. Since 2016, ATF only requires notification of the CLEO, taking away the power to effectively veto individual ownership of NFA items within their jurisdictions. So there is no need to form a trust or entity to bypass the CLEO signature requirement.

The second advantage was that ATF did not require fingerprints or photographs and did not run background checks on trusts and entities until 2016. That made it possible to process their applications more quickly. Since 2016 ATF has required "responsible persons" of trusts and entities to submit a completed questionnaire, fingerprints, and photographs, and to undergo a background check. So there is no need to form a trust or entity to speed up processing.

Their reasons are different, but since 2016 people have continued to form NFA trusts. Now the benefits of an NFA trust include protecting spouses and others from liability for allowing them access to NFA firearms, the ability to lend NFA firearms to other persons by appointing them as trustees, and being able to carve out NFA firearms from the estate and preserve them for future generations.

Regardless of people's motives in using them, NFA trusts have exploded in popularity. According to ATF attorney William Ryan, there were a total of 45 applications submitted in 2003 to transfer NFA firearms into a trust. By 2012 this number had climbed to 36,000, which *eight hundred times* as many. This was reported on <https://blog.princelaw.com/2015/04/10/shocking-statementsconcessions-by-atf-at-the-nra-firearms-law-seminar/>.

As of 2007 there were approximately 2 million firearms registered in the National Firearms Registration and Transfer Record ("NFRTR"), the database of NFA firearms maintained by ATF. As of May, 2019, the total number of registered NFA firearms had tripled, to 6,058,390. This includes 2,977,630 destructive devices, 1,750,433 "silencers," and 699,977 machine guns.

Gun trusts intended non-NFA firearms are becoming increasingly popular. The strict regulations on possession and transfer do not apply to ordinary guns, but the estate planning benefits make them worthwhile for many gun owners. A gun trust allows a gun owner to carve out their guns and accessories for special treatment, often by preserving those items and making them available to future generations.

**2. Wait a Minute - Is this a good idea?**

The NFA was enacted in 1934. It generally banned civilian ownership of machine guns, except those

lawfully registered. Since then, there appear to be only two instances where a legally-owned machine gun was used in a crime. Both happened in Ohio. One was committed by a law enforcement officer. Crimes committed using illegally possessed machine guns are also rare. [http://www.guncite.com/gun\\_control\\_gcfullau.html](http://www.guncite.com/gun_control_gcfullau.html).

In 1986, ATF Director Stephen E. Higgins testified before the Subcommittee on Crime: "Registered machine guns which are involved in crimes are so minimal so as not to be considered a law enforcement problem."

On June 1, 2019, a city engineer murdered twelve people in the Virginia Beach municipal building. It was reported that he used two legally-purchased pistols and a legally-purchased suppressor:

<https://abcnews.go.com/US/suspected-virginia-beach-gunman-resigned-personal-reasons-massacre/story?id=63449625>

Following the massacre, President Trump indicated that he was going to consider pushing for an outright ban on suppressors:

<https://www.washingtonexaminer.com/news/trump-seriously-considering-banning-suppressors-after-virginia-beach-shooting>

Despite the negative publicity, suppressors are also almost never used in crimes. In 2017 ATF released information to the Washington Free Beacon, reported here:

<https://freebeacon.com/issues/atf-despite-nearly-1-3-million-silencers-united-states-rarely-used-crimes/>

ATF reported that as of February 3, 2017, there were 1,297,670 suppressors registered with ATF. Almost 400,000, close to a third of the total number in civilian hands, had been registered in the previous year. ATF reported that it had only recommended prosecutions for 44 crimes involving suppressors in the last decade. Which means approximately .003% of them are used in crime each year. The column reports that in a leaked internal memo, ATF Associate Deputy Director Ronald Turk argued that silencers should be deregulated (no longer regulated under the NFA).

Between 1995 and 2005, there were only 167 federal prosecutions involving suppressors reported in Lexis or Westlaw between 1995 and 2005, out of 75-80,000 prosecutions per year. This includes not only convictions, but also sentence enhancements, allegations in the charging instrument, and similar occurrences. Many of these were for mere possession of a suppressor, without any further wrongdoing. There were eight cases where a suppressor was actually used, but not to hurt anyone. There were only two reported murders involving a suppressor during that time. The bottom line is that NFA firearms are almost never used in crimes.

