

GUN SHOP LIABILITY FOR DISTRIBUTING LIVING TRUSTS

With Discussion of Potential Ethical Violations for Attorney Facilitation

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BACKGROUND

Gun owners have learned to use an entity such as a corporation or living trust to make it more efficient and easier to acquire National Firearms Act (NFA) items such as machine guns, short-barreled rifles (SBRs), Any Other Weapons (AOWs), Destructive Devices (DDs), and silencer (suppressors) in states where citizens are permitted to own them. Use of either an entity or living trust allows the gun owner to apply for the transfer of an NFA item directly to the BATFE without the requirement to first request their Chief Law Enforcement Officer (CLEO) to sign off on their paperwork. Using an entity likewise obviates the need to provide fingerprints and a photograph as well. And, in addition to these requirements for individual acquisition, many CLEOs simply refuse to sign off.

While it is true that most types of entities can be used to obtain NFA items, living trusts have become increasingly popular because a living trust provides privacy, is easy to modify as things change, and does not require corporate formalities, state registration and fees, or create IRS scrutiny.

Gun owners have access to the Internet a fount of information and misinformation for a bit of quick advice. Some turn to Quicken, LegalZoom, or download a form from a firearms forum on the internet. Needless to say, because NFA items are highly regulated by both state and federal governments, these do-it-yourself solutions are risky. Some gun owners turn to their local gun shop for a solution assuming that a trust should be included as part of the sales transaction for an NFA firearm.

Gun shops have responded by providing living trust forms to gun owners in order to facilitate the sale of an NFA item, expedite its delivery, and to keep gun owners happy. The gun shop provides the living trust form, its employees assist in the completion of the form, and imply by word, action, or from the context of the transaction that the living trust accomplishes the goal(s) of the gun owner.

Most such trusts are generic and contain no guidance on local, state, or federal gun laws that might create criminal or civil liability for the gun owner should the trust be administered incorrectly. Additionally, many such trusts reviewed by attorneys and by BATFE are void or invalid *ab initio*. Some transfers to such trusts were approved and later the trust ruled invalid rendering the entire transfer invalid. An invalid transfer means that the gun owner technically is in felony violation of state and/or federal law. This risks forfeiture of weapons and criminal penalties including fines or imprisonment. At the very least the gun owner will pay significant legal fees to correct the deficiency.

This memorandum briefly discusses the significant potential liability facing gun shops and their owners for distributing living trusts, whether downloaded from the Internet, prepared from a software package, or provided by the gun shop's attorney for use by a gun owner at the gun shop.

WHAT IS THE PRACTICE OF LAW?

The Washington State Supreme Court sets the standards and authorizes a person who possesses the required skill and knowledge to practice law within the state. The Supreme Court, in General Rule 24, defines the "Practice of Law" as "[T]he application of legal principles and judgment with the regard to the circumstances or objectives of another entity or person(s) which require knowledge and skill of a person trained in the law. This includes but is not limited to: ... (2) Selection, drafting, or completion of legal documents or agreements which will affect the legal rights of an entity or person(s)

Gun shops sell firearms, accessories, and related products. Employees may also freely give general advice on the law but absent a license to practice law, a gun shop and its employees cannot select, draft, or complete legal documents (living trusts) which will affect the legal rights of a customer. To do so is the Unauthorized Practice of Law (UPL).

WHAT IS THE UNAUTHORIZED PRACTICE OF LAW?

A person who provides legal services, who is not a licensed lawyer, or who is not otherwise authorized by law to provide legal services, may be engaging in the Unauthorized Practice of Law (UPL).

1. IS THE UNAUTHORIZED PRACTICE OF LAW ILLEGAL?

In Washington UPL is a crime. RCW 2.48.180 provides criminal penalties for the unauthorized practice of law. A single violation is considered a gross misdemeanor and EACH subsequent violation is a Class C felony.

