

## **DON'T BE PENNY WISE AND POUND FOOLISH WITH ATTORNEYS AND FIREARMS LAWS**

**By Derek Andrew DeBrosse and J. Clayton Cheshire**

We have heard it said countless times: "I'll just go online and do it myself" or "well, I found another lawyer who will do it much cheaper". Our response has always been the same and has proven correct time and time again: "Understood. When you're ready to do it right, or need it fixed, call me."

While it is admirable to budget our finances and to avoid excessive spending it often creates a greater expense down the road. As firearms attorneys, we encounter clients with this type of mindset all too frequently especially with regard to firearms estate planning and business planning. This article focuses on the necessity of competent legal counsel in both of these areas, and encourages people to avoid "self-help" or "going cheap" in these situations.

### **GUN TRUSTS**

Gun Trusts have taken the Title II, Class III community by storm. They have become a very successful and lucrative practice for many lawyers. Our law firm (Barney DeBrosse, LLC; [BarneyDeBrosse.com](http://BarneyDeBrosse.com), [OhioGunLawyer.com](http://OhioGunLawyer.com)) was in fact one of the first to offer them in the State of Ohio. When we first rolled the product out it took months to draft a suitable trust from the ground up. We spent countless hours rehashing potential pitfalls and benefits of various provisions. It is important to remember that what a client pays for is not only the document but also the expertise, assurances, knowledge and counsel that goes with an estate-planning tool from an attorney. A gun trust is just that, an estate-planning tool that has wide ranging implications on one's overall estate.

When the market began taking off many gun stores, manufacturers, dealers and other non-lawyers began offering gun trusts as if they are merely "forms" to fill out. These products are offered as low as \$99.00 but are oftentimes fraught with error and bad draftsmanship. The even more troublesome issue is that many times these non-lawyers are giving legal advice without knowing the overall impact these decisions have on one's estate or on the validity of the trust itself. We had a client once hire us to review a trust they had purchased on the cheap. Upon review it became readily apparent it was not valid even though it already held many NFA items. The most glaring inaccuracy was the settlor was the trust itself - which is simply not possible. A glaring mistake even a novice attorney should not have made. Our client had an invalid trust that was holding title to various highly regulated NFA items. This obviously was a problem he could have avoided had he hired competent counsel in the first place. It ended up costing him even more to work through these problems.

These problems are not unique to the gun community. In 2005 in the case of Columbus Bar Assn. v. Am. Family Prepaid Legal Corp. 2009-Ohio-5336, the court imposed a \$6.3 million dollar civil penalty on “Trust Mill” organizations. Essentially a Trust Mill is a non-lawyer organization that engages in the unauthorized practice of law. These non-lawyer gun trust companies are likely engaging in or on the verge of engaging in the unauthorized practice of law themselves and potentially subject to civil action.

Once you decide to retain counsel, it is important that you retain the *correct* attorney who either (1) is an actual estate planning attorney who also has knowledge in firearms law or (2) associates with your general estate planning expert to advise him on firearms-specific issues. Our office routinely consults with other well-known and competent estate planning lawyers because a good lawyer knows what he doesn't know. Once counsel is retained, it is time to begin thinking about what it is that you desire and need. There are dozens of ways to “skin the cat” but generally there is always a best way. Our office begins with the premise that most clients need one of three basic types of firearm trusts.

#### **1. The Basic NFA Trust.**

Our office offers a basic NFA (National Firearms Act) Trust that is a simple revocable living trust with complex firearms regulation provisions. This trust provides the client with the knowledge and resources necessary to handle not only firearm regulations but also complicated estate planning and probate avoidance issues. Essentially this trust is for the gun owner wishing to expand into basic NFA items. This trust is adequate for those who (a) wish to have the ability to allow for multiple people to possess the firearm, (b) to ensure the property is kept out of the probate court process, and (c) to be confident that the named beneficiaries will have an expedited transfer of the property at death.

#### **2. The Firearm Collector's Trust**

We often get asked, “should I place my Title I non-NFA guns into my NFA Trust?” While each case is different we generally recommend against this for two main reasons, (1) to avoid having an entire collection in a legal instrument that ATF has knowledge and a copy of and (2) to separate potential liability. Because of this we generally advise to handle the Title I firearms in a client's Last Will & Testament or through a separate Collector's Trust. The decision on how to handle Title I firearms depends on many factors and issues within one's estate which is individualized per client. This is yet another reason to seek competent counsel and to avoid the “cheap guys”. The Collector's Trust has more robust provisions to include additional integrated oversight into the transfer of firearms and the ability for a trust to be amended in an emergency situation. It also allows for the itemization of each firearm and to name individual beneficiaries per each gun. This trust has all the benefits of the NFA Trust with the added protection of one's overall gun collection.

