



TEXAS PERSPECTIVES
ON

FIREARMS LAW

**Texas Perspectives on
Firearms Law**

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Texas Perspectives on Firearms Law



Austin 2015

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The State Bar of Texas is proud to present *Texas Perspectives on Firearms Law*. For more than five decades, the State Bar has published books that offer Texas lawyers informative resources to improve their practices. This compilation of articles, initially presented at various TexasBarCLE seminars across the state, continues that tradition by covering a variety of state and federal topics that will assist Texas lawyers in advising and representing their clients regarding firearm use and ownership.

The Bar wishes to acknowledge its deep gratitude to the authors who contributed to this book. Without their hard work and commitment to the ideals of our profession, this publication would not be possible.

A handwritten signature in black ink, appearing to read "Trey Apffel".

Trey Apffel
President, State Bar of Texas

Texas Perspectives on Firearms Law

CHAPTER 1

Firearms Instructor Liability

Stefan B. Tahmassebi

Firearms instructors in Texas and elsewhere are susceptible to a number of different theories of liability, including negligence claims. Depending on the particular facts and circumstances and the particular state, various defenses, including specific statutes that protect firearms instructors, can be asserted against such claims. Texas has enacted some of these protective statutes. This chapter addresses possible causes of action that may be brought against an instructor, defenses that can be asserted, and certain statutory and other protections.

I. Causes of Action

A. Negligence

1. Negligence in Texas

Texas has adopted comparative negligence. The proportionate responsibility statute in Texas applies to any action based in tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought. Tex. Civ. Prac. & Rem. Code § 33.002(a)(1). A claimant may not recover damages if his percentage of responsibility is greater than 50 percent. Tex. Civ. Prac. & Rem. Code § 33.001.

Firearms instructors have been sued in negligence. To successfully bring a negligence claim in Texas, one must prove “a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach.” *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

Negligence, a common law doctrine, consists of three essential elements—a legal duty owed by one person to another, a breach of that duty, and damages proximately resulting from the breach. *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 531 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.). Duty is the threshold inquiry; a plaintiff must prove the existence and violation of a duty owed to him by the defendant to establish liability in tort.

Abalos v. Oil Development Co., 544 S.W.2d 627, 631 (Tex. 1976). In describing “duty” this court has stated generally:

... if a party negligently creates a situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby.

Buchanan v. Rose, 138 Tex. 390, 159 S.W.2d 109, 110 (1942). More recently, we said duty is the function of several interrelated factors, the foremost and dominant consideration being foreseeability of the risk: *Otis*, 668 S.W.2d at 309; *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983).

El Chico Corp., 732 S.W.2d at 311.

“Proximate cause in Texas consists of two concepts: (1) cause in fact and (2) foreseeability. Both of these elements must be present.” *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975) (citation omitted). Both the elements of cause in fact and foreseeability must be present to establish proximate cause. *Farley*, 529 S.W.2d at 755.

The issues in *Farley* included the question of whether a known dangerous horse or the failure to supervise was the proximate cause of an injury. *Farley*, 529 S.W.2d at 755. The Texas Supreme Court held that a plaintiff need show only “the greater probability is that either the nature of the horse or the failure to supervise caused the collision.” *Farley*, 529 S.W.2d at 755–56. Plaintiffs do not need to exclude all other possibilities outside what is alleged. *Farley*, 529 S.W.2d at 755.

Foreseeability is established by “proof that the actor as a person of ordinary intelligence and prudence should have anticipated the danger to others created by his negligent act.” *Clark v. Waggoner*, 452 S.W.2d 437, 439–40 (Tex. 1970) (citation omitted). Anticipation of “just how injuries will grow from that dangerous situation” is not necessary to prove foreseeability. *Clark*, 452 S.W.2d at 440.

2. Reasonable Person Standard—Instructors

When determining whether an instructor owes a duty, the trier of fact should make reasonableness determinations based on a reasonable person employed in a particular field. 13 Ill. Jur. *Personal Injury* § 22:22 (2011) (citing *Avemco Insurance Co., Inc. v. Elliot Aviation Flight Services, Inc.*, 86 F. Supp. 2d 824 (C.D. Ill. 2000)). A flying instructor remains under a duty to act as a reasonably prudent pilot under the circumstances. 13 Ill. Jur. *Personal Injury* § 22:22. The reasonable instructor standard has been applied in other states in the driving context as well. Bryan P. Whitaker, *Empty Hands, Deep Pockets: Tort Liability and Potential for Recovery Against Individuals Applying Martial Arts Training in Self Defense*, 31 Gonz. L. Rev. 413, 426 (1995–1996). “In these situations the instructor is liable if he or she does not act as an

‘ordinarily reasonable vehicle instructor’ would with respect to teaching or supervising the student.” Whitaker, 31 Gonz. L. Rev. at 426.

Likewise, a firearms instructor who fails to instruct students as an ordinarily reasonable firearms instructor should may be liable if that negligence is a proximate cause of an injury.

3. Student’s Negligence Imputed to Instructor

In *Avemco*, a student’s negligence could not be imputed to an instructor because they were not acting in concert. 8A Am. Jur. *Aviation* § 135. “The negligence of a pilot during a recertification flight which ended in a crash could not be imputed to the flight instructor based on the rule of persons acting in concert, where the pilot and instructor were not acting in accordance with any agreement between them, and there was no evidence that the instructor encouraged the pilot to act negligently.” 8A Am. Jur. *Aviation* § 135 (citing *Avemco*). *Avemco*, applying Illinois’s comparative negligence law, involved a flight instructor and a pilot undergoing a flight review whose separate negligent actions both amounted to proximate cause of damage caused to the plane. *Avemco*, 86 F. Supp. 2d at 829. The court rejected the argument that any negligence by the student pilot was attributable to the instructor. *Avemco*, 86 F. Supp. 2d at 833. The court held that both the student and the instructor “had a duty to act as a reasonably prudent pilot would have acted under the circumstances.” *Avemco*, 86 F. Supp. 2d at 831 (citing *Steering Committee v. United States*, 6 F.3d 572, 579 (9th Cir. 1993)). The court reasoned that no evidence existed that both actors were acting in accordance with any agreement between them or that the instructor encouraged the “student” to act negligently. *Avemco*, 86 F. Supp. 2d at 831.

Applying this concept to a firearms instructor’s case, absent any evidence that the instructor and student were acting in accordance with an agreement between them or that the instructor encouraged or caused the student to act negligently, the firearms instructor should not be held vicariously liable for the negligence of the student.

4. Student’s Level of Competence

In *Farley*, the Texas Supreme Court reversed a judgment against the plaintiffs because a jury could have found that a prudent foreman would have supervised young boys, as opposed to experienced ranch hands, in a potentially dangerous cattle roundup. *Farley*, 529 S.W.2d at 757.

A suit for negligence may be brought if it is alleged that the instructor placed an inexperienced and inadequately trained student into the sport for which they are training. *Derricotte v. United States*, 794 A.2d 867, 871 (N.J. Super. Ct. App. Div. 2002). In *Derricotte*, the plaintiff was an overweight woman who had never skated before and who had informed the instructor that she had not skated before and that she was very nervous. *Derricotte*, 794 A.2d at 869–70. The instructor “gave her only a few

minutes of instruction in a carpeted area, during which she moved less than five feet.” *Derricotte*, 794 A.2d at 870. The instructor then instructed the plaintiff to go into the rink by herself, which the plaintiff did, suffering serious injuries after traveling a little more than five feet. *Derricotte*, 794 A.2d at 870.

In fact, students are inherently less informed and experienced in a given subject matter than other patrons; that is why they are seeking instruction in the first place. This may require a higher degree of care on the part of the instructor toward students. Courts will take notice of the level of inexperience of a student and may adjust the duty of care imposed on the instructor accordingly.

Applying Utah law, a federal district court allowed negligent instruction claims for failing to warn of spring ski conditions because of a higher degree of care owed to ski students as opposed to general patrons because of a student’s lack of known and appreciable risks. *Ghionis v. Deer Valley Resort Co., Ltd.*, 839 F. Supp. 789 (D. Utah 1993).

[T]he court believes the duty owed by a ski resort to students enrolled in the resort’s instructional programs, is significantly higher than that duty owed to nonstudent patrons of the resort. The student pays a fee for ski instruction, and informs the resort that he or she is not knowledgeable about the skiing sport. The ski student is not in a position, through experience or knowledge to assume the risks of skiing, and relies upon his or her instructor to bring him or her up to the level of competence to assume those risks.

Ghionis, 839 F. Supp. at 796 (footnotes omitted); see also *Zanan v. Jack Frost Ski Lodge*, 36 Pa. D. & C.3d 444, 445 (Pa. Ct. Com. Pl. 1985) (“plaintiff avers that he informed the ski instructor that he was a novice”); *Weiner v. Mt. Airy Lodge, Inc.*, 719 F. Supp. 342, 343 (M.D. Pa. 1989) (“having never skied before”).

Applying this concept to a firearms instructor’s case, a firearms instructor in Texas should consider the student’s experience and level of competence with firearms and adjust the level of instruction, training, and supervision accordingly.

5. Instructor Negligence

The U.S. District Court for the Southern District of Florida, on a summary judgment motion, determined that Royal Caribbean Cruise Line could be held liable for negligent instruction arising from an injury sustained by a passenger learning how to surf on the ship’s simulated surfing system. *Magazine v. Royal Caribbean Cruises, Ltd.*, No. 12-23431-CIV, 2014 WL 1274130, at *8 (S.D. Fla. Mar. 27, 2014).

The court rejected the plaintiff’s failure-to-warn argument that Royal Caribbean legally failed to warn the passenger of dangers because such alleged failure was not the proximate cause of her injuries, because she admitted that she would have ignored warnings. *Magazine*, 2014 WL 1274130, at *4.

Other issues in the case however, were whether the instructors' handling of a rope for the passenger to hold while training contributed to the plaintiff's particular injury and whether the resulting risk was greater than the inherent risk of the surfing device. *Magazine*, 2014 WL 1274130, at *8. The court of appeals left for the trial court to decide whether the employees' use and handling of a rope for balancing, which was not referenced in the training manuals, amounted to negligent instruction. *Magazine*, 2014 WL 1274130, at *9.

[T]he Court cannot conclude at this time, as a matter of law, that RCL's instructors necessarily exercised reasonable care in their *handling* of the balancing rope, and that such breach did not heighten the risk of [the plaintiff's] injury. While the Court is not deciding this issue of law at this time, in a paid lesson for a sport or similar recreational activity such as the Flow-Rider, reasonable care by an instructor *may* include not exposing a plaintiff to risks beyond those inherent in the recreational activity itself, at least not before the plaintiff is ready to handle those risks.

Magazine, 2014 WL 1274130, at *8 (footnotes omitted).

The instructor and shooting school should not expose students to risks beyond those inherent in the recreational activity itself. Furthermore, the failure to comply with training manuals may be evidence of negligence.

6. Failure to Warn

Firearms instructors should be aware of their duty to warn students. An instructor has a duty to warn of dangers that are not open and obvious but of which the instructor is aware.

[T]o prevail on a negligence claim predicated on a defendant's failure to warn, a plaintiff must identify a specific risk (1) of which the defendant had notice or constructive notice, (2) that is not open and obvious, (3) about which the defendant failed to warn the plaintiff, and (4) that actually caused the plaintiff's injury. *See, e.g., Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012).

Magazine, 2014 WL 1274130, at *5.

An instructor does not have a duty to warn students of dangers that are open and obvious.

[T]here generally is no obligation to warn of a hazard that should be appreciated by persons whose intelligence and experience are within the normal range. When the risk involved in the defendant's conduct is encountered by many persons, it may be foreseeable that some fraction of them will be lacking the intelligence or the experience needed to appreciate the risk. But to require warnings for the sake of such persons would produce such a pro-

fusion of warnings as to devalue those warnings serving a more important function.

Restatement (Third) of Torts: Phys. & Emot. Harm § 18, cmt. f (2010).

Thus, an instructor has a duty to warn of those dangers that are not open and obvious. It may not be a bad idea however, to also provide warnings of dangers that may appear to be open and obvious, including specific warnings of the danger of firearm discharges and possible gunshot wounds.

7. Educational Malpractice

Some courts have specifically held that no cause of action exists for educational malpractice. Even though the plaintiffs claimed that the trial court erred by characterizing their claim as sounding in the tort of educational malpractice rather than ordinary negligence, the Appellate Court of Illinois held that claims pertaining to the teaching, training, and instruction of the pilot of the plane before an accident related to the quality of the instruction provided to the pilot and constituted claims of educational malpractice that were not recognized in Illinois and were, therefore, barred as a matter of law. *Waugh v. Morgan Stanley & Co., Inc.*, 966 N.E.2d 540 (Ill. App. Ct. 2012). The court considered the plaintiff's negligent instruction claims to be the equivalent of "educational malpractice" claims rather than ordinary negligence claims. *Waugh*, 966 N.E.2d at 548.

[M]ost jurisdictions that have considered the issue have found that educational malpractice claims are not cognizable. See, e.g., *Glorvigen* [v. *Cirrus Design Corp.*, 796 N.W.2d 541, 553 (Minn. Ct. App. 2011)] ("The bar on educational-malpractice claims recognizes that '[a]llowing individuals . . . to assert claims of negligent instruction would avoid the practical reality that, in the end, it is the student who is responsible for his knowledge, including the limits of that knowledge.'" (quoting *Page v. Klein Tools, Inc.*, 461 Mich. 703, 610 N.W.2d 900, 906 (Mich. 2000)); *Johnson v. Clark*, 165 Mich. App. 366, 418 N.W.2d 466 (Mich. Ct. App. 1987); *Dallas Airmotive [Inc. v. Flight Safety International, Inc.]*, 277 S.W.3d 696 (Mo. Ct. App. 2009)]; *Christensen v. Southern Normal School*, 790 So. 2d 252, 255 (Ala. 2001) (claim is barred by educational malpractice doctrine if the claims "require an analysis of the quality of education received"); *Gupta v. New Britain General Hospital*, 239 Conn. 574, 687 A.2d 111 (Conn. 1996) (claim based on institution's failure to provide "adequate training" was not cognizable); *Lawrence v. Lorain County Community College*, 127 Ohio App. 3d 546, 713 N.E.2d 478 (Ohio Ct. App. 1998) (court would not recognize any claim that educational services were "substandard" or "inadequate"); *Bittle v. Oklahoma City University*, 2000 OK CIV APP 66, 6 P.3d 509 (Okla. Civ. App. 2000) (declining to recognize claim based on "inadequate or improper instruction"); *Houston v. Mile High Adventist Academy*,

846 F. Supp. 1449, 1455–56 (D. Colo. 1994) (claims that teachers were “not properly trained,” and that “school failed to provide adequate instruction” were construed as educational malpractice and properly dismissed); *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 845 P.2d 685 (Kan. 1993); *Blane v. Alabama Commercial College, Inc.*, 585 So. 2d 866 (Ala. 1991); *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554 (Alaska 1981); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); *Smith v. Alameda County Social Services Agency*, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (Cal. Ct. App. 1979); *Tubell v. Dade County Public Schools*, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (Idaho 1986); *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986); *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky. Ct. App. 1990); *Hunter v. Board of Education*, 292 Md. 481, 439 A.2d 582 (Md. 1982); *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (N.Y. 1979); *Wilson v. Continental Insurance Co.*, 87 Wis. 2d 310, 274 N.W.2d 679 (Wis. 1979); but see *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (Mont. 1982).

Those courts that have refused to recognize claims of educational malpractice have done so based on various public policy grounds, including: (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student’s attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will “embroil the courts into overseeing the day-to-day operations of schools.” (Internal quotation marks omitted.) *Alsides [v. Brown Institute, Ltd.]*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999)].

Waugh, 966 N.E.2d at 551–52.

8. Ordinary Negligence

Claims based on ordinary negligence however, are actionable. Despite the bar, in some states, against educational malpractice claims, there still is a duty not to cause injury through negligent conduct in the educational context. *Dallas Airmotive, Inc. v. FlightSafety International, Inc.*, 277 S.W.3d 696, 700 (Mo. Ct. App. 2009) (citing *Vogel v. Maimonides Academy of Western Connecticut, Inc.*, 754 A.2d 824, 827 n.7 (Conn. App. Ct. 2000)). The “duty pertains to an educator or supervisor using reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision.” *Dallas Airmotive*, 277 S.W.3d at 700 (citing *Vogel*, 754 A.2d at 828). For instance, “a woodworking shop instructor has a duty ‘to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines

provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.” *Dallas Airmotive*, 277 S.W.3d at 700–701 (quoting *Kirchner v. Yale University*, 192 A.2d 641, 643 (Conn. 1963)). “The duty recognized was the duty owed by an educator not to cause physical injury by negligent conduct *in the course* of instruction.” *Dallas Airmotive*, 277 S.W.3d at 701. *Dallas Airmotive* held that the claim against the defendant flight instruction company sounded in educational malpractice, because it related to the quality of instruction regarding a flight simulator and the quality of instruction. *Dallas Airmotive*, 277 S.W.3d at 701.

9. Instructor Negligence—Texas

Sugar Land Properties, Inc. v. Becnel involved a child who injured a fellow swimmer with a kickboard during swimming instruction. *Sugar Land Properties, Inc. v. Becnel*, 26 S.W.3d 113, 117–19 (Tex. App.—Houston [1st Dist.] 2000, no pet.). The injured swimmer claimed that the country club failed to adequately train instructors, failed to adequately supervise children, and entrusted children with devices capable of causing serious bodily harm. *Becnel*, 26 S.W.3d at 118.

The appeals court found that the club had failed to provide sufficient evidence to prove an independent contractor relationship existed with the swimming instructor. *Becnel*, 26 S.W.3d at 118. But even if the club had provided sufficient evidence of an independent contractor relationship, it would not necessarily escape liability. The club had control over the premises and over other involved activities and, therefore, could have been found liable in regard to claims outside of the scope of the swimming instructor’s class, such as claims relating to premises liability. *Becnel*, 26 S.W.3d at 118–19.

10. Firearms Instructor Negligence

Several cases in Texas address negligence in the context of firearms instructors and training. These claims can be based on failure to train, failure to supervise, reasonableness of training methods, using unsafe equipment, and so on. Negligence has also been alleged in firearms training accidents for authorizing the use of blanks for close-range training, failing to require protective eyewear, and authorizing individuals without firearms instructor training to supervise firearms scenarios. *Adams v. Downey*, 124 S.W.3d 769, 771 (Tex. App.—Houston [1st Dist.] 2003, no pet.). *Butler v. TASER Int’l, Inc.* involved negligence claims alleging failure to train instructors or use ordinary care in developing training. *Butler v. TASER Int’l, Inc.*, No. 3:11-CV-00030-K, 2012 WL 3867105, at *3 (N.D. Tex. Sept. 6, 2012), *aff’d*, 535 F. App’x 371 (5th Cir. 2013). However, “the Court conclude[d] that Officer Butler’s negligence claim was actually a products liability claim sounding in negligence.” *Butler*, 2012 WL 3867105, at *3.

Moore v. Phi Delta Theta Co. involved a paintball gun injury in which a plaintiff claimed that a competition's sponsoring organization was negligent based on the following:

- (1) sponsoring an unreasonably dangerous activity,
- (2) failing to provide adequate protective equipment to engage in the activity,
- (3) failing to properly train him prior to engaging in the activity, . . .
- (4) failing to properly train the fraternity members participating in the activity in the proper use of the equipment . . .
- (5) failing to properly monitor the activities of its local chapter, and
- (6) failing to have proper rules regulations, and sanctions for its local chapter when that chapter engages in unauthorized rush activities.

Moore v. Phi Delta Theta Co., 976 S.W.2d 738, 740 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

11. Rentals

Instructors and ranges who lease firearms to students should note that they may be exposed to negligence claims, and possibly product liability claims, related to the rented equipment.

In an appellate ruling in New York, a ski school and an instructor were not held responsible for injuries related to the failure of ski bindings because they were not affiliated with the renter of equipment. *Jordan v. Maple Ski Ridge*, 229 A.D.2d 756 (N.Y. App. Div. 1996). "The gravamen of plaintiff's complaint against defendants is that they had a duty to inspect and, in some manner, supervise her on the proper inspection and maintenance of her allegedly defective and unsafe rental equipment." *Jordan*, 229 A.D.2d at 756. Under the facts of this case, summary judgment in favor of the instructor and the ski school was upheld because "defendants clearly established that they were not involved in the rental, inspection, maintenance or adjustment of any ski equipment." *Jordan*, 229 A.D.2d at 757–58.

If, however, the instructor is in fact involved in the rental or the provision of the equipment, the instructor may have a duty to provide nonfaulty equipment and may have a duty to inspect the equipment. For example, Brigham Young University (BYU), which rented ski equipment to students taking BYU ski classes, was held liable in negligence for injuries resulting from faulty ski equipment. *Meese v. Brigham Young University*, 639 P.2d 720, 723 (Utah 1981).

[I]n the skiing world the adjustment of the bindings to a skier's needs and boots is the responsibility of the agency from which boots and skis are acquired, whether it be by rental or purchase, which in this case was the bookstore of the BYU. Appellant does not suggest otherwise. This responsibility imposes upon such rental agency the duty to use ordinary care commensurate with the standards of the industry in installing and adjusting the

bindings, giving due regard to the factors that are relevant thereto. Such factors would include the weight and experience of the person renting the skis; the proper placement and adjustment of the bindings to the person's needs; an explanation of how to adjust the bindings to tighten or loosen them; and to employ competent persons knowledgeable about the matters involved. Any breach of that duty would constitute negligence.

Meese, 639 P.2d at 722–23.

12. Ultrahazardous Activity

The ultrahazardous-activities doctrine can impose strict liability, in which case negligence need not be proved by the plaintiff, and the defendant is strictly liable for any injury. This doctrine may apply when the particular activity involves the risk of serious harm, cannot be performed with complete safety no matter how much care is taken, and is not engaged in on a common basis in the particular community. Under the ultrahazardous-activities doctrine, a “plaintiff is not required to show that his loss was caused by the defendant’s negligence. It is sufficient to show only that the defendant engaged in an ultrahazardous activity that caused the defendant’s loss.” *Rokicki v. Putnam Fish & Game Club, Inc.*, No. WWMCV116003596S, 2012 WL 4801457, at *3 (Conn. Super. Ct. May 21, 2012) (citing *Green v. Ensign-Bickford Co.*, 25 Conn. App. 479, 482, *cert. denied*, 597 A.2d 341 (1991)).

Even though gun prohibitionists have tried to get courts to apply the ultrahazardous-activities doctrine to firearms manufacturing and sales and the operation of firearms ranges, this doctrine has not been sustained by a court regarding the operation of a firearms range or firearms. *See Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239 (Ill. App. Ct. 1995). “Connecticut has never recognized owning a firing range as an ultrahazardous activity.” *Rokicki*, 2012 WL 4801457, at *2.

Furthermore, the facts that comparably few accidents occur on firearms ranges and that such ranges are quite common would constitute evidence that the operation of a firearms range is not an ultrahazardous activity.

B. Premises Liability

Firearms instructors, especially those who own or operate ranges, should be aware of their duties under premises liability law. Businesses that have constructive knowledge of conditions with an unreasonable risk of harm must exercise reasonable care to reduce or eliminate the risk. *Mangham v. YMCA of Austin, Texas-Hays Communities*, 408 S.W.3d 923, 927 (Tex. App.—Austin 2013, no pet.). There is also a duty to warn of defective conditions on one’s property. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 788 (Tex. 2010).

In a premises-liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach. Whether a duty exists is a question of law for the court and turns “on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.” In premises-liability cases, the scope of the duty turns on the plaintiff’s status. . . . [G]enerally, a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.

Del Lago Partners, 307 S.W.3d 762 at 767 (citations omitted).

In a premises liability action, the duty owed by a premises owner depends on the plaintiff’s status. *Fort Brown Villas III Condo. Ass’n, Inc. v. Gillenwater*, 285 S.W.3d 879, 883 (Tex. 2009) (per curiam). An invitee asserting a premises liability claim must prove: (1) actual or constructive knowledge of some condition on the premises by the owner/operator; (2) the condition posed an unreasonable risk of harm; (3) the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) the owner/operator’s failure to use such care proximately caused the plaintiff’s injury. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

Mangham, 408 S.W.3d at 927.

In *Mangham*, a YMCA member who fell on a piece of exercise equipment sued the YMCA for negligence and premises liability on the grounds that it failed to adequately maintain and operate its premises and equipment, warn invitees about the dangers inherent in the premises and equipment, and properly and adequately supervise the usage of its premises and equipment. *Mangham*, 408 S.W.3d at 926.

As an invitee, Mangham had to show as a threshold element of her claim that YMCA knew, or after reasonable inspection should have known, of an unreasonably dangerous condition on its premises. See [*Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005)]. A condition is unreasonably dangerous if it presents an unreasonable risk of harm. *Brinson Ford, Inc., v. Alger*, 228 S.W.3d 161, 163 (Tex. 2007).

Mangham, 408 S.W.3d at 927.

“To support her premises liability claim, Mangham must also bring forth evidence that YMCA did not exercise reasonable care to reduce or eliminate the risk and that the lack of such care proximately caused her injury.” *Mangham*, 408 S.W.3d at 928. The court of appeals found that the plaintiff failed to provide any such evidence, including evidence that the YMCA failed to exercise reasonable care and inspection of the property. *Mangham*, 408 S.W.3d at 928.

Mangham had also alleged that the YMCA was negligent in failing to properly and adequately supervise the use of its premises and equipment and, more specifi-

cally, that the YMCA's failure to instruct her about the setup or use of the aerobics step and failure to inform her of the equipment's two-hundred-pound weight limitation constituted negligence. The court found that the plaintiff also failed to raise evidence of material fact on essential negligence elements. *Mangham*, 408 S.W.3d at 929.

It's reasonable to presume that if a plaintiff were to provide evidence that a firearms school had failed to exercise reasonable care and inspection of the property to reduce or eliminate a risk and that failure proximately caused injury to the plaintiff, the range or school could be held liable for the injury.

C. Intentional Injuries

Some training may involve alleged intentional torts that may give rise to claims. In Washington, a police officer who was injured by a Taser in a training program and who received industrial insurance coverage for his injuries subsequently sued the Washington State Patrol (WSP) for an intentional tort claiming that the patrol deliberately intended to cause him injury when it exposed him to being shot with a Taser during training. *Michelbrink v. Washington State Patrol*, 323 P.3d 620 (Wash. App. 2014). The Washington court of appeals allowed the injured patrolman to maintain a tort action because of a statutory exception for intentional injuries to the bar in the workers' compensation statute limiting remedies to workers' compensation. *Michelbrink*, 323 P.3d at 629.

Taken in the light most favorable to *Michelbrink*, as we must on summary judgment, the record shows that (1) WSP required Taser training for troopers opting to use Tasers on the job; (2) WSP knew at a minimum that the Taser barbs would wound and deliver an electric shock on contact with a trooper's back; and (3) despite this knowledge of certain injury, WSP shot troopers with Tasers during training, which it required of all troopers using Tasers in the course of performing their duties. We hold, therefore, that *Michelbrink* has established a material issue of fact about whether WSP deliberately intended to injure him, despite its knowledge that the Taser barbs were certain to cause injury, to defeat summary judgment.

Michelbrink, 323 P.3d at 629.

California has developed case law relating to martial arts and unarmed combat police training. In a negligence and intentional tort action involving a correctional officer injured during unarmed defensive training, the California court of appeal held that under the doctrine of primary assumption of the risk, no duty is owed to an officer engaged in such training. *Hamilton v. Martinelli & Associates Justice Consultants, Inc.*, 110 Cal. App. 4th 1012, 1017 (Cal. Ct. App. 2003). The court of appeal affirmed the dismissal of the action, holding that the doctrine of primary assumption of the risk barred the officer's negligence and intentional tort causes of action. The court reasoned that the ability to restrain violent juvenile offenders was a necessary tool in the

officer's employment capacity and by continuing in that employment she assumed the risk that she would be injured by a violent juvenile offender. By participating in the required training, she assumed the risk that she would be injured while training to restrain a violent juvenile offender. The doctrine of primary assumption of the risk applied to the officer's workplace activities, because she was hired to confront the very risks that caused her injuries. The court also noted that the officer was a public safety employee and that the California firefighter's rule barred her claims. The officer was a public employee, training was essential to her performance, and the allegedly negligent conduct of the instructor that caused the injury was an integral part of the training. *Hamilton*, 110 Cal. App. 4th at 1023–25.

Note that the protections afforded by the firefighter's rule, and the reasoning relied on by the court, will not be applicable to private students as opposed to law enforcement officers undergoing required job-related training.

In a case not involving such mandatory public servant training, a martial arts student sued the martial arts studio after being kicked by another student, alleging that her injury resulted from insufficient supervision and control of the other student. *Rodrigo v. Koryo Martial Arts*, 100 Cal. App. 4th 946, 948–49 (Cal. Ct. App. 2002). Because the court found no evidence to indicate that the instructor did anything to increase the risks associated with learning martial arts techniques, primary assumption of the risk barred the student's negligence action. *Rodrigo*, 100 Cal. App. 4th at 949. The court noted that because this sport involved mutual combat, there was an inherent risk that a participant would be kicked or punched. Any expectation on the part of the plaintiff that she would not be injured while waiting in line was irrelevant. The instructor had directed the other students not to practice kicks while they were waiting in line, and any failure on his part to supervise their compliance with that direction did not defeat application of the doctrine of primary assumption of the risk, because his instruction did not increase the risks inherent in the sport. *Rodrigo*, 100 Cal. App. 4th at 959–60.

II. Defenses

A. Texas Governmental Immunity

Generally, in Texas, discretionary duties carried out by the state in good faith will be immunized under official immunity.

Sovereign immunity protects the State from lawsuits for money damages. Sovereign immunity encompasses two principles: immunity from suit and immunity from liability. Immunity from suit bars a suit against the State unless the Legislature expressly consents to the suit. If the Legislature has not expressly waived immunity from suit, the State retains such immunity

even if its liability is not disputed. Immunity from liability protects the State from money judgments even if the Legislature has expressly given consent to sue.

Texas Natural Resource Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 853 (Tex. 2002) (citations omitted).

“When the State contracts with a private party, it waives immunity from *liability*. But the State does not waive immunity from *suit* simply by contracting with a private party.” *IT-Davy*, 74 S.W.3d at 854 (citation omitted). Sovereign immunity exists in the context of contract claims, but the state has created an administrative mechanism for resolving contract disputes with the state. *IT-Davy*, 74 S.W.3d at 854. “[A] private party . . . must have legislative consent—by statute or resolution—to sue the State for claims arising from an alleged breach of contract.” *IT-Davy*, 74 S.W.3d at 860.

The Texas Torts Claims Act waives sovereign immunity for governmental units in the case of property damage, personal injury, and death caused by a wrongful act, omission, or negligence arising from a governmental employee’s operation or use of a motor vehicle or motor-driven equipment. Tex. Civ. Prac. & Rem. Code § 101.021(1). Sovereign immunity is also waived for personal injury or death arising from the conditions of real or personal property. Tex. Civ. Prac. & Rem. Code § 101.021(2). Section 101.021 provides—

A governmental unit in the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
 - (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
 - (B) the employee would be personally liable to the claimant according to Texas law; and
- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code § 101.021.

Claims arising from discretionary duties of governmental units continue to enjoy sovereign tort immunity. *See* Tex. Civ. Prac. & Rem. Code § 101.056.

Governmental employees in Texas are granted official immunity for discretionary duties within the scope of their authority performed in good faith. *Adams v. Downey*, 124 S.W.3d 769, 772 (Tex. App.—Houston [1st Dist.] 2003, no pet.). A governmental employee is “entitled to official immunity (1) for the performance of discretionary duties, (2) within the scope of his authority, (3) for acts he performed in good faith.” *Adams*, 124 S.W.3d at 772 (citing *University of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000)).