2. HAS THE PRACTICE OF LAW BOARD ISSUED AN ADVISORY OPINION RELATIVE TO THIS ISSUE? (Note: (Advisory opinions are issued by the Practice of Law Board by authority of General Rule 25(c)(1) and are published at the direction of the Board).

YES. Below are excerpts from Advisory Opinion (Inquiry # 04-18) August 13, 2004 is titled: GIVING ADVICE RELATIVE TO THE SALE OF LIVING TRUSTS OR OTHER TESTAMENTARY INSTRUMENTS BY PERSONS NOT ADMITTED TO PRACTICE LAW IN WASHINGTON

Advising individuals whether or not a particular form of testamentary device is appropriate to protect their legal rights or to meet their intended legal responsibilities is the practice of law. GR 24(1)(a). Only lawyers admitted to practice in this state may practice law in Washington.

In *Perkins v. CTX Mortgage Co.*, 137 Wn. 2d 93, 969 P. 2d 93 (1999), the Washington Supreme Court held that a mortgage lender engages in the practice of law when producing and completing residential home loan documents. Similarly, in *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P. 3d 1068 (2002), the Supreme Court held that actions of an insurance claims adjuster constituted the practice of law when she completed legal forms, advised unrepresented claimants, and advised claimants to sign settlement and release agreements without advising them there were potential legal consequences or referring them to independent counsel.

In *Perkins*, the Supreme Court said:

“Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm.”
Perkins, at 102.

In that case, the Court found that “lenders are authorized to prepare the types of legal documents that are ordinarily incident to their financing activities when lay employees participating in such document preparation do not exercise any legal discretion.” Similarly in *Jones v. Allstate*, the Supreme Court held that insurance claims adjusters may prepare and complete legal documents incidental to the business of claims adjusting. *Jones* at 305. The Court also held **in both cases that the persons engaging in such activities must comply with the standard of care of a practicing attorney.**

While some Gun Shops seem to think that a “free” living trust gets them off the hook, it does not. The Board further states:

The marketing of living trusts and other testamentary instruments is unlike the activities in *Perkins* and *Jones*. In those cases, the activities constituting the practice of law were incidental to the business of the defendants. **In the case of advising individuals on the selection and use of testamentary instruments, that itself is the practice of law, whether or not for a fee or other consideration.** It is not “incidental” to anything else. It is the practice of law and may only be engaged in by persons admitted to practice by the Washington Supreme Court.

In *The Florida Bar Re Advisory Opinion--Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992), the Florida Supreme Court held “the assembly, drafting, execution, and funding of a living trust document constitute the practice of law.” Also, in *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997), that court said:

Under the untenable guise of “gathering information,” non-lawyer ASCA employees answered specific legal questions; determined the appropriateness of a living trust based on a gun owner’s particular needs and circumstances; assembled, drafted and executed the documents; and funded the living trusts... The particularized legal advice and services rendered by ASCA’s non-lawyer employees clearly constituted the unlicensed practice of law.

The Washington Practice of Law Board concluded that a person who is not admitted to practice law in Washington, and who gives advice relating to the sale of living trusts or other testamentary instruments, **whether or not for a fee or other consideration**, is engaged in the practice of law. (Emphasis added.)

Clearly, the Board says, and the Courts say, that “free” does not protect the gun shop. Our experience with local gun shops is that many (if not most) gun shops provide the forms, tell the client what the trust does, show them how to fill it out, and generally represent that the trust will serve the client’s purpose.

I conclude that providing a living trust as part of an actual or pending sale of a firearm is the unauthorized practice of law. **UPL is a crime in Washington.**

3. CAN A LAWYER, ADMITTED TO PRACTICE LAW IN WASHINGTON, SIMPLY DRAFT AND APPROVE A LIVING TRUST FOR THE GUN SHOP TO USE?