Generally clients with a growing collection in excess of 30 guns are suited for this trust.

### 3. **The Asset Protection Trust**

Many states have begun to pass laws allowing for what is commonly referred to as the Self-Settled Asset Protection Trust (known also as the Legacy Trust). This is for client's who have gone beyond mere collection and entered the realm of investment. Guns are no longer a hobby but a Legacy and that Legacy needs to be protected from those who want to take it for themselves. This trust if properly created protects assets from the potential threat of lawsuits and other creditor issues. Of all the trusts we offer this is one of the most sophisticated. To be properly created an attorney must consider, aside from firearm laws and regulations, possession issues, creditor protection issues, wrongful transfer issues, and gift tax issues just to name a few. Under no circumstances should a client attempt this type of trust on their own, as the consequences could not only be financial but also criminal.

In the end, to put it succinctly, if you are interested in firearms estate planning you should retain the services of an attorney who is actually a probate/estate attorney who has knowledge of gun law. Do not go cheap, and *never* go without counsel.

Please visit us at **OhioGunLawyer.com** for further information on our gun law practice.

**Derek Andrew DeBrosse, Esq.** is a licensed Ohio attorney with a firearms legal practice emphasizing in Gun Rights Restoration. Derek began his law practice immediately after law school in 2008 when he graduated from Regent University School of Law; Derek also holds a B.A. from The Ohio State University. Mr. DeBrosse's practice not only focuses on rights restoration but also a variety of other firearm related matters from NFA issues to FFL representation. Derek has represented both individual, corporate, and grass-roots organizational firearm clients in both Federal and State court.

Before entering into law school Derek served a combat tour of duty with the 1487th Transportation Company in support of Operation Iraqi Freedom. Derek has received various military accolades to include the Combat Action Badge, Army Commendation Medal and Iraq Campaign Medal. Mr. DeBrosse is licensed to practice in all Ohio State and Federal Courts, the U.S. Supreme Court, the U.S. Court of Appeals for the Federal Circuit, the U.S. Army Court of Criminal Appeals, U.S. Navy-Marine Corps Court of Criminal Appeals, U.S. Air Force Court of Criminal Appeals, U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Armed Forces.

Mr. DeBrosse is a NRA Benefactor Life Member, NRA Golden Eagle Member, NRA Firearms Instructor, GLOCK Advanced Armorer, Smith & Wesson M&P Armorer, Defensive Edge Certified Armorer in Precision Rifle/AR15/M4/M16/LEO Shotgun, and member of various other pro Second Amendment organizations. In his free time Derek enjoys tactical firearms training, backpacking, scuba diving, white water rafting and anything outdoor related.

Professionally Derek also serves as General Counsel of Ohioans for Concealed Carry, Judge Advocate for the Ohio Combat Infantryman's Association, as well as Special Assistant Prosecuting Attorney for the Village of Hartford, Ohio.

## THE BUSINESS OF GUNS

Firearms industry (“Industry”) businesses are some of the most highly regulated in the world. Because of that, there are unique risks that must be taken into consideration. For many Industry members, their business is the primary source of income, both for owners and the employees. Even if the business “starts small”, we tell our clients to plan for the future and build it right because it may very well become bigger or more important than they imagined.

For the last decade, our law firm (J. Clayton Cheshire, P.C., [www.jclaytonlaw.com](http://www.jclaytonlaw.com)) has advised Industry clients on structure, formation, governance, operations, and everything else affecting a new or re-organizing company. We generally begin that process by looking at the business model and making customized recommendations. Our recommendations are designed to ensure long-term viability.

There are three general areas where we focus: (1) business structure, (2) governance, and (3) standard operating procedures. All three of these areas require specialized knowledge and experience with firearms laws and regulations, and when they are addressed properly, add tremendous value and strength to the business. And, the cost to address these issues on the front end is relatively small, especially in comparison to the potentially enormous costs (not only financial costs, but also criminal costs) of failing to address them.

### **1. Business Structure**

An Industry business’ structure is essentially its shelter. If it is not strong, and not built to withstand threats, then the business is at risk. After reviewing a client’s business model, we often recommend a new or reorganized business structure that anticipates growth and diversity and segregates and protects multiple assets (including ATF licenses) and lines of revenue. This kind of structure insulates one asset from another and better enables a growing business to survive regulatory and political unpredictability, to be flexible, and to explore franchising, licensing, and spin-offs.