In *Adams*, the court of appeals emphasized the importance of objectively determining what a reasonable person would have done in planning and administering training for establishing good faith.

To establish good faith as a matter of law, Downey is required to show that a reasonably prudent coordinator, under the same or similar circumstances, could have believed that loading the cadets' handguns with blanks, failing to require the cadets to wear protective eyewear, and selecting Harris to oversee the cadets, was justified based on the information he possessed. See *Telthorster v. Tennell*, 92 S.W.3d 457, 465, 45 Tex. Sup. Ct. J. 948 (Tex. 2002). Downey is not required to show that the only reasonable manner to plan and administer the close training exercises is the manner that he did, or that all reasonably prudent coordinators would have acted as he did. See *id.* Rather, he must prove only that a reasonably prudent coordinator, under similar circumstances, might have decided to plan and administer the close training exercises as he did. *Id.* Even if Downey acted negligently, good faith is not defeated. *Id.* The test is not "what a reasonable person would have done," but "what a reasonable [coordinator] could have believed." *Id.* In conducting our review, we must measure good faith in official immunity cases against a standard of objective reasonableness, without regard to the official's subjective state of mind. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656, 37 Tex. Sup. Ct. J. 980 (Tex. 1994); *Gidvani [v. Aldrich]*, 99 S.W.3d 760, 764 (Tex. App.—Houston [1st Dist.] 2003)]. Only if Downey meets his burden of proof on good faith does the burden shift to Adams to produce controverting evidence—that is, Adams then must show that no reasonable person in Downey's position could have thought the facts were such that they justified Downey's conduct. *Chambers*, 883 S.W.2d at 656–57.

Adams, 124 S.W.3d at 772.

Governmental employees, such as those who coordinate police firearms training academies, must show that a reasonably prudent coordinator or trainer believed his decisions or actions were justified based on the information he possessed. *Adams*, 124 S.W.3d at 770, 772.

Of course, the governmental immunity defense will apply only if the firearms instructor or firearms school is a governmental employee or agency.

B. Texas Statutory Immunity for Concealed-License Instructors

Some states have enacted statutes to protect firearms instructors from some types of liability. These statutes differ in the type of protection provided to certified instructors. Most relate to the training and instruction for and the issuance of concealed-carry

weapon applications under their state law. All of these statutes are limited and have various conditions and limitations placed on such immunities. Some states immunize only governmental instructors; others immunize private instructors as well. Some states provide immunity for actions or omissions that occur during training. Other states provide immunity to certified instructors for the actions of trainees once training is complete. Some state statutes do not provide any immunities at all but require instructors to carry liability insurance.

Texas provides statutory immunity to state governmental units, state employees, peace officers, and also qualified handgun instructors for damages in the context of the concealed-carry application and instruction process. *See* Tex. Gov't Code § 411.208. Section 411.208 provides the following:

- (a) A court may not hold the state, an agency or subdivision of the state, an officer or employee of the state, a peace officer, or a qualified handgun instructor liable for damages caused by:
 - (1) an action authorized under this subchapter or a failure to perform a duty imposed by this subchapter; or
 - (2) the actions of an applicant or license holder that occur after the applicant has received a license or been denied a license under this subchapter.
- (b) A cause of action in damages may not be brought against the state, an agency or subdivision of the state, an officer or employee of the state, a peace officer, or a qualified handgun instructor for any damage caused by the actions of an applicant or license holder under this subchapter.
- (c) The department is not responsible for any injury or damage inflicted on any person by an applicant or license holder arising or alleged to have arisen from an action taken by the department under this subchapter.
- (d) The immunities granted under Subsections (a), (b), and (c) do not apply to an act or a failure to act by the state, an agency or subdivision of the state, an officer of the state, or a peace officer if the act or failure to act was capricious or arbitrary.
- (e) The immunities granted under Subsection (a) to a qualified handgun instructor do not apply to a cause of action for fraud or a deceptive trade practice.

Tex. Gov't Code § 411.208.

Unlike sovereign immunity, the immunity granted by this statute is not limited to state actors but includes "qualified handgun instructors." Tex. Gov't Code § 411.208. The immunity applies to actions authorized under the concealed-carry statute and also to the failure of duties under the concealed-carry statute. Tex. Gov't Code § 411.208(a)(1). Immunity is also provided for the actions of an applicant or license holder occurring after the applicant receives or is denied his license. Tex. Gov't Code § 411.208(a)(2). Governmental units and employees may lose immunity under the

concealed-carry statute if their actions are capricious or arbitrary. Tex. Gov't Code § 411.208(d). Qualified handgun instructors do not enjoy immunity in fraud and deceptive trade practice actions. Tex. Gov't Code § 411.208(e).

Qualified handgun instructors are persons certified to instruct in the use of handguns by the Texas Department of Public Safety (DPS). Tex. Gov't Code § 411.190(a). The director of the DPS may certify qualified handgun instructors as individuals who (1) are certified as instructors by the Texas Commission on Law Enforcement or under the state's private security statutes, (2) regularly instruct others in the use of handguns and graduated from a handgun instruction school that is nationally recognized, or (3) are certified by the National Rifle Association as handgun instructors. Tex. Gov't Code § 411.190(a). Qualified handgun instructors must be able to give instruction related to (1) weapons and deadly force laws; (2) handgun use, proficiency, and safety; (3) nonviolent dispute resolution; and (4) storage practices, including childproofing. Tex. Gov't Code § 411.190(b). Texas requires applicants for certification as qualified handgun instructors to pass background checks using the same standards as regular license applicants and to undergo handgun instructor training. *See* Tex. Gov't Code § 411.190(c).

C. Texas Shooting Range Immunity Statute

Like most states, Texas grants statutory immunity to the owners and operators of sport shooting ranges against private and governmental suits for damages, injunctions, or abatement of a nuisance relating to the lawful discharge of firearms and noise complaints. *See* Tex. Civ. Prac. & Rem. Code §§ 128.001(b)(2), 128.052(a); Tex. Loc. Gov't Code § 250.001. The Texas range protection statute authorizes private suits, however, for breach of contract, property damage, personal injury, death, and injunction relief to enforce valid laws. *See* Tex. Civ. Prac. & Rem. Code § 128.052(b).

Also, note that unless the firearms instructor is an owner, operator, or employee of the range, the statute will not provide protection to the instructor. "Sport shooting range" means a business establishment, private club, or association that operates an area for the discharge or other use of firearms for silhouette, skeet, trap, black powder, target, self-defense, or similar recreational shooting." Tex. Loc. Gov't Code § 250.001(a)(2).

D. Assumption of the Risk

1. Assumption of the Risk in Other States

When a plaintiff voluntarily assumes the risk of known dangers, contributory-negligence states like Virginia recognize the doctrine of assumption of the risk as a

complete bar to recovery. *Thurmond v. Prince William Professional Baseball Club*, 574 S.E.2d 246, 249 (Va. 2003).

It is well settled that “[v]oluntary participants in the sport of downhill skiing assume the inherent risks of personal injury caused by, among other things, terrain, weather conditions, ice, trees and man-made objects that are incidental to the provision or maintenance of a ski facility” (*Fabris v Town of Thompson*, 192 AD2d 1045, 1046; see, *Dicruttalo v Blaise Enters.*, 211 AD2d 858; *Nagawiecki v State of New York*, 150 AD2d 147). With defendants contending that plaintiff was injured as a result of icy conditions, it became incumbent upon plaintiff to establish that her injuries were caused by some factor other than the risks she assumed by engaging in this sport (see, *Fabris v Town of Thompson*, *supra*; *Nagawiecki v State of New York*, *supra*).

Jordan v. Maple Ski Ridge, 229 A.D.2d 756, 757 (N.Y. App. Div. 1996).

“[T]he essential elements of assumption of risk are (1) knowledge of a danger and, (2) a free and voluntary consent to assume it. It must be actual knowledge and it is not sufficient to say that in the exercise of ordinary care, one would know that danger exists.” *Meese v. Brigham Young University*, 639 P.2d 720, 724 (Utah 1981).

California, despite being a comparative-negligence jurisdiction, has affirmed the continued viability of the doctrine of implied assumption of the risk by adopting the concepts of primary and secondary assumption of the risk. *Knight v. Jewett*, 3 Cal. 4th 296, 308 (Cal. 1992). Primary assumption of risk involves a “legal conclusion that there is ‘no duty’ on the part of the defendant to protect the plaintiff from a particular risk.” *Knight*, 3 Cal. 4th at 308. Primary assumption of the risk acts as a bar to recovery. *Knight*, 3 Cal. 4th at 308. Secondary assumption of the risk entails “instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty.” *Knight*, 3 Cal. 4th at 308. Secondary assumption of the risk is merged into comparative-negligence analysis. *Knight*, 3 Cal. 4th at 308. The trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties. *Knight*, 3 Cal. 4th at 315.

The *Knight* case involved a touch football game in which the plaintiff was injured. The court upheld the granting of summary judgment for the defendant. The court found that at most the plaintiff established that the defendant was careless or negligent but that—

the conduct alleged in those declarations is not even closely comparable to the kind of conduct—conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport—that is a prerequisite to the imposition of legal liability upon a participant in such a sport.

Knight, 3 Cal. 4th at 320–21.

Primary assumption of the risk applies to sports trainers and coaches. School sports instructors are in breach of a duty of care only if there is an intentional injury or

reckless conduct completely outside the range of the ordinary activity involved in teaching or coaching; that is, they are not liable for ordinary negligence. *Kahn v. East Side Union High School District*, 31 Cal. 4th 990, 996 (Cal. 2003). The California Supreme Court reversed summary judgment in favor of the defendants in a case concerning a student athlete swimmer who sustained a broken neck diving into shallow water. *Kahn*, 31 Cal. 4th at 996. Examining the totality of the circumstances, including evidence of the coach's failure to provide the athlete with training in shallow-water diving, knowledge of the student's diving fears, retracting a promise during a competition that the athlete would not have to dive, and threatening to pull the student from a competition if she did not complete a dive, the court concluded that there could have been a breach of duty. *Kahn*, 31 Cal. 4th at 996. Given the existence of a well-established mode of training and the risk of injury if not correctly trained, a student could make a claim. *Kahn*, 31 Cal. 4th at 996.

The court held that to support a cause of action against the coach for requiring the novice swimmer to perform beyond her capacity as a competitive swimmer and without adequate instruction, it had to be alleged and proved that the coach acted with intent to cause an injury or that the coach acted recklessly, in the sense that his conduct was totally outside the range of the ordinary activity involved in coaching a swim team. *Kahn*, 31 Cal. 4th at 996.

In the present case, we recognize that the relationship of a sports instructor or coach to a student or athlete is different from the relationship between coparticipants in a sport. But because a significant part of an instructor's or coach's role is to challenge or "push" a student or athlete to advance in his or her skill level and to undertake more difficult tasks, and because the fulfillment of such a role could be improperly chilled by too stringent a standard of potential legal liability, we conclude that the same general standard should apply in cases in which an instructor's alleged liability rests primarily on a claim that he or she challenged the player to perform beyond his or her capacity or failed to provide adequate instruction or supervision before directing or permitting a student to perform a particular maneuver that has resulted in injury to the student. A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is "totally outside the range of the ordinary activity" (*ibid.*) involved in teaching or coaching the sport.

Kahn, 31 Cal. 4th at 996.

In another case, summary judgment was found to be proper in denying a plain negligence claim against a fitness trainer and the gym because his conduct was not intentional or reckless for failing to realize that the plaintiff was about to have a heart attack when the trainer could have concluded that the plaintiff lacked conditioning and for failing to investigate the plaintiff's cardiac risk factors. *Rostai v. NESTE Enterprises*, 138 Cal. App. 4th 326, 336–38 (Cal. Ct. App. 2006).

Application of the principles established in *Knight* leads us to conclude in this case that the physical activity of fitness training under the guidance of a personal fitness trainer is one to which the doctrine of primary assumption of the risk applies. Therefore, defendants did not owe plaintiff a duty of care. (See *Knight, supra*, 3 Cal.4th at p. 308, 11 Cal.Rptr2d 2, 834 P.2d 696 [the doctrine of primary assumption of the risk “embodies a legal conclusion that there is ‘no duty’ on the part of the defendant to protect the plaintiff from a particular risk”].) We conclude here, as the court did in *Kahn*, that in order to state a cause of action against a personal fitness trainer . . . a plaintiff must allege and prove that the trainer acted either with intent to cause injury or that the trainer acted recklessly in that the conduct was “‘totally outside the range of ordinary activity’ [citation] involved in [personal fitness training].” (*Kahn, supra*, 31 Cal.4th at p. 996, 4 Cal.Rptr.3d 103, 75 P.3d 30.)

Plaintiff did not allege such a claim and instead alleged a claim predicated on ordinary negligence. Therefore, the trial court properly granted defendants’ summary judgment motion on the ground that plaintiff’s claim was subject to the doctrine of primary assumption of the risk and barred.

Rostai, 138 Cal. App. 4th at 335.

But a riding coach who makes claims vouching for the fitness of an unfit horse to the parents of a child who is then injured by the horse could be found grossly negligent. *Eriksson v. Nunnink*, 191 Cal. App. 4th 826, 856–57 (Cal. Ct. App. 2011). The complaint in this wrongful-death case alleged that the coach had unreasonably increased the inherent risk of injury in horse jumping by allowing the child to ride an unfit horse in a competition. *Eriksson*, 191 Cal. App. 4th at 845–46.

Applying California law, a federal court granted summary judgment against a plaintiff who broke her foot on a cruise ship excursion because the tour operator’s duty to warn did not encompass danger equally obvious to both parties. *Andia v. Full Service Travel*, No. 06cv0437 WQH (JMA), 2007 WL 4258634, at *6 (S.D. Cal. Nov. 29, 2007). The court relied on the plaintiff’s acknowledgment that she understood the risks of hiking on slippery rocks and proceeded despite the risks. *Andia*, 2007 WL 4258634, at *6.

Although California does not have a statewide statutory scheme for ski operator immunity, California courts recognize collisions in skiing generally as part of primary assumption of the risk. *Cheong v. Antablin*, 16 Cal. 4th 1063, 1069–70 (Cal. 1997). The court held that the doctrine of primary assumption of the risk barred the plaintiff’s action because a collision is an inherent risk of downhill skiing, and because the defendant did not act recklessly and did not intentionally collide with the plaintiff. *Cheong*, 16 Cal. 4th at 1069–70. A ski school instructor could, however, be liable for foreseeable intervening hazards, such as third-party skiers who crash into students, allegedly as a result of the instructor’s actions. *Davis v. Erickson*, 350 P.2d 535 (Cal. 1960).

A plaintiff assumed the risk of injuries resulting from the violent shaking of white-water rafting on a tour. *Ferrari v. Grand Canyon Dories*, 32 Cal. App. 4th 248, 253–55 (Cal. Ct. App. 1995). The court held that the plaintiff's negligence action was barred by the principle of primary assumption of the risk. While the defendants owed the plaintiff a duty not to increase the risks inherent in the activity, permitting the plaintiff to sit in the back of the raft did not increase the risk, because passengers often sat in the back and the plaintiff had been instructed to hold on to the raft. While the defendants owed a duty to provide equipment that did not increase the risk of injury, the evidence revealed that rafts with metal frames were the standard in the industry. *Ferrari*, 32 Cal. App. 4th at 253–55.

Primary assumption of the risk also applies in the context of police and martial arts training. See, e.g., *Hamilton v. Martinelli & Associates Justice Consultants, Inc.*, 110 Cal. App. 4th 1012 (Cal. Ct. App. 2003); *Rodrigo v. Koryo Martial Arts*, 100 Cal App. 4th 946 (Cal. Ct. App. 2002).

2. Assumption of the Risk in Texas

Texas follows a comparative-negligence methodology in allocating liability and requires claimants to be less than 50 percent negligent to recover damages. See Tex. Civ. Prac. & Rem. Code § 33.001. In Texas, assumption of the risk is not a complete bar to recovery by a plaintiff, but it plays a role in using comparative responsibility principles. *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 717–18 (Tex. App.—San Antonio 1994, writ denied).

Texas, like some other comparative-negligence jurisdictions, has incorporated assumption of the risk into the comparative-negligence analysis. *Newman*, 891 S.W.2d at 717–18. Before the adoption of the comparative-negligence law, assumption of the risk was an affirmative defense that, if proved, generally precluded recovery in a negligence case. *Meese*, 639 P.2d at 724. In a comparative negligence jurisdiction, contributory negligence includes assumption of the risk. *Meese*, 639 P.2d at 724. In Texas, “the Legislature has now adopted comparative negligence and thus evidenced its clear intention to apportion negligence rather than completely bar recovery. Assumption of the risk is incompatible with this rationale since that defense operates as a complete bar to recovery.” *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975).

Although assumption of the risk was once an affirmative defense in tort cases, the Texas Supreme Court has abolished it in ordinary negligence actions. *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975). The factfinder in a negligence action now determines the reasonableness of an actor's conduct in confronting a risk by using comparative responsibility principles. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001–.016 (Vernon 1986 and Supp. 1991); *Farley*, 529 S.W.2d at 758; *Connell v. Payne*, 814 S.W.2d 486, 488 (Tex. App.—Dallas 1991, writ denied). Assumption of the risk remains viable only in cases involving “a knowing and express

oral or written consent to the dangerous activity or condition.” *Farley*, 529 S.W.2d at 758; *Connell*, 814 S.W.2d at 488.

Newman, 891 S.W.2d at 717–18.

We therefore hold that . . . henceforth in the trial of all actions based on negligence, *volenti non fit injuria*—he who consents cannot receive an injury—or, as generally known, voluntary assumption of risk, will no longer be treated as an issue. Rather, the reasonableness of an actor’s conduct in confronting a risk will be determined under principles of contributory negligence. Unaffected will be the current status of the defense in strict liability cases and cases in which there is a knowing and express oral or written consent to the dangerous activity or condition. The reasons expressed for abolishing the defense in negligence cases do not obtain as to these situations.

Farley, 529 S.W.2d at 758.

Thus, in Texas, assumption of the risk as an affirmative defense is viable only in cases involving a knowing and express oral or written consent to the dangerous activity or condition. *Farley*, 529 S.W.2d at 758.

A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

Restatement (Second) of Torts § 496B (1965).

In a wrongful death case arising out of a scuba diving certification course, while acknowledging that the Texas Supreme Court had abolished the assumption-of-the-risk doctrine in ordinary negligence actions, the San Antonio court of appeals held that the plaintiff had expressly assumed the risk of the injuries suffered during scuba diving.

Although the precise words “assumption of the risk” are not used in the agreement, it is clear from the language of the document that Mrs. Newman intended to do just that. It specifically states it was her intent to relieve the defendants from “all liability . . . caused by negligence.” It would be difficult to imagine language more clearly designed to put a layperson on notice of its legal significance and effect. We therefore hold that under the agreement Newman effectively assumed all of the risks of any injury she might suffer as a result of the defendants’ negligence during the scuba training course.

Newman, 891 S.W.2d at 719.

Thus, an instructor is well advised to add assumption-of-the-risk language to a written release to be executed by his students.

E. Competitive Contact Sports Doctrine

As an exception to the abolishment of implied assumption of the risk in Texas, defendants in cases of dangerous and competitive sports may defeat tort claims under the competitive contact sports doctrine. That doctrine provides that a participant in contact sports assumes a game's inherent risks unless a defendant acted recklessly or intentionally in a way not inherent to the sport. *Connell v. Payne*, 814 S.W.2d 486, 488–89 (Tex. App.—Dallas 1991, writ denied).

In *Connell*, a case of first impression in Texas, the court of appeals noted that until then, “[n]o Texas court has decided the issue of the legal duty owed by one participant to another participant in a competitive contact sport.” *Connell*, 814 S.W.2d at 488. The case involved injuries suffered at a polo match. The court began its discussion by noting that “[a]ll parties agree polo is a dangerous game. The risk of injury is high. It is common for injuries to occur even while players diligently follow the rules.” *Connell*, 814 S.W.2d at 487. The court continued:

By participating in a dangerous contact sport such as polo, a person assumes a risk of injury. The risk involved in competing in contact sports is the basis for the historical reluctance of courts to allow players to recover damages for injuries received while participating in a competitive contact sport unless one participant deliberately injures another. *See Kuehner v. Green*, 436 So. 2d 78, 81 (Fla. 1983) (Boyd, J., concurring).

Connell, 814 S.W.2d at 488.

The court then held as follows:

The Ohio Supreme Court recently considered a similar issue. *See Marchetti v. Kalish*, 53 Ohio St. 3d 95, 559 N.E.2d 699 (1990). That court reasoned a mere showing of negligence is not enough to allow recovery in sport or recreational activity. We agree. We join the authorities cited in *Marchetti*. A participant in a competitive contact sport expressly consents to and assumes the risk of the dangerous activity by voluntarily participating in the sport. We hold that for a plaintiff to prevail in a cause of action for injuries sustained while participating in a competitive contact sport, the plaintiff must prove the defendant acted “recklessly” or “intentionally” as the Restatement of Torts defines those terms. RESTATEMENT (SECOND) OF TORTS §§ 8A, 500 (1965).

Connell, 814 S.W.2d at 488–89.

Referencing *Connell*, the *Newman* court subsequently noted that “[s]everal recent cases have applied an assumption of the risk analysis to injuries inflicted during competitive contact sports.” *Newman*, 891 S.W.2d at 718.

In *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614 (Tex. App.—Amarillo 1993, no writ), the court extended this reasoning to the game of golf, holding that golfers assume the risk of being struck by balls hit by

other golfers, and thus may recover from another golfer only if the other golfer acted recklessly or intentionally. *Id.* at 616–17. The court concluded, “Acts that would be negligent if performed on a city street or in a backyard are not negligent in the context of a game where a risk of inadvertent harm is built into the sport.” *Id.*

In *Bangert v. Shaffner*, 848 S.W.2d 353 (Tex. App.—Austin 1993, writ denied), the plaintiff was injured in a parasailing accident. He sued the owner of the parasail, arguing he was negligent in failing to instruct or supervise the operation of the parasail. Affirming a judgment in favor of the plaintiff, the court distinguished *Connell*, concluding it “clearly addressed the legal duty participants owe one another while engaging in a competitive contact sport.” *Id.* at 355. Because it was undisputed that parasailing was not a contact sport, the court declined “to adopt the reckless disregard standard for every recreational activity or sport that might be considered dangerous.” *Id.* at 356 (Emphasis in original).

Newman, 891 S.W.2d at 718.

Thus contact sports such as golf are covered, whereas noncontact sports like parasailing do not fall under the competitive contact sports doctrine. *See Newman*, 891 S.W.2d at 718.

In *Moore v. Phi Delta Theta Co.*, the plaintiff was injured by a paintball fired in the course of a fraternity-sponsored activity. 976 S.W.2d 738, 741–42 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). The Houston court of appeals held that while the competitive contact sports doctrine did apply to participants, it did not apply to nonparticipants, such as sponsors. *Moore*, 976 S.W.2d at 742. The court remanded to the trial court, holding “that under prevailing standards of Texas law the conduct of non-participants connected to a contact sports activity is judged by concepts of ordinary negligence, rather than the different and more demanding standard of care . . . that is applied to a game’s participants under the competitive contact sports doctrine.” *Moore*, 976 S.W.2d at 742.

It is unclear if firearms training or competitions would be covered by the competitive contact sports doctrine. While *Moore* and paintball can be distinguished from the shooting sports—in that participants are expected to shoot each other in the former and not the latter—some advanced tactical shooting classes include the physical touching of the participant.

Furthermore, it is not the objective in golf to hit another player. If a golf injury arising from being accidentally hit—shot—by a golf ball is covered by the competitive contact sports doctrine, maybe it can be argued that an accidental shooting in the shooting sports is also.

In *Hathaway v. Tascosa Country Club, Inc.*, a case involving a golfer struck accidentally by a golf shot, the Amarillo court of appeals reasoned that things like shanking, hooking, slicing, pushing, and pulling a golf shot were “foreseeable and not uncommon” in the game of golf. 846 S.W.2d 614, 616 (Tex. App.—Amarillo 1993, no

writ). The court held that “for a plaintiff to prevail in a cause of action against a fellow golfer, the defendant must have acted recklessly or intentionally.” *Hathaway*, 846 S.W.2d at 617. Summary judgment was affirmed by the court in *Hathaway* in favor of the golfer accused of hitting the errant shot. *Hathaway*, 846 S.W.2d at 617. The court reasoned that the record offered no evidence that the golfer recklessly or intentionally drove the ball to endanger other golfers. *Hathaway*, 846 S.W.2d at 617. Although the court did not view golf as a “competitive contact sport” in the traditional sense, it held that it was appropriate to hold the sport to the same standard as other sports, like polo, that fall under the competitive contact sports doctrine. *Hathaway*, 846 S.W.2d at 616.

It should be noted that in this case, the court also held that traditional landowner liability duties still applied to the country club despite the recreational nature of the facility. *See Hathaway*, 846 S.W.2d at 617–18. Thus, while the defendant may escape liability for negligence under the competitive contact sports doctrine, the defendant may still be found liable because of a defect in the premises.

F. Release and Waiver

A firearms instructor is well advised to require participants, club members, or customers to sign a full release and waiver for any liabilities. Nevertheless, depending on state law, some courts will not enforce such releases or certain aspects of such releases or may, at least, closely scrutinize them. The law on this subject varies from state to state.

It is advisable that the release be both detailed and all-inclusive, including the specification of particular causes of action to be released. “If a defendant seeks to use the agreement to escape responsibility for the consequences of his negligence, then it must so provide, clearly and unequivocally, as by using the word ‘negligence.’” *Prosser and Keeton on Torts* § 68, at 484 (5th ed. 1984).

Many courts . . . have held in effect that a clause will not be construed to include an exemption for negligence unless it does so in the clearest terms, as by using the word *negligence*, or language so broad and sweeping that it must be taken to have given fair notice that it includes negligence.

Fowler V. Harper et al., *The Law of Torts* § 21.6, at 251 (2d ed. 1984).

1. Release and Waiver in Other States

In Alaska, a plaintiff who was injured during all-terrain vehicle (ATV) safety training could bring a suit against her instructors despite signing a release. *See Moore v. Hartley Motors, Inc.*, 36 P.3d 628, 633 (Alaska 2001). The plaintiff argued that the release was not valid because she received no consideration, the release was against public policy, and the course was inherently unsafe. *Hartley Motors*, 36 P.3d at 629. The Alaska Supreme Court found that adequate consideration was provided by the

defendant “by offering participation in the class.” *Hartley Motors*, 36 P.3d at 631. The court also found that the release did not violate public policy. *Hartley Motors*, 36 P.3d at 632.

The release waived claims arising from the inherent dangers of ATV use but was silent on “general negligence” not related to the inherent dangers of ATV riding. *Hartley Motors*, 36 P.3d at 632–33.

Moore agreed to release the [defendants] from liability, loss, and damages “including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse.” But the release does not discuss or even mention liability for general negligence. Its opening sentences refer only to unavoidable and inherent risks of ATV riding, and nothing in its ensuing language suggests an intent to release [the defendants] from liability for acts of negligence unrelated to those inherent risks. Based on this language, we conclude that Moore released [the defendants] only from liability arising from the inherent risks of ATV riding and ordinary negligence associated with those inherent risks. As we noted in *Kissick v. Schmierer*, an exculpatory release can be enforced if “the intent to release a party from liability for future negligence” is “conspicuously and unequivocally expressed.” However, underlying the ATV course release signed by Moore was an implied and reasonable presumption that the course is not unreasonably dangerous.

Hartley Motors, 36 P.3d at 632–33 (quoting *Kissick v. Schmierer*, 816 P.2d 188, 191 (Alaska 1991)).

The Alaska Supreme Court remanded to the trial court. *Hartley Motors*, 36 P.3d at 634.

If the course was designed or maintained in such a manner that it increased the likelihood of a rider encountering a hidden rock, then the course layout may have presented an unnecessary danger; holding an ATV safety class on an unnecessarily dangerous course is beyond the ordinary negligence released by the waiver.

Hartley Motors, 36 P.3d at 633. While the court did not specifically state so, it appears that if the release had specifically referenced general negligence and not been limited to the inherent dangers of ATV riding, the plaintiff’s remedies might have been barred as to negligence. See *Hartley Motors*, 36 P.3d at 633.

A Pennsylvania court held that releases for equipment rentals in training did not cover negligent instruction. In *Zanan v. Jack Frost Ski Lodge*, 36 Pa. D. & C.3d 444, 447 (Pa. Ct. Com. Pl. 1985), the court noted, “[S]o far as any injury sustained by husband-plaintiff due to defective equipment furnished plaintiff by defendant, the release would be a defense and it would be entitled to a summary judgment.” Continuing, the court found the following:

It is clear that the release here pleaded, applies exclusively to injuries arising out of the use of ski equipment rented by defendant to plaintiff. This suit does not allege that the injuries sustained by plaintiff were caused by such equipment. The negligence here averred relates to the selection of any icy ski slope not adaptable for use by a skiing novice and to improper instructions by defendant's ski instructor.

Zanan, 36 Pa. D. & C.3d at 447. Therefore, the release did not bar the plaintiffs' claim.

Following Pennsylvania law, a Pennsylvania federal district court held that an exculpatory clause in the ski rental agreement releasing a ski operator from liability arising from the use of the ski rental equipment was valid. *Weiner v. Mt. Airy Lodge, Inc.*, 719 F. Supp. 342, 345–46 (M.D. Pa. 1989). However, “[s]ince the rental agreement applies only to injuries arising out of the use of the equipment,” its exculpatory clause did not bar the plaintiff from suing for negligent maintenance of premises, employee training, or supervision of a ski student. *Weiner*, 719 F. Supp. at 345. The district court also held that for “garden variety” consumer transactions a liability release would not immunize the ski facility against strict liability claims for maintenance and care of rented equipment. *Weiner*, 719 F. Supp. at 346. Strict products liability, according to the district court, should not be waived for “garden variety” consumer transactions. *Weiner*, 719 F. Supp. at 346.

2. Release and Waiver in Texas

Exculpatory clauses in a liability release or waiver, including for negligence, will be honored in Texas unless they violate public policy. *Newman*, 891 S.W.2d at 718–19.

General release clauses are narrowly construed. *Newman*, 891 S.W.2d at 719. Releases must specifically mention the claim to be released. *Newman*, 891 S.W.2d at 719. Release agreements must specifically use the word *negligence* to cover negligence. *Newman*, 891 S.W.2d at 719.

In order to effectively release a claim in Texas, the releasing instrument must “mention” the claim to be released. Even if the claims exist when the release is executed, any claims not clearly within the subject matter of the release are not discharged. *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 204 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). See *Baker v. City of Fort Worth*, 146 Tex. 600, 210 S.W.2d 564, 567–68 (1948); *Houston Oilers, Inc. v. Floyd*, 518 S.W.2d 836, 838 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). Furthermore, general categorical release clauses are narrowly construed. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984).

Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 938 (Tex. 1991).

Under Texas law, a release is a contract and subject to avoidance on grounds such as fraud or mistake, like any other contract. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990).

[W]hether the parties to a release intended to cover an unknown injury cannot always be determined exclusively from the language of the release itself. It may require consideration of the conduct of the parties and the information available to them at the time of signing. In a subsequent suit for an unknown injury once the affirmative defense of release has been pleaded and proved, the burden of proof is on the party seeking to avoid the release to establish mutual mistake.

Williams, 789 S.W.2d at 264.

Exculpatory clauses barring gross negligence claims have been found to violate Texas public policy. *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ).

III. Conclusion

Texas firearms instructors and firearms training schools should take reasonable measures to ensure they are not liable for tort actions, such as taking into account the experience levels of their students, having qualified, trained instructors, and using nondefective equipment. Although governmental instructors have broader protections, private instructors may avail themselves of Texas statutory protections in the context of firearms training related to the Texas concealed-carry permit application process. While Texas firearms instructors do not have the type of broader protections that those in some other states have, instructors can use strategies to insulate themselves from liability outside the concealed-carry context. For instance, firearms instructors should have students execute releases. For a release to be effective, it should be carefully drafted by a Texas-licensed attorney to make sure it comports with Texas law and is both all-inclusive and yet specific to the types of claims released.