The cited Board Opinion answers this question, too. The Opinion, on similar facts, says:

A lawyer involved in the marketing of living trusts and other legal instruments with a non-lawyer must comply with RPC 5.3 Responsibilities Regarding Non-lawyer Assistants and other provisions of the RPCs, such as those concerning sharing fees with non-lawyers, conflicts of interest, etc. Specific advice on those requirements is beyond the authority of the Practice of Law Board.

The Board notes, however, that this issue was addressed by the Florida Supreme Court in Florida Bar Re Advisory Opinion, *supra*:

The question posed by petitioner also presents a potential conflict of interest for a lawyer employed by a corporation or other entity involved in the sale of living trusts. Loyalty is an essential element in the lawyer’s relationship to a client.

In advising a client about the disposition of property after death, the lawyer must first determine whether a living trust is appropriate for that client. If so, the lawyer must then ensure that the living trust meets the client’s needs. If the lawyer is employed by the corporation selling the living trust rather than by the client, then the lawyer’s duty of loyalty to the client could be compromised. [citations to Florida rules nearly identical to Washington RPC 1.7 (b) and 1.8(f) omitted] In light of this duty of loyalty to the client, a lawyer who assembles, reviews, executes, and funds a living trust document should be an independent counsel paid by the client and representing the client’s interests alone.

4. IS SUCH A LAWYER RISKING AN ETHICAL VIOLATION AND SANCTIONS?

Every Washington lawyer is required to follow RPC 5.5 which is the rule prohibiting the unauthorized practice of law by the lawyer. RPC 5.5(a) says that “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” The comment to the rule says: Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer’s direct action or by the lawyer assisting another person.

A lawyer who violates the Rules of Professional Conduct faces discipline by the State Bar which may include public censure, suspension, disbarment, an order to provide restitution, etc.

5. Are there potential liability risks for a Gun Shop providing free trusts as part of a commercial transaction?

Yes. There is potential civil liability for providing living trusts to Gun Owners under the Consumer Protection Act (CPA). A violation of the CPA resulting in an award for damages means you face possible treble damages (3x actual damages) and the requirement to pay the plaintiff's attorney fees.

RCW 19.295.020 makes it unlawful for a person to market estate distribution documents, directly or indirectly, in or from this state unless the person is authorized to practice law in this state. (Emphasis added.) There is an exemption for a person employed by someone authorized to practice law in this state may gather information for, or assist in the preparation of, estate distribution documents but may not provide any legal advice.

RCW 19.295.030 makes the Consumer Protection Act applicable to this chapter. The legislative intent is to protect the development and preservation of business. A violation is an unfair or deceptive act in trade or commerce and an unfair method of competition under Chapter 19.86 RCW.

ILLUSTRATIONS OF WHAT CAN GO WRONG...

#1. Gun shop provides trust document. Employee helps fill it out. Form 4 is submitted and BATFE approves the transfer and issues a tax stamp.

Later, BATFE determines that the trust is invalid and that the transfer is therefore invalid. Gun owner is faced with the threat of weapons confiscation, fines, and facing criminal charges. Gun owner hires lawyer to work out a deal with BATFE and to provide a restated trust.

Question – Any potential liability for the gun shop? YES.

- Consumer Protection Act judgment against gun shop... treble damages and attorney fees.
- Potential criminal charges against gun shop for unauthorized practice.
- Bad press.
- Angry gun owner who feels betrayed.
- Loss of gun owner confidence.

#2. Gun shop provides trust document. Employee helps fill it out. Form 4 is submitted and BATFE approves the transfer and issues a tax stamp.

All goes well with the trust. Later, though, gun owner is shooting with friend and loans NFA item to him. Friend is not a trust beneficiary. While getting a soda, Friend is approached by Officer Smiley. Officer Smiley notes that the person on the Form 4 is not in possession.

Question – Any potential liability for the gun owner or Friend? YES.

- Unlawful transfer of an NFA item.
- Potential criminal charges against gun owner.

Question – Any potential liability for the gun shop? YES.