### **3. Applicable Law**

#### **a. General Legal Principles Governing Gun Trusts**

Here are the six legal principles that govern NFA trusts (and trusts holding “normal” firearms):

- i. Prohibited Persons: It is illegal for any Prohibited Person to possess any type of firearm or ammunition. This includes both Title I firearms ("normal" rifles,

shotguns, and handguns) and Title II firearms. It is illegal for a person charged with a felony to receive or transport a firearm, but not to continue to possess ones he or she had before being charged. This matter is discussed in detail below.

- ii. State Law: State law may also restrict the ability of individuals, trusts, or other legal entities from having ownership, possession, and use of firearms, including Title II firearms. For example, in New York and California a Title II firearm may not be possessed even if eligible or appropriate under Federal law.
- iii. Trusts are Persons Too: The NFA is a part of the Tax Code (Title 26 of the U.S. Code), which defines "person" to include trusts, corporations, and other business entities. Therefore trusts and business entities can legally make or own Title II firearms.
- iv. Trust Requirements: A trust or business entity that owns Title II firearms must be legally valid and must remain in existence during the entire time it has NFA firearms registered in its name. It must be drafted to meet the many requirements that apply to firearms and NFA items.
- v. Possession of NFA Firearms: The National Firearms Act (NFA) makes it illegal for any person other than the registered owner to possess a Title II firearm (machine gun, silencer or suppressor, short-barreled rifle or shotgun, destructive device, or "any other weapon"). Violation of this law is a felony punishable by ten years imprisonment plus a fine of up to \$250,000.
- vi. Application and Transfer Tax: It is illegal to make or transfer an NFA firearm until an application has been submitted to ATF, a transfer tax paid (\$200.00 for all NFA firearms except for "any other weapon," which costs \$5.00), and the application returned by ATF with a tax stamp. Beginning on July 13, 2016, each application must include additional information on "Responsible Persons," including a completed "Responsible Person Questionnaire," plus fingerprints and photographs of all responsible persons. The chief local law enforcement officer (CLEO) must be notified of each application. Applications submitted prior to 7/13/16 did not require the "responsible person" information, but individual applications required a CLEO signature.

NFA trusts are governed by all six legal principles. Non-NFA gun trusts are governed by Principles 1 and 2 (although Principles 3 and 4 may also apply).

The purpose of most trusts is to place the trustee(s) in charge of financial assets, for the benefit of the Beneficiaries. The purpose of an NFA trust is to allow multiple persons to possess (and possibly borrow) NFA firearms. The settlor usually pays for the trust property, serves as the primary trustee, and does not want the other trustees to make any significant decisions until he or she dies. These motives must be considered when drafting an NFA trust.

An NFA trust usually also serves as an estate planning document. Most settlors would prefer for their heirs not to risk prosecution for inheriting from them. So NFA trusts should also be drafted to educate and protect the Trustees and beneficiaries.

In general, the only time the NFA requires disclosure of information regarding trustees is when an application to transfer an NFA item is submitted. The Settlers may appoint and remove Trustees as they wish, without notifying ATF or obtaining anyone's permission, except when an application is submitted. At that time, the regulations require the applicant to submit a responsible person questionnaire, and the RP undergoes a background check. I will caution you not to use this information to appoint a prohibited person as a trustee, or to evade the background check requirement. If any information changes while an application is pending (such as appointment of another Trustee), I would notify the government and submit a responsible person questionnaire. I would also avoid any appearance of impropriety, by having a good reason for waiting until after the application is processed to appoint a new trustee.

**b. Firearms Regulated by the National Firearms Act (“NFA Firearms”)**

The NFA applies to all “firearms.” The definition of “firearm” under the NFA is both narrower and broader than the common meaning of the term. It excludes ordinary rifles, pistols, and shotguns, but includes certain parts of NFA firearms that are not actually firearms, such as sears and baffles. The definition of “firearm” under the NFA includes the following items:

1. Machine guns: “Any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger,” plus certain parts as discussed below. Guns which fire a three round burst are considered machine guns. 26 U.S.C. § 5845(b). Gatling guns are not considered machine guns. Rev. Rul. 55-528, 1955-2 C.B. 482.
2. Suppressors and silencers: “Any device for silencing, muffling, or diminishing the report of a portable firearm,” plus parts as discussed below. 18 U.S.C. § 921(a)(24).
3. Short barreled rifles: “A rifle having a barrel or barrels of less than 16 inches in length.” 26 U.S.C. § 5845(a).
4. Short barreled shotguns: “A shotgun having a barrel or barrels of less than 18 inches in length.” 26 U.S.C. § 5845(a).
5. Destructive devices [26 U.S.C. § 5845(f)]:
  - (a) Bombs, rockets, missiles, mines, etc.: Any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device.
  - (b) Guns with bores over .50 caliber: “Any weapon which expels a projectile by the action of an explosive or other propellant with a bore of more than one-half inch in diameter (greater than .50 caliber), and weapons which may be readily converted to fire such large projectiles, except a shotgun or shotgun shell found by the Secretary to be particularly suitable for sporting purposes.” This exception covers 12 gauge shotguns, for example, which have a bore size of .73 inches.
  - (c) Exclusions: The term excludes any device which is neither designed nor redesigned for use as a weapon; any device originally designed for use as a weapon then redesigned as a signaling, pyrotechnic, line throwing, safety, or similar device;



surplus ordnance sold, loaned, or given by the Secretary of the Army; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

6. Weapons made from a shotgun: A weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches, or a barrel or barrels of less than 18 inches in length. 26 U.S.C. § 5845(a)(2).
7. Weapons made from a rifle: A weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches, or a barrel or barrels of less than 16 inches in length. 26 U.S.C. § 5845(a)(4).
8. “Any other weapon”: Any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.” 26 U.S.C. § 5845(e). Common AOW’s include smooth-bore pistols, pen guns, cane guns, other disguised firearms, guns that can be fired from a wallet holster or briefcase, and handguns with a vertical foregrip.

These definitions appear in the NFA, at 26 U.S.C. § 5845, and also in the GCA, at 18 U.S.C. § 921(a).

In addition to the items described above, the NFA definition of “firearm” also includes the following parts and combinations of parts:

1. Machine gun receivers: The frame or receiver of a machine gun. 26 U.S.C. § 5845(b).
2. Machine gun parts: Any part or combination of parts designed and intended solely and exclusively for use in converting a weapon into a machine gun. 26 U.S.C. § 5845(b). One example of such an item is an auto sear or drop-in auto sear (DIAS), a part which can convert some semi-automatic guns into a machine guns. Most sears require other parts, or other modifications to the gun, before it can function as a machine gun.
3. Combinations of parts: Any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person. 26 U.S.C. § 5845(b).
4. Suppressor parts: Any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication. 18 U.S.C. § 921(a)(24). One example of such an item is a baffle for a suppressor.
5. Destructive device parts: Any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled. 26 U.S.C. § 5845(f).

These items are clearly different from ordinary firearms (rifles, pistols, and shotguns) which are regulated by the Gun Control Act but not the NFA, and from “antique firearms” which are excluded from the GCA definition of “firearm.”

**c. “Assault Weapons”**

There is a lot of confusion regarding machine guns, some of it created on purpose. “Semi-automatic” means the gun fires one bullet each time the trigger is pulled. The “automatic” part refers to the fact that the gun reloads itself, so all the operator has to do to fire another round is to pull the trigger again. The “semi” part refers to the fact that the gun does *not* fire again without another trigger pull.

“Fully automatic” or “full auto” means the gun fires more than one round each time the trigger is pulled. The term “automatic weapons” refers to fully automatic weapons, in other words, machine guns. Fully automatic guns are machine guns; semi-automatic guns are not.

An “assault rifle” is legitimate term which refers to a fully automatic rifle, fired from the shoulder, with an intermediate caliber cartridge and a detachable magazine. The most common examples are the M-16 (or M-4) and the AK-47.

An assault rifle is distinguished from several other types of gun. A “battle rifle” such as the Browning Automatic Rifle or M-14 is a fully automatic weapon which fires a full caliber rifle cartridge. This is a disadvantage in fully automatic fire because of the increased recoil.

A “submachine gun” such as the MP-5 or Uzi is a smaller fully automatic weapon using a pistol cartridge. Some submachine guns can be fired with one hand. Some have folding or telescoping stocks. Submachine guns range in size from machine pistols (pistol-sized or slightly larger) to rifle-sized, but most are in between, about the size of a carbine.