CHAPTER 2

National Firearms Act (NFA) Trusts

Sean P. Healy

I. Introduction

It comes as a surprise to many people that federal law permits civilians to own machine guns, suppressors, and similar items. That law is called the National Firearms Act (NFA). This chapter refers to items regulated by the NFA as “NFA firearms.” Texas law also allows individuals to own and possess NFA firearms.

The NFA was enacted in 1934. It generally banned civilian ownership of machine guns, except those lawfully registered. Since then, there appear to have been only two instances where legally owned machine guns were used in crimes. Both happened in Ohio. One was committed by a law enforcement officer. Crimes committed using illegally possessed machine guns are also rare. See the discussion at Full Auto Weapons, http://www.guncite.com/gun_control_gcfullau.html.

As of 2006, there were approximately two million NFA firearms registered in the National Firearms Registration and Transfer Record (NFRTR), the database of NFA firearms maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). See The Bureau of Alcohol, Tobacco, Firearms and Explosives’ National Firearms Registration and Transfer Record (June 2007), available at <http://www.justice.gov/oig/reports/ATF/e0706/final.pdf>. Of those, approximately 390,000 were machine guns.

Because federal law defines “person” to include trusts, corporations, and other entities, it is lawful to form a trust for the purpose of owning NFA firearms. This chapter addresses the various factors that must be considered in drafting NFA trusts.

The information in this chapter is intended to be used by attorneys drafting NFA trusts for their clients. It is *absolutely* not intended to be used by nonlawyers for anything other than general information. I *strongly* recommend against nonlawyers drafting their own NFA trusts, because of the immense legal risks.

This chapter discusses the state and federal laws regarding machine guns, suppressors, and similar items and Texas law regarding trusts only in sufficient detail to address NFA trusts. It is not intended to list each and every statute and case bearing on these subjects.

Keep in mind that the information in this chapter is based on state and federal law and on the policy and practices of the ATF at the time this chapter was written.

You must remain informed of changes in the law, regulations, and ATF practices if you choose to draft NFA trusts as a part of your practice.

II. Professional Considerations: Business, Ethics, and Avoiding Malpractice

Before expanding your law practice to include NFA trusts, you must understand a few facts about the market.

First, you must consider your competition. Experienced attorneys may charge thousands of dollars for comprehensive estate planning packages. But most gun owners would rather spend their money on guns than legal documents. They might not understand why your NFA trust is more valuable than those advertised on the Internet.

Some people draft their own NFA trusts using standard forms or consumer software such as Quicken or LegalZoom, which is designed to allow nonlawyers to draft their own simple legal documents. Others get their forms from office supply stores. Still others start with copies of their friends' NFA trusts. Others cobble together their own forms from documents found on the Internet. There are numerous pitfalls to this approach. These forms are usually intended as basic forms and not to form NFA trusts. They generally do not include specific instructions to the trustees to help them comply with the laws regarding guns. They do not include advice from attorneys. The drafters often make arbitrary choices about the wording, and the aftermath could invalidate or terminate trusts and result in illegal possession of NFA firearms. You must be prepared to explain the grave risks of this approach and justify your fee in other ways. It does not make sense to take a chance of a felony conviction to save a little money.

Most attorneys who advertise their NFA trusts charge flat fees. Many focus on spending as little time as possible on these matters to keep their fees competitive. They barely confer with clients, provide little or no legal advice, and generally use the same forms with few modifications, other than substituting the names of the settlors, trustees, and beneficiaries.

I have seen NFA trusts advertised by attorneys for less than \$200. According to the State Bar of Texas, the median rate for an attorney working full-time in private practice in Texas in 2013 was \$242 per hour. See Department of Research & Analysis, State Bar of Texas, 2013 Hourly Fact Sheet, available at http://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27264. Just how much help should a client expect from an attorney who has allocated a total of forty-five minutes to confer and draft an NFA trust?

Texas Disciplinary Rule of Professional Conduct 1.04(b) is used to determine whether a given fee is reasonable, based on certain factors. One of those factors is “the

amount involved and the results obtained.” In other words, the attorney is justified in charging a higher fee if there is more at stake. Another way of looking at this is that, the more significant the consequences are to the client, the more time the attorney should devote to the matter.

In drafting an NFA trust, the risks to the client include a felony conviction for him or his loved ones, in addition to the normal estate planning risk of having his property distributed in a way that conflicts with his intentions. Put another way, you may commit malpractice by failing to determine the client’s level of knowledge about guns and gun law or by failing to ask enough questions about the client’s overall situation and estate planning needs. If you charge a lowball fee and focus on only volume, you are greatly magnifying the risks to yourself and the client. I believe the risks make it worthwhile for the attorney to devote more time to the matter and for the client to be prepared to pay for that time. You may be in serious trouble if your only defense at a grievance hearing or malpractice trial is “I only earned \$200 for this!”

You may also encounter a few clients who need a full estate planning package in addition to an NFA trust. Some clients may intend to acquire a large number of NFA firearms, which could justify custom provisions in the trust or forming multiple trusts. Taking the time to ask more questions may lead to additional income.

I believe the proper approach is somewhere in the middle. Spend an hour or so consulting with the client and advising him on how to use the trust. This assumes you have a detailed letter that augments your in-person advice. Allocate an hour or so to draft the trust and ancillary documents. I also set aside thirty minutes or so to meet with the client at the time the trust is signed.

When setting your fee, consider the time spent drafting your basic NFA trust form. If you have spent ten hours researching and drafting your basic forms, and if you have ten clients who hire you to form NFA trusts for them, charge each client for one hour of that time.

If we assume you will spend two to four hours on each trust, assuming you charge \$250 per hour, a reasonable fee for an NFA trust would be \$500 to \$1,000. If you charge less than that, you are not spending sufficient time to determine the client’s needs and to advise him on operating the trust. If you charge more than that, you will have very few clients.

You must also recognize that many gun owners who are considering owning NFA firearms are very well informed about gun laws and the NFA in particular. You may meet some laypersons who know more about this area of law than you do. If you have any doubt about this, ask one of these people about 18 U.S.C. § 922(r) or about the (now expired) assault weapons ban. Many gun owners can tell you exactly what makes a gun legal or illegal under these laws. This may be one of the few instances when your client will know more about the law than you do.

III. The Law

Ownership of NFA firearms is governed by both state and federal law. We will first examine federal law, focusing on the law that specifically regulates machine guns, suppressors, and similar items. Then we will examine the relevant parts of the main federal gun control law, the Gun Control Act of 1968.

A. Federal Law

1. National Firearms Act

The National Firearms Act (NFA) is the federal law that regulates machine guns, suppressors, and similar items. It does not apply to ordinary guns such as rifles, pistols, and shotguns.

The NFA is contained in 26 U.S.C. ch. 53. This is part of title 26, the Internal Revenue Code, rather than title 18, Crimes and Criminal Procedure. The NFA is based on Congress's authority to impose taxes. Violations of the NFA are therefore considered violations of the tax laws.

The NFA is also known as title II of the Gun Control Act of 1968. For that reason, NFA firearms are also referred to as "title II weapons."

All manufacturers, importers, and dealers of firearms are required to be federal firearms licensees (FFLs). A firearms licensee who deals with NFA firearms is required to become a special occupational taxpayer (SOT). *See* 26 U.S.C. § 5801. Importers are Class 1 SOTs. Manufacturers-dealers are Class 2 SOTs. Dealers are Class 3 SOTs. For this reason, persons who sell NFA firearms are sometimes referred to as "Class 3 dealers."

a. General Provisions

Since 1934, the government has imposed a transfer tax on any person wanting to acquire an item regulated by the NFA. *See* 26 U.S.C. § 5811. Along with payment of the tax, the law also requires the applicant to submit an application to the ATF and to receive approval before the transfer.

It is illegal for any person to receive or possess an NFA firearm that is not registered to him. 26 U.S.C. § 5861(d).

Using or carrying a machine gun, short-barreled rifle, short-barreled shotgun, destructive device, or firearm silencer or muffler during any crime of violence or drug trafficking carries with it a mandatory minimum sentence of thirty years, in addition to the sentence for the underlying crime. *See* 18 U.S.C. § 924(c)(1). This could be a concern to an armed citizen who uses his legally owned NFA firearm in self-defense.

b. Definition of “Firearm”

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. 26 U.S.C. § 5845(b). Guns which fire a three-round burst are considered machine guns. Gatling guns are not considered machine guns. See 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*
 - 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 that “expel[s] 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 twelve-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, although originally designed for use as a weapon, which is redesigned for use 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.”

26 U.S.C. § 5845(f).

6. *Weapons made from shotguns*: “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).
7. *Weapons made from rifles*: “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).
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). Such weapons 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 Gun Control Act, at 18 U.S.C. § 921(a).

In addition to the items described above, the NFA definition of “firearm” 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 machinegun.” 26 U.S.C. § 5845(b). One example of such an item is an autosear or drop-in autosear, a part which can convert some semiautomatic guns into 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 machinegun 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).

c. “Assault Weapons”

There is a lot of confusion regarding machine guns, some of it created on purpose. “Semiautomatic” 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 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; semiautomatic guns are not.

An “assault rifle” is a legitimate term that 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 guns. A “battle rifle” such as the Browning automatic rifle, or M-14, is a fully automatic weapon that 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 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 are 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 semiautomatic 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 semiautomatic guns with fully automatic guns.

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

d. Machine Gun Freeze

In 1986, Congress passed a law that froze the supply of machine guns. *See* 18 U.S.C. § 922(o). Introduced by William J. Hughes (D-NJ) 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 legally own machine guns registered only before May 19, 1986. Machine guns that were not registered as of that date, including those manufactured afterward, may be legally owned only by governmental entities like the army and police departments or by licensed machine gun dealers.

The freeze applies to only 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. Definition of "Person"

The Internal Revenue Code defines "person" to include individuals, trusts, estates, partnerships, associations, companies, or corporations. 26 U.S.C. § 7701(a)(1); *see also* 26 C.F.R. § 479.11. This definition is in the "Procedure and Administration" portion of the Internal Revenue Code rather than the NFA.

The NFA makes frequent references to "persons." By virtue of section 7701(a)(1), and sometimes by their own explicit language, these provisions also apply to trusts. Here are some specific sections:

1. 26 U.S.C. § 5812 requires the government's permission to transfer NFA firearms. "[I]f such person is an individual, the identification must include his fingerprints and his photograph." 26 U.S.C. § 5812(a). Obviously this statute contemplates persons who are not individuals seeking transfer of NFA firearms into their names.
2. 26 U.S.C. § 5822 prohibits a person from making a firearm unless it is registered. This section also requires an individual to include fingerprints and a photograph with the application.
3. 26 U.S.C. § 5861 makes it illegal for any person to transfer, receive, or possess an NFA firearm not registered to him.

The Treasury Regulations generally define "trust" as used in the Internal Revenue Code as "an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts." 26 C.F.R. § 301.7701-4(a). State law governs the validity and operation of trusts.

Because these definitions apply to the NFA, trusts may own NFA firearms.

f. Requirements for Acquiring NFA Firearms

To acquire an NFA firearm, an applicant must pay the transfer tax and submit an application. *See* 26 U.S.C. §§ 5811, 5812. The application that must be submitted is ATF Form 4, “Application for Tax Paid Transfer and Registration of Firearm,” available at <http://www.atf.gov/files/forms/download/atf-f-5320-4.pdf>. The application is executed under penalty of perjury. It must be submitted in duplicate, and it must identify the specific firearm to be transferred by serial number. For this reason, an applicant cannot submit Form 4 until the dealer has the NFA firearm in his possession.

An individual applicant must submit his fingerprints and his photograph with his application. 26 U.S.C. § 5812(a)(3). The applicant must also secure the signature of his chief law enforcement officer (CLEO) on the form, certifying that the NFA firearm will not be used illegally and that possession by the transferee would not violate the law. At least two states, Alaska and Tennessee, require their CLEOs to sign the form. *See* Alaska Stat. § 18.65.810; Tenn. Code Ann. § 39-17-1361.

The tax is \$200 to transfer any NFA firearm, other than one classified as “any other weapon,” for which it is only \$5. 26 U.S.C. § 5811(a).

There are similar requirements for “making” an NFA firearm. This process requires payment of a \$200 tax. *See* 26 U.S.C. § 5821(a). It also requires submission of a similar application. *See* 26 U.S.C. § 5822. The form for this process is ATF Form 1, which has similar requirements to Form 4.

These taxes are fixed and are not indexed for inflation.

As mentioned above, the ATF maintains a database of all NFA firearms called the National Firearms Registration and Transfer Record (NFRTR). After submission of the form and approval by the ATF, the NFA firearm is registered in the NFRTR in the name of the transferee. The applicant cannot take possession of the firearm until the application is approved. 26 U.S.C. § 5812(b). The owner must retain proof of registration and present it on request. 26 U.S.C. § 5841(e).

g. Criminal Penalties

Possessing, receiving, or transferring an NFA firearm without paying the transfer tax and holding an approved Form 4 is unlawful. *See* 26 U.S.C. § 5861. It is punishable by up to ten years in prison and a \$10,000 fine. *See* 26 U.S.C. § 5871. The firearm is also subject to forfeiture. *See* 26 U.S.C. § 5872(a).

Willful evasion of the tax is punishable by a fine of \$100,000 (for individuals) to \$500,000 (for corporations and trusts). *See* 26 U.S.C. § 7201.

In addition to imprisonment, fines, and forfeiture, a felony conviction makes it permanently illegal for the person to possess any firearm, ammunition, or components. *See* 18 U.S.C. § 922(g)(1).

h. Death of Owner

If the owner of an NFA firearm dies, his heirs must apply for transfer within a reasonable time (as defined by the ATF). The ATF takes the position that possession of NFA firearms is a crime, even when it occurs because of the death of the registered owner. The ATF does allow a “reasonable time” to get the items transferred to the heir. *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, Transfers of National Firearms Act Firearms in Decedents’ Estates, available at <http://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html>. Note that this statement is in a letter from 1999, and the ATF has been known to change its position without prior notice.

Transfers to heirs are handled using ATF Form 5. They are tax-exempt.

2. Gun Control Act

The Gun Control Act of 1968 (GCA), 18 U.S.C. §§ 921–931, is the main federal statute regulating firearms. It is also known as title I of the federal firearms laws. It applies to ordinary guns such as pistols, rifles, and shotguns and also to most NFA firearms.

The GCA is based on Congress’s authority to regulate interstate commerce rather than on its authority to impose taxes.

a. Definition of “Firearm”

The GCA applies to all firearms. The definition of “firearm” under the GCA is “any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C. § 921(a)(3)(A).

The GCA does exclude “antique firearms.” This refers to “any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898” or any replica of an antique firearm if the replica “is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.” 18 U.S.C. § 921(a)(16). The NFA also excludes antique firearms from its definition of firearm. 26 U.S.C. § 5845(g).

Most of the items defined by the NFA as firearms are also defined by the GCA as firearms. Most NFA firearms are also considered firearms under state law. Therefore, a person possessing an NFA firearm must generally comply with the restrictions on the special types of firearms under the NFA, the federal laws governing all firearms under the GCA, and state laws governing firearms.

There is a narrow category of items that are considered firearms under the NFA but not the GCA. Here is a matrix showing how these two laws overlap:

		Gun Control Act	
		Firearm	Not a Firearm
National Firearms Act	Firearm	<u>“Firearm” under both laws</u> <ul style="list-style-type: none"> • Machine guns • Short-barreled rifles (barrel < 16" or overall < 26") • Short-barreled shotguns (barrel < 18" or overall < 26") • Destructive devices • Weapons made from shotguns or rifles • “Any other weapon” • Guns that can be readily converted to machine guns 	<u>“Firearm” under only NFA</u> <ul style="list-style-type: none"> • Suppressors and silencers • Suppressor parts • Machine gun receivers
	Not a Firearm	<u>“Firearm” under only GCA</u> <ul style="list-style-type: none"> • Normal pistols • Normal rifles • Normal shotguns 	<u>Not “Firearm” under either law</u> <ul style="list-style-type: none"> • Antique firearms • Airguns • Any device (other than a machine gun or destructive device) designed as a weapon but which the Secretary finds is primarily a collector’s item and is not likely to be used as a weapon

b. GCA Provisions Applicable to NFA Firearms

The GCA applies to items that are defined as firearms under both the GCA and the NFA. In plain English, the GCA applies to guns but generally not to parts.

i. Prohibited Persons

The GCA makes it illegal for any of the following persons to possess firearms or ammunition:

1. persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year (18 U.S.C. § 922(g)(1));
2. fugitives from justice (18 U.S.C. § 922(g)(2));
3. unlawful users of or persons addicted to any controlled substance (18 U.S.C. § 922(g)(3));

4. persons who have been adjudicated as a mental defective or who have been committed to a mental institution (unless their rights were restored) (18 U.S.C. § 922(g)(4));
5. illegal aliens and persons with nonimmigrant visas (18 U.S.C. § 922(g)(5));
6. persons with dishonorable discharges from the U.S. Armed Forces (18 U.S.C. § 922(g)(6));
7. persons who have renounced their U.S. citizenship (18 U.S.C. § 922(g)(7));
8. persons subject to certain domestic court orders (protective orders and some injunctions) (18 U.S.C. § 922(g)(8)); 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) (18 U.S.C. § 922(g)(9)).

It is unlawful 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).

A person is not considered convicted if the conviction was expunged or set aside, if the person was pardoned, or if the person had his civil rights restored, unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not possess firearms. 18 U.S.C. § 921(a)(33)(B)(ii).

ii. Minors

Persons under eighteen years of age may not lawfully possess handguns or ammunition that is usable only in handguns. *See* 18 U.S.C. § 922(x). There are exceptions involving specific circumstances. Gun dealers may not sell handgun ammunition to persons under twenty-one. *See* 18 U.S.C. § 922(b)(1). To avoid problems, persons under twenty-one should not generally be appointed as trustees of NFA trusts.

iii. Transfers to Prohibited Persons

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. *See* 18 U.S.C. § 922(d).

c. Criminal Penalties

Violation of the GCA carries a penalty of up to ten years in prison, subject to the federal sentencing guidelines. *See* 18 U.S.C. § 924(a)(2). Fines can be as high as \$250,000. *See* 18 U.S.C. § 3571.

B. Texas Law

Several areas of Texas law apply to the possession, ownership, and use of NFA firearms. State law also governs the creation, operation, and legal effect of trusts.

1. "Prohibited Weapons" and Criminal Penalties

The state law governing prohibited weapons is contained in Tex. Penal Code § 46.05. Subsection (a) makes it illegal to possess ten different types of weapons. *See* Tex. Penal Code § 46.05(a). These include explosive weapons, machine guns, short-barreled firearms, and silencers, which are all regulated by the NFA. Possessing any of these four items is a third-degree felony, punishable by confinement for two to ten years and a fine of up to \$10,000. *See* Tex. Penal Code §§ 12.34, 46.05(e).

The definitions in the state law are different from those in the NFA. *Compare* Tex. Penal Code § 46.01 *with* 26 U.S.C. § 5845. The Texas definition of "explosive weapon" is similar to part of the definition of "destructive device" in the NFA, but the state definition does not include firearms that have a bore over one-half inch in diameter but do not fire explosive rounds. The state definitions include only the actual firearms (machine gun, short-barreled rifle, short-barreled shotgun, and silencer) but not the parts (receiver, sear, baffles, etc.). The state law also does not declare "any other weapon" to be a "prohibited weapon." To be a "silencer" under the NFA, the item must be portable, but that is not a part of the definition of "firearm silencer" under Texas law.

A person wishing to legally own NFA firearms can comply with the requirements of the NFA and know that he is thereby complying with Texas law. A person being prosecuted for violating the NFA or Texas law (or his attorney) should carefully analyze the definitions to see if they apply to the particular circumstances.

Tex. Penal Code § 46.05(c) states, "It is a defense to prosecution under this section that the actor's possession was pursuant to registration pursuant to the National Firearms Act, as amended." Therefore, a person who lawfully purchases his NFA firearm by paying the transfer tax and obtaining approval of Form 4, and who complies with the other provisions of the NFA, will have a defense available if he is arrested and prosecuted for possessing a prohibited weapon.

2. Hunting with Suppressors

On March 29, 2012, the Texas Parks and Wildlife Commission voted unanimously to allow the use of suppressors while hunting game animals (mule deer, white tail deer, and antelope). *See* 31 Tex. Admin. Code § 65.11(1)(A). Suppressors were previously legal for use in other shooting activities and in hunting nuisance animals (such as feral hogs, coyotes, and exotic game) but not for game animals.

The benefits of suppressors include increased safety due to protection from hearing damage, reduced noise pollution, and increased accuracy because of reduced recoil and muzzle blast. I expect that this will significantly increase the number of lawfully owned suppressors in the state.

3. Trusts

Trusts are commonly used in the estate planning process. A trust is a legal arrangement that separates the right to *control* assets from the right to receive the *benefits* from those assets. In other words, one person controls the assets for the benefit of another person. The obvious example is a child who inherits significant assets—normally a responsible adult will control the assets for the child's benefit.

Trusts can be revocable (able to be cancelled or amended) or irrevocable (set in stone once formed). Making a trust revocable or irrevocable has different legal and tax consequences.

A trust has three main categories of persons involved with it. The *settlor* (or donor) is the person who transfers the property to the trust. The *trustee* is the person who controls the property in the trust, for the benefit of the beneficiary (the trustee also has the right to keep possession of the trust property, which is a side benefit of an NFA trust). The *beneficiary* is the person who is ultimately entitled to receive the benefits from the property. A trust may have more than one donor, beneficiary, and trustee.

Tex. Prop. Code § 112.008(c) allows a settlor to serve as trustee, but there can be serious consequences of that decision. The settlor can also be a beneficiary.

An NFA trust is generally a revocable living trust. This means the settlor retains the power to modify or dissolve the trust (revocable), that the settlor is alive when he forms the trust (living), rather than arranging for a trust to be formed upon death (testamentary). NFA trusts generally have the same basic characteristics as ordinary living trusts. The remainder of this chapter focuses on the characteristics that are relevant to firearms.

a. Same Person as Settlor, Trustee, and Beneficiary

The biggest risk to the client and to the lawyer is that the lawyer could draft an invalid trust. As a result, the trustees could possess NFA firearms without legal authority to do so. The easiest way to draft an invalid trust is to appoint one person as the sole trustee and the sole beneficiary. This seems like a good idea, which would allow the client to obtain all the benefits of an NFA trust without giving up any control. Unfortunately this results in a merger of the right to control the property and the right to receive the benefits, which violates the whole idea of a trust.

Tex. Prop. Code § 112.008(b) allows the settlor to be a beneficiary. Section 112.008(c) allows the settlor to be a trustee. Tex. Prop. Code § 112.008(c). But as discussed below, one person cannot be the sole trustee and the sole beneficiary.

Property Code section 112.034(a) (part of the Texas Trust Code) sets out the doctrine of merger:

If a settlor transfers both the legal title and all equitable interests in property to the same person or retains both the legal title and all equitable interests in property in himself as both the sole trustee and the sole beneficiary, a trust is not created and the transferee holds the property as his own.

Tex. Prop. Code § 112.034(a). “Legal title” refers to the interest held by the trustee, primarily control of the assets. “Equitable title” refers to the interest held by the beneficiary, primarily the right to receive the benefits. “Merger” refers to the fact that a single person holds both the right to control and the right to receive the benefits of the trust property. This is contrary to the trust concept, which is to separate those two interests.

Section 402(a)(5) of the Uniform Trust Code (which has been adopted by twenty-three states) sets forth this same principle.

In the case of NFA trusts, this principle also means that the individual has possession of NFA firearms that are not registered in his name. Because the trust is invalid, the individual faces possible criminal prosecution.

To avoid merger problems, a trust must also have at least one beneficiary who is not a settlor.

b. Spendthrift Trusts

A spendthrift trust prohibits the interest of a beneficiary in the income or principal of a trust from being transferred to a third party, whether voluntarily or involuntarily, before it is actually paid or delivered to the beneficiary. Tex. Prop. Code § 112.035(a). The trust does not even have to set this out explicitly—it is enough to use the phrase “spendthrift trust.”

Section 541(c)(2) of the Bankruptcy Code excludes property held by spendthrift trusts from the bankruptcy estate, so in this circumstance federal law incorporates the protections of state law. *See* 11 U.S.C. § 541(c)(2). Spendthrift provisions are common, intended to protect the assets from claims of the beneficiary’s creditors. By taking away any right to assign future distributions to third parties, the trust protects irresponsible beneficiaries from their own bad decisions.

NFA trusts should normally be created as spendthrift trusts. In addition to the normal protections this provides, it also protects the NFA firearms from being transferred in conflict with the settlor’s desires. However, the attorney must advise the client that if he includes a spendthrift clause, the client will need the consent of the other beneficiaries to terminate the trust. *Fewell v. Republic National Bank of Dallas*, 513 S.W.2d 596, 598 (Tex. Civ. App.—Eastland 1974, writ ref’d n.r.e.).

c. Same Person as Settlor and Beneficiary

Spendthrift trusts do have some limitations. The “self-settlor rule” provides that when a settlor is also a beneficiary, a spendthrift provision does not prevent creditors from reaching the settlor’s interest in the trust estate. Tex. Prop. Code § 112.035(d); see also *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 378 (Tex. App.—San Antonio 1992, writ denied). This means that a settlor who also makes himself a beneficiary leaves the trust property vulnerable to the claims of his creditors.

The Fifth Circuit has reached a similar conclusion. In *In re Shurley*, 115 F.3d 333, 337 (5th Cir. 1997) the court held that the property contributed to a trust by a settlor who is also a beneficiary is not protected from creditors’ claims. The court explained:

The rationale for this “self-settlor” rule is obvious enough: a debtor should not be able to escape claims of his creditors by himself setting up a spendthrift trust and naming himself as beneficiary. Such a maneuver allows the debtor, in the words of appellees, to “have his cake and eat it too.”

In re Shurley, 115 F.3d at 337.

In most NFA trusts are only one or two settlors (a single person or a married couple), which means in most cases, a creditor would be able to reach the entire trust estate. Clients need to understand this before forming trusts.

These limits are especially important in trusts that own NFA firearms. If the trust is invalid under state law, the person who possesses the NFA firearm is not the actual owner and has no authority to possess it on behalf of the (nonexistent) trust. If the ATF does not recognize the validity of the trust, it may disapprove the transfer or find the persons named as trustees are violating the NFA by possessing NFA firearms illegally.

Because of the vital importance of meeting these legal requirements, nonlawyers put themselves in grave legal danger when they draft their own trusts, find forms on the Internet, or use general living trust forms not intended to own NFA firearms.

Trusts must generally be in writing. See Tex. Prop. Code § 112.004. NFA trusts always have to be in writing because the applicant must provide a copy of the trust to the ATF (not just a summary or declaration of the trust). In addition, the trustees need guidance to comply with the law, so it protects everyone involved to have the rules set forth in writing.

The trust should also require each trustee to sign it, representing that they have read and agree to comply with its terms. Trustees who exercise powers or perform duties under a trust are presumed to have accepted the terms of the trust, but their signature on the trust or a separate written acceptance is conclusive evidence of acceptance. Tex. Prop. Code § 112.009(a).

At some point a trust must terminate. If there are still assets in the trust, they must be distributed somehow. One common arrangement is for the property to be transferred directly to the beneficiary, who may do with it as he wishes. Another com-

mon arrangement is for the assets to be sold with the proceeds distributed to the beneficiary.

d. Powers of Trustees

The “broad form” list of trustees’ powers include a number of provisions that could be useful at some point. These powers are similar to the powers held by the board of directors of a corporation. They are described in Texas Property Code chapter 113.

The client will probably want to retain as much power as possible over the trust and its property. It is understandable that a client who forms an NFA trust and buys the trust property with his own money would want to be able to override the decisions of any other trustees.

Property Code section 113.085(a) governs the exercise of powers by multiple trustees. Until 2005, the relevant part of this section read, “Except as otherwise provided by the trust instrument or by court order . . . a power vested in three or more trustees may be exercised by a majority of the trustees.” In 2005 this language was amended to read, “Cotrustees that are unable to reach a unanimous decision may act by majority decision.” This was interpreted to mean that cotrustees must first try to reach unanimous agreement, but if unsuccessful, the majority rules. In 2007 this language was amended to read, “Cotrustees may act by majority decision.” Tex. Prop. Code § 113.085(a).

I was unable to find any Texas cases considering whether trustees can have unequal powers. This is an open question.

You may consider including a provision stating that in the event of a disagreement between the settlor-trustee and the other trustees, the decision of the settlor-trustee is final. Obviously this is not a typical provision, and it may run afoul of section 113.085(a). If it does, maybe a court would rule this provision unenforceable instead of invalidating the entire trust, but it is up to you to determine whether to take a chance. You might increase your odds by incorporating a provision allowing the other trustees to override the decision of the settlor-trustee by a supermajority vote, to make sure their trustee positions are legitimate. This may help counter an argument that the other trustees have no real power, are therefore not really trustees, and the settlor-trustee is therefore the sole trustee.

In the alternative, you could include a provision requiring a supermajority or even unanimous consent for certain decisions such as selling or transferring NFA firearms.

IV. Advantages of NFA Trusts

A. Access to NFA Firearms

One of the biggest advantages of an NFA trust is that any of its trustees can lawfully possess the NFA firearms. An individual who owns NFA firearms could run into trouble with the law for “transferring” the item to another person, even if he simply lets the other person hold it or shoot it. The other person could be prosecuted for possessing an NFA firearm that is not registered in his name. An NFA trust allows any trustee to lawfully possess the NFA firearms without violating the NFA.

One danger facing owners of NFA firearms and their families is a legal concept called “constructive possession.” In this context, it means that a person who has access to an NFA firearm can be considered to have actual possession of the item. This may be because the person has the combination to the gun safe, has a key to it or access to a key, or simply has access to the premises where the NFA firearm is stored. Thus, a person who is not allowed legally to possess NFA firearms can be charged with possessing them, even if he never actually touches them.

The government has used this argument to prosecute married couples where one spouse is a gun owner and the other spouse is a convicted felon. The felon is charged with being a “felon in possession” of firearms in violation of 18 U.S.C. § 922(g)(1), and the spouse is charged with knowingly delivering a firearm to a convicted felon in violation of 18 U.S.C. § 922(d). The government could make this argument against an individual who owns NFA firearms, claiming that the spouse violated the law by having access to the guns without registering as an owner with the ATF.

A person who owns NFA firearms must take steps to limit any other person’s access to them. This includes spouses, children, roommates, friends, relatives, business partners, and everyone else who is not listed with the ATF as owner of the items or a trustee of the NFA trust. A person whose spouse is not listed as an owner would be well advised to keep all NFA firearms in a locked gun safe and not allow the spouse access to the key or combination. Even with such steps, it would be difficult or impossible to prove in court that the other spouse could not gain access to the items.

Unlike a prosecution under the felon-in-possession statute, a prosecution for violating the NFA does not require the defendant to be a prohibited person. Placing the NFA firearm in an NFA trust and making both spouses trustees should eliminate this risk. Another is to form a corporation or similar entity and give the spouse a position with the company that allows him access to the NFA firearms. This doesn’t relieve the trustees of the obligation not to allow other persons access to the items, but it does allow trustees access without having to fear prosecution.

B. Protection from Criminal Prosecution

An individual owner of an NFA firearm risks prosecution if he loans it to another person, allows another person to use it under his direct supervision, or even stores it where another person could potentially have access to it, because the individual owner is the only person legally allowed to possess the NFA firearm. An NFA trust, however, allows the other trustees to possess the item without fearing prosecution.