- Consumer Protection Act judgment against the gun shop... treble damages and attorney fees. Did not create a trust with the same care and professionalism as a lawyer.
- Potential criminal charges against gun shop for unauthorized practice.
- Bad press.
- Angry gun owner who feels betrayed.
- Loss of gun owner confidence.

#3. Same facts as #2 with a twist.

All goes well with the trust. Gun owner lives with Roomie. Roomie is arrested for pushing his girlfriend while drunk and is convicted of a misdemeanor Domestic Violence offense, receiving probation. While celebrating his stay from prison life with another party, a neighbor complains about the loud noise which results in Officer Smiley dropping by. Gun owner answers the door and Officer Smiley asks, "For my own safety, are there any firearms in the apartment?" Gun owner helpfully tells the truth, that he owns a Walther P22 target pistol. Officer Smiley recognizes Roomie from his previous arrest and makes a mental note that Roomie may be in constructive possession of any firearms in the apartment. Officer Smiley asks "what else do you have and where are your firearms located." This turns up the GemTech Outback II silencer he just proudly received for the Walther... which is an NFA item! Bad day for Roomie... but even worse for GUN OWNER. This is the "pile-on" effect. Officer Smiley is a Hero, Roomie a Felon, Gun Owner..?

Question – Any liability for the Gun Owner or Roomie? YES.

- Unlawful transfer of an NFA item by the gun owner.
- Unlawful possession of a firearm by Roomie.
- Unlawful possession of an NFA item by Roomie.
- Roomie in jail as probation is over; now is pending felony charges for criminal possession.
- Potential criminal charges against the gun owner.

Question – Any potential liability for the Gun Shop? YES.

- Consumer Protection Act judgment against the gun shop... treble damages and attorney fees. The generic trust did NOT DO THE JOB. Gun owner unknowingly acted in violation of law... trust contained no guidance to help the gun owner to administer it consistent with state and federal law. Gun shop delivered a legally insufficient trust and at a minimum did not create a trust with the same care and professionalism as a lawyer.
- Potential criminal charges against the gun shop for unauthorized practice.
- Bad press.
- Angry gun owner who feels betrayed.

- Loss of gun owner confidence.

NEW FACTS. Gun Shop provides trust document. Employee helps fill it out. Form 4 is submitted and BATFE approves the transfer and issues a tax stamp.

All goes well with the trust. Later, gun owner becomes disabled. Spouse terminates trust and distributes asset or sells them to friends and neighbors without following state or federal law. Neighbor, a convicted sex offender, uses a firearm during an enticement of a minor child but is thankfully arrested and no one is hurt.

Question – Any potential liability for the Spouse? YES.

- Unlawful transfer of an NFA item by terminating the trust and not following BATFE procedures.
- Potential criminal charges against Spouse for unlawful transfer under state and federal law to a prohibited person.

Question – Any potential liability for the Gun Shop? YES.

- Consumer Protection Act judgment against gun shop... treble damages and attorney fees. Did not create a trust with the same care and professionalism as a lawyer.
- Potential criminal charges against gun shop for unauthorized practice.
- Bad press.
- Angry gun owner who feels betrayed.
- Loss of gun owner confidence.
- So, what if you tell all your customers to just do a Quicken trust, or to download one from the Internet? Well, if you want to hang them out, that will legally insulate YOU. Can you sleep with that result?

THIS MEMORANDUM IS NOT INTENDED TO NOR DOES IT PROVIDE LEGAL ADVICE TO ANY PERSON OR ENTITY ABOUT HIS, HER, OR ITS OWN LEGAL OR FACTUAL SITUATION. IT IS MERELY PROVIDED FOR PURPOSES OF GENERAL LEGAL DISCUSSION. ANY PERSON OR ENTITY DESIRING LEGAL ADVICE UNDER HIS, HER, OR ITS FACT PATTERN AND APPLICATION OF LEGAL CONCEPTS TO IT SHOULD CONSULT WITH HIS, HER, OR ITS LAWYER.