The term “machine gun” is used generally to refer to all fully automatic firearms, but it can also to refer to medium and heavy machine guns. These weapons generally fire rifle cartridges, are often belt fed, are normally mounted on a bipod, tripod, vehicle, or other fixed mount, and sometimes served by a crew of more than one person. Common examples include the Browning M-2 and the M-60

The term “assault weapon” is a political and legal term. In statutes it is often defined to include semi-automatic guns with cosmetic features such as pistol grips, flash hiders, or bayonet lugs that make them resemble military firearms. Most of these features do little or nothing to increase the lethality of the firearm. Politicians and others often misuse the term and cause the public to confuse semi-automatic guns with fully automatic guns.

In this paper, the term “machine gun” will refer to the legal definition of the term in the NFA and Texas Penal Code, which is any firearm which fires more than one bullet for one pull of the trigger.

**d. Hughes Amendment (Machine Gun Freeze)**

In 1986 Congress passed a law that froze the supply of machine guns. 18 U.S.C. § 922(o). Introduced by William J. Hughes (D-N.J.) as a part of the Firearm Owners’ Protection Act, the freeze is known as the Hughes Amendment. As a result of that law, civilians may only legally own machine guns registered before May 19, 1986. Machine guns that were not registered as of that date, including those manufactured afterwards, may only be legally owned by governmental entities like the army and police departments, or by licensed machine gun dealers.

The freeze only applies to machine guns, not to other NFA firearms. Put another way, civilians can lawfully own other items regardless of when they were manufactured or registered, but may lawfully own machine guns only if they were manufactured and registered before May 19, 1986. As long as this law is in place, the supply of machine guns available for civilians to own will gradually drop and will never increase. As a result, the market price for a “transferable” machine gun is many times more than the price for an identical weapon that is not transferable.

**e. Prohibited Persons - Additional Details**

The phrase “prohibited persons” (abbreviated “PP” herein) refers to persons prohibited by state or federal law from possessing firearms or ammunition.

Federal law makes it illegal for any of these persons to possess firearms or ammunition [numbers are subsections of 18 U.S.C. § 922(g)]:

- (1) Persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year;
- (2) Fugitives from justice;
- (3) Unlawful users of or persons addicted to any controlled substance;
- (4) Persons who have been adjudicated as a mental defective or who have been committed to a mental institution (unless their rights were restored);
- (5) Illegal aliens and persons with nonimmigrant visas;
- (6) Persons with dishonorable discharges from the U.S. Armed Forces;
- (7) Persons who have renounced their U.S. citizenship;
- (8) Persons subject to certain domestic court orders (protective orders and some injunctions); and
- (9) Persons who have been convicted of a misdemeanor crime of domestic violence (if represented by counsel and tried by a jury, or knowingly and intelligently waived those rights).

It is a crime for a person under indictment for a crime punishable for confinement for more than one year to ship, transport, or receive a firearm. 18 U.S.C. § 922(n). Technically this does not prohibit such a person from continuing to possess firearms or ammunition possessed prior to the indictment, but from a practical standpoint the person’s bond conditions will probably prohibit this.

A person is not considered "convicted" if the conviction was expunged or set aside, if the person was pardoned, or had his civil rights restored, unless same provided that the person may not possess firearms. 18 U.S.C. § 921 (a)(33)(A).

It is unlawful to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is a prohibited person. 18 U.S.C. § 922(d). Technically this does

not require the transferor to investigate whether the transferee is a PP, but it is good practice at least to ask the person if he or she may legally possess firearms.

Texas law prohibits persons who have been convicted of a felony or of misdemeanor assault on a family member from possessing firearms. Texas Penal Code § 46.04. A convicted felon recovers the right to possess firearms on the premises where he or she resides, five years after final release from confinement or supervision. Persons convicted of misdemeanor assault recover their right under state law to possess firearms five years after final release from confinement or supervision. This does not matter because both categories of persons are still prohibited from possessing firearms or ammunition under federal law.

Note that some of these prohibitions are lifelong (felons, persons with DD's, persons who renounced their citizenship, and persons convicted of MCDV's), but some are temporary (fugitives, drug addicts, aliens and persons with nonimmigrant visas, persons subject to protective orders, persons under indictment). Persons who lost their gun rights due to a finding of incompetence or an involuntary commitment may get those rights restored by the same court that rendered the original ruling, under the NICS Improvement Act (codified in Texas as H&S Code § 574.088).