A trust also provides for orderly transfer of control of the NFA firearms upon death or incapacity. A well-drafted trust will not allow a prohibited person to become a trustee, to possess the NFA firearms, or to receive a trust distribution that includes firearms. A well-drafted trust document also provides multiple warnings to the trustees that NFA firearms are subject to strict state and federal laws. It can warn trustees of the specific requirements, and its provisions can prevent them from taking action that would violate those laws.

C. Continuity

Another important characteristic of a living trust is continuity. If one or more of the trustees dies or ceases to be a trustee, the trust continues to exist. This characteristic is especially important when the property in the trust includes NFA firearms because most transfers of NFA firearms require an application to the ATF and payment of the \$200 transfer tax. So even if the trustees change, the trust remains the owner, and there is no requirement to submit paperwork to the government and pay the \$200 transfer tax.

One other advantage is that if it ever becomes illegal to transfer NFA firearms, holding the items in a trust may prevent loss of the items, because the trust will continue to exist, and no transfer will be necessary (although the trustees may change). Of course this depends on the exact language of any changes to the law, which is impossible to predict.

D. Quicker Processing

In the past, using an NFA trust has cut weeks or months off the time the ATF spends processing an application because there is no requirement to submit photographs or fingerprints or to wait for CLEO approval.

This advantage may no longer exist. The ATF is reporting a significant increase in the number of applications (Form 1, Form 4, and Form 5) from entities, from 840 in 2000, to 12,600 in 2009, to 40,700 in 2012 (excluding applications by dealers). 78 Fed. Reg. 55,014, 55,016 (Sept. 9, 2013). An e-mail from the ATF indicates that they processed more than 199,900 applications (presumably including all types) in 2013. See Nick Leghorn, *ATF Adding More NFA Branch Staff, Reducing Backlog, Re-*

Designing eForms System. Again. (Apr. 17, 2014), <http://www.thetruthaboutguns.com/2014/04/foghorn/atf-adding-nfa-branch-staff-reducing-backlog-re-designing-eforms-system/>. For additional discussion, see part XI.B. below.

This is part of an overall surge in applications to acquire NFA firearms. As a result, dealers are reporting that the ATF is taking six months or so to process applications, regardless of whether the applicant is a trust or an individual.

In addition, manufacturers of suppressors appear to have a backlog of orders, in part because of the new laws allowing them to be used in hunting. Some manufacturers have a backlog of six months or more, from the time a dealer orders a suppressor until it is delivered to the dealer.

The bottom line is it could take a year or more to receive an NFA firearm.

E. CLEO Approval Not Required

Individuals wishing to acquire NFA firearms must get their local CLEO to sign the application form. ATF regulations require this certification to come from the local chief of police, county sheriff, head of the state police, or state or local district attorney or prosecutor. *See* 27 C.F.R. §§ 479.63, 479.85. The regulations also provide that certifications of other officials are appropriate if found in a particular case to be acceptable to the director of the ATF. Examples of other officials who have been accepted in specific situations include state attorneys general and judges of state courts having authority to conduct jury trials in felony cases.

By signing the form, the CLEO is certifying that he has no information that the NFA firearm will be used for an unlawful purpose and that he has no information that receipt or possession of the item would place the applicant in violation of the law. It is normal for a CLEO to perform his own background check before signing the form, which can also significantly delay things.

A proposed federal rule has no requirement for CLEOs to sign the forms, which effectively gives the local sheriff or chief of police veto power over NFA applications. *See* the discussion at part XI.A. below. CLEOs in at least three counties in East Texas (Harrison, Cass, and Rusk) refuse to sign these forms.

Because trusts and business entities are not required to obtain CLEO approval, transfers to trusts can avoid delays due to CLEO background checks, and individuals who live in counties where CLEOs refuse to sign the forms may own NFA firearms if they do so through a trust or business entity.

F. Fingerprints and Photographs Not Required

Currently, the requirement to provide fingerprints and photographs along with Form 4 does not apply to trusts and business entities.

G. Form 4473 and National Instant Criminal Background Check System Are Required

The individual who takes possession of the NFA firearm from the transferor must be a trustee. He should take a copy of ATF Form 4473 appointing him as a trustee when he goes to pick up the firearm so he can show it is legal for him to possess the item on behalf of the trust. Obviously the person must not be a prohibited person.

It is a federal felony to knowingly make a false statement on Form 4473 or show false identification to a gun dealer. *See* 18 U.S.C. § 922(a)(6).

V. Steps Involved in Acquiring NFA Firearms (including Forming Trust, if Desired)

A. Order NFA Firearm

The first step in acquiring an NFA firearm is to have the dealer order the firearm and get it in his possession. Form 4 requires the applicant to state the name and address of the manufacturer, the type of firearm, the caliber, the model, the barrel length, the overall length, and the serial number of the firearm. Therefore, the transferor (usually a dealer) must have the specific NFA firearm in possession before the form can be completed and submitted.

B. If Using Trust, Draft and Execute It

The settlor should transfer a nominal amount of assets to the trust (such as \$100). Without any property, the trust does not exist. *See* Tex. Prop. Code § 112.005.

C. Complete Form 4

When the dealer receives the item, complete and submit Form 4 and pay the appropriate tax. If the transferee is a trust—

1. list the trust as the transferee on the form;
2. provide the name and address of the principal officer or an authorized representative; and
3. provide a complete copy of the actual trust document (a certificate of trust is not sufficient).

If the transferee is an individual—

1. list the individual as the transferee on the form;
2. submit the individual's fingerprints on FBI Form FD-258; and
3. submit a 2" × 2" passport photograph of the individual taken within one year of the application on each of the two copies of the form.

See 27 C.F.R. § 479.63.

D. Obtain CLEO Approval

If purchasing as an individual, the applicant must take Form 4 to his CLEO and have that person sign the law enforcement certification. Some CLEOs perform their own background checks.

E. Submit Two Complete Copies of Form 4 with Proper Tax

The tax is \$5 for "any other weapon" and \$200 for all other NFA firearms.

F. Take Possession of NFA Firearm

Once Form 4 is approved, a trustee must take possession of the item. The person taking possession will have to submit to a National Instant Criminal Background Check System (NICS) check and must be a trustee, so confirm in advance that he is not a prohibited person and send a copy of the approved Form 4 and any documentation of the trustee appointment.

VI. Risks

A. Normal Estate Planning Risks

Drafting an NFA trust involves the normal risks associated with drafting any trust. Whenever a lawyer drafts a document, there is a risk of drafting errors. This risk is magnified when a lawyer practices outside his area of expertise, such as when a lawyer who is not familiar with the law governing trusts attempts to draft one. These risks are greatly increased if the lawyer fails to take the time to become familiar with the client's situation.

Another risk, which is especially relevant to estate planning, is when a situation later arises that the attorney did not foresee. A living trust will probably be active for the life of the client and for some time thereafter. Many things could happen during

that time that could have significant consequences for client and his family, and the outcome of some of those may depend on the language in the trust.

B. Interstate Transportation of NFA Firearms

To transport NFA firearms to another state, even temporarily, a person must submit ATF Form 5320.20 and get it approved. *See* 18 U.S.C. § 922(a)(4); 27 C.F.R. § 478.28. Form 5320.20 is available for download at <https://www.atf.gov/files/forms/download/atf-f-5320-20.pdf>.

It is also possible to move the situs (location) of the trust from one state to another. In addition to the ATF approval discussed above, it may be necessary to modify or replace the trust with a document appropriate to the new state. The trustees will have to research the law of the new state and confirm it is legal to own and possess NFA firearms there. They will also need to determine whether there are any special requirements.

C. Inadvertent Transfers to Prohibited Persons

State and federal law make it illegal for prohibited persons to possess firearms. It is also illegal to sell or dispose of a firearm to a prohibited person. Even though there is not an explicit prohibition on such a person serving as a trustee, settlor, or beneficiary, this creates significant risks and special drafting considerations for the attorney.

A trustee's duties require him to preserve, protect, and control the trust property for the benefit of the beneficiary. A prohibited person *cannot* legally possess firearms. Therefore, I believe it is impossible for a prohibited person to serve as trustee of an NFA trust. Tex. Prop. Code § 112.008 requires a trustee to have the capacity to hold the trust property, which could prevent prohibited persons from serving as trustees for NFA trusts. The trust should make this prohibition explicit and state that any purported appointment of a prohibited person as a trustee is void. The trust should also provide that any trustee who subsequently becomes a prohibited person must immediately resign.

It is unlikely that a prohibited person will ever come to you wanting to form an NFA trust. But there is no legal reason a prohibited person cannot be a settlor of an NFA trust, as long as his involvement is limited to donating other property (not a firearm) to the trust. For instance, a prohibited person could provide the funds to purchase an NFA firearm to be transferred to the trust. A settlor cannot transfer an NFA firearm to the trust because that would probably involve possessing the firearm before the transfer.

A more likely scenario is where the client wants to form an NFA trust, but one or more of his beneficiaries is a prohibited person. In that case, the attorney must take special care to explain the law to the client. The trust should be drafted to require sale

or transfer of the NFA firearms to other persons to avoid any possibility of a transfer to the prohibited person. The attorney should carefully scrutinize the other provisions of the trust to avoid other problems.

D. Transfers without Form 4

NFA firearms cannot be transferred without submitting Form 4 and receiving ATF approval. For transfers to heirs, Form 5 is used. The client may know this, but his heirs and family members may not. This creates a risk that a subsequent trustee or family member may transfer an NFA firearm into or out of the trust without Form 4, thereby risking prosecution.

For this reason, the client must make sure his heirs learn of the existence of the trust and of the special restrictions on NFA firearms. The trust and other documents should be drafted to educate the other trustees, heirs, and family members of these requirements.

E. Inadvertent Violation of Firearms Laws

There are thousands of state, federal, and local gun laws. Most of these laws impose severe penalties for any violation, often regardless of whether the person had any intent to commit a crime or was even aware of the law. In other words, gun laws are “zero tolerance”—good intentions do not usually matter.

The NFA is a particularly technical law. It is imperative for an owner of NFA firearms, and any trustees of an NFA trust, to understand and comply with the law. The client’s family, friends, and heirs are probably not as familiar with these laws as the client is. They may be completely ignorant of them. A trust can give instructions to the trustees to fulfill their legal duties regarding NFA firearms. Without this information the client’s heirs and executors may not realize they need to take special care with NFA firearms. The client (and the client’s lawyer) should do everything possible to make sure this gift does not result in them doing hard time in the penitentiary. An NFA trust can and should be a tool to educate the trustees and keep them out of trouble.

F. Changes to the Law

Most people who sign a will (or trust) take it home, put it in their files, and forget about it. The average layperson does not follow changes in the law. Trusts are often in existence for many years, and for that reason the law governing them is stable.

Guns are a very political subject. Machine guns, suppressors, destructive devices, and similar items are even more touchy. The law governing these items can change with the blink of an eye, or more accurately, with a single election. Trustees

absolutely must stay informed about state and federal law and be prepared to move quickly to stay out of trouble should the law change.

VII. Losing Form 4; Problems with NFRTR

The ATF maintains a national database of NFA firearms known as the National Firearms Registration and Transfer Record (NFRTR), which is required by 26 U.S.C. § 5841. The NFA requires owners of NFA firearms to keep the original stamped Form 4 and to present it to the ATF on request. *See* 26 U.S.C. § 5841(e). Apart from this legal requirement, there are practical reasons to keep the paperwork safe.

The NFRTR is notoriously inaccurate and incomplete. In 1996, an ATF training video was publicized in which an ATF official said that the agency's officials always testify that the database is 100 percent accurate, but he acknowledged "that may not be 100 percent true." He indicated that the error rate might have been as high as 50 percent when he took over but claimed that it had been reduced to approximately 8 percent. The video may be viewed at <http://armsandthelaw.com/Static/rollcall.htm>.

After the video came out, the Department of Justice distributed a packet to all U.S. Attorneys' offices, requiring disclosure of the problems in all NFA prosecutions. *See* U.S. Department of Justice, Criminal Resource Manual 1436 (Oct. 1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01436.htm. The NFRTR was subsequently investigated by the Inspector General and was the subject of Congressional hearings. The ATF also ran into problems in court as a result of the inaccuracies.

Owners of NFA firearms have run into significant trouble when their forms were lost or destroyed and the NFRTR erroneously showed no record of the registration of their NFA firearms. It is common knowledge in the NFA community that you do not rely on the NFRTR for proof that your NFA firearm is properly registered. The stamped Form 4 is the only reliable proof that an NFA firearm is properly registered in the owner's name. If the owner loses his Form 4, he could be prosecuted and convicted of possessing an unregistered NFA firearm. I suggest keeping a copy of the stamped Form 4 with the NFA firearm and keeping the original in a safe, secure, fire-proof place like a gun safe.

VIII. Drafting NFA Trusts

An NFA trust must be designed from the ground up to be legally valid and to provide the maximum benefit to the client. It should also be as thorough and flexible as possible. The attorney should be willing to customize the trust forms to meet the client's particular needs.

A. Conduct Adequate Consultation with Client

At a minimum, I believe the attorney should obtain the following information from the client:

1. *Settlor:* Obtain the full name, address, phone number, and other contact information such as e-mail address of the settlor (the person forming the trust, normally the client). If the client is married, his spouse should normally be a settlor as well. The attorney should also to gain an understanding of the client's knowledge of guns, firearms laws, and the NFA. Some nonlawyers know more than lawyers about these subjects. Some people know nothing at all about them.
2. *Trustees:* The client should name additional persons as trustees or successor trustees in case he dies or is incapacitated. If the settlor wants to give other persons access to the NFA firearms, he needs to name them as trustees as well. What line of succession does the client want? Who will serve as trustees? Will they all begin serving immediately, or will some become trustees only in the event of vacancies (successor trustees)? What happens if all named trustees, including successors, die or become disabled? The client should also obtain the full name, address, phone number, and other contact information for each trustee. Normally the settlor will also serve as one of the initial trustees. The attorney should ask some additional questions, in particular about the trustees' knowledge of guns and gun laws. Do they care about guns? Do they know anything about NFA firearms? Can they be trusted to follow the law? Are they responsible and mature enough to handle this responsibility?
3. *Beneficiaries:* What does the client want to happen to the trust property once the trust terminates? Should it be sold, or should it be transferred to a friend or family member who has an interest in NFA firearms? The attorney should also obtain the full name, address, phone number, and other contact information for each beneficiary, in addition to the same information required regarding trustees.
4. *Trust property:* Obtain a general description of each NFA firearm and any other property to be transferred to the trust.
5. *Transferor:* Obtain the name and contact information for the transferor. Normally this will be the dealer selling the items, but in some cases a person might wish to transfer individually owned items to a trust or accept a transfer from someone else.
6. *Criminal history:* It is essential to determine if any of the possible settlors, trustees, or beneficiaries are prohibited persons. Some people may not be willing to disclose this information truthfully, so it may be advisable to run some form of background check.

7. *Control:* What degree of control should the other trustees (other than the settlor-trustee) have? What happens if there is a disagreement among the trustees?
8. *Estate planning information:* A trust is an estate planning document. The attorney should obtain general information from the client about his estate, debts, net worth, plans for disposing of his property, and any special estate planning considerations. What are the client's broader estate planning goals? Does the client already have an estate plan in place or any estate planning documents such as a will or trust? If so, the attorney should review it to make sure there are no conflicts with the terms of the NFA trust. Will the NFA trust affect the existing estate plan? Asking these questions may also result in additional business, if the client desires a complete estate planning package.

B. Consider Client's Overall Situation and General Estate Planning Needs

An NFA trust is an estate planning document that is adapted to a specific purpose. Do not forget to address your client's estate planning needs. The standard inter vivos trust (and therefore the one I use as the basis for my NFA trust) is designed to be used as an estate planning document, conveying the settlor's assets after death to the persons chosen as beneficiaries. It also considers the fact that those persons may not be adults when this occurs.

C. Start with Standard Form

I suggest that you begin with the standard revocable living trust form. This form has been drafted by people who draft trusts and other estate planning documents for a living and has been tested in court over the years. It is thorough and versatile and covers a lot of eventualities.

D. Draft a Valid Trust

As noted above, it is imperative to draft a valid trust. An invalid trust could render your client a convicted felon.

Persons unfamiliar with trusts (including lawyers) may believe they can simply create a trust naming the settlor as the sole trustee and sole beneficiary and be fully protected. This is not the case. Here are some suggestions for drafting a valid trust:

1. *Settlers:* Normally the client will be the settlor. If the settlor is married, the spouse should normally also be a settlor. This eliminates the possibility

of subsequent claims that the spouse lacked authority over the property. It also reduces the chance of any subsequent challenge by the other spouse, for instance of excessive gifts, or fraud on the community.

2. *Revocability:* Normally an NFA trust should be revocable. That allows the settlor to amend the trust if needed, which can be important should circumstances change. This also allows the settlor to revoke the trust and retake ownership of the trust property. Of course the trust must provide that it cannot be revoked until Form 4 is submitted and approved. Making a trust revocable can also have tax consequences, but this should not be a problem because most NFA trusts will never generate any income, unless the trust sells its assets and makes a profit.
3. *Trustees:* Make sure the client appoints trustees he can trust. Normally the client will want to be appointed as a trustee to retain some control over the trust and trust property.
4. *Beneficiaries:* To avoid merger problems, do not appoint one person as the sole trustee and the sole beneficiary. In other words, appoint at least one beneficiary who is not a settlor. The settlor can be one of the beneficiaries. This could be important if the trustee is disabled, because he may need financial support from the trust. Assuming your client wants to be a beneficiary, there is probably no way to avoid the self-settlor rule. But you should advise your client that the property he donates to the trust will probably be subject to claims of his creditors. Make special provisions if any beneficiary is a prohibited person. Normally this will mean selling the NFA firearms before distributing trust property to that beneficiary.
5. *Spendthrift trust:* Normally you should make an NFA trust a spendthrift trust. This reduces the possibility that a beneficiary could get into trouble and assign the trust property to a third party.
6. *Partial invalidity:* Include a clause stating that if any provision in the trust is found to be invalid, the remainder of the trust will remain in full force and effect.
7. *Powers of trustees:* One motive for forming an NFA trust is to give the trustees access to NFA firearms. The normal motive of relying on the trustees' judgment to administer the trust property is less important than normal. Therefore the settlor of an NFA trust will want to retain maximum control over the trust and property. Normally a settlor who holds on to too much power may run afoul of the tax laws. But in the case of an NFA trust, which will probably never generate income, these considerations may not matter. For this reason you should consider giving the settlor-trustee as much power as possible compared to the power given to the other trustees. This could be done through an explicit allocation of decision-making power or by requiring a supermajority for certain decisions.

8. *Signatures:* Make sure the trust is signed by each settlor and trustee (or have trustees sign a document accepting appointment as such, representing that they have read the trust and agreeing to comply with the terms).

E. Customize Trust for Intended Purpose

An NFA trust should have numerous provisions that are drafted specifically for owning and possessing NFA firearms.

In many cases, the attorney drafting a trust will meet with the client (usually a settlor and a trustee) but will have no chance to meet any of the other trustees or beneficiaries. That makes it difficult or impossible to gauge their knowledge of guns and gun laws and to advise them regarding the law. For these reasons and more, the trust form should include repeated warnings that all transfers of NFA firearms require submission and approval of Form 4 and payment of the transfer tax. It should also include repeated, redundant, strident warnings that prohibited persons cannot possess firearms, ammunition, or components, including NFA firearms.

An NFA trust should generally encourage the trustees to obtain additional training regarding the safe use and storage of firearms and the legal requirements of owning guns and NFA firearms. If the trust has assets available other than the NFA firearms themselves, the trust may provide funding for such training. It can also pay for legal advice to the trustees regarding trust matters.

Remember that most clients will not want the trust to require sale of any NFA firearms to fund training or anything else unless it is absolutely necessary. In fact, most clients who go to the expense and trouble of obtaining machine guns and similar items will consider them family heirlooms. For that reason, my standard trust form requires the trustees to preserve NFA firearms unless it is impossible or unless the settlor-trustee specifically authorizes their sale.

F. Limit Civil Liability as Much as Possible

The forms are designed to protect the client and the other people involved with the trust from civil liability. It absolves settlors who are also trustees from most civil liability. It may include a provision requiring the trust to indemnify any trustee for good-faith actions, similar to the ones which are commonplace in corporate law, although this could result in the forced sale of the NFA firearms.

G. Limit Criminal Exposure as Much as Possible

The attorney's paramount goal in drafting an NFA trust should be to protect the client and friends and family from criminal prosecution. For that reason, the trust should be drafted to prevent the trustees from taking actions that could violate the

NFA (such as transferring an NFA firearm without submission and approval of Form 4 or allowing a prohibited person to have possession of NFA firearms). It should also be drafted to remind the client and to educate the other principals about the gun laws, especially the laws governing NFA firearms and those applying to prohibited persons.

The forms should also admonish the reader that those laws may change and it is their duty to stay informed of those changes.

H. Maximize Client's Control of Trust and Assets

The client will likely choose an NFA trust in part to allow the other trustees access to the NFA firearms. In most occasions the client will be the settlor and will also serve as a trustee. Because the client normally pays for the NFA firearms, he will want to maintain control over them. Therefore, the trust should give the settlor-trustee control over disposition of the items, and it should explicitly prohibit any trustee from selling any NFA firearm without the settlor-trustee's permission.

I. Determine What Assets Trust Will Hold

An NFA trust can own assets other than just guns, including land, insurance proceeds, and investments, although that is not its primary purpose. I do not limit my NFA trust to owning NFA firearms, but you can do so if you think it is advisable. My approach is to make sure the client is fully informed about the advantages and disadvantages of transferring other items to the trust, then to let the client make the decision.

I do not recommend placing unrelated items (homestead, financial assets, and so on.) in an NFA trust. This could conceivably put them at risk of civil liability or forfeiture, should the client or trust ever have problems with the authorities.

I recommend that clients also transfer accessories that are specific to NFA firearms to the trust. Items that are not specific to those firearms should be kept separate. My general rule is that an item that is only usable with the NFA firearm should be transferred into the trust. I do not recommend placing other firearms, ammunition, or accessories into an NFA trust. For instance, magazines that may be used with an M-16 or AR-15 should not be transferred to the trust. Links used to create belts of .50 BMG ammo for use in an M-2 machine gun should be transferred into the trust along with the firearm itself.

The trust can own any number of NFA firearms. There is no need to draft a separate trust to purchase additional items. This is a significant selling point—the client needs to know that once he forms one NFA trust, he locks in the advantages for all future NFA firearm purchases, as long as the law does not change.

J. Maximize Flexibility of Trust

In general, legal documents should provide maximum flexibility to the client. This is especially important if the document is going to be in effect for a long time. For that reason, an NFA trust should generally be revocable, which allows it to be modified or terminated while the client is still living.

Whenever a client appoints someone to manage his affairs, such as an attorney-in-fact (power of attorney), I always emphasize the need to designate someone trustworthy. If there is even a chance that the person cannot be trusted, then he should not give the person power over his affairs.

Assuming the client appoints only trustworthy persons to serve as trustees, I advise the client to make the powers of the trustees very broad. Remember, this document may be in place for many years. The trust should provide the trustees with the discretion to adjust for changed circumstances.

K. Provide Continuity

The trust should include numerous provisions to allow it to continue to exist as circumstances change. At a minimum it should include provisions for resignation, removal, and replacement of trustees and for appointment of additional trustees. It should allow more property to be added to the trust. It should also provide for disposition of the trust property should all the beneficiaries die, and this provision should be coordinated with the settlor's will if possible.

The client may choose to move, so the trust should allow the trustees to move the situs of the trust to another state. The trust should also allow the trustees to merge the trust with similar trusts, create additional trusts to divide the trust assets, and exercise other options to adapt to future circumstances that can be anticipated. The form should allow the client to engage in transactions between him personally and the trust. You may or may not want to allow other trustees the same option.

L. Maximize Privacy

Gun owners generally value their privacy. Owners of NFA firearms are even more sensitive about this issue. Privacy is discussed below in more detail, but at this point it should be obvious that a properly drafted NFA trust will preserve the settlor's privacy to the maximum extent possible. For instance, it should require documents relating to the trust to be filed of record only when required by law.

A trust may also provide that any resulting disputes will be resolved through arbitration (which the law deems a private matter) instead of a lawsuit (where the pleadings and other filings become public record).

The ATF does require a copy of the actual trust agreement to be filed when a trust applies for transfer of an NFA firearm, but most filings relating to NFA firearms are considered tax records and are therefore confidential. Accordingly, the ATF will have specific information regarding the trust and the NFA firearms it owns, but the state and the public should not have access to that information. That means that the existence of the trust, its specific terms, and the identity of the persons involved will generally be private.

M. Include Related Documents

1. Letter of Explanation

A client purchasing an NFA trust needs the equivalent of an owner's manual. Some of this can be included in the trust itself, but numerous matters need to be explained that do not belong in the trust. I do this in the form of a letter.

My letter is twelve pages long. I actually used it as the starting point for this chapter. This chapter contains most of the same information contained in the letter, but obviously the letter would be intended for a nonlawyer who would be a settlor and trustee.

If the client breaks the law because you failed to provide complete, correct advice, you could be responsible for him going to prison and being fined hundreds of thousands of dollars. If the client receives your letter and then fails to follow your advice, it will be much harder to hold you responsible for the resulting consequences. Therefore, the letter is the primary method of protecting the client and the attorney from future problems.

2. Appointment of Additional Trustee

At some point, the client will probably need a form to appoint additional trustees. I believe it is unfair to expect him to come back and pay an additional fee at that time, so I provide the appointment form along with the trust. I like to allow the client to choose whether to appoint the person to serve immediately (additional trustee) or only after the client dies or is incapacitated (successor trustee).

I also prefer to include a requirement for the possible trustee to represent that he is eligible to serve as a trustee and to promise to comply with the trust's terms before the client actually appoints him as a trustee. If there is later a problem with eligibility, this will allow the client to show that he did not knowingly allow a prohibited person to have possession of NFA firearms. It also provides the client with written proof that the person read the trust and agreed to perform the duties of trustee before actually being appointed. My form must be notarized, which requires the candidate to make these statements under oath. Only after the possible trustee has signed it and had it

notarized does the form allow the settlor or existing trustee to sign it, actually appointing the candidate as a trustee.

3. Assignment (to Add Property to Trust)

At some point, the client will probably want to transfer additional property to the trust. This could be other NFA firearms (which require submission and approval of Form 4), ammunition or accessories, or other assets unrelated to guns. Providing this form at the time the trust is drafted is an added value to the client and may prevent him from having to hire a lawyer in the future.

4. Declaration of Trust

A declaration of trust is basically a summary of the trust, providing a basic description without all the details. The ATF requires the actual trust document to be submitted with Form 4 and will not accept a declaration. A declaration of trust, however, may be useful in other situations where the client needs to provide some proof that the trust exists but does not wish to share the actual document.

IX. Alternatives to NFA Trusts

There are two major alternative methods of acquiring NFA firearms other than forming an NFA trust.

A. Individual Ownership

The client could have the NFA firearms transferred into his individual name. That would require the individual to go through the full application process, obtain the CLEO signature, provide fingerprints and passport photographs, and pay the transfer tax for each NFA firearm.

Individual owners have no continuity of ownership, unlike NFA trusts and NFA corporations. Upon the death of the individual, the executor or administrator must submit Form 5 to have the items transferred into the heirs' names. The individual should take steps to warn his executor or administrator of the special requirements pertaining to NFA firearms. Of course, the transfer is tax-free.

Individual owners cannot allow other persons to have access to their NFA firearms.

B. Corporation or Other Business Entity

The client may also choose to form a corporation, limited liability company, or other business entity to own the NFA firearms. There would be costs involved, but they would not be excessive. Texas charges a state filing fee of \$300, plus the client would have to pay an attorney to draft the corporate documents. The entity may also have to file state and federal tax returns.

The effects of forming an NFA corporation are similar to those involved with an NFA trust. The officers and directors of the corporation can legally have possession of the NFA firearms. Like applications for NFA trusts, corporate applications can be processed faster and do not require fingerprints, photographs, or CLEO approval. The corporate documents can also be drafted so they alert successors that there are special requirements for lawfully owning NFA firearms.

The biggest advantage of a corporation or similar entity over a trust is limited liability. The shareholders, officers, and directors of an NFA corporation would enjoy the same protection from civil liability that applies to ordinary corporations. Of course, this covers only civil liability, not criminal responsibility, and there are situations where the protections might not apply. Still, limited liability from civil claims is a significant advantage, especially when automatic weapons or similar items are involved.

Most business entities can be structured so their existence is perpetual. For this reason, business entities enjoy the advantage of continuity just as a trust does. In other words, the entity (trust or business) continues to exist even if the principals (trustees, officers, or directors) die or are replaced.

Shares in a corporation or other business can generally be transferred without ATF approval. Business entities, therefore, enjoy the advantage of transferability just as a trust does. In other words, the principals (trustees or shareholders) can generally transfer ownership or control of the entity without triggering a transfer of the NFA firearms and requiring submission of another Form 4 and payment of the transfer tax.

A business entity may also be appropriate if the client wants to designate a prohibited person or a minor as a beneficiary. For instance, a relative who is a convicted felon could be a beneficiary of a trust who receives the proceeds after the trust assets are liquidated. Such a person could also be involved in some capacities with a business entity. Of course this will not allow a person to possess the NFA firearms or any other firearms, ammunition, or components if he is a prohibited person. If any of the persons who might be involved with an NFA corporation are prohibited persons, the attorney will have to customize the terms to protect the client and other principals. The attorney must ask this question of the client.

Texas requires corporations and other businesses to pay a franchise tax or business receipts tax. These taxes are usually based on income or profits, and there is a relatively high exemption, so an entity like an NFA corporation that does not generate income will probably not have to pay the tax. However, Texas does require a corpora-

tion to file a franchise tax report and a public information report even if there is no tax due. Failing to submit these documents each year will result in the loss of corporate privileges and eventually revocation of the corporate charter. This could happen if the officers and directors simply forget to file these documents or if the corporation moves and forgets to provide its current address.

One fact of life is that the organizers of corporations sometimes do not always complete and submit the required documents. In my litigation work, I frequently discover corporations that are “not in good standing” for this reason. Suspension of corporate privileges or revocation of the charter leaves the shareholders, officers, and directors without any protection from liability.

Corporations also generally have to file federal tax returns each year, which could result in some recurring costs if the officers pay a bookkeeper or accountant to prepare the returns.

State law also requires corporations to hold annual meetings and keep minutes. This can incur some costs to pay someone to prepare the minutes for those meetings. Of course, there is nothing preventing the client from preparing the franchise tax report, public information report, federal tax return, and annual minutes.

I believe an NFA corporation involves a significantly greater risk of problems than an NFA trust. If the client forms a trust and then fails to exercise due diligence, the trust will probably still be in existence. If the client forms a corporation and then fails to exercise due diligence, however, the state will eventually revoke the charter and the corporation will cease to exist. If the corporation loses its charter, the principals will have NFA firearms in their possession in violation of the law. Clients should consider using a corporation or other business entity to own NFA firearms only if they are prepared to take great care to meet all these requirements and keep the corporation in good standing.

X. Privacy

Gun owners are concerned about their privacy. They generally want to avoid public disclosure of the fact that they are gun owners, the types of guns they own, and where the guns are stored. People who own devices like machine guns and suppressors are particularly concerned about privacy. There are many reasons for gun owners to value their privacy. They do not want criminals to have a road map to their homes or their guns. They are also concerned, in some cases with good reason, that the government might use those lists to confiscate their guns.

Several recent events highlight the importance of privacy to gun owners. A newspaper in New York published a map showing the names and addresses of gun owners in parts of the state. It is a common occurrence to hear about governmental entities accidentally disclosing citizens' private information. The various bills proposed to establish state or national lists of guns or gun owners are a third example. The

bottom line is that gun owners should take every possible step to prevent governmental officials or the public from knowing they own NFA firearms.