### **2. Governance**

If an Industry business’ structure is the same as shelter, then its governance is essentially its emergencies and contingencies plan. A strong business has to plan for both. With many clients, we often recommend new or updated operating agreements, shareholder agreements, bylaws, and other items that address internal operations, including emergencies and contingencies (“governance agreements”). It is absolutely essential that Industry governance agreements address certain issues that are unique to the Industry, including the death or disability of owners and potential issues regarding “prohibited person” owners or responsible persons.

### 3. **Standard Operating Procedures**

As a structure is shelter, and governance the emergencies/contingencies plan, standard operating procedures (“SOPs”) are the same as maintenance. We all understand that our homes, vehicles, and businesses can fall apart if not properly maintained, and that it can cost much more to fix a problem that arises because of a lack of proper maintenance than it would have cost to perform proper maintenance. We focus on SOPs that are designed to keep an Industry business compliant with Federal regulators (ATF, the U.S. State Department, etc.). We work with Industry members to develop SOPs relating to ATF compliance, security, and workplace safety. Not only do these SOPs reduce the risk of compliance violations, they also can reduce insurance premiums and other costs of doing business.

As noted above, there are real consequences for not having the right shelter, emergencies/contingencies plan, or standard operating procedures in place, and for engaging in “self-help” or “going cheap”. In fact, we saw what happened to a well-known firearms manufacturer in 2015 – Stag Arms.

#### *The Stag Arms Story*

In late 2015, ATF announced that it was revoking Stag Arms LLC’s FFL. This was a big story in the Industry because Stag is a well known firearms manufacturer, which sells its products to civilians, the military, and law enforcement.

According to an article by the *Hartford Courant*, the revocation essentially resulted from two “bad” ATF compliance inspections, the first in 2007 and the second in 2014:

In 2007, ATF inspectors found instances of poor record-keeping, administrative violations and regulatory violations, but worked with Stag to bring it into compliance, said Nealy Earl, area head of industry operations for ATF. The problems found during the 2014 compliance review at Stag Arms were similar or worse than those found in 2007.

As a result of the 2014 inspection, ATF pursued criminal charges and the company’s president and owner “pleaded guilty . . . to violating federal firearms laws and . . . agreed to sell the company and have no further ownership or management role in a gun manufacturer.” ([www.courant.com/breaking-news/hc-stag-arms-guilty-plea-federal-court-1223-20151222-story.html](http://www.courant.com/breaking-news/hc-stag-arms-guilty-plea-federal-court-1223-20151222-story.html))

There are some important tips for Industry members (or future members) based on the Stag Arms story.

#### 1. **TAKE COMPLIANCE SERIOUSLY**

Stag had a lot to lose by not ensuring 100% compliance with ATF regulations. Stag

Arms was in business for twelve years and in that time grew to supply broad markets and employ 100 people. Because of the revocation, its ownership was forced to sell Stag's assets in a distressed sale and its owner will likely be forever barred from owning or running another Industry business.

From what we have read, Stag Arms often spoke of its commitment to compliance. But, it is one thing to say all of the right things, and another to actually do them. There are a number of cost-effective methods and resources for establishing an ongoing compliance program. We encourage Industry members to understand and take advantage of them. We guarantee you that Stag wishes it had.

## 2. **IF ATF GIVES YOU A SECOND CHANCE, TAKE ADVANTAGE OF IT**

Stag had seven years to learn from its 2007 ATF inspection. If you have an ATF inspection and ATF finds *any* violations, address them immediately and develop measures (again, using the various compliance resources) to prevent them from happening again. And, if the inspection leads to a warning letter or warning conference, we encourage you to consider some long-term solutions that our firm has developed for effectively addressing that adverse compliance history, and reducing your exposure to the kinds of consequences Stag has suffered.

So, as you can see, there is a lot more to being a member of the Industry that simply "getting an FFL". By bringing in experts who deal with ATF and legal issues related to firearms businesses every day in all jurisdictions, you can potentially prevent an enormous amount of time, stress, unpredictability and expense. The amount of money you will spend on "the front end" to set up and run your business the right way will be far less than what you may spend or lose on "the back end" to get things right.

You can read more about our firm and how we work with Industry members at [www.jclaytonlaw.com](http://www.jclaytonlaw.com).

Many lawyers and firms hold themselves out as "gun lawyers"; few actually are gun lawyers. **J. Clayton Cheshire, P.C.** represents firearms, ammunition, and explosives companies every single day, throughout the United States. Clay Cheshire is one of the most experienced, skilled Firearms Industry – Gun Business – lawyers in the United States. And we have access to a cadre of expert consultants who can advise clients (and us) on the most highly-technical, high-stakes, issues affecting Industry members. We help clients build the strongest business imaginable, so it will remain viable for the long-term and have the highest value to its owners.