#### 4. Sources of Gun Trusts

Where do people get their gun trusts? There are a number of sources:

- a. Download or copy the forms (free): This is the “riverboat gambler” option. If you can get a free gun trust, you save enough money to buy another gun (maybe a Saturday Night Special, but it’s still another gun in the collection). Some people have stolen the forms, submitted their trusts, and had no problems. One MAJOR downside is that people using free forms have no access to legal advice. If they have a problem (ATF rejects the trust, or a situation arises and they need advice), they have no backup. ATF Attorney William Ryan described one notorious example of how stolen forms can backfire. Mr. Ryan examines trusts for ATF, and determines if they are legally sufficient or not. At the NRA Firearms Law Seminar in 2015, Mr. Ryan recounted one situation where the use of a free form backfired. ATF started receiving many copies of the same trust form, the only differences being in the names of the settlors, names of the trustees, and the trust property. Apparently the drafters copied the form but left the beneficiary unchanged. As a result, a lady in Kansas will begin receiving literally thousands of NFA firearms from people she has never met. Mr. Ryan indicated that most problems with trusts arise with gun store trusts, free trusts, or trusts drafted by nonlawyers.
- b. Standard trust from office supply store, Quicken, or LegalZoom (\$5.00 to \$50.00): These forms are intended to be used to bypass probate. They are NOT intended to be used to hold firearms, or NFA firearms, and some even recommend against that use. They are drafted with NO consideration to the numerous local, state, and federal gun laws. Several of the standard provisions directly conflict with the law, so if your trustees follow them, they are very likely to commit multiple crimes. This is possibly the single worst source for an NFA trust.
- c. Gun shop NFA trusts (about \$25.00): Some NFA dealers and gun shops draft gun trusts for their customers. The trust form is usually a “bare bones” document. The customer runs the risk of the gun dealer completing the form wrong. If something goes wrong, have fun trying to sue the gun dealer for legal malpractice.

- d. Inexpensive lawyer-drafted trusts (\$200.00 or so): These trusts are drafted by attorneys who try to compete with trusts that are free or very inexpensive. The forms range from barely sufficient to very good. The service ranges from nonexistent (no contact with the lawyer except email) to thorough (full consultation, in-person, by phone, or by video). The problem is that the average lawyer in Texas earns \$250-\$350 per hour. A lawyer who charges \$200.00 for a gun trust is not allowing much time, if any, to meet with you, ascertain your level of knowledge, and educate you on this subject. If the lawyer does advise the client, whether verbally or through written documents, the client has access to actual legal advice.
- e. Professional gun trusts (\$500.00 to \$3,500.00): These are the gun trusts drafted by lawyers who have been drafting them for years, who regularly teach lawyers and judges about the law in this area, and who are recognized authorities in the field. These lawyers spend the time to develop cutting-edge forms, and they generally spend the time to get to know their clients enough to gauge their level of knowledge, and their trusts and other forms are MUCH more detailed and complete. The cost is higher than the other options (about as much as a gun, depending on what kind you like to shoot), but the end product is as good as it gets. Generally these forms allow the trust to hold any number of items. If the lawyer makes a mistake, he or she probably has malpractice insurance to cover it, but such a mistake is unlikely. Some other lawyers affiliate with the authorities, so the client gets the best possible trust at a more reasonable price.

**5. Lethal Pitfalls in Drafting Gun Trusts**

- a. Truly Lethal Pitfalls - Resulting in Prison, Disbarment, or Bankruptcy: These are the most dangerous pitfalls, reserved for truly epic fails. Generally this means your client and/or his loved ones could end up in prison, barred from owning guns for life. You could end up in another profession because of horrific bad advice, which could result in a very meritorious grievance and a colossal malpractice claim.
  - i. Don't terminate your NFA trust immediately when the settlors die. The NFA requires the proper form to be submitted, the transfer tax paid, and the form to be approved, *before* an NFA firearm can be transferred. If your trust says, "When the settlors die, distribute the trust property and terminate the trust," you just instructed your client and his other trustees to commit a federal felony. Consequences include a prison term of up to ten years and a fine of up to \$250,000.00 for *each* violation, possible forfeiture of the firearms, and lifelong status as a felon who is prohibited from possessing firearms. What do you think your malpractice exposure is if you actually told these people, in writing, to commit a felony? *This is a VERY common error in NFA trusts.*
  - ii. Don't let Prohibited Persons possess guns or ammunition. A traditional trust allows the trustees to possess the trust property. If your trust does not prohibit PP's from being trustees, then the trustee/PP may violate the law by possessing firearms or ammunition, and the other trustees may violate the law by providing those items to the trustee/PP. The trustees should ask each beneficiary to affirm he or she is not a prohibited person, before making any distribution to that person. Trustees should be under a duty to inform the other trustees and the settlor if they become

prohibited persons, and to have another trustee retrieve any trust property. Gun trusts often say prohibited persons can't be trustees, but they don't impose a duty to inform anyone if the trustee becomes a PP, and they don't require resignation or removal.