A. Information That Must Be Disclosed to ATF

There is no way around having the federal government know who the owner of an NFA firearm is, what type of NFA firearms he owns, and where he lives. However, most filings relating to NFA firearms are considered tax records and are not available to the public. Under current law, a person could hide his individual identity from the government, but at least one of the other trustees would have to disclose his identity (on Form 4 as the principal of the trust and on Form 4473 as the person taking possession of the NFA firearm for the trust).

B. Trusts and Privacy

A trust is generally a private document. In Texas, there is no requirement to file the trust documents or register the trust with the state.

C. Corporations and Privacy

In contrast, a corporation or similar entity requires public disclosure of significant information. A corporation must provide additional information to the state. When the entity is formed, the organizer files a certificate of formation (also known as articles of incorporation or charter) with the Texas secretary of state. The certificate of formation must disclose the name and address of the incorporator (the person forming the corporation), the names and address of the initial directors (members of its board), the name of its registered agent (the person to notify if the corporation is sued), its registered address (where its corporate books will be kept), and a general description of the type of business in which it will engage.

Each year while in existence, the corporation is required to file a franchise tax report and provide a public information report including the names and addresses of the officers, directors, and members. The entity must also maintain a registered agent and registered office and notify the state if they change.

The certificate of formation and public information reports are public records. Copies of a corporation's governing documents can be accessed online, for a nominal fee, at Web sites like <https://direct.sos.state.tx.us/acct/acct-login.asp> or various commercial sites.

For example, access the following Web address: <https://mycpa.cpa.state.tx.us/coa/Index.html>. In the "Entity Name" field, type "HEALY LAW," and click the "Search by Name" button. This should produce one result, "HEALY LAW OFFICES, A PROFESSIONAL CORPORATION." Click on that link. You will then see the

entity name, its address, and the name and address of its registered agent, along with some other information. Click on the “Officers and Directors Information” button, and you can see the name and address of the director.

If you form a corporation, the same information regarding that corporation would be available online. The certificate of formation, any amended versions, changes of registered agent, changes of address, the information provided in the public information report, and some other documents would also be available to the public.

D. Practice Notes

From a privacy standpoint, a trust is clearly superior to a business entity. If I were forming a corporation to own NFA firearms, I would choose a name that does not involve firearms, state the purpose as “transacting any lawful business,” and make every effort not to publicize the address where the guns would be kept. You do not want to give the bad guys directions to your gun safe. The law may or may not require you to disclose that address in a public record. For instance, Tex. Bus. Orgs. Code § 3.005(a) requires the certificate of formation of a for-profit entity like a corporation to include the “registered address,” which is the location where the corporate documents must be kept. There is no requirement that this be the same as the principal place of business. I would also list my address in the public information reports as a P.O. box or use a business address.

You might also consider paying a company to serve as your corporation’s registered agent. That would allow you to avoid posting your address online.

No matter how careful the client is, a criminal may discover his name and possibly that he owns NFA firearms. With some basic information, it is a fairly straightforward matter to discover his address and other information from online sources. These include online telephone books, similar sources like Switchboard, real property or appraisal district records like those available on TexasCAD.com, court records maintained by governmental entities, employers’ Web sites, and social networking sites like Facebook. There are also companies like PublicData.com that compile and resell public records. These include information on driver’s licenses, professional licenses, voter registration, vehicle and aircraft registration, civil lawsuits, real property records, and other records. It is becoming more and more difficult to maintain any semblance of privacy. The fact that privacy might be compromised is no reason to ignore privacy entirely.

XI. Recent Developments

A. Proposed ATF Regulation 41P

On August 29, 2013, President Obama announced that he would introduce a federal rule requiring “responsible persons” of firearms trusts and businesses to submit photographs and fingerprints and undergo background checks. Below is some background information on the proposed rule:

1. *Administration announces new gun control measures, targets military surplus imports*, FoxNews.com (Aug. 29, 2013), <http://www.foxnews.com/politics/2013/08/29/obama-announces-new-gun-control-measures-targets-military-surplus-imports/>.
2. Julian Hattem, *White House eyes ‘gun trust’ loophole*, TheHill.com (Aug. 21, 2013, 7:42pm), <http://thehill.com/regulation/pending-regs/318133-white-house-reviewing-draft-gun-control-rule>.
3. Press Release, The White House, *FACT SHEET: New Executive Actions to Reduce Gun Violence* (Aug. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence> (White House Press Release).
4. Office of Information and Regulatory Affairs, View Rule, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=1140-AA43> (description) (Reginfo.gov); Federal Register, Proposed Rule, <https://www.federalregister.gov/articles/2013/09/09/2013-21661/machine-guns-destructive-devices-and-certain-other-firearms-background-checks-for-responsible> (summary).
5. Docket Folder Summary, Regulations.gov, <http://www.regulations.gov/#!docketDetail;D=ATF-2013-0001> (with comments and other information).
6. Bureau of Alcohol, Tobacco, Firearms and Explosives, Notice of Proposed Rulemaking (Aug. 29, 2013), available at <https://www.atf.gov/sites/default/files/assets/inside-atf/2013/082913-wash-machine-guns-destructive-devices-and-certain-other-firearms.pdf>.

The proposed rule will apply to only NFA firearms, not to transfers of ordinary rifles, pistols, and shotguns. The rule would require the application to be signed by the CLEO but would eliminate some of the certifications made by the CLEO by signing the form.

The proposed rule does have one good feature. It would create an official rule allowing executors or other personal representatives to possess a decedent’s firearms while the estate is pending. Currently, the ATF gives executors a reasonable time to transfer them to the beneficiaries, but this is not incorporated into any statute or rule.

1. Proposed Rule Not Yet Adopted

The ATF issued its Notice of Proposed Rulemaking on August 29, 2013. The rule was subject to a ninety-day comment period, which ended December 9, 2013. At the end of that period, the ATF had received 9,479 comments, which were overwhelmingly against the proposal. The law requires the ATF to review each comment before finalizing the rule, which is apparently causing some problems. The initial notice stated that the rule was intended to be finalized and become effective in June 2014. The ATF subsequently moved that date to January 2015. As of August 25, 2014, the Office of Information and Regulatory Affairs had not specified a date when the regulation would be made effective. *See* Reginfo.gov (look under “Timetable” for “Final Action”). If your practice involves drafting NFA trusts, you must check this frequently so you know the rule’s status.

2. Problems with the Rule

The biggest problem with this proposal is that it requires a CLEO signature on every Form 1 and Form 4. *See* Notice of Proposed Rulemaking, at 14. Currently, CLEO approval is required for only transfers to individuals but not to trusts or business entities. The only way to own NFA firearms if you live in an area where your CLEO refuses to sign Form 4 is to form an NFA trust.

Form 4 is written so that, by signing the form, the CLEO is certifying that he has no information that the NFA firearm will be used illegally or that possession by the transferee would violate the law. In its Notice of Proposed Rulemaking, the ATF asserts that CLEOs refuse to sign the form only because they are afraid they will be held liable for crimes or other consequences if they make that certification. If that’s the case and the form is revised so those certifications are removed, CLEOs will have no reason to refuse to sign the form. If the ATF’s assertion is correct, requiring CLEO signatures on all Forms 4, including those where a trust or business entity is the applicant, will not cause any problems. If, however, CLEOs refuse to sign the form because they do not believe civilians should own machine guns or suppressors, or because they are against gun ownership in general, this rule will prevent many people from obtaining NFA firearms at all. Depending on your point of view, this change will either be a very good thing or a very bad thing. It is beyond dispute that this will result in vastly different treatment of people in different parts of the country, and even different parts of the state, based solely on the attitudes of their local law enforcement officers.

Also keep in mind that there is no incentive for CLEOs to sign the forms. If the CLEO refuses to do so, under the new rule, the ATF will reject the application. That gives local law enforcement the absolute power to deny individuals in their areas the right to possess NFA firearms. A trust would no longer bypass this requirement. If gun ownership is a privilege granted at the discretion of the government, this is not a prob-

lem. If it is a right, it should not be allowed to exist only at the discretion of the government.

This rule change could cause major problems for corporations. The composition of boards of directors and officers routinely changes from year to year. If the requirement applies to any changes of officers or directors, any corporation owning guns will have to obtain ATF approval before seating new officers or directors. If the government treats a change of trustee or of corporate officials as a transfer, each corporation will have to submit a Form 4, pay the transfer tax, and wait for approval whenever it seats a new officer or director. Approval of a Form 4 takes six months or so. It could take even longer if this new requirement forces trusts and business entities to file a Form 4 whenever there is such a change.

The White House press release stated, “felons, domestic abusers, and others prohibited from having guns can easily evade the required background check and gain access to machine guns or other particularly dangerous weapons by registering the weapon to a trust or corporation.” *See* White House Press Release. This statement is misleading because it ignores several significant facts. First, mere possession of a firearm or ammunition by a prohibited person is a felony. Second, the law still requires the person accepting delivery of the item on behalf of a trust or business entity to complete a Form 4473 and submit to a background check through NICS. Third, the person taking delivery of the item could be committing two federal felonies, one by giving it to a prohibited person and another by misrepresenting the identity of the person who would receive the item.

I have been unable to locate a single reported case where a person was prosecuted for using a trust or business entity to obtain an NFA firearm. In its Notice of Proposed Rulemaking, the ATF identified three occurrences where a prohibited person was involved with a trust or business attempting to obtain an NFA firearm. In none of them did the transfer occur, and there is no allegation that a crime was actually committed in any instance.

3. Possible Future Requirements

The proposed rule, as it now stands, would require fingerprints and photographs for only the initial trustees (and anyone else who has access to the items). The Notice of Proposed Rulemaking specifically states that the ATF is considering a future rule that would apply this requirement to all trustees and persons with access to the items, even those appointed after the trust is formed and after Form 4 is approved.

As long as the government requires fingerprints, photographs, and background checks for only initial applications, the new requirement will only slightly increase the amount of trouble involved in that process. If the government starts requiring fingerprints, photographs, background checks, and CLEO approval for any changes of trustees or beneficiaries, it will significantly increase the regulatory burden and legal risks of gun trusts.

4. If Rule Is Adopted, Would NFA Trusts Still Be Useful?

My answer is “Yes,” for the following reasons:

- NFA trusts would still allow friends and family members to become trustees and possess the NFA firearms without fearing prosecution. This is perhaps the single biggest advantage of an NFA trust.
- NFA trusts would still make it easier to transfer NFA firearms (appointing different trustees to transfer control of the trust instead of submitting a Form 4 and paying the tax for a transfer through the ATF).
- NFA trusts allow lawful transfer of control of NFA firearms without paying a transfer tax or waiting for another Form 4 to be processed (by appointing different trustees).
- NFA trusts will continue to confer the estate planning benefits of a trust, which are particularly useful in this context.

I am advising my clients that if they wish to use NFA trusts, they should submit their Forms 4 before this rule becomes effective. There is a good chance the ATF will process applications received before the effective date under the old rules and applications received after that date using the new rules. You want your application to be in the pile received before the effective date.

B. Electronic Filing

On July 10, 2013, the acting director of the ATF approved ATF Ruling 2013-2, which authorized the agency to accept Forms 1 and 4 (among others) electronically. This system was intended to bring the NFA section into the twenty-first century and shorten the wait time between an application’s filing and its return with ATF approval.

This e-filing system, “eForms,” is important to purchasers of NFA firearms and to the lawyers who represent them because as the wait time is reduced, more people purchase NFA firearms.

1. ATF Ruling 2013-2

The ATF ruling authorizing the eForms system may be accessed at <https://www.atf.gov/sites/default/files/assets/pdf-files/atf-ruling-2013-2.pdf>.

The system has two limitations. First, use of the site requires registration by a gun dealer (with one exception described below). Second, forms that include photographs or fingerprints cannot be e-filed. Because individual applicants are required to submit photographs and fingerprints, but trusts and other entities do not have to do so, the only transfer applications that may be e-filed are transfers from a dealer to a trust or other entity.

There is one circumstance where a nondealer can e-file an application. Nondealers are allowed to e-file Form 1 (an application to make an NFA firearm) if the appli-

cant is a trust or other entity. In other words, an application to make an NFA firearm and register it in the name of a trust may be e-filed.

As noted above, the ATF requires the entire trust document to be submitted with the application. When the application is e-filed, the trust must be scanned and submitted along with the application. The transfer tax must be paid using <https://pay.gov/public/home>, which also requires registration.

2. Technical Difficulties

The eForms system first came online on August 3, 2013. Since then, the ATF has had serious problems with the system, including unexplained crashes, problems with different browsers, and system freezes. The ATF advised that the site was not compatible with Google Chrome, but some NFA dealers reported that it worked with only that browser. On April 1, 2014, the ATF notified users that the problems were caused by multiple users submitting forms simultaneously using the same account.

On April 5, 2014, the ATF took the eForms system down and posted a message saying it would be unavailable “until further notice.” The ATF put the system back online on April 25, 2014, but for only Form 6 (to import firearms). The ATF began accepting Form 1 through eForms on June 24, 2014. As of August 25, 2014, the ATF is accepting Form 1, Forms 6 and 6a (both for use in importing NFA firearms), and Form 2 (for a business to manufacture or import a firearm). The ATF still does not accept Form 4 through the eForms system. There is some discussion of allowing Form 3 (transfers between dealers) to be filed electronically, but this will increase the risk of the system crashing.

3. Decreased Wait Times

In 2007 and 2008, it typically took one or two months for the ATF to process a paper application. According to NFATracker.com and the NFA dealers who spoke to me, the wait time gradually increased to around six months in 2012. In the months before e-filing, wait times had increased to ten to eleven months.

When the eForms system first came online, wait times for electronic filings were around five to six months. With paper forms, wait times were approximately three months longer (eight to nine months). While eForms was active, wait times decreased to a low of approximately three months before the technical difficulties began.

At the beginning of 2014, the NFA Branch of the ATF had a total of nine examiners to review applications for the entire country. In the first six months or so of 2014, they increased that number to fifteen, and it now stands at twenty-six. They may hire up to five additional examiners in the near future.

This hiring spurt allowed the ATF to decrease the backlog of applications from eighty-six thousand in February to a little more than fifty thousand in mid-July. This has decreased the average wait time by approximately one month. Apparently this is

the first time in years that the backlog has actually decreased. The ATF's announced goal is to drop the wait time to under six months.

As of August 25, 2014, it appears that the ATF is processing applications that were e-filed between March and early April 2014 and applications that were submitted on paper between November and December 2013. That means the current wait time for trust applications filed electronically is approximately five months, and the current wait time for trust forms filed in paper form is approximately nine to ten months. The wait time for individual applications (which can be filed using only a paper form) is approximately seven to nine months. Thanks to Dave Matheny of Silencer Shop in Austin, Texas, and NFATracker.com for most of this information.

Wait times for Form 3 (transfers between dealers) have also increased. Remember, a dealer can't submit a Form 4 for a customer until he has the NFA firearm in his possession, so he can include its serial number on the form. Therefore, the processing time for Form 3 affects customers because it directly adds to their wait times. One NFA dealer reports that before the eForms system, it took approximately one and one-half weeks for a Form 3 to be approved. Now it takes six to eight weeks. If the ATF resumes accepting Form 3 electronically, it will significantly decrease the total delay for a customer purchasing an NFA firearm.

Wait times can vary drastically. One NFA dealer reported to me that a Form 4 was returned to him in approximately nine months and another in approximately thirteen months. Both were submitted on the same day and for the same customer. His record wait time is approximately one and one-half years. On the other hand, Florida attorney David M. Goldman reported that one of his clients received his Form 1, approved, in one day. Dave Matheny reports that he received one Form 4 in thirty days. The best guess is that these are the result of some sort of mistake where forms are somehow moved out of order.

4. Future Improvements

Dave Matheny discussed the current status of the eForms system with me on August 25, 2014. He attended an industry roundtable conducted by the ATF on July 22, 2014, along with some of the highest-volume NFA dealers in the country. The ATF announced that it was working on "eForms 2.0" with another contractor. They intend to leave the current system in place but have no way to repair glitches. For that reason the ATF will probably not resume accepting Form 4 electronically until eForms 2.0 is up and running.

Another NFA dealer told me that an ATF employee told him over the phone that they expected to resume accepting Form 4 through the eForms system sometime in November.

The ATF hopes to have eForms 2.0 running sometime in the last quarter of 2014 but did not make any promises. The new contractor must go through the vetting pro-

cess before any actual work commences. Additional information regarding the roundtable is available at <http://www.silencershop.com/eforms-20-industry-roundtable/>.

The ATF also sent an e-mail to eForms subscribers discussing the measures the agency is taking. See Nick Leghorn, *ATF Adding More NFA Branch Staff, Reducing Backlog, Re-Designing eForms System. Again.* (Apr. 17, 2014), <http://www.thetruthaboutguns.com/2014/04/foghorn/atf-adding-nfa-branch-staff-reducing-backlog-re-designing-eforms-system/>.

What does all this mean for future wait times? There are at least three variables. First, eForms 2.0 could come online, making it possible to file Form 4 electronically once again, and significantly speed up the process. Second, if the ATF keeps the large number of examiners on the job, the additional attention to applications should eventually eliminate the backlog and directly reduce wait times. Third, if Rule 41P is adopted, wait times will probably increase because each application will include multiple sets of fingerprints and photographs that need to be processed. If the difference in wait times between electronic and paper applications is any guide, Rule 41P will increase wait times by at least one month and probably more.

XII. Conclusion

I do not believe the cookie-cutter approach is appropriate for drafting gun trusts. I do not want to compete for this business with Quicken or LegalZoom or with a layperson who believes he can cobble together his own NFA trust from what he can find on the Internet. I am happy to meet with people who are considering these alternatives, but if a potential client can't see the benefits of having an experienced lawyer draft a custom document to protect him and his loved ones, then I will gladly forgo that project.

I spent countless hours researching the issues, learning new things over the years, and custom-drafting my basic form. I literally went through the inter vivos trust form letter by letter and modified the form in all respects to fulfill the specific purposes described above. Now when someone hires me to draft an NFA trust, I start with my basic form, but each NFA trust is a custom document drafted to meet the specific client's needs. I meet with each client, in person unless that is not practical for the client, and I spend whatever time it takes to explain the process and obtain the necessary information. Once the trust is drafted, I normally meet with the client to answer any additional questions.

Drafting a document may be a routine thing for lawyers, but when a mistake could land your client or his loved ones in federal prison for many years, it deserves your undivided attention. You should devote an appropriate amount of time to it and charge an appropriate fee for your work. Anything less is a serious disservice to your clients.

CHAPTER 3

The Who, What, and How of Federal Firearms Law

John B. Ross and Myrna G. Montemayor

I. Introduction

This chapter illuminates federal enforcement issues by grouping and analyzing relevant firearms provisions under three categories of violations: prohibited persons, prohibited firearms, and prohibited conduct—the “who, what, and how” of federal firearms law.

II. Prohibited Persons

A. Generally

Federal law makes it illegal for certain categories of persons to possess firearms or ammunition. *See* 18 U.S.C. § 922(g), (n). Section 922(g) “prohibited persons” are felons, fugitives, drug addicts, mental defectives, illegal aliens, dishonorably discharged veterans, persons who have renounced their U.S. citizenship, persons subject to certain domestic violence restraining orders, and persons convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g). Section 922(g) violations are punishable by imprisonment for not more than ten years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(2). Firearms involved in section 922(g) violations are subject to seizure and forfeiture. 18 U.S.C. § 924(d). Significantly enhanced penalties apply to section 922(g) defendants with three or more convictions for a serious drug offense or violent felony. 18 U.S.C. § 924(e). Such defendants, known as “armed career criminals,” are discussed at part II.E. below.

B. Elements

The elements of a section 922(g) violation are as follows: (1) the defendant knowingly possessed the firearm or ammunition, (2) the defendant is a prohibited person, and (3) the possession of the firearm or ammunition was in the course of or affecting interstate commerce. *See, e.g., United States v. Villegas*, 494 F.3d 513, 514–15 (5th Cir. 2007).

1. Mens Rea

Section 922(g) violations require “knowing” possession. *See* 18 U.S.C. § 924(a)(2). *See also United States v. Schmidt*, 487 F.3d 253, 254 (5th Cir. 2007). The government must prove that the defendant knew he possessed a firearm. *Schmidt*, 487 F.3d at 254. The knowledge requirement applies only to possession. *Schmidt*, 487 F.3d at 254. It does not apply to the interstate commerce requirement or the defendant’s prohibited status. *Schmidt*, 487 F.3d at 254 (citing *United States v. Dancy*, 861 F.2d 77, 81–82 (5th Cir. 1988)).

2. Firearms or Ammunition

Section 922(g) applies to ammunition and firearms and broadly defines “firearm” to include any weapon, including a “starter gun,” that is designed or readily convertible to expel a projectile by an explosive. 18 U.S.C. § 921(a)(3)(A). The definition includes the frame or receiver of any such weapon as well as silencers and destructive devices. 18 U.S.C. § 921(a)(3)(B), (C). The definition does not include “antique firearms.” 18 U.S.C. § 921(a)(3)(D). Inoperable firearms count. *See, e.g., United States v. Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993) (damaged hammer). In practice, however, the government will rarely prosecute a section 922(g) case without a firearm. That is because, as discussed below, the government must prove that the firearm traveled at some time in interstate commerce.

3. Actual and Constructive Possession

Possession may be actual or constructive. *See, e.g., United States v. Fields*, 72 F.3d 1200, 1212 (5th Cir. 1996). Actual possession requires direct physical control over the item possessed. Constructive possession requires dominion or control over the firearm, dominion or control over the place where the firearm is located, or ownership of the firearm. *Fields*, 72 F.3d at 1212. But if two or more persons jointly occupy the place where a firearm is found, mere dominion or control of that place is by itself insufficient to establish constructive possession. *Fields*, 72 F.3d at 1212. Evidence showing at least a plausible inference that the defendant had knowledge of and access to the weapon is necessary to establish constructive possession. *United States v. De*

Leon, 170 F.3d 494, 497 (5th Cir. 1999) (holding that “possession may be actual or constructive and may be proved by circumstantial evidence”).

4. Interstate Commerce

Section 922(g) requires the government to prove that the firearm or ammunition previously traveled in interstate or foreign commerce. *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996). There is no requirement that the firearm “substantially affect” interstate commerce. *Rawls*, 85 F.3d at 242. The government typically proves the interstate nexus through the testimony of a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) firearms expert who has examined the firearm and determined that it was manufactured in another state or country.

5. Defense Issues

It is well established that defendants have the right to admit or stipulate to a prior felony conviction for purposes of proof of felon status. *See, e.g., United States v. Hollis*, 506 F.3d 415, 419 (5th Cir. 2007) (citing *Old Chief v. United States*, 519 U.S. 172, 190–91 (1997)). Such a stipulation will generally prevent the government from offering incriminating evidence related to the prior conviction. *See Hollis*, 506 F.3d at 419.

Self-defense, necessity, or justification are potential affirmative defenses to section 922(g) prosecution. Accordingly, a defendant must present evidence of each element of the defense before it may be presented to the jury. *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998). A conviction cannot be overturned for failure to instruct the jury on a defense unless the requested but omitted instruction has an evidentiary basis in the record that would lead to acquittal. *United States v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996) (citing *United States v. Duvall*, 846 F.2d 966 (5th Cir. 1988)). The offense established by section 922(g) is a general intent crime requiring no proof of scienter. *United States v. Schmitt*, 748 F.2d 249, 250–52 (5th Cir. 1984)); *see also United States v. Frazier*, 983 F.2d 232, 232 (5th Cir. 1993). Thus, voluntary intoxication is not a defense to section 922(g) prosecution. *Frazier*, 983 F.2d at 232.

C. Common Prohibited Persons Cases

1. Section 922(g)(1)—Felons

Section 922(g)(1), which prohibits felons from possessing firearms, is very commonly charged. Section 922(g)(1) establishes a lifetime ban on possession of firearms by anyone “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1); *see also Villegas*, 494 F.3d 513, 514–15; *Dancy*, 861 F.2d at 81.

For purposes of section 922(g)(1), a “conviction” is one that is recognized as a conviction under the “law of the jurisdiction in which the proceedings were held.” 18 U.S.C. § 921(a)(20).

Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not possess firearms.

18 U.S.C. § 921(a)(20). Accordingly, under Texas law, successfully completed deferred-adjudication probation is not a conviction for purposes of section 922(g)(1).

2. Section 922(g)(5)—Illegal or Unlawful Aliens

Prohibited persons under this section fall into two categories: persons who are “illegally and unlawfully in the United States” and persons who have overstayed their nonimmigrant visa. 18 U.S.C. § 921(g)(5). Courts have made clear that the Constitution does not prohibit congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens. *See United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011). “Whatever else the term means or includes, the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States [and] section 922(g)(5) is constitutional under the Second Amendment.” *Portillo-Munoz*, 643 F.3d at 442. It is possible for persons who have entered the country illegally to adjust their unlawful status relative to firearm possession. In *United States v. Orellana*, the defendant was a citizen of El Salvador who entered the United States without inspection but subsequently applied for and was granted temporary protected status. In that case, the court held that the defendant was not clearly “illegally or unlawfully in the United States” and reversed his conviction under section 922(g)(5). *United States v. Orellana*, 405 F.3d 360, 365–66 (5th Cir. 2005); *but see United States v. Flores*, 404 F.3d 320, 326–27 (5th Cir. 2005) (defendant’s application for temporary protected status and receipt of temporary treatment benefits did not alter his unlawful status regarding firearm possession).

3. Section 922(n)—Person under Felony Indictment

Section 922(n) makes it unlawful for any person under indictment for a felony to receive, ship, or transport a firearm in interstate commerce. *See* 18 U.S.C. § 922(n). The operative term is “receive.” Section 922(n) does not prohibit possession of a firearm that was possessed before indictment. The section 922(n) prohibition applies equally to individuals serving felony deferred-adjudication probation in Texas. *See United States v. Valentine*, 401 F.3d 609, 615 (5th Cir. 2005) (defendant on deferred-adjudication probation for a felony charge in Texas was “under indictment” for purpose of section 922(n)). Section 922(n) violations are punishable by imprisonment for

not more than five years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(1)(D).

D. Other Prohibited Persons Cases

1. Section 922(g)(2)—Fugitives

Section 922(g)(2) makes it unlawful for any person who is a fugitive from justice to receive, ship, or transport a firearm in interstate commerce. *See* 18 U.S.C. § 922(g)(2). A “fugitive from justice” is “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” 18 U.S.C. § 921(a)(15). The government is not required to prove that the defendant knew of his legal status as a fugitive. *See, e.g., United States v. Ballentine*, 4 F.3d 504, 506 (7th Cir. 1993) (citing cases).

2. Section 922(g)(3)—Addicts and Unlawful Users

“Addicts” and “unlawful users” of controlled substances are prohibited from possessing firearms. 18 U.S.C. § 922(g)(3). An “addict” is a person “who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.” 21 U.S.C. § 802(1). Although the term “unlawful user” is not defined by statute, the Fifth Circuit has held that a person’s objective conduct confers “unlawful user” status within the meaning of section 922(g)(3). *See United States v. Patterson*, 431 F.3d 832, 836 (5th Cir. 2005). In *Patterson*, the defendant failed a urinalysis for marijuana usage, admitted to police that he regularly used marijuana, and told police that it would be hard for him to quit using marijuana. *Patterson*, 431 F.3d at 836. The court held that, under these circumstances, an ordinary person would understand that the defendant’s actions established him as an “unlawful user” of a controlled substance while in possession of a firearm. *Patterson*, 431 F.3d at 836. *See also United States v. Edwards*, 182 F.3d 333, 334–35 (5th Cir. 1999) (defendant was an “unlawful user” of a controlled substance where police found marijuana in his car during traffic stop, found baggie of marijuana in police car in which he had been sitting, and found marijuana and cocaine during search of his residence and where defendant admitted having used marijuana on daily basis for past two to three years).

3. Section 922(g)(4)—Mental Defectives

Persons who have been “adjudicated as a mental defective” or “committed to a mental institution” are prohibited from possessing firearms. 18 U.S.C. § 922(g)(4). The Fifth Circuit has affirmed the government’s important interest in prosecuting this

class of prohibited persons. See *United States v. Palmer*, 507 F.3d 300, 303–04 (5th Cir. 2007) (affirming trial court finding of important government interest in prosecution of firearm possession by person committed to mental institution). Although 27 C.F.R. § 478.11 defines the terms “adjudicated as a mental defective” and “committed to a mental institution,” application of section 922(g)(4) has been problematic. See, e.g., *United States v. Giardina*, 861 F.2d 1334, 1336–37 (5th Cir. 1988) (defendant’s involuntary hospitalization, pursuant to physician’s and coroner’s emergency certificates, did not constitute commitment to mental institution within meaning of section 922(g)(4)). As a practical matter, these defendants are often incompetent to stand trial, which sometimes leads to litigation over forced medication to restore competency. See *United States v. Rix*, 574 F. Supp. 2d 726 (S.D. Tex. 2008) (denying government’s motion to have defendant forcibly medicated to restore competency). Section 922(g)(4) does not appear to function well in practice.

4. Section 922(g)(8)—Domestic Violence Court Restraining Orders

Section 922(g)(8) prohibits possession of a firearm by any person subject to a court-ordered domestic violence restraining order, provided the restraining order meets certain requirements. The court order must have been issued after a hearing in which the defendant received actual notice and an opportunity to participate. See 18 U.S.C. § 922(g)(8)(A). “Actual notice” means that the hearing was “set for a particular time and place and the defendant must have received notice of that and thereafter the hearing must have been held at that time and place.” *United States v. Banks*, 339 F.3d 267, 273 (5th Cir. 2003) (quoting *United States v. Spruill*, 292 F.3d 207, 220 (5th Cir. 2002) (defendant appeared with counsel and consented to an agreed protective order). The order must have restrained the defendant from threatening conduct—such as harassing or stalking—that would place an “intimate partner” or their child in reasonable fear of bodily injury. See 18 U.S.C. § 922(g)(8)(B). Finally, the order must include a finding that the person is a credible threat to the physical safety of the intimate partner or explicitly prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury. See 18 U.S.C. § 922(g)(8)(C). The definition of “intimate partner” excludes noncohabitational boyfriends and girlfriends. See 18 U.S.C. § 921(a)(32). A defendant is not permitted to collaterally attack the validity of the underlying protective order during a section 922(g)(8) proceeding unless the underlying protective order is “so transparently invalid as to have only a frivolous pretense as to validity.” *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001); see also *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004) (holding that even though the factual basis for issuing the protective order was later proved to be false, there was still a valid protective order in effect at the time of the section 922(g)(8) violation).

5. Section 922(g)(9)—Misdemeanor Crimes of Domestic Violence

a. Generally

Section 922(g)(9) prohibits possession of a firearm by persons convicted of a “misdemeanor crime of domestic violence.” 18 U.S.C. § 922(g)(9). The law defines “misdemeanor crime of domestic violence” as a misdemeanor that has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, committed within a domestic relationship. Domestic relationships are defined by statute to include relationships between spouses, former spouses, parents, guardians, and similarly situated persons. *See* 18 U.S.C. § 921(a)(33)(A)(ii). By far the most problematic feature of the law has been the “use or attempted use of physical force” requirement.

b. Recent Development: *United States v. Castleman*

Before *United States v. Castleman*, 134 S.Ct. 1405 (2014), circuits were split as to what constitutes physical force for purposes of section 922(g)(9). In a sweeping decision, the Court found that section 922(g)(9) encompassed acts “that one might not characterize as ‘violent’ in a nondomestic context.” *Castleman*, 134 S.Ct. at 1411.

Castleman was charged with being a prohibited person under section 922(g)(9) and moved to dismiss his case, arguing that his prior Tennessee domestic violence conviction did not have, as an element, “the use of physical force.” *Castleman*, 134 S.Ct. at 1409. In affirming the district court, the Sixth Circuit applied the Supreme Court’s decision in *Johnson v. United States*, 559 U.S. 133 (2010), and held that because Castleman “could have been convicted for ‘caus[ing] a slight, nonserious, physical injury with conduct that cannot be described as violent,’” his crime did not qualify as a “misdemeanor crime of domestic violence.” *Castleman*, 134 S.Ct. at 1409–10.

The Supreme Court reversed and resolved the circuit split in favor of the government, finding that the Tennessee conviction qualified as a “misdemeanor crime of domestic violence.” The Court reasoned that Congress must have incorporated the common-law meaning of “force,” namely offensive touching, in the section 921(a)(33)(A) definition of a “misdemeanor crime of violence.” *Castleman*, 134 S.Ct. at 1410. The Supreme Court considered several studies regarding domestic violence and weapons and concluded that Congress enacted section 922(g)(9) to “close [a] dangerous loophole” in the gun control laws. *Castleman*, 134 S.Ct. at 1409.

Against this backdrop, the Court drew several conclusions. First, Congress created the statute to include misdemeanor crimes of domestic violence because domestic violence cases are generally prosecuted under assault and battery laws. *Castleman*, 134 S.Ct. at 1411. Second, the term “domestic violence” “is a term of art encompass-

ing acts that one might not characterize as ‘violent’ in a nondomestic context.” *Castleman*, 134 S.Ct. at 1411. Third, Congress grouped the “misdemeanor crime of domestic violence” statute with other statutes that disqualify addicts and nonimmigrants from gun ownership and those “whose conduct does not warrant” a designation as an “armed career criminal.” *Castleman*, 134 S.Ct. at 1412. Fourth, if a “misdemeanor crime of domestic violence” did not include typical assault or battery laws, then section 922(g)(9) would have been “inoperative in many states at the time of its enactment.” *Castleman*, 134 S.Ct. at 1413.

The implication for Texas practitioners is that the Texas misdemeanor assault statute *may* now qualify as a “misdemeanor crime of domestic violence” under section 922(g)(9). *But see United States v. Hagen*, 349 F. App’x 896 (5th Cir. 2009). The Texas misdemeanor assault statute is satisfied by proof of “bodily injury,” which includes “any impairment of physical condition.” *See* Tex. Penal Code §§ 1.07(a)(8), 22.01(a)(1). In *Hagen*, the Fifth Circuit followed *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2008), and held that the Texas assault statute was not a crime of violence within the meaning of section 922(g)(9), reasoning that the statute may be violated without the use of force. The Fifth Circuit has not ruled on a section 922(g)(9) case since the Supreme Court decided *Castleman*.

E. Major Sentencing Enhancement

1. 18 U.S.C. § 924(e)—Armed Career Criminal Act

a. Generally

The Armed Career Criminal Act (ACCA) significantly enhances the punishment range for section 922(g) defendants with three or more previous convictions for a violent felony or serious drug offense. *See* 18 U.S.C. § 924(e)(1); U.S. Sentencing Guidelines Manual (U.S.S.G.) § 4B1.4 (2014). Such defendants, known as “armed career criminals,” are subject to enhanced guidelines and imprisonment for a term of fifteen years to life. *See* 18 U.S.C. § 924(e)(1); U.S.S.G. § 4B1.4. The prior convictions must have different offense dates and must consist of violent felonies or serious drug offenses, or both. 18 U.S.C. § 924(e)(1). “Violent felony” means any crime punishable by imprisonment for more than one year; that has as an element the use, attempted use, or threatened use of physical force against another; or is burglary, arson, or extortion, involves the use of explosives, or involves other conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B). “Serious drug offense” means certain federal drug offenses with a statutory maximum of ten years or more imprisonment, or state offenses involving manufacturing, distributing, or possessing with intent to manufacture or distribute, with a statutory maximum of ten years or more imprisonment. 18 U.S.C. § 924(e)(2)(A). The guideline implementing this statutory provision is U.S.S.G. section 4B1.4.

b. Notice

Unlike other statutory sentencing enhancements, the ACCA does not require prosecutors to give formal notice of their intent to seek enhancement under the Act. *See, e.g., United States v. Howard*, 444 F.3d 326, 327 (5th Cir. 2006) (ACCA finding in presentence investigation report is adequate notice to defendant).

2. What Qualifies as Violent Felony?

a. U.S. Supreme Court Cases

The definition of “violent felony” for purposes of the ACCA has been the subject of an ongoing series of Supreme Court decisions. Following is an outline of the major cases.

Taylor v. United States, 495 U.S. 575 (1990), was the first major Supreme Court case instructing courts how to determine whether a particular prior offense is a “violent felony.” In *Taylor*, the Court considered how to determine whether a particular state conviction for burglary qualified as a burglary for ACCA purposes. In making this determination, the Court explained that courts should apply a “formal categorical approach,” looking to the elements of the statute under which the defendant was convicted, not to the facts of the particular defendant’s offense. *Taylor*, 495 U.S. at 600–01. This is because “the language of § 924(e) generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Taylor*, 495 U.S. at 600. However, the Court described an exception to this general rule: if the state statute is broader than the generic offense, courts could look to other records of the case to see if the jury determined that the defendant had actually committed the generic offense. *Taylor*, 495 U.S. at 602. The Court addressed this modified categorical approach in *Shepard v. United States*, 544 U.S. 13 (2005). In *Shepard*, the Court explained that this modified inquiry required courts to consider “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Shepard*, 544 U.S. at 26.

Recent Supreme Court cases have focused on the application of these principles on the third part of the ACCA’s “violent felony” definition, known as the residual clause. The residual clause is the part of the definition that follows the listed offenses, such as burglary. The residual clause provides that, in addition to the listed offenses, an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another” can be considered a “violent felony.” *See* 18 U.S.C. § 924(e)(2)(B)(ii).

In *Begay v. United States*, 553 U.S. 137, 144–45 (2008), the Supreme Court held that to qualify as a “violent felony” under the residual clause, the prior offense must be similar to the listed offenses in ways that are “purposeful, violent, and aggressive” in nature. In *Begay*, the Court concluded that DUI, a strict liability crime, did not qualify as a violent felony. The court reasoned that DUI is not associated with a likelihood of future violent, aggressive, and purposeful “armed career criminal” behavior. *Begay*, 553 U.S. at 144–45.

Most recently, the Court interpreted the phrase “physical force” as used in the ACCA’s “violent felony” definition in *Johnson v. United States*, 559 U.S. 133 (2010). *Johnson* held that in the context of “violent felony,” “physical force” means violent force, “capable of causing physical pain or injury to another.” *Johnson*, 559 U.S. at 140.

Much of the case law on how to determine what constitutes a “violent felony” under the ACCA also applies to determining what constitutes a “crime of violence” under U.S.S.G. section 4B1.2, and vice versa. The definition of “crime of violence” in section 4B1.2 is similar to the definition of “violent felony” in the ACCA, so courts have treated cases defining those terms accordingly. See *United States v. Serna*, 309 F.3d 859, 864 (5th Cir. 2002). An exhaustive survey of these cases is, however, beyond the scope of this chapter. Instead, the following discussion considers two recent Fifth Circuit ACCA decisions that are instructive on the Court’s methodology following *Taylor*, *Shepard*, and *Begay*.

b. Fifth Circuit Cases

In *United States v. Schmidt*, 623 F.3d 257, 265 (5th Cir. 2010), the Fifth Circuit held that theft of firearms from a licensed dealer was a crime of violence for ACCA purposes. In *Schmidt*, the court considered 18 U.S.C. § 922(u) in light of *Taylor* and *Begay*, and determined that section 922(u) qualified as a violent felony under the ACCA’s residual clause provision.

The residual clause defines a violent felony as one that “involves conduct that presents a serious potential risk of physical injury to another.” *Schmidt*, 623 F.3d at 262 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The apparent purpose of the residual clause is to include those offenses that indicate the offender is a violent person who is likely to harm others. *Schmidt*, 623 F.3d at 262 (citing *Begay*, 553 U.S. at 144–45). Following *Taylor*’s categorical approach, the court noted that the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. *Schmidt*, 623 F.3d at 263. The court concluded from plea documents that Schmidt was convicted of stealing guns from the premises of a licensed firearms dealer. *Schmidt*, 623 F.3d at 263. Examining this offense under *Begay*, the court concluded that it posed a serious threat of harm to another and that it was sufficiently similar to burglary. *Schmidt*, 623 F.3d at 264–65.

In *United States v. Gore*, 636 F.3d 728, 735 (5th Cir. 2011), the court similarly held that conspiracy to commit aggravated robbery was a crime of violence under the ACCA's residual clause provision. In *Gore*, the court applied the modified categorical approach, considered Gore's indictment for conspiracy to commit aggravated robbery, and concluded that it did not have any element of force against another. *Gore*, 636 F.3d at 732–33.

The court then followed *Begay*, finding that, although conspiracy to commit aggravated robbery did not have any element of force against another, it was a crime that presented a serious potential risk of physical injury to another. The court noted that the *agreement* to commit aggravated robbery presents a serious potential risk of injury even if it is agreed that a conspirator other than the defendant whose conviction is at issue would actually carry out the aggravated robbery. *Gore*, 636 F.3d at 738.

The court reasoned that the risk typically posed by the least culpable means of committing conspiracy to commit aggravated robbery under Texas law is that a victim will be confronted by the assaulter, thereby placing each other "at risk of imminent bodily injury or death." *Gore*, 636 F.3d at 739. The court concluded, therefore, that conspiracy to commit aggravated robbery was sufficiently similar to burglary and extortion. *Gore*, 636 F.3d at 739–40.

III. Prohibited Firearms

A. Title 18 Prohibited Firearms

1. Section 922(j)—Possession of Stolen Firearm or Ammunition

Section 922(j) makes it unlawful to possess a stolen firearm or ammunition. *See* 18 U.S.C. § 922(j). To obtain a section 922(j) conviction, the government must prove that the defendant knowingly possessed or received a stolen firearm or ammunition that had moved in interstate or foreign commerce. *See, e.g., United States v. Luna*, 165 F.3d 316, 319 (5th Cir. 1999). The defendant must have reasonable cause to know that the firearm or ammunition was stolen. *Luna*, 165 F.3d at 319. Section 922(j) violations are punishable by imprisonment for not more than ten years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(2).

2. Section 922(k)—Possession of Firearm with Obliterated Serial Number

Section 922(k) makes it unlawful to possess a firearm with an obliterated serial number. *See* 18 U.S.C. § 924(k). A conviction under this section requires proof of the

defendant's knowledge that the serial number was obliterated. *See, e.g., United States v. Johnson*, 381 F.3d 506, 508 (5th Cir. 2004). This knowledge can be tough for the government to prove beyond a reasonable doubt. In *Johnson*, the defendant admitted to "playing" with the gun several times. *Johnson*, 381 F.3d at 508. But the court concluded that there was no evidence that the defendant had an opportunity to investigate whether scratches on the gun obliterated the serial number. *Johnson*, 381 F.3d at 510. Section 922(k) violations are punishable by imprisonment for not more than five years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(1)(B).

3. Section 922(o)—Possession of Machine Gun

It is generally unlawful to possess a machine gun. *See* 18 U.S.C. § 922(o); 26 U.S.C. § 5861 (National Firearms Act, discussed below). The government must prove that the defendant had reasonable cause to know that his firearm was a machine gun. *See Staples v. United States*, 511 U.S. 600, 621 (1994). Section 921(a)(23) adopts the definition of machine gun from section 5845(b) of the National Firearms Act. Accordingly, a machine gun is "any weapon which shoots, is designed to shoot, or which can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 18 U.S.C. § 921(a)(23); 26 U.S.C. § 5845(b). A machine gun includes the frame or receiver of a machine gun and generally any parts designed or intended to convert a weapon into a machine gun. 18 U.S.C. § 921(a)(23); 26 U.S.C. § 5845(b). Where a section 922(o) prosecution is based on a "combination of parts," it may not matter whether the parts are found at the same or different locations in the defendant's home. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 516 (1992) (noting that machine gun parts need not be in any particular proximity to each other). Section 922(o) violations are punishable by imprisonment for not more than ten years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(2).

B. National Firearms Act Prohibited Firearms

The National Firearms Act of 1934 (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (codified at 26 U.S.C. §§ 5801–5872), is a taxing scheme that regulates the manufacture, sale, and transfer of certain "firearms," including machine guns, short-barreled weapons, silencers, and bombs. The NFA prohibits shotguns with a barrel less than eighteen inches; weapons made from a shotgun that are less than twenty-six inches or that have a barrel less than eighteen inches; rifles with a barrel less than sixteen inches; a weapon made from a rifle that is less than twenty-six inches or that has a barrel less than sixteen inches; machine guns; silencers; and destructive devices. 26 U.S.C. § 5845(a).

Section 5861(d), which makes it unlawful for any person to “receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record,” is the most commonly prosecuted NFA violation. *See* 26 U.S.C. § 5861(d). Under this section, the government must prove the following elements: (1) that the defendant knowingly possessed the firearm described in the indictment, (2) that the firearm was not registered to the defendant in the NFA’s Registration and Transfer Record, and (3) that the defendant “knew the features of his [weapon] that brought it within the scope of the Act.” *Staples v. United States*, 511 U.S. 600, 619 (1994). Violations of the NFA are punishable by imprisonment for not more than ten years, a fine not to exceed \$10,000, or both. 26 U.S.C. § 5871. Any firearm involved in an NFA violation is subject to seizure and forfeiture. *See* 26 U.S.C. § 5872(a).

IV. Prohibited Conduct

A. Possession in Furtherance of Crime of Violence or Drug Trafficking Crime

1. Section 924(c)

Section 924(c) makes it unlawful for any person to use or carry a firearm “during and in relation” to a federal crime of violence or drug trafficking crime. *See* 18 U.S.C. § 924(c)(1)(A). Several features of this statute make it heavily punitive. Section 924(c) establishes escalating minimum sentences of five, seven, and ten years, depending on whether a firearm is possessed, brandished, or discharged in violation of the statute. *See* 18 U.S.C. § 924(c)(1)(A). Second or subsequent section 924(c) violations carry minimum sentences of twenty-five years’ imprisonment. 18 U.S.C. § 924(c)(1)(C)(i). If the second violation involves a firearm equipped with a silencer, a machine gun, or a destructive device, the minimum penalty is life imprisonment. 18 U.S.C. § 924(c)(1)(C)(ii). Finally, the statute requires that any section 924(c) sentence be served consecutively to any other sentence. 18 U.S.C. § 924(c)(1)(D)(ii). Section 924(c) establishes enhanced minimum sentences for certain enumerated firearms, including firearms equipped with silencers, short-barreled firearms, and destructive devices. *See* 18 U.S.C. § 924(c)(1)(B).

2. Elements

The elements of a section 924(c) violation are that, (1) the defendant committed a crime of violence or drug trafficking crime that may be prosecuted in a court of the United States, (2) the defendant knowingly used or carried a firearm during the crime of violence or drug trafficking crime or possessed a firearm in furtherance of such

crime, and (3) the carrying or use of the firearm facilitated the defendant's commission of the crime of violence or drug trafficking crime. *See, e.g., United States v. Ramos*, 537 F.3d 439, 457 (5th Cir. 2008).

a. Predicate Offenses

A violation of section 924(c) requires as a predicate the commission of a "crime of violence or a drug trafficking crime" for which the defendant may be prosecuted in a court of the United States. 18 U.S.C. § 924(c)(1)(A). The government must prove the requisite predicate beyond a reasonable doubt as an element of the section 924(c) offense. It is unnecessary that the defendant be convicted of, or even charged with, the underlying predicate offense. *See, e.g., United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir. 1993). Further, the government is not required to specify a particular section 924(c) predicate in an indictment. However, if the indictment specifies the predicate offense, the government is foreclosed from obtaining a conviction on the basis of a different predicate, because doing so has been held to constitute a constructive amendment of the indictment. *See United States v. Reyes*, 102 F.3d 1361, 1365 (5th Cir. 1996).

"Drug trafficking crime" is defined in section 924(c)(2) as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." 18 U.S.C. § 924(c)(2). "Crime of violence" is defined in section 924(c)(3) as any felony that—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

Not surprisingly, the "crime of violence" predicate generates more case law than the drug trafficking predicate, which is more clearly defined by the statute. In determining what constitutes a crime of violence for purposes of section 924(c), courts have applied a categorical approach. Under the categorical approach, courts focus on the elements of the offense and the nature of the crime as alleged in the indictment rather than the circumstances of the particular criminal activity. *See Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (considering whether an offense is a crime of violence under 18 U.S.C. § 16(b), which contains virtually identical language to 18 U.S.C. § 924(c)(3)). Accordingly, it is not important whether the risk inherent in the conduct actually occurs. *See, e.g., United States v. Jennings*, 195 F.3d 795 (5th Cir. 1999). The Fifth Circuit has found the crime of violence predicate to be satisfied by a variety of offenses. *See, e.g., United States v. Williams*, 343 F.3d 423, 434 (5th Cir. 2003) (deprivation of civil rights); *United States v. Golding*, 332 F.3d 838, 842 (5th Cir. 2003) (possession of machine gun a crime of violence for purpose of sentencing guidelines);

United States v. Jennings, 195 F.3d 795 (5th Cir. 1999) (possession of pipe bomb a crime of violence because it is a firearm singled out for particularized treatment in the NFA); *United States v. Martinez*, 28 F.3d 444, 445–46 (5th Cir. 1994) (Hobbs Act robbery); *United States v. Ivy*, 929 F.2d 147, 152 (5th Cir. 1991) (interstate kidnapping); *United States v. Contreras*, 950 F.2d 232, 241 (5th Cir. 1991) (witness tampering).

b. Uses or Carries

The Supreme Court has defined the terms “uses” and “carries” in section 924(c) cases. In *Bailey v. United States*, 516 U.S. 137 (1995), the Court narrowly interpreted “uses” to reach only situations where the firearm was actively employed during commission of the crime. Under *Bailey*, “uses” includes brandishing, displaying, bartering, striking with, and shooting but does not include mere storage near drugs or drug proceeds. *Bailey*, 516 U.S. at 148; see also *United States v. Tolliver*, 116 F.3d 120, 124 (5th Cir. 1997) (reaching for pistol when police stormed into bedroom constitutes “using” because of potential to facilitate drug distribution conspiracy by preventing arrest of coconspirators and forestalling seizure of instrumentalities). In *Muscarello v. United States*, 524 U.S. 125 (1998), the Supreme Court addressed the definition of “carries.” Under *Muscarello*, firearms stored in a locked glove compartment or trunk of an automobile are “carried” for purposes of section 924(c). *Muscarello*, 524 U.S. at 138. See also *United States v. Logan*, 135 F.3d 353, 355 (5th Cir. 1998) (pistol in jacket on backseat of automobile); but see *United States v. Sanders*, 157 F.3d 302, 306 (5th Cir. 1998) (facts insufficient to support conviction where firearm was lying under porch three feet from where defendant hid cache of cocaine, and there was no evidence that he ever moved it in any fashion).

c. Possesses in Furtherance

In 1998, Congress amended section 924(c) to include possession of a firearm “in furtherance” of a crime of violence or drug trafficking crime. Pub. L. No. 105-386, 112 Stat. 3469 (1998). Commonly known as the “Bailey Fix,” the “in furtherance” requirement was added to make it clear that the “mere presence” of a firearm at the scene of criminal activity is not sufficient to secure a conviction. See H.R. Rep. No. 105-344, at 11 (1997). In *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000), the Fifth Circuit interpreted “in furtherance” to mean furthering, advancing, or helping forward. In *Ceballos-Torres*, the Court noted several ways in which a firearm may advance a drug trafficking crime:

First, an accessible gun provides defense against anyone who may attempt to rob the trafficker of his drugs or drug profits. Second, possessing a gun, and letting everyone know that you are armed, lessens the chances that a robbery will even be attempted. Third, having a gun accessible during a transaction provides protection in case a drug deal in the apartment turns

sour. Fourth, the visible presence of a gun during the transaction may prevent the deal from turning sour in the first place. Fifth, having a gun may allow the drug trafficker to defend “turf,” areas of the street from which lower level dealers operate for the trafficker.

Ceballos-Torres, 218 F.3d at 412. The amendment to section 924(c) was manifestly an effort by Congress to “broaden the reach of the statute in the wake of the Supreme Court’s narrow construction” in *Bailey*. *Ceballos-Torres*, 218 F.3d at 413. The broadest category of such cases involves instances in which it can be inferred from the location of the firearm that it was employed to protect the defendant’s possession of drugs or the integrity of a drug enterprise. *Ceballos-Torres*, 218 F.3d at 414–15 (affirming “possession in furtherance” conviction because defendant’s weapon was loaded and easily accessible in his apartment and was possessed along with substantial amount of drugs and money). The court further observed that the “in furtherance” element can be inferred from factors such as the type of drug activity being conducted, the accessibility of the firearm, the type of firearm, whether the firearm was stolen, whether its possession was illegal, whether the firearm was loaded, the proximity of a firearm to drugs or drug profits, and the time and circumstances under which the firearm was found. *Ceballos-Torres*, 218 F.3d at 415.

d. Firearm

The firearm used or carried in violation of section 924(c)(1) must satisfy the definition of a “firearm” contained in section 921(a)(3). The Fifth Circuit has held that it is unnecessary that the firearm be loaded. *See, e.g., United States v. Coburn*, 876 F.2d 372, 375 (5th Cir. 1989). Further, it is not necessary that the firearm be produced as an exhibit at trial. All that is required is some evidence that would permit a reasonable jury to infer that the object carried by the defendant was a firearm. *See, e.g., United States v. Beverly*, 99 F.3d 570, 572 (3d Cir. 1996) (testimony of victim that defendant had threatened him with gun sufficient to justify conviction).

3. Major Sentencing Enhancement

The federal sentencing guidelines provide significantly enhanced sentences for violations of section 924(c) committed by career offenders. *See* U.S.S.G. § 4B1.1. For the career offender enhancement to apply, the following conditions must be met: (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense is a felony that is a crime of violence or controlled substance offense, and (3) the defendant has at least two prior felony convictions for a crime of violence or controlled substance offense. U.S.S.G. § 4B1.1(a). Section 924(c) is a crime of violence. So when a violator of section 924(c) is determined to be a career offender, the applicable guideline range is determined under U.S.S.G. section 4B1.1(c). By design, U.S.S.G. section 4B1.1 is heavily punitive. For example, a defendant convicted under

section 924(c) with two prior convictions for delivery of a controlled substance faces a guideline range from 360 months to life imprisonment. *See* U.S.S.G. § 4B1.1(c).

B. Firearms Transfer Offenses

1. Buyer's False Statements in Acquisition of Firearm

a. Generally

An individual purchasing a firearm from a Federal Firearms Licensee (FFL) must fill out an ATF Form 4473. *See* 18 U.S.C. §§ 922(s)(3), 923(g). The form asks for, among other information, the person's name, birth date, residence, and certification that he is not prohibited from possessing firearms. *See* 18 U.S.C. §§ 922(s)(3), 923(g). FFLs are required to keep the ATF Form 4473. *See* 18 U.S.C. § 923(g). A person who makes a false statement on the form has potentially violated sections 922(a)(6) and 924(a)(1)(A). The gravamen of the offense under both section 922(a)(6) and 924(a)(1)(A) is the false statement. Accordingly, a violation does not require that the defendant successfully acquire the firearm.

b. Straw Purchasers—Section 922(a)(6)

Section 922(a)(6) is commonly referred to as the “lying and buying” statute. *See* 18 U.S.C. § 922(a)(6). The elements of a section 922(a)(6) violation are as follows: (1) the defendant knowingly made a false statement to a licensed firearms dealer, (2) the false statement was made in connection with the acquisition or attempted acquisition of a firearm, and (3) the statement was intended or likely to deceive the dealer with respect to a fact material to the lawfulness of the sale of the firearm to the defendant. *See United States v. Harrelson*, 705 F.2d 733, 736 (5th Cir. 1983); *see also United States v. Chapman*, 7 F.3d 66, 67 (5th Cir. 1993). Section 922(a)(6) violations are punishable by imprisonment for not more than ten years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(2).

c. False Statement in Record—Section 924(a)(1)(A)

The elements of a section 924(a)(1)(A) violation are as follows: (1) the defendant knowingly made a false statement and (2) the statement pertained to information that the law requires an FFL to keep. *See* 18 U.S.C. § 924(a)(1)(A). Section 924(a)(1)(A) violations are punishable by imprisonment for not more than five years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. 18 U.S.C. § 924(a)(1).

2. Other Transfer Offenses

a. Section 922(d)

Section 922(d) makes it unlawful to knowingly transfer a firearm to any person prohibited under section 922(g). *See* 18 U.S.C. § 922(d). *See United States v. Murray*, 988 F.2d 518, 521–22 (5th Cir.1993) (government must prove that defendant knew or should have known of transferee’s prohibited status). A section 922(d) violation is punishable by imprisonment for not more than ten years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(2).

b. Section 924(h)

Section 924(h) makes it unlawful to knowingly transfer a firearm with knowledge that it will be used to commit a crime of violence or drug trafficking crime in violation of section 924(c). *See* 18 U.S.C. § 924(h). A section 922(h) violation is punishable by imprisonment for not more than ten years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(h).

C. Dealing in Firearms without License

Section 922(a)(1)(A) provides essentially that it is unlawful for any nonlicensed person to engage in the business of dealing in firearms. *See* 18 U.S.C. § 922(a)(1)(A). Section 921(a)(21) defines “engaged in the business” as a dealer in firearms “who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.” 18 U.S.C. § 921(a)(21)(D). The definition excludes one who “makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection.” 18 U.S.C. § 921(a)(21)(C). Further, section 921(a)(22) provides that “the term ‘with the principal objective of livelihood and profit’ means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.” 18 U.S.C. § 921(a)(22). Proof of profit, however, is not required. 18 U.S.C. § 921(a)(22). Section 922(a)(1)(A) offenses are punishable by imprisonment for not more than five years, a fine not to exceed \$250,000, or both, and supervised release of not more than three years. *See* 18 U.S.C. § 924(a)(1)(D).

D. Exporting Firearms without License

1. 22 U.S.C. § 2778(c)

The Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified at 22 U.S.C. §§ 2751–2799aa-2), prohibits the exportation of firearms, magazines, ammunition, and certain other national defense-related articles without a valid license. In Texas, firearms cases prosecuted under section 2778 involve the exportation, or attempted exportation, of firearms or ammunition across the border into Mexico. *See, e.g., United States v. Castro-Trevino*, 464 F.3d 536 (5th Cir. 2006) (affirming conviction for attempting to export 11,500 rounds of firearm ammunition to Mexico).

2. Elements

The elements of a section 2778(c) violation are as follows: the government must prove that the defendant (1) exported or attempted to export articles, (2) the articles were listed on the United States Munitions List at the time of export, (3) without obtaining a license or written approval from the State Department, (4) knowing that such license or approval was required to export these articles, and (5) with intent to violate the known legal duty. *See, e.g., United States v. Covarrubias*, 94 F.3d 172, 175 (5th Cir. 1996); *see also United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978).

3. Defenses

Because the offense requires specific intent, ignorance of the law is a defense. The government must show more than the defendant's mere awareness of the general unlawfulness of his conduct. *United States v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981). Also, not all firearms or related items are on the United States Munitions List. The items covered in the Munitions List are found in administrative regulations and include items that are not generally known to be controlled by the government. *See* 22 C.F.R. § 121.1. Changes often can be found on the State Department Web site, www.state.gov.

The United States Immigration and Customs Enforcement has posted signs at the bridges going into Mexico warning persons that it is illegal to export guns without a license. However, the signs are in English, and the government may not be permitted to rely on them against Spanish-speaking defendants. *See United States v. Markovic*, 911 F.2d 613 (11th Cir. 1990) (Yugoslavian seaman who did not understand English could not be convicted of attempting to export defense articles because warnings were in English).

4. Sentencing Issues

A section 2778 violation is punishable by imprisonment for not more than twenty years. U.S.S.G. section 2M5.2 applies to section 2778. *See* U.S.S.G. § 2M5.2. Under the guidelines, if the offense involves no more than two nonfully automatic small arms (rifles, handguns, or shotguns), and no more than five hundred rounds of ammunition for nonfully automatic small arms, the base offense level is 14. U.S.S.G. § 2M5.2(a)(2). If it is more than that, the base offense level is 26. U.S.S.G. § 2M5.2(a)(1).

V. Sentencing Guidelines

A. Section 2K2.1

The principal sentencing guideline for firearms offenses is U.S.S.G. section 2K2.1. The offense level under this guideline is determined by the type of firearm in question, the defendant's prior convictions for violent felonies or drug-related felonies, the defendant's status as a prohibited person, and certain other characteristics discussed below. The base offense level ranges from 6 to 26, depending on which of these characteristics are present. *See* U.S.S.G. § 2K2.1.

B. Definitions

1. Firearm

The guideline defines "firearm" as it is defined in 18 U.S.C. § 921(a)(3), which includes any weapon (including a starter gun) that will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; and any destructive device. *See* U.S.S.G. § 2K2.1 app. n.1. The definition does not include "antique firearms." Inoperable firearms count. *See, e.g., United States v. Ruiz*, 986 F.2d 905 (5th Cir. 1993) (damaged hammer).

2. Semiautomatic Firearm

A "semiautomatic firearm" is a firearm capable of accepting "a large capacity magazine." *See* U.S.S.G. § 2K2.1 app. n.2. "Large capacity magazine" means "a magazine or similar device that could accept more than 15 rounds of ammunition" that was found in close proximity to the firearm. U.S.S.G. § 2K2.1 app. n.2. The definition

does not include a “semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.” U.S.S.G. § 2K2.1 app. n.2.

3. Crime of Violence/Controlled Substance Offense

A “crime of violence” is a felony that includes as an element of the “use, attempt, or threat of physical force against another person” or “involves conduct that presents a serious potential risk of physical injury to another.” U.S.S.G. § 2K2.1 app. n.1 (cross-referencing U.S.S.G. § 4B1.2(a)). (Several offenses fit in the latter category, including burglary of a dwelling, arson, or extortion and offenses that involve the use of explosives.) *See* U.S.S.G. § 4B1.2(a)(2).

A “controlled substance offense” is a felony that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense the substance. U.S.S.G. § 2K2.1 app. n.1 (cross-referencing U.S.S.G. § 4B1.2(b)).

C. Specific Offense Characteristics

1. Multiple Firearms

If a defendant possesses three or more firearms, U.S.S.G. section 2K2.1(b)(1) increases the base offense by two, four, six, eight, or ten levels, depending on the number of firearms. *See* U.S.S.G. § 2K2.1(b)(1). This provision is subject to the rules of relevant conduct. *See* U.S.S.G. §§ 3D1.2(d), 1B1.3(a)(2). Thus, if a court finds by a preponderance of the evidence that the defendant possessed firearms other than those charged in the indictment, the additional firearms may count. Firearms lawfully possessed by the defendant are not included. U.S.S.G. § 2K2.1 app. n.5. Traditional rules of constructive possession apply when counting firearms. *See, e.g., United States v. Houston*, 364 F.3d 243 (5th Cir. 2004) (discussing constructive possession; determining that evidence did not support defendant’s constructive possession of firearm found in his wife’s purse).

2. Sporting Purposes or Collection

If the court finds that the defendant “possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition,” the base offense level may be reduced. U.S.S.G. § 2K2.1(b)(2). If the court finds that this provision applies, the offense level is reduced to six. The reduction does not apply, however, to base offense levels determined under subsections (a)(1)–(a)(5) (offense levels 18–26) of U.S.S.G.

section 2K2.1. The defendant carries the burden of proving the applicability of this reduction. *United States v. Keller*, 947 F.2d 739, 741 (5th Cir. 1991).