- iii. Don't give guns or ammunition to Prohibited Persons. If your gun trust says, "When the trust terminates, distribute the trust property to the beneficiaries," without further limitations, then you could be telling the trustees to commit crimes. A gun trust must have a provision stating that no firearms or ammunition may be distributed to any prohibited person. The settlor should choose what happens if a beneficiary is a PP. Remember, one may be a PP but the others may not. Either the trust property should be sold and the proceeds distributed to the PP/beneficiary, the trust should keep the trust property and the PP should forfeit his or her distribution, or if the prohibition is temporary, the trust can hold the firearms until the prohibited person status ends. The trustees and/or settlor should ask each trustee candidate to affirm he or she is not a prohibited person, before appointing him or her as trustee.
- iv. Submit the form, get it approved, before transferring an NFA firearm. It is advisable for the trust document to explain the requirements to transfer an NFA firearm. These include preparing and submitting the application, submitting the responsible person questionnaires, fingerprints, and photographs, sending copies to the chief local law enforcement officer, paying the tax, then waiting for the application to be approved and returned with a tax stamp.
- v. Don't INSTRUCT trustees to commit felonies. See above. I believe this is generally good advice for a lawyer. I tell clients that my main purpose in drafting a gun trust is to make sure neither the client nor any of his friends or family go to federal prison.
- vi. INSTRUCT your trustees NOT to commit felonies. Optimally, your trust should cover all the possibilities. With regard to criminal acts, your trust should be thorough enough to force the trustees to follow the law, if they follow the terms of the trust. In effect you create a "Safe Space" where they don't have to worry about criminal liability.
- vii. Don't allow non-trustees have access to NFA firearms. The ONLY persons authorized to possess NFA firearms are the trustees. Under the law, constructive possession (roughly equivalent to access) is just as bad as actual possession. No one except trustees should have keys or codes allowing access to the gun safe where NFA firearms are kept.
- viii. Do not appoint one person as sole settlor, trustee, and beneficiary: The core concept of a trust is to separate the right of control of an asset from the right to receive the benefits from that asset. If the same person has control (the trustee) and the right to receive the benefits (the beneficiary), then the trust merges. The end result is that the person owns the trust property in his or her individual capacity, without limitations, and there is no trust. Normally this would be fine, because the person would be free of any limitations imposed by the trust. In this case it results

in a federal felony because the property is titled in the name of a nonexistent trust, so the person possessing the NFA firearm is not the registered owner. To avoid merger problems, make sure there is always at least one trustee who is not a beneficiary, or at least one beneficiary who is not a trustee. This is a common mistake in gun trusts.

- ix. ALWAYS have at least two trustees: Having more than one trustee is also a good idea to avoid the problem discussed above. It is also helpful so one can take over if something happens to the other. This is a common mistake in gun trusts.
  - x. Require submission of Form 5320.20 for interstate transport of NFA firearms. This is legally required for machine guns, SBR's, SBS's, and DD's. It is highly advisable for all other NFA firearms. This document, with ATF's approval shown on it, could get you out of trouble when the local LEO finds you with a suppressor.
  - xi. Keep your Trust Valid: It is unquestionably legal to possess an NFA firearm as trustee for a valid trust. If you possess an NFA firearm for a nonexistent trust, you are violating the law because you are not the registered owner, and you are not possessing it as representative for a trust or other entity. A trust only exists if it holds some property. That is why smart settlors transfer a nominal sum, like \$10.00, into a trust when they sign the trust agreement. This is also why well-drafted trusts require more than one trustee. It is very uncommon for an NFA trust to properly address these problems.
- b. Less Lethal Pitfalls: These pitfalls are still serious, but they involve the collateral parts of the trust, or less obvious mistakes. Generally this means the client might have to hire a competent gun trust attorney to fix your mistakes, might suffer inconvenience or expense as a result of poorly drafted provisions, or that the trust property could go to the wrong person.
- i. Educate your client: Clients vary in their knowledge of gun safety, experience with guns, and knowledge of gun laws. You need to ask questions to determine your client's knowledge in each of these areas. You also need to provide written materials to each client, explaining the basics of the applicable gun laws, and the practical aspects of forming and operating a gun trust.
  - ii. Educate the client's trustees: I have heard of executors finding suppressors among the decedent's personal effects, and heading to Canton's Trade Days to sell them off. This would greatly alarm the authorities, and could get the executor in trouble. Some NFA firearms are not readily recognizable as such - A Glock Model 18 (full-auto) looks a lot like the other Glocks (semi-auto). So the settlor must find a way to inform the executor or the other trustees that 1) This is an NFA firearm, requiring special treatment, and 2) You need to educate yourself and probably get help from a qualified attorney. Most gun trusts require the trust to terminate when the settlors die. Proper NFA trusts include a delay while the proper documents are submitted and approved. By definition, that means your client will not be around when the trust terminates and distributes its property. Presumably your client was the most knowledgeable person in his or her family, regarding guns, NFA firearms, and gun laws. You need to make an effort to educate the other trustees regarding