3. Stolen Firearms/Altered or Obliterated Serial Numbers

Stolen firearms carry a two-level enhancement. U.S.S.G. § 2K2.1(b)(4)(A). Firearms with altered or obliterated serial numbers carry a four-level enhancement. U.S.S.G. § 2K2.1(b)(4)(B). This subsection does not require knowledge by the defendant. *See United States v. Singleton*, 946 F.2d 23, 26–27 (5th Cir. 1991) (holding that lack of scienter requirement in stolen firearm enhancement is permissible); *United States v. Perez*, 585 F.3d 880, 883 (5th Cir. 2009) (holding that enhancement does not require defendant to know serial number is altered or obliterated). Also, this subsection does not require that the serial number be rendered unreadable. *See Perez*, 585 F.3d at 884–85 (affirming district court’s finding that serial number of firearm was materially changed even though alteration did not render it unreadable).

4. Trafficking

If the defendant trafficked in firearms, U.S.S.G. section 2K2.1(b)(5) provides for a four-level enhancement. U.S.S.G. § 2K2.1(b)(5). Trafficking requires two elements. Essentially, the defendant must have transferred two or more firearms to another individual with reason to believe that the firearms were being transferred to an individual either who could not legally possess them or who intended to use or dispose of them unlawfully. *See, e.g., United States v. Juarez*, 626 F.3d 246, 252–53 (5th Cir. 2010) (finding clandestine nature of firearms transactions and \$200 premium per firearm sufficient to infer that defendant knew or had reason to believe the weapons were intended for unlawful use and so justified enhancement). U.S.S.G. § 2K2.1(b)(5). If the defendant trafficked substantially more than twenty-five firearms, an upward departure may be warranted. U.S.S.G. section 2K2.1 app. n.13(C). *See, e.g., United States v. Hernandez*, 633 F.3d 370 (5th Cir.), *cert. denied*, 131 S. Ct. 3006 (2011) (affirming an upward departure pursuant to U.S.S.G. section 5K2.0 for trafficking 103 firearms to Mexican drug cartels). Also, if the defendant both possessed and trafficked three or more firearms, both the specific offense characteristics for the number of firearms and trafficking would apply. U.S.S.G. § 2K2.1 app. n.13(D).

5. Firearm or Ammunition Possessed in Connection with Another Offense

Under two circumstances, U.S.S.G. section 2K2.1(b)(6) provides for a four-level enhancement and minimum offense level 18. Most commonly, this enhancement comes into play when the defendant possessed a firearm or ammunition “in connection with” another offense. U.S.S.G. §§ 2K2.1(b)(6)(B), 2K2.1 app. n.14. The posses-

sion must have facilitated or had the potential of facilitating the offense. U.S.S.G. § 2K2.1 app. n.14(A). The enhancement applies equally to firearms and ammunition-only cases. When the other offense is a burglary, and the defendant stole a firearm during the burglary, this enhancement applies. U.S.S.G. § 2K2.1 app. n.14(B). When the other offense is a drug trafficking offense, the enhancement applies if a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. U.S.S.G. § 2K2.1 app. n.14(B). However, “the mere presence of drug residue . . . and firearms alone is [in]sufficient to prove the ‘in connection with’ requirement . . . when the ‘felony offense’ is drug possession.” *United States v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008); *see also United States v. Jeffries*, 587 F.3d 690, 694 (5th Cir. 2009); *cf United States v. Condren*, 18 F.3d 1190, 1197–98 (5th Cir. 1994) (distinguished in *Jeffries* because in *Condren* defendant was involved in drug trafficking). This enhancement also applies when a defendant possessed any firearm or ammunition while leaving or attempting to leave the United States or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States. U.S.S.G. § 2K2.1(b)(6)(A).

6. Enhancement Based on Criminal Livelihood

The sentencing guidelines provide enhanced sentences for certain offenses committed by career offenders. *See* U.S.S.G. § 4B1.1. For the career offender enhancement to apply, the following conditions must be met: (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense is a felony that is a crime of violence or controlled substance offense, and (3) the defendant has at least two prior felony convictions of a crime of violence or controlled substance offense. U.S.S.G. § 4B1.1(a).

If a defendant is determined to be a career offender under U.S.S.G. section 4B1.1, his criminal history is always category VI. *See* U.S.S.G. § 4B1.1(b). Also, U.S.S.G. section 4B1.1(b) provides a table to determine the career offender offense level. This table always applies when it provides a greater offense level than otherwise applicable under the guidelines. *But see* U.S.S.G. § 4B1.1(c) (providing enhanced sentencing ranges for convictions under 18 U.S.C. § 924(c)).

If the defendant is a career offender convicted of possessing a firearm in furtherance of a crime of violence or drug trafficking crime in violation of section 924(c), the applicable guideline range is determined under U.S.S.G. section 4B1.1(c). For example, a defendant convicted of violating section 924(c), with two prior convictions for delivery of a controlled substance, faces a guideline range from 360 months to life imprisonment. In sum, U.S.S.G. section 4B1.1 dramatically increases the guideline sentence for career offenders. Accordingly, practitioners should always consider the potential operation of U.S.S.G. section 4B1.1 on any defendant.

VI. Conclusion

Facility with the federal enforcement scheme begins with the understanding that—no matter how the law is styled or numbered—federal firearms violations exist within three basic categories: prohibited persons, prohibited weapons, and prohibited conduct. From this perspective, any practitioner can master the seemingly complex system of statutes, regulations, and guidelines that make up federal firearms law.

CHAPTER 4

Advising and Representing Federal Firearms Licensees

Allen Halbrook

I. Introduction

The firearms business is a highly regulated industry. Despite this, it attracts typical hard-nosed, bottom-line businesspeople and also a large number of individual-minded participants. Its primary regulator, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), is, at best, a typical bureaucracy, at times bound by statutes providing limited options and at other times acting with seemingly excessive zeal. Counsel for a licensee sometimes may feel caught between a client that feels right as a matter of principle but is ignorant of working in a highly regulated industry and, on the other side, a federal agency and laws that seem to view regulations as ends in themselves while seeming totally ignorant of the realities of business. Representing holders (licensees) of federal firearms licenses (FFLs) presents various significant challenges. This chapter tries to provide some background and references to assist practitioners with regard to the current state of the law and regulations.

II. FFLs Are Required to Engage in Business of Transferring, Importing, or Manufacturing Firearms and Devices Included in Definition of Firearms

An individual or entity is required to have an FFL “to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.” 18 U.S.C. § 922(a)(1)(A). A “firearm” for purposes of the relevant statutes and regulations includes—

- a firearm that is not an antique;

- the frame or receiver of any firearm;
- a firearm “muffler” or “silencer”; and
- any destructive device, which includes any explosive, incendiary or poison gas—
 - bomb;
 - grenade;
 - rocket with more than four ounces of propellant;
 - missile or explosive with a charge of more than one-quarter ounce;
 - mine; or
 - similar device.

See 18 U.S.C. § 921(a)(3)–(4). What constitutes “business” requiring licensure is often a contentious issue. There is no minimum number of sales or dollar volume required; instead, “business” includes engaging in any of the described activities in a manner that “occupies the time, attention and labor of men for the purpose of livelihood or profit.” *United States v. Williams*, 502 F.2d 581, 583 (8th Cir. 1974) (quoting *United States v. Gross*, 313 F. Supp. 1330, 1333 (S.D. Ind. 1970), *aff’d*, 451 F.2d 1355 (7th Cir. 1971)).

A. Types of FFLs

There are four main categories of FFLs: (1) dealers (18 U.S.C. § 923(a)(3)); (2) manufacturers (18 U.S.C. § 923(a)(1)); (3) importers (18 U.S.C. § 923(a)(2)); and (4) collectors (18 U.S.C. § 923(g)(1)(C)). This chapter discusses the laws and regulations applicable to only dealers, manufacturers, and importers. Because a collectors license does not authorize the holder to engage in the firearms business (27 C.F.R. § 478.41(d)), this chapter does not address the laws or regulations concerning collectors.

Gunsmiths usually obtain the most basic FFL for dealers, but have somewhat less onerous recordkeeping and other regulatory requirements. While gunsmiths must maintain acquisition and disposition records as must any other holder of a dealer license, they are able to largely avoid the requirements concerning Form 4473 (discussed below). If a gunsmith receives a firearm only for repair or nonmanufacturing work and returns that firearm to the same person they received it from, no Form 4473 is required. See 27 C.F.R. § 478.124(a).

In addition to the four main categories, FFLs are further subdivided into nine subcategories commonly denoted by a two-number component used in the license number (for example, #-##-###-01-#X-#####) to denote the subcategory of the license:

- 01 dealer in firearms other than destructive devices (27 C.F.R. § 478.42(c)(2));
- 02 pawnbroker;

- 03 collector (27 C.F.R. § 478.42(d));
- 06 manufacturer of ammunition other than ammunition for destructive devices (27 C.F.R. § 478.42(a)(3));
- 07 manufacturer of firearms other than destructive device (27 C.F.R. § 478.42(a)(2));
- 08 importer of firearms or ammunition other than destructive devices (27 C.F.R. § 478.42(c)(2));
- 09 dealer in destructive devices (27 C.F.R. § 478.42(c)(1));
- 10 manufacturer of destructive devices, ammunition for destructive devices, or armor-piercing ammunition (27 C.F.R. § 478.42(a)(1)); and
- 11 importer of destructive devices, ammunition for destructive devices, or armor-piercing ammunition (27 C.F.R. § 478.42(b)(1)).

B. FFLs and Licensees Are Subject of Multiple Statutes and Regulations

1. Main Regulatory Requirements Are in Gun Control Act, National Firearms Act, and Related Regulations

The main statutes applicable to FFLs and licensees are the Gun Control Act of 1968, Pub. L. No. 90-615, 82 Stat. 1214 (codified at 18 U.S.C. §§ 921–928), and the National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified at 26 U.S.C. §§ 5801–5872). The primary regulations applicable to FFLs and licensees are codified in the Code of Federal Regulations at title 27, sections 478.1 through 478.171 (27 C.F.R. §§ 478.1–.171).

2. Some Licensees Are Required to Register with U.S. Department of State

In addition to obtaining an FFL, those engaging in activities requiring a manufacturer's FFL, an importer's FFL, and some dealers must register with the United States Department of State pursuant to regulations referred to as ITAR (International Traffic in Arms Regulations). *See generally* 22 C.F.R. §§ 120.1–130.17. The ATF is aware of this requirement and sometimes insists licensees comply. If this might be an issue, the following links may be helpful:

http://pmdtdc.state.gov/registration/faqs_reg.html

<http://pmdtdc.state.gov/registration/wmr.html>

C. Licensees Are Subject to Numerous and Complicated Recordkeeping Requirements

1. Acquisition and Disposition Records

Licensees must keep records in bound books or by approved electronic form of the creation or receipt of all firearms and the disposition of firearms manufactured or received. These acquisition and disposition records are commonly referred to as A&D records. The statutory requirements for A&D records are found at 18 U.S.C. § 922(g). The regulations for A&D records, including the general forms, are found at 27 C.F.R. § 478.123 (manufacturers), § 478.122 (importers), and § 478.125(e) (dealers). While the form of A&D records is basically the same regardless of the type of FFL held, the deadlines for recording information are different depending on the type of FFL.

- *Dealers:* Acquisition of a firearm must be recorded in the A&D record by the close of business, one business day after the firearm is received. 27 C.F.R. § 478.125(e).
Disposition (transfer) of a firearm must be recorded within seven calendar days after the transfer. 27 C.F.R. § 478.125(e).
- *Manufacturers:* Acquisition of a firearm must be recorded in the A&D record within seven calendar days after the firearm is manufactured or received. 27 C.F.R. § 478.123(a).
Disposition (transfer) of a firearm must be recorded within seven calendar days after the transfer. 27 C.F.R. § 478.123(b).
- *Importers:* Acquisition of a firearm must be recorded in the A&D record within fifteen calendar days after the firearm is received. 27 C.F.R. § 478.122(a).
Disposition (transfer) of a firearm must be recorded within seven calendar days after the transfer. 27 C.F.R. § 478.122(b).

2. Retention of A&D Records

Dealers, manufacturers, and importers are required to retain records regarding the manufacture or receipt of firearms permanently. 27 C.F.R. § 478.129(d). Other A&D records are required to be retained by manufacturers, importers, and dealers for only twenty years. 27 C.F.R. § 478.129(d), (e). However, as a practical matter, most dealers maintain these records permanently.

3. Forms 4473

The second main type of record licensees are required to create and maintain is a Form 4473 for every transfer of firearms to a nonlicensee. See this chapter's Appendix A. Like the A&D records, the statutory basis for requiring Form 4473 is also 18 U.S.C. § 922(g). The relevant regulations are codified at title 27, section 478.124, of the Code of Federal Regulations. See 27 C.F.R. § 478.124. Licensees are required to retain Form 4473s for a period of twenty years after the transfer of a firearm. 27 C.F.R. § 478.129(b). If a National Instant Criminal Background Check System (NICS) check is performed and the response is a denial or the firearm is not transferred for any other reason, the licensee must still retain the Form 4473; however, in these circumstances retention is required for only five years. 27 C.F.R. § 478.129(b).

4. Records of Transfers to Other Licensees

The third type of records required to be maintained pertain to transfers to other licensees. When transferring a firearm to another licensee, the transferor licensee must obtain and maintain a copy of the transferee licensee's FFL and keep the commercial record (for example, a purchase order and invoice) separate from his other records and available for inspection by the ATF. *See* 27 C.F.R. §§ 478.94, 478.95.

5. Other Reports and Records

Other common forms licensees are required to file include (but are not limited to)—

- Form 3310.4—for multiple sales of handguns (18 U.S.C. § 923(g)(3) and 27 C.F.R. § 478.126a);
- Form 3310.11—for reporting the loss or theft of a firearm (27 C.F.R. § 478.39a); and
- Form 3310.12—for multiple sales of certain rifles.

In addition to these forms, a host of other forms are required in certain situations. Some of these forms are available on the ATF Web site. Others must be ordered for delivery in hard copy. For a listing of forms, see Bureau of Alcohol, Tobacco, Firearms and Explosives, Firearm Forms, at <http://www.atf.gov/content/library/firearms-forms>.

D. National Firearms Act

If a licensee is going to possess firearms subject to the National Firearms Act (NFA), often referred to as "Class 3 firearms" or "Title II firearms," the licensee is subject to additional requirements, including additional recordkeeping requirements. As an initial matter, before possessing a Class 3 firearm the licensee, in addition to its

license, must register and pay a Special Occupations Tax (SOT) and acquire the SOT stamp. *See* 26 U.S.C. §§ 5801, 5802. In addition, many other requirements relate to the receipt and transfer of NFA firearms. Violation of any of the statutes or regulations pertaining to NFA firearms is a serious matter and great pains should be taken to comply with the NFA and related regulations. A licensee and counsel dealing with NFA firearms should become thoroughly familiar with the statutes and regulations and the ATF's application and interpretation of the law. A very useful resource in this regard is the *ATF National Firearms Act Handbook*. The handbook is available for download at <http://www.atf.gov/content/firearms/firearms-industry/guides/publications-firearms-national-firearms-act-handbook>.

For a licensee who has not registered and obtained an SOT stamp, the primary concern is to avoid inadvertently violating the NFA and associated regulations by unwittingly acquiring (or creating) a Class 3 firearm. To that end, a licensee and its counsel should be able to identify Class 3 firearms and items that might be Class 3 firearms. Class 3 firearms are not restricted to what is commonly regarded as a firearm. *See* 26 U.S.C. § 5845(a). Rather, the categories of Class 3 firearms include the following:

1. a shotgun with a barrel less than eighteen inches long (26 U.S.C. § 5845(a));
2. a shotgun with an overall length less than twenty-six inches (26 U.S.C. § 5845(a));
3. a rifle with a barrel less than sixteen inches long (26 U.S.C. § 5845(a));
4. a rifle with an overall length of less than twenty-six inches (26 U.S.C. § 5845(a));
5. any other weapon, which includes any concealable somewhat atypical firearm (such as a pistol with a vertical foregrip, a smoothbore pistol, a pen gun, a knife gun, an umbrella gun, etc.) (26 U.S.C. § 5845(a), (e));
6. a machine gun (any fully automatic firearm) (26 U.S.C. § 5845(a));
7. any silencer (26 U.S.C. § 5845(a), defined at 18 U.S.C. § 921(a)(24)); and
8. a destructive device (explosive, poison gas, bomb, grenade, rocket, missile, mine, any firearm with a bore diameter greater than one-half inch (other than standard shotguns, flare guns, line-throwing guns, etc.)) (26 U.S.C. § 5845(a), (f)).

Licensees that have not complied with the requirements to deal in NFA weapons must be alert to the possibility that an item they might acquire or create falls within the categories of items that constitute "firearms" subject to the NFA and avoid the acquisition or creation of any such items.

E. Enforcement

1. Inspections

The ATF may inspect the records and inventory of a licensee without cause once during any twelve-month period. 18 U.S.C. § 923(g)(1)(B)(ii)(I); 27 C.F.R. § 478.23(b)(2)(i). The ATF may also inspect records and inventory as appropriate without a warrant in the course of a criminal investigation of someone other than the licensee, in connection with the tracing of a firearm, and also with respect to a particular firearm or firearms in the course of a criminal investigation. *See* 18 U.S.C. §§ 923(g)(1)(B)(i), 923(g)(1)(B)(ii)(II), 923(g)(1)(B)(iii); 27 C.F.R. §§ 478.23(b)(1), 478.23(b)(2)(ii), 478.23(b)(3).

If the ATF believes it has discovered a violation during the course of an inspection, it may present the licensee with a Report of Violations and ask the licensee to sign the notice. However, no law or regulation requires the licensee to sign the report.

2. Warnings

After an inspection, the ATF may send a licensee a warning letter or schedule a warning conference. No law or regulation expressly provides for warning letters or conferences. However, warning letters and conferences are often used by the ATF in revocation proceedings as evidence that alleged violations subsequent to the warning letter or conference were “willful” as required as a basis for revocation by 18 U.S.C. § 923(e). *See* part II.F. below for additional discussion.

3. Penalties

The ATF has very few penalty options that it may impose on a licensee. With regard to a transfer of a firearm to a disqualified person in violation of requirements related to a NICS check, the ATF may suspend the license for up to six months or impose a fine of up to \$5,000. *See* 18 U.S.C. § 922(t)(5); 27 C.F.R. § 478.73(a). For all other violations, the only penalty available to the ATF for imposition on a licensee is revocation of its license. *See* 18 U.S.C. § 923(e); 27 C.F.R. § 478.73(a).

4. Administrative Hearing

Proceedings are begun by the ATF by sending a notice of revocation (or suspension or fine). *See* 18 U.S.C. § 923(e), (f); 27 C.F.R. § 478.73(a), (b). The licensee has fifteen days after receipt of the notice to request a hearing, or the penalty imposed by the notice will become effective on the date stated in the notice. *See* 18 U.S.C. § 923(f)(2); 27 C.F.R. §§ 478.73(b), 478.74. Additionally, with regard to a notice of revocation, the licensee should request a stay of the effective date of revocation,

which the ATF is required to grant. *See* 18 U.S.C. § 923(f)(2). In the case of denial of a timely filed renewal of license, if the licensee has timely requested a hearing, the old license will remain in effect through proceedings at the agency level even if it is past its expiration date. *See* 27 C.F.R. § 478.78.

After receiving a request for hearing, the ATF will schedule the hearing and must provide the licensee at least ten days' notice of hearing. *See* 27 C.F.R. § 478.74.

Under the current state of the law, the hearing is not subject to the federal Administrative Procedures Act (APA). *See Arwady Hand Truck Sales, Inc. v. Vander Werf*, 507 F. Supp. 2d 754, 758–61 (S.D. Tex. 2007) (noting that an ATF denial hearing is not a formal, adversary hearing to which the APA standards apply). Because the federal APA does not apply, a licensee has no ability to conduct discovery or to compel attendance of a witness at a hearing. The inapplicability of the APA also means that not only are the federal rules of evidence not applicable at the hearing, effectively no rules of evidence are applicable.

A licensee may be represented by counsel at the hearing. 27 C.F.R. § 478.76. However, the ATF has sometimes required counsel to file a power of attorney executed by the licensee authorizing counsel to represent the licensee. *See* 27 C.F.R. § 478.76. A form power of attorney that has been previously accepted by the ATF is attached as Appendix B. The hearing is held before a hearing officer selected and hired by the ATF, often an employee of the ATF. After the hearing, the hearing officer makes a report to the director of industry operations (DIO), and the DIO will render a decision. *See* 27 C.F.R. §§ 478.72, 478.74. In rendering the decision, the DIO issues a report of its findings and conclusions. *See* 27 C.F.R. §§ 478.72, 478.74. The DIO's decision is final unless appealed.

5. Appeal to District Court

If the DIO's decision is adverse to the licensee, the licensee may appeal by filing a petition for judicial review in the federal district court for the district in which the licensee resides or has its principal place of business. *See* 18 U.S.C. § 923(f)(3); 27 C.F.R. § 478.78. The petition for judicial review must be filed within sixty days of the licensee's receipt of the final notice of the adverse action. *See* 18 U.S.C. § 923(f)(3); 27 C.F.R. § 478.78.

When "justice so requires," the DIO may postpone the effective date of a revocation or authorize continued operations (in the case of denial of a renewal) pending judicial review. 27 C.F.R. § 478.78. Generally, counsel for a licensee should always make a written request for postponement to the DIO. In the author's direct and indirect experience, such postponements are usually granted.

The judicial review is a de novo judicial review, but the court is not required to provide a trial de novo. *See Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 466 (7th Cir. 1980). While the review is allegedly de novo, the court may not only use the administrative record in reaching its decision but may also give that record whatever weight it

decides is appropriate. *Willingham Sports, Inc., v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 348 F. Supp. 2d 1299, 1306 (S.D. Ala. 2004), *aff'd*, 415 F.3d 1274 (11th Cir. 2005). The district court may receive additional evidence, but it is not required to do so. *Strong v. United States*, 422 F. Supp. 2d 712, 719–20 & n.12 (N.D. Tex. 2006).

Typically, the government will seek to resolve the case by motion for summary judgment based on the administrative record. *See, e.g., Stein's, Inc.*, 649 F.2d at 467; *see also Arwady*, 507 F. Supp. 2d at 758. The ATF is highly successful with this approach. The author is aware of only three instances in which the ATF's motion for summary judgment was denied by a district court: *Jim's Pawn Shop, Inc. v. Bowers*, No. 5:05-CV-525-H(3), 2008 U.S. Dist. LEXIS 97199 (E.D.N.C. Sept. 16, 2008); *Red's Trading Post, Inc. v. Van Loan*, No. CV07-090-S-EJL, 2008 WL 216611 (D. Idaho Jan. 24, 2008); and *Rich v. United States*, 383 F. Supp. 797, 800 (S.D. Ohio 1974). In *Jim's Pawn Shop*, the licensee ultimately prevailed at trial. In *Red's Trading Post*, the ATF settled with the licensee, allowing it to retain its license. In *Rich*, there were cross-motions for summary judgment, both of which were denied. The court overturned revocation but allowed the ATF to suspend the license for up to sixty days (a penalty no longer available). *Rich*, 383 F. Supp. at 802.

6. Subsequent Appeals

Appeals after judgment by a district court are subject to the same procedures as other civil appeals. The ATF has also been highly successful at the courts of appeals. The author is unaware of any instance of a licensee prevailing on an appeal at any of the courts of appeals.

F. "Willfully" Committed Violation

For a licensee to be disciplined for most types of violations, the licensee must have committed the violation "willfully." *See* 18 U.S.C. § 923(d)(1)(C)–(e). Most cases against licensees involve recordkeeping violations. While the fact of some violations may be contested, for many violations, the primary dispute is whether the violation was committed willfully. Most courts define willful violations to include those committed despite the licensee's best efforts to comply.

At least one early case interpreted *willfully* in a manner more friendly to the licensee, finding that the term in section 923 of the Gun Control Act referred to intentional violations rather than inadvertent violations. In *Rich*, 383 F. Supp. at 800, the court noted, "The language of § 923(d)(1)(C), when read together with the word 'willfully' in § 923(d)(1)(D) immediately following, supports the conclusion that Congress was concerned with purposeful, intentional conduct to be punished by revocation of licenses rather than mere negligence on the part of the licensee." Also, the U.S.

Supreme Court has interpreted *willfully* in the context of criminal violations of the Gun Control Act (18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D)) to require bad intent:

The word “willfully” . . . differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind.

....

. . . As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.” In other words, in order to establish a “willful” violation of a statute, “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.”

....

. . . More is required, however, with respect to the conduct in the fourth category that is only criminal when done “willfully.” The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.

Bryan v. United States, 524 U.S. 184, 191–93 (1998) (citations and annotations omitted). However, since *Rich*, the vast bulk of cases have construed *willfully* in a manner less friendly to licensees.

A common interpretation is the one set out by the Seventh Circuit in *Stein’s, Inc. v. Blumenthal*. In *Stein’s, Inc.*, the Seventh Circuit held that for a violation to be willful, no bad intent was required but that the ATF needed only to “prove that the [licensee] knew of his legal obligation and purposefully disregarded or was plainly indifferent to the recordkeeping requirements.” *Stein’s, Inc.*, 649 F.2d at 467 (citations and internal quotations omitted). While purposeful disregard or plain indifference might seem difficult to prove, most courts have made it rather easy on the ATF requiring only evidence that the licensee had knowledge of the legal requirements and had repeat violations, allowing the use of a Report of Violations from an earlier inspection together with a similar violation from a subsequent inspection to establish the knowledge and repeat violations. See *Willingham Sports, Inc.*, 415 F.3d at 1277–78.

In another case, the court of appeals upheld the revocation of the license based solely on errors in 12 to 15 of 880 Forms 4473 (an error rate of 1.3–1.7 percent), noting that the “[Gun Control] Act does not allow any *de minimis* number of violations.” *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 494, 497–98 (7th Cir. 2006). Some courts have used language construing *willfully* that on its face appears more favorable to licensees, but end up ruling adversely. For instance, in *Armalite, Inc. v. Lambert*, 544 F.3d 644, 648 (6th Cir. 2008), the Sixth Circuit held that a licensee “‘willfully’ violates the GCA when it intentionally, knowingly or recklessly violates known legal requirements.” The court recited evidence that a 2004 compliance inspection found errors in 24 of the 111 Forms 4473 reviewed and that a subsequent 2005 inspection discovered errors in 3 to 6 items out of 74 Forms 4473. *Armalite*, 544 F.3d

at 649. The court affirmed the revocation of Armalite's license. *Armalite*, 544 F.3d at 650.

While most cases have more egregious facts than those recited by the court as justifying its ruling in *Armalite*, generally it appears that the courts have been strongly inclined to uphold any revocation based on violations if the licensee has been found in a previous Report of Violations or warning letter to have committed prior similar violations.

III. Compliance

It is difficult for licensees conducting a significant volume of business to achieve perfect compliance. Of the top ten categories of violations cited by the ATF, eight are recordkeeping violations. The number one category of violation in 2013 was failure to properly complete Form 4473 (this category was second in 2011 and 2012). Of the eight categories, five involve Form 4473. In 2011 and 2012, the most cited category of violations was failure to timely record information in the A&D records (this category was second in 2013). While the ATF may be most concerned about transfers of firearms to felons and other prohibited persons and firearms that are unaccounted for, the cases they often bring are based on recordkeeping violations.

Even with recent developments in Second Amendment law, almost any repeat violation found by the ATF may serve as a basis for revocation. To avoid that possibility and to place a licensee in the best possible position should that situation arise, the licensee should not only strive to achieve the highest level of compliance possible but also should do so in a documentable manner before a violation is discovered by the ATF.

Steps licensees can take to help with compliance include—

- employee training;
- procedures for multiple reviews of Forms 4473 at time of sale;
- a written compliance plan (and adherence to the procedures in the plan);
- audits of inventory and A&D records;
- audits of Forms 4473;
- corrections of forms, A&D records, and filing of missed reports based on audits and reviews; and
- attendance at business and ATF seminars.

The licensee should document or otherwise be able to evidence its compliance efforts.

One of the most effective aids to licensees is an audit of records by outside consultants. There are a number of former ATF personnel who act as consultants, auditing records and inventory, and also advising about compliance procedures. If possible, the licensee should have consultants review all records for relevant periods, not just samplings. The ATF will often review all Forms 4473 for a given period, such as going back one year or five years in an inspection. Consultants can also conduct inventories

of open entries in A&D records and even conduct complete inventories. In following up reviews and inventories, consultants can assist the licensee with procedures to minimize errors.

Other resources are available. The industry group National Shooting Sports Foundation has written guides, including on employee training. It also offers seminars. While the National Rifle Association is not an industry group, it has a knowledgeable staff that can refer a licensee to professionals.

The greater the volume of business, the more likely errors become, rising to being almost inevitably probable in a large-volume retail business requiring the use of Form 4473. The greater the volume of business, the greater the efforts at compliance that will be required to avoid problems.

IV. Conclusion

Given the state of the law, licensees should strive for the highest level of compliance possible. Counsel for licensees can assist not only by educating and advising about compliance itself but also by helping a licensee be able to provide evidence of compliance efforts. To that end, counsel should urge licensees to get counsel involved at the earliest possible time in any dealings with the ATF other than routine filing of forms and traces of firearms. Should the ATF make allegations of violations, counsel should go to great efforts to avoid an administrative hearing. Even a report of violations or a warning letter warrants a carefully crafted written response from counsel. Also, counsel should probably make additional communications with ATF inspectors and field division counsel to assure them of compliance efforts. Further, counsel should consider implicitly or explicitly communicating to the ATF that it will face a zealous defense if disciplinary proceedings ensue. Unless and until case law on the Second Amendment develops further, representing FFLs is not primarily a matter of constitutional principles but of the gritty detail of regulatory law and compliance issues in an arena where the regulator holds significant advantages.

Appendix A

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and
Explosives

OMB No. 1140-0020

Firearms Transaction Record Part I - Over-the-Counter

WARNING: You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine.

Transferor's Transaction
Serial Number (If any)

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name		Last Name		First Name		Middle Name (If no middle name, state "NMN")		
2. Current Residence Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)				City		County		
Number and Street Address				State		ZIP Code		
3. Place of Birth		4. Height		5. Weight		6. Gender		
U.S. City and State		-OR- Foreign Country		Ft. _____ In. _____		Male <input type="checkbox"/> Female <input type="checkbox"/>		
				7. Birth Date		Month _____ Day _____ Year _____		
8. Social Security Number (Optional, but will help prevent misidentification)				9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.)				
10.a. Ethnicity		10.b. Race (Check one or more boxes.)						
<input type="checkbox"/> Hispanic or Latino		<input type="checkbox"/> American Indian or Alaska Native		<input type="checkbox"/> Black or African American		<input type="checkbox"/> White		
<input type="checkbox"/> Not Hispanic or Latino		<input type="checkbox"/> Asian		<input type="checkbox"/> Native Hawaiian or Other Pacific Islander				
11. Answer questions 11.a. (see exceptions) through 11.l. and 12. (if applicable) by checking or marking "yes" or "no" in the boxes to the right of the questions.								
a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.							Yes <input type="checkbox"/>	No <input type="checkbox"/>
b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)							Yes <input type="checkbox"/>	No <input type="checkbox"/>
c. Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)							Yes <input type="checkbox"/>	No <input type="checkbox"/>
d. Are you a fugitive from justice?							Yes <input type="checkbox"/>	No <input type="checkbox"/>
e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?							Yes <input type="checkbox"/>	No <input type="checkbox"/>
f. Have you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) OR have you ever been committed to a mental institution? (See Instructions for Question 11.f.)							Yes <input type="checkbox"/>	No <input type="checkbox"/>
g. Have you been discharged from the Armed Forces under dishonorable conditions?							Yes <input type="checkbox"/>	No <input type="checkbox"/>
h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)							Yes <input type="checkbox"/>	No <input type="checkbox"/>
i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)							Yes <input type="checkbox"/>	No <input type="checkbox"/>
j. Have you ever renounced your United States citizenship?							Yes <input type="checkbox"/>	No <input type="checkbox"/>
k. Are you an alien illegally in the United States?							Yes <input type="checkbox"/>	No <input type="checkbox"/>
l. Are you an alien admitted to the United States under a nonimmigrant visa? (See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.							Yes <input type="checkbox"/>	No <input type="checkbox"/>
12. If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20c.) (See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13.							Yes <input type="checkbox"/>	No <input type="checkbox"/>
13. What is your State of residence (if any)? (See Instructions for Question 13.)		14. What is your country of citizenship? (List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.) <input type="checkbox"/> United States of America		15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?				
		<input type="checkbox"/> Other (Specify) _____						

Note: Previous Editions Are Obsolete
Page 1 of 6

Transferee (Buyer) Continue to Next Page
STAPLE IF PAGES BECOME
SEPARATED

ATF Form 4473 (5300.9) Part I
Revised April 2012

I certify that my answers to Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "Yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law (See Instructions for Question 16).