the law. At a minimum, I instruct my clients to keep my NFA Firearms letter with the trust and other documents, in the gun safe.

- iii. Trust name: Normally I do not mention firearms or the NFA in the trust name. Outsiders don't need to know it holds those items. Some banks and third parties may refuse to deal with a gun trust. Also, gun owners value their privacy for a reason, and references to guns could lead bad guys or protestors to your door.
- iv. Trustee powers: The settlor formed the trust, and usually paid for the trust property. The other trustees should have the right to possess trust property *only* with permission of the "primary" trustee (the one who is also a settlor, hereinafter called "settlor-trustee"), but should have little or no power to sell or transfer trust property or make other major decisions. I call this type of trust a "Benevolent Dictator Trust." The normal "Committee Trust," where all the trustees have equal power and matters are decided by majority vote, could allow the other trustees to override your client and sell off the trust property which he or she funded. *Almost every gun trust assigns equal powers to all Trustees.*
- v. Possession of trust property: The settlor-trustee should also have the superior right to keep possession of any trust property, and to decide when the other trustees may possess it. *Very few trusts have this limitation.*
- vi. Spending money: Typical living trusts include multiple provisions either allowing or requiring expenditures to be made from trust property. A gun trust should *only* allow expenditures if approved in writing by the settlor-trustee. Allowing or requiring expenditures could force sale of NFA firearms, if the trust does not hold money or other assets that can be used to reimburse trustees. This could also allow other trustees to transfer or liquidate trust assets without the consent of the settlor-trustee (who paid for those assets). This could subvert the intent of the settlor, which was probably to preserve the firearms at any cost. Most Settlor's treat NFA firearms as family heirlooms, and would prefer all other options be exhausted before any of them are sold. It would be a good idea to provide a source of money from outside the trust (such as a provision in the settlor's Will providing money to the Trust, or a requirement that beneficiaries contribute money in certain circumstances), then money can be spent without selling guns. *Very few trusts customize or omit the provisions regarding spending money.*
- vii. Recordkeeping: You might add a recordkeeping requirement to your trust. At a minimum, this should include all NFA applications and tax stamps; all bills of sale or receipts for purchase of trust property; and all maintenance and repair records.
- viii. Safe Storage: All firearms, especially NFA firearms, must be stored so they are not accessible to unauthorized persons. For NFA firearms, only the Trustees are authorized to possess or have access to trust property. Trustees also have a duty to preserve and protect all trust property. Guns must be stored in a clean, dry, temperature-controlled place, and be checked occasionally, or they may rust or suffer other damage. Normally, the settlor-trustee will keep possession of the trust property except when one of the other trustees is "borrowing" it. Note that a trustee who is married or who has adults living in the same residence must keep all NFA



firearms outside the possession of the other person, unless they are also trustees.

- ix. Dispute Resolution: I like to have an arbitration clause, so any disputes are resolved privately. This reduces the chances of prosecution and protects the privacy of all persons involved. *Few gun trusts have arbitration clauses.*
- x. Duty to Make Trust Property Productive: The law ordinarily imposes a duty on the trustees to make the trust property productive. This means they are supposed to use their knowledge and judgment to generate income, or to increase the value of the trust assets. This is difficult or impossible when the trust property is comprised of several firearms, with no opportunity to invest in other assets (the only way to increase the value is through appreciation, which is beyond the powers of the trustees). A gun trust should abrogate the common law duty of a trustee to generate income. It should also absolve the Trustees of liability for depreciation. *Very few gun trusts waive the duty of productivity.*
- xi. Liability for Damage or Destruction of Trust Property: You should explicitly authorize the Trustees to use Trust property without liability for ordinary wear and tear, but require each Trustee to repair or replace any NFA firearm which is damaged or destroyed by his or her acts or omissions.
- xii. Spouses: I prefer to appoint the spouse as co-settlor for marital property purposes. I'd add a paragraph stating that the persons signing the Trust consent to the donation of any transfer of their property to the Trust. The spouse should also be a Trustee, to avoid constructive possession issues resulting from having possible access to NFA firearms. *It is common for gun trusts to fail to appoint spouses as settlor and/or as trustee.*
- xiii. Persons under 21: The trust needs to account for beneficiaries under 21. It should explicitly state who takes charge of their property. My suggestion is to leave it in the trust. There is no need to transfer an NFA firearm to the beneficiary's parents, then again to the beneficiary when he or she turns 21.
- xiv. Flexibility: I include provisions giving the Trustees flexibility in distributing specific NFA firearms. They can distribute the firearms themselves, sell some and split the proceeds to equalize things, or require a beneficiary to pay in money to equalize things. I also allow beneficiaries to request specific items be awarded to them.
- xv. Last resort: If all other "gifts" under the trust fail, you should specify that the trust property will be distributed according to the Settlers' Last Will and Testament, or by the laws of intestate succession.
- xvi. Definitions: The definitions should include the correct legal definitions of prohibited persons, NFA firearms, and non-NFA firearms. The definition of PP's should include anyone prohibited from possessing firearms or ammunition by federal law, or by the law of the state where the firearm is located. Antique firearms should be excluded from the definition of "firearm" because federal gun laws do not generally apply to them. If your state law applies to antique firearms,

then you need to draft your trust to account for this. If you are going to define other terms, get them right. Although NFA firearms are sometimes referred to as “Class 3 Firearms” and their dealers are sometimes referred to as “Class 3 Dealers,” both phrases are incorrect. Special Occupational Taxpayers are divided into classes. Class 1 is an importer, Class 2 is a manufacturer, and Class 3 is a dealer. If you refer to a Class Three Dealer while in the presence of a knowledgeable gun owner, you will be showing your ignorance. NFA firearms are properly referred to as “Title 2 Firearms,” or “NFA Firearms” if the phrase is defined in the trust.

- xvii. The Law: If you invoke any laws, you should cite the law then include the following language or something similar: “. . . as it may be amended in the future, and as it is interpreted from time to time in applicable regulations and in cases decided by courts with proper jurisdiction and precedential effect.”
- xviii. Representations by Trustees: I have each trustee sign a document representing and warranting that he or she is legally allowed to possess firearms, and that he or she has read the trust document and agrees to comply with it. The second part of the form allows the settlor to appoint that person as a trustee.

## 6. Conclusion

Lawyers drafting gun trusts face a number of challenges. They must get the trust drafted correctly, so it is legally valid and remains so throughout its existence. They must scrupulously avoid telling the trustees to violate the law, and this is complicated by the fact that many common trusts include provisions that are incompatible with the gun laws. They must also do their best to incorporate the law into their trust documents. Finally, they must perform the difficult task faced by anyone drafting an estate planning document, which is predicting the future and applying the client’s intentions to the various possibilities.

Gun laws are generally drafted by unsmiling people who are unmoved by good intentions. Most gun control laws are strict liability laws, imposing long prison sentences even when the actor was trying to comply with the law. Some of these lawmakers are so strident in their opposition to guns that they believe no good person would ever want to own a gun. The logical consequence of that belief is that owning guns is always bad, and convicting gun owners of crimes is only giving them what they deserve. To complicate things, gun laws change over the years. An estate planner drafting documents for an estate including guns has a tougher than normal challenge predicting the future.

Remember, if you have a flawed gun trust, the settlor can generally cure the problems by amending it.

The client has the option of choosing a low-cost or no-cost option for obtaining a gun trust. The attorney does not have that option. An attorney who starts drafting gun trusts without thoroughly exploring the law, is asking for trouble. This is not an area of law in which you can dabble. If you choose to work in this area, you owe it to yourself to become one of the professionals. You also owe it to yourself to charge a fee sufficient to allow you to get to know the client, explain the law so the client understands it, and draft a thorough trust.