16. Transferee's/Buyer's Signature _____ 17. Certification Date _____

Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred (check or mark all that apply):
 Handgun Long Gun Other Firearm (Frame, Receiver, etc. See Instructions for Question 18.)
19. If sale at a gun show or other qualifying event.
Name of Event _____
City, State _____

20a. Identification (e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 20.a.)
Issuing Authority and Type of Identification _____ Number on Identification _____ Expiration Date of Identification (if any)
Month _____ Day _____ Year _____

20b. Alternate Documentation (if driver's license or other identification document does not show current residence address) (See Instructions for Question 20.b.)

20c. Aliens Admitted to the United States Under a Nonimmigrant Visa Must Provide: Type of documentation showing an exception to the nonimmigrant visa prohibition. (See Instructions for Question 20.c.)

Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) (See Instructions for Questions 21, 22 and 23.)

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: (Month/Day/Year)
Month _____ Day _____ Year _____
21b. The NICS or State transaction number (if provided) was: _____

21c. The response initially provided by NICS or the appropriate State agency was:
 Proceed Delayed [The firearm(s) may be transferred on _____ (Missing Disposition Information date provided by NICS) if State law permits (optional)]
 Denied Cancelled
21d. If initial NICS or State response was "Delayed," the following response was received from NICS or the appropriate State agency:
 Proceed _____ (date)
 Denied _____ (date)
 Cancelled _____ (date)
 No resolution was provided within 3 business days.

21e. (Complete if applicable.) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on:
_____ (date). Proceed Denied Cancelled

21f. The name and Brady identification number of the NICS examiner (Optional)
_____ (name) _____ (number)

22. No NICS check was required because the transfer involved only National Firearms Act firearm(s). (See Instructions for Question 22.)

23. No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS (See Instructions for Question 23.)

Issuing State and Permit Type _____ Date of Issuance (if any) _____ Expiration Date (if any) _____ Permit Number (if any) _____

Section C - Must Be Completed Personally By Transferee (Buyer)

If the transfer of the firearm(s) takes place on a different day from the date that the transferee (buyer) signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). (See Instructions for Question 24 and 25.)

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature _____ 25. Recertification Date _____

Transferor (Seller) Continue to Next Page
STAPLE IF PAGES BECOME
SEPARATED

Section D - Must Be Completed By Transferor (Seller)				
26. Manufacturer and/or Importer (If the manufacturer and importer are different, the FFL should include both.)	27. Model	28. Serial Number	29. Type (pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)	30. Caliber or Gauge
30a. Total Number of Firearms (Please <i>handwrite</i> by printing e.g., one, two, three, etc. Do not use numerals.)			30b. Is any part of this transaction a Pawn Redemption? <input type="checkbox"/> Yes <input type="checkbox"/> No	
30c. For Use by FFL (See Instructions for Question 30c.)				

Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days	
31. Trade/corporate name and address of transferor (seller) (Hand stamp may be used.)	32. Federal Firearms License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXX.) (Hand stamp may be used.)

The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.

I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer if the transfer does not occur on the day Section A was completed); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

33. Transferor's/Seller's Name (Please print)	34. Transferor's/Seller's Signature	35. Transferor's/Seller's Title	36. Date Transferred
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NOTICES, INSTRUCTIONS AND DEFINITIONS

Purpose of the Form: The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun (rifle or shotgun) to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological (by date), alphabetical (by name), or numerical (by transaction serial number), as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name) or chronological (by date of transferee's certification) order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

Over-the-Counter Transaction: The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

State Laws and Published Ordinances: The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

Exportation of Firearms: The State or Commerce Departments may require you to obtain a license prior to export.

Section A

Question 1. Transferee's Full Name: The buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the seller. Two persons (other than the seller) must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

business must complete Section A of the form with his or her personal information, sign Section A, and attach a written statement, executed under penalties of perjury, stating: (A) the firearm is being acquired for the use of and will be the property of that business entity and (B) the name and address of that business entity. If the buyer's name in question 1 is illegible, the seller must print the buyer's name above the name written by the buyer.

Question 2. Current Residence Address: U.S. Postal abbreviations are acceptable. (*e.g., St., Rd., Dr., P.A., NC, etc.*). Address cannot be a post office box. County and Parish are one and the same.

If the buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his or her permanent duty station is located, but does not reside at his or her permanent duty station, the buyer must list both his or her permanent duty station address and his or her residence address in response to question 2. If you are a U.S. citizen with two States of residence, you should list your current residence address in response to question 2 (*e.g., if you are buying a firearm while staying at your weekend home in State X, you should list your address in State X in response to question 2*).

Question 9. Unique Personal Identification Number (UPIN): For purchasers approved to have information maintained about them in the FBI NICS Voluntary Appeal File, NICS will provide them with a Unique Personal Identification Number, which the buyer should record in question 9. The licensee may be asked to provide the UPIN to NICS or the State.

Question 11.a. Actual Transferee/Buyer: For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself (*e.g., redeeming the firearm from pawn/retrieving it from consignment, firearm raffle winner*). You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. **ACTUAL TRANSFEREE/BUYER EXAMPLES:** Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones. However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer "YES" to question 11.a. However, you may not transfer a firearm to any person you know or have reasonable cause to believe is prohibited under 18 U.S.C. § 922(g), (n), or (x). **Please note: EXCEPTION:** If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.

Question 11.b. - 11.l. Definition of Prohibited Person: Generally, 18 U.S.C. § 922 prohibits the shipment, transportation, receipt, or possession in or affecting interstate commerce of a firearm by one who: has been convicted of a misdemeanor crime of domestic violence; has been convicted of a felony, or any other crime, punishable by imprisonment for a term exceeding one year (*this does not include State misdemeanors punishable by imprisonment of two years or less*); is a fugitive from justice; is an unlawful user of, or addicted to, marijuana or any depressant, stimulant, or narcotic drug, or any other controlled substance; has been adjudicated mentally defective or has been committed to a mental institution; has been discharged from the Armed Forces under dishonorable conditions; has renounced his or her U.S. citizenship; is an alien illegally in the United States or an alien admitted to the United States under a nonimmigrant visa; or is subject to certain restraining orders. Furthermore, section 922 prohibits the shipment, transportation, or receipt in or affecting interstate commerce of a firearm by one who is under indictment or information for a felony, or any other crime, punishable by imprisonment for a term exceeding one year.

Question 11.b. Under Indictment or Information or Convicted in any Court: An indictment, information, or conviction in any Federal, State, or local court. An information is a formal accusation of a crime verified by a prosecutor.

EXCEPTION to 11.c. and 11.l.: A person who has been convicted of a felony, or any other crime, for which the judge could have imprisoned the person for more than one year, or who has been convicted of a misdemeanor crime of domestic violence, is not prohibited from purchasing, receiving, or possessing a firearm if: (1) under the law of

the jurisdiction where the conviction occurred, the person has been pardoned, the conviction has been expunged or set aside, or the person has had their civil rights (*the right to vote, sit on a jury, and hold public office*) taken away and later restored AND (2) the person is not prohibited by the law of the jurisdiction where the conviction occurred from receiving or possessing firearms. Persons subject to this exception should answer "no" to 11.c. or 11.l., as applicable.

Question 11.f. Adjudicated Mentally Defective: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs. This term shall include: (1) a finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility.

Committed to a Mental Institution: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution. Please also refer to Question 11.c. for the definition of a prohibited person.

EXCEPTION to 11.f. NICS Improvement Amendments Act of 2007: A person who has been adjudicated as a mental defective or committed to a mental institution is not prohibited if: (1) the person was adjudicated or committed by a department or agency of the Federal Government, such as the United States Department of Veteran's Affairs ("VA") (as opposed to a State court, State board, or other lawful State authority); and (2) either: (a) the person's adjudication or commitment for mental incompetency was set-aside or expunged by the adjudicating/committing agency; (b) the person has been fully released or discharged from all mandatory treatment, supervision, or monitoring by the agency; or (c) the person was found by the agency to no longer suffer from the mental health condition that served as the basis of the initial adjudication. **Persons who fit this exception should answer "no" to Item 11.f.** This exception does not apply to any person who was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.

Question 11.h. Definition of Restraining Order: Under 18 U.S.C. § 922, firearms may not be sold to or received by persons subject to a court order that: (A) was issued after a hearing which the person received actual notice of and had an opportunity to participate in; (B) restrains such person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. An "intimate partner" of a person is: the spouse or former spouse of the person, the parent of a child of the person, or an individual who cohabitates or cohabitating with the person.

Question 11.l. Definition of Misdemeanor Crime of Domestic Violence: A Federal, State, local, or tribal offense that is a misdemeanor under Federal, State, or tribal law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with, or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. The term includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon (*e.g., assault and battery*), if the offense is committed by one of the defined parties. (*See Exception to 11.c. and 11.l.*) A person who has been convicted of a misdemeanor crime of domestic violence also is not prohibited unless: (1) the person was represented by a lawyer or gave up the right to a lawyer; or (2) if the person was entitled to a jury, was tried by a jury, or gave up the right to a jury trial. Persons subject to this exception should answer "no" to 11.l.

Question 11.i. An alien admitted to the United States under a nonimmigrant visa includes, among others, persons visiting the United States temporarily for business or pleasure, persons studying in the United States who maintain a residence abroad, and certain temporary foreign workers. The definition does NOT include permanent resident aliens nor does it apply to nonimmigrant aliens admitted to the United States pursuant to either the Visa Waiver Program or to regulations otherwise exempting them from visa requirements.

An alien admitted to the United States under a nonimmigrant visa who responds "yes" to question 11.i. must provide a response to question 12 indicating whether he/she qualifies under an exception.

Question 12. Exceptions to the Nonimmigrant Alien Response: An alien admitted to the United States under a nonimmigrant visa is not prohibited from purchasing, receiving, or possessing a firearm if the alien: (1) is in possession of a hunting license or permit lawfully issued by the Federal Government, a State, or local government, or an Indian tribe federally recognized by the Bureau of Indian Affairs, which is valid and unexpired; (2) was admitted to the United States for lawful hunting or sporting purposes; (3) has received a waiver from the prohibition from the Attorney General of the United States; (4) is an official representative of a foreign government who is accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; (5) is en route to or from another country to which that alien is accredited; (6) is an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or (7) is a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

Persons subject to one of these exceptions should answer "yes" to questions 11.i. and 12 and provide documentation such as a copy of the hunting license or letter granting the waiver, which must be recorded in 20.c. If the transferee (buyer) answered "yes" to this question, the licensee must complete 20.c.

The seller should verify supporting documentation provided by the purchaser and must attach a copy of the provided documentation to this ATF Form 4473, Firearms Transaction Record.

Question 13. State of Residence: The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State. If an individual is a member of the Armed Forces on active duty, his or her State of residence also is the State in which his or her permanent duty station is located.

If you are a U.S. citizen with two States of residence, you should list your current residence address in response to question 2 (e.g., if you are buying a firearm while staying at your weekend home in State X, you should list your address in State X in response to question 2.)

Question 16. Certification Definition of Engaged in the Business: Under 18 U.S.C. § 922 (a)(1), it is unlawful for a person to engage in the business of dealing in firearms without a license. A person is engaged in the business of dealing in firearms if he or she devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. A license is not required of a person who only makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his or her personal collection of firearms.

Section B

Question 18. Type of Firearm(s): Check all boxes that apply. "Other" refers to frames, receivers and other firearms that are not either handguns or long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell, or National Firearms Act (NFA) firearms.

If a frame or receiver can only be made into a long gun (rifle or shotgun), it is still a frame or receiver not a handgun or long gun. However, they still are "firearms" by definition, and subject to the same

GCA limitations as any other firearms. See Section 921(a)(3)(b). 18 U.S.C. Section 922(b)(1) makes it unlawful for a licensee to sell any firearm other than a shotgun or rifle to any person under the age of 21. Since a frame or receiver for a firearm, to include one that can only be made into a long gun, is a "firearm other than a shotgun or rifle," it cannot be transferred to anyone under the age of 21. Also, note that multiple sales forms are not required for frames or receivers of any firearms, or pistol grip shotguns, since they are not "pistols or revolvers" under Section 923(g)(3)(a).

Question 19. Gun Shows: If sale at gun show or other qualifying event sponsored by any national, State, or local organization, as authorized by 27 CFR 100, the seller must record the name of event and the location (city and State) of the sale in question 19.

Question 20a. Identification: List issuing authority (e.g., State, County or Municipality) and type of identification presented (e.g., Virginia driver's license (VA DL), or other valid government-issued identification).

Know Your Customer: Before a licensee may sell or deliver a firearm to a nonlicensee, the licensee must establish the identity, place of residence, and age of the buyer. The buyer must provide a valid government-issued photo identification to the seller that contains the buyer's name, residence address, and date of birth. The licensee must record the type, identification number, and expiration date (if any) of the identification in question 20.a. A driver's license or an identification card issued by a State in place of a license is acceptable. Social Security cards are not acceptable because no address, date of birth, or photograph is shown on the cards. A combination of government-issued documents may be provided. For example, if a U.S. citizen has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license (showing his name, date of birth, and photograph) issued by State Y and another government-issued document (such as a tax document) from State X showing his residence address. If the buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his or her permanent duty station is located, but he or she has a driver's license from another State, you should list the buyer's military identification card and official orders showing where his or her permanent duty station is located in response to question 20.a.

Question 20.b. Alternate Documentation: Licensees may accept a combination of valid government-issued documents to satisfy the identification document requirements of the law. The required valid government-issued photo identification document bearing the name, photograph, and date of birth of transferee may be supplemented by another valid, government-issued document showing the transferee's residence address. This alternate documentation should be recorded in question 20.b., with issuing authority and type of identification presented. A combination of government-issued documents may be provided. For example, if a U.S. citizen has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license (showing his name, date of birth, and photograph) issued by State Y and another government-issued document (such as a tax document) from State X showing his residence address.

Question 20c. Documentation for Aliens Admitted to the United States Under a Nonimmigrant Visa: See instructions for Question 11.i. Types of acceptable documents would include a valid hunting license lawfully issued in the United States or a letter from the U.S. Attorney General granting a waiver.

Question(s) 21, 22, 23, NICS BACKGROUND CHECKS: 18 U.S.C. § 922(t) requires that prior to transferring any firearm to an unlicensed person, a licensed importer, manufacturer, or dealer must first contact the National Instant Background Check System (NICS). NICS will advise the licensee whether the system finds any information that the purchaser is prohibited by law from possessing or receiving a firearm. For purposes of this form, contacts to NICS include contacts to State agencies designated to conduct NICS checks for the Federal Government. **WARNING:** Any seller who transfers a firearm to any person they know or have reasonable cause to believe is prohibited from receiving or possessing a firearm violates the law, even if the seller has complied with the background check requirements of the Brady law.

After the buyer has completed Section A of the form and the licensee has completed questions 18-20, and before transferring the firearm, the licensee must contact NICS (read below for NICS check exceptions.) However, the licensee should NOT contact NICS and should stop the transaction if: the

buyer answers "no" to question 11.a.; the buyer answers "yes" to any question in 11.b.-11.l., unless the buyer only has answered "yes" to question 11.l. and also answers "yes" to question 12; or the buyer is unable to provide the documentation required by question 20.a, b, or c.

At the time that NICS is contacted, the licensee must record in question 21.a-c: the date of contact, the NICS (*or State*) transaction number, and the initial response provided by NICS or the State. The licensee may record the Missing Disposition Information (MDI) date in 21.c. that NICS provides for delayed transactions (*States do not provide this number*). If the licensee receives a "delayed" response, before transferring the firearm, the licensee must record in question 21.d. any response later provided by NICS or the State or that no resolution was provided within 3 business days. If the licensee receives a response from NICS or the State after the firearm has been transferred, he or she must record this information in question 21.e. **Note:** States acting as points of contact for NICS checks may use terms other than "proceed," "delayed," "cancelled," or "denied." In such cases, the licensee should check the box that corresponds to the State's response. Some States may not provide a transaction number for denials. However, if a firearm is transferred within the three business day period, a transaction number is required.

NICS Responses: If NICS provides a "proceed" response, the transaction may proceed. If NICS provides a "cancelled" response, the seller is prohibited from transferring the firearm to the buyer. If NICS provides a "denied" response, the seller is prohibited from transferring the firearm to the buyer. If NICS provides a "delayed" response, the seller is prohibited from transferring the firearm unless 3 business days have elapsed and, before the transfer, NICS or the State has not advised the seller that the buyer's receipt or possession of the firearm would be in violation of law. (See 27 CFR § 478.102(a) for an example of how to calculate 3 business days.) If NICS provides a "delayed" response, NICS also will provide a Missing Disposition Information (MDI) date that calculates the 3 business days and reflects when the firearm(s) can be transferred under Federal law. States may not provide an MDI date. *Please note State law may impose a waiting period on transferring firearms.*

EXCEPTIONS TO NICS CHECK: A NICS check is not required if the transfer qualifies for any of the exceptions in 27 CFR § 478.102(d). Generally these include: (a) transfers where the buyer has presented the licensee with a permit or license that allows the buyer to possess, acquire, or carry a firearm, and the permit has been recognized by ATF as a valid alternative to the NICS check requirement; (b) transfers of National Firearms Act weapons approved by ATF; or (c) transfers certified by ATF as exempt because compliance with the NICS check requirements is impracticable. See 27 CFR § 478.102(d) for a detailed explanation. If the transfer qualifies for one of these exceptions, the licensee must obtain the documentation required by 27 CFR § 478.131. A firearm must not be transferred to any buyer who fails to provide such documentation.

Section C

Question 24 and 25. Transfer on a Different Day and Recertification: If the transfer takes place on a different day from the date that the buyer signed Section A, the licensee must again check the photo identification of the buyer at the time of transfer, and the buyer must complete the recertification in Section C at the time of transfer.

Section D

Immediately prior to transferring the firearm, the seller must complete all of the questions in Section D. In addition to completing this form, the seller must report any multiple sale or other disposition of pistols or revolver on ATF Form 3310.4 (see 27 CFR § 478.126a).

Question(s) 26, 27, 28, 29 and 30, Firearm(s) Description: These blocks should be completed with the firearm(s) information. Firearms manufactured after 1968 should all be marked with a serial number. Should you acquire a firearm that is not marked with a serial number; you may answer question 28 with "NSN" (No Serial Number), "N/A" or "None."

If more than five firearms are involved in a transaction, the information required by Section D, questions 26-30, must be provided for the additional firearms on a separate sheet of paper, which must be attached to the ATF Form 4473 covering the transaction.

Types of firearms include: pistol, revolver, rifle, shotgun, receiver, frame and other firearms that are not either handguns or long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell or National Firearms Act (NFA) firearms.

Additional firearms purchases by the same buyer may not be added to the form after the seller has signed and dated it. A buyer who wishes to purchase additional firearms after the seller has signed and dated the form must complete a new ATF Form 4473. The seller must conduct a new NICS check.

Question 30c. This box is for the FFL's use in recording any information he or she finds necessary to conduct business.

Question 32 Federal Firearms License Number: Must contain at least the first three and last five digits of the FFL number, for instance X-XX-XXXX.

Question 33-35 Transferor/Sellers Information: For "denied" and "cancelled" NICS transactions, the person who completed Section B must complete Section D, questions 33-35.

Privacy Act Information

Solicitation of this information is authorized under 18 U.S.C. § 923(g). Disclosure of the individual's Social Security number is voluntary. The number may be used to verify the buyer's identity.

Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine the eligibility of the transferee to receive firearms under Federal law. The information is subject to inspection by ATF officers and is required by 18 U.S.C. § 922 and 923.

The estimated average burden associated with this collection is 30 minutes per respondent or recordkeeper, depending on individual circumstances. Comments about the accuracy of this burden estimate and suggestions for reducing it should be directed to Reports Management Officer, Document Services Section, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, DC 20226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Confidentiality is not assured.

Appendix B

POWER OF ATTORNEY AND DECLARATION OF REPRESENTATIVE

ACME GUNS & AMMO, INC. ("Acme") whose address is 308 Caliber Rd., Liberty, Texas 77575, Tax Identification No. _____, Federal Firearms License No. #-##-###-##-#-#####, appoints Joseph Allen Halbrook, Jr. as its attorney-in-fact and representative to represent Acme at hearing concerning the April 24, 2026, Notice of Denial of Application for License issued to Acme.

Mr. Halbrook's mailing address and contact information is as follows:

Joseph Allen Halbrook, Jr.
Sneed, Vine & Perry, P.C.
900 Congress Avenue, Suite 300
Austin, Texas 78701
Telephone: 512-476-6955
Facsimile: 512-476-1825

Mr. Halbrook, as attorney-in-fact and representative for Acme, is authorized to represent it at hearing and in all matters in connection with the proposed Denial of Application for License to Acme, including but not limited to representing Acme in any and all hearings and conferences in connection with the proposed Denial of Application of License. As part of this representation, Mr. Halbrook is authorized to receive and respect confidential information and confidential tax information and to perform any and all acts that Acme could perform with respect to the Notice of Denial of Application for License or the proposed denial of such license.

Acme requests that all original notices and other written communications be sent to Acme with a copy to its attorney-in-fact, Mr. Halbrook.

Attached as Exhibit A hereto is the Declaration of Representative of Mr. Halbrook.

SIGNED this the _____ day of _____, 2026.

ACME GUNS & AMMO, INC.

SILAS DOGOOD
PRESIDENT

THE STATE OF TEXAS §
 §
COUNTY OF _____ §

This Power of Attorney was acknowledged before me on the _____ day of _____, 2026, by **SILAS DOGOOD**, President of Acme Guns & Ammo, Inc. on behalf of said corporation.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

EXHIBIT A

DECLARATION OF REPRESENTATIVE

Under penalties of perjury, I declare that:

- (1) I am not currently under suspension or disbarment from practice before the Internal Revenue Service, the Bureau of Alcohol, Tobacco, Firearms and Explosives, or other practice of my profession by any other authority.
- (2) I am aware of the regulations contained in Treasury Department Circular No. 230 (31 CFR part 10), concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;
- (3) I am authorized to represent the licensee and taxpayer identified in the Power of Attorney; and
- (4) I am an attorney, and a member in good standing of the Bar of the highest court of jurisdiction of the State of Texas. My State Bar No. is 08721300.

Joseph Allen Halbrook, Jr.

Date _____

Appendix C

Partial Listing of Relevant Cases

- American Arms International v. Herbert*, 563 F.3d 78 (4th Cir. 2009)
- Armalite, Inc. v. Lambert*, 544 F.3d 644 (6th Cir. 2008)
- Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492 (7th Cir. 2006)
- Arwady Hand Truck Sales, Inc. v. Vander Werf*, 507 F. Supp. 2d 754 (S.D. Tex. 2007)
- Athens Pawn Shop Inc. v. Bennett*, 364 F. App'x 58 (5th Cir. 2010)
- Borchardt Rifle Corp. v. Cook*, 684 F.3d 1037 (10th Cir. 2012)
- Bryan v. United States*, 524 U.S. 184 (1998)
- DiMartino v. Buckles*, 129 F. Supp. 2d 824 (D. Md. 2001)
- Harrison v. United States ex rel. Department of the Treasury*, No. CIV-04-100-SPS, 2006 WL 3257401 (E.D. Okla. Nov. 9, 2006)
- Jim's Pawn Shop, Inc. v. Bowers*, No. 5:05-CV-525-H(3), 2008 U.S. Dist. LEXIS 97199 (E.D.N.C. Sept. 16, 2008)
- Prino v. Simon*, 606 F.2d 449 (4th Cir. 1979)
- Red's Trading Post, Inc. v. Van Loan*, No. CV07-090-S-EJL, 2008 WL 216611 (D. Idaho Jan. 24, 2008)
- Red's Trading Post, Inc. v. Van Loan*, No. CV07-090-S-EJL, 2007 WL 1302761 (D. Idaho Apr. 30, 2007)
- Red's Trading Post, Inc. v. Van Loan*, No. CV07-090-S-EJL, 2007 WL 1381799 (D. Idaho Apr. 4, 2007)
- Rich v. United States*, 383 F. Supp. 797 (S.D. Ohio 1974)
- RSM, Inc. v. Herbert*, 466 F.3d 316 (4th Cir. 2006)
- Service Arms Co., Inc. v. United States, Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 463 F. Supp. 21 (W.D. Okla. 1978)
- Service Arms Co., Inc. v. United States, Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 76 F.R.D. 109 (W.D. Okla. 1977)
- Stein's, Inc. v. Blumenthal*, 649 F.2d 463 (7th Cir. 1980)
- Strong v. United States*, 422 F. Supp. 2d 712 (N.D. Tex. 2006)
- Weaver v. Harris*, 486 F. App'x 503 (5th Cir. 2012)
- Weaver v. Harris*, 856 F. Supp. 2d 854 (S.D. Miss. 2012)
- Weidner v. Kennedy*, 309 F. Supp. 1018 (C.D. Cal. 1970)
- Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 415 F.3d 1274 (11th Cir. 2005)
- Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 348 F. Supp. 2d 1299 (S.D. Ala. 2004)

Appendix D

Helpful Web Sites

<http://www.atf.gov/>: main ATF Web site

<http://www.atf.gov/content/library/firearms-publications-library>: ATF firearms publications Web page

<http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>: Federal Firearms Regulations Reference Guide

<http://www.atf.gov/content/firearms/firearms-industry/guides/publications-firearms-national-firearms-act-handbook>: NFA Handbook Web page

<http://www.atf.gov/regulations-rulings/regulations/index.html>: ATF regulations Web page

<http://www.atf.gov/regulations-rulings/rulings/index.html>: ATF rulings Web page

<http://www.atf.gov/publications/circulars-bulletins.html>: ATF Web page of industry circulars and bulletins

<https://www.atf.gov/files/forms/download/atf-f-4473-1.pdf>: Form 4473

<http://home.nra.org/home/list/home-feature>: NRA Web site

<http://www.fairtradegroup.org/mainpage.htm>: FireArms Import/Export Roundtable Trade Group

<http://www.nssf.org/Industry/>: National Shooting Sports Foundation (NSSF) industry Web page

<http://www.nssf.org/compliance/>: NSSF compliance page

<http://www.nssf.org/retailers/consultants/>: NSSF consultants page

<http://www.nssf.org/retailers/consultants/info.cfm>: NSSF page with useful resources on compliance

<http://pmdrtc.state.gov/registration/wmr.html>: U.S. State Department Web page on ITAR registration

http://pmdrtc.state.gov/registration/faqs_reg.html: U.S. State Department FAQ Web page on ITAR registration

CHAPTER 5

Self-Defense and the Castle Doctrine: When Is Deadly Force Unlawful?¹

Mia Magness

I. Origin of the Castle Doctrine

An old English proverb states, “A man’s house is his castle.” The saying was popularized by Sir Edward Coke (1552–1634), an English lawyer, writer, politician, and parliament member.² From 1628 through 1664, he authored *The Institutes of the Laws of England*, a series of legal treatises. In the third part of the treatises, Coke wrote, “For a man’s house is his castle, et domus sua cuique tutissimum refugium.”³ The Latin portion is translated as “and his home his safest refuge.” Together, the saying becomes “For a man’s house is his castle, and his home his safest refuge.”⁴ Thus, Coke helped establish the general legal principle that no one has the authority to enter your home without invitation or permission. This common-law principle became known as the Castle Doctrine. Over time, the Castle Doctrine came to represent a homeowner’s legal right to use force to defend and protect his home from unwanted intruders.

1. This chapter was originally presented at the 40th Annual Advanced Criminal Law Course in Houston, Texas, July 21–24, 2014. The author would like to thank Justin Forster, third-year law student at Texas Tech University School of Law, and Assistant District Attorney Erik Locascio for their assistance.

2. See *Encyclopedia Britannica*, www.britannica.com/EBchecked/topic/124844.

3. Sir Edward Coke, *Third Institutes of the Laws of England* 162 (1644).

4. See also *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195 (K.B.) 195; 5 Co. Rep. 91 a, 91 b (“[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.”).

II. Evolution of the Castle Doctrine Law in Texas

In 1973, the Sixty-third Texas Legislature imposed a duty to retreat, if possible and reasonable, before one would be justified in using deadly force. In essence, this was the antithesis of stand-your-ground law. Section 9.31 of the 1974 Texas Penal Code justified the use of physical, but not deadly, force when and to the extent that the actor reasonably believed it was immediately necessary to protect himself against the other's use or attempted use of unlawful force.⁵

Deadly force could be used only if the actor reasonably believed that it was immediately necessary to protect himself or a third person from another's use or attempted use of unlawful deadly force on himself or a third person, or to prevent the "imminent commission of aggravated robbery, murder, rape, aggravated rape, robbery, or aggravated robbery."⁶ Even when deadly force was justified, it was still restricted. An actor could use deadly force only if "a reasonable person in the actor's situation would not have retreated."⁷ Thus, the victim of a possible lethal attack still had the burden to retreat even in his own home.

An exception to the duty to retreat was created in 1995 by the Seventy-fourth Legislature. The duty to retreat before using deadly force no longer applied if the use of deadly force was in response to another's unlawful entry into the actor's home. Penal Code section 9.32(b) stated, "The requirement imposed by Section (a)(2) does not apply to an actor who uses force against a person who is at the time of the use of force committing an offense of unlawful entry in the habitation of the actor."⁸ However, the general duty to retreat remained applicable in all other cases. By 1995, the Castle Doctrine was firmly incorporated and codified into Texas's self-defense law.

In 2007, the Eightieth Legislature expanded the Castle Doctrine and stand-your-ground law with Senate Bill (S.B.) 378.⁹ S.B. 378 created a presumption of reasonableness with respect to an actor's belief that force was immediately necessary to protect the actor from another's use or attempted use of unlawful force as long as three conditions existed: he knew or had reason to believe the person whom force was used against was engaged in one of the unlawful acts listed in the statute, he did not provoke the person whom force was used against, and he wasn't otherwise engaged in criminal activity. S.B. 378 specifically stated that an actor had no duty to retreat if attacked in a place where he had a right to be present, as long as the actor didn't provoke the attack and wasn't otherwise engaged in criminal activity at the time force was used.

5. Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 901.

6. Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 901.

7. Acts 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 901.

8. Acts 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2141-42.

9. Sen. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 378, 80th Leg., R.S. (2007) available at www.capitol.state.tx.us/tlodocs/80R/analysis/html/S.B.00378F.htm.

On March 27, 2007, Governor Rick Perry signed S.B. 378 into law; it expanded Texans' self-defense rights by no longer requiring a person to retreat while acting in self-defense.¹⁰ Texans were given the right to use force, including deadly force, to protect their homes, vehicles, and places of business or employment when an intruder was unlawfully entering or attempting to enter one of these locations. In addition, the use of force or deadly force became permissible if an actor was attempting to remove someone from the actor's home, vehicle, place of business or employment by force.

III. Section-by-Section Analysis of Senate Bill 378

Section 1 of S.B. 378 amended section 9.01 of the Texas Penal Code by adding subsections (4) and (5), to define "habitation" and "vehicle." "Habitation" was assigned the same meaning as used in section 30.01(1) of the Penal Code, namely "a structure or vehicle that is adapted for the overnight accommodation of persons, and includes: (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle."¹¹ "Vehicle" was assigned the same meaning used in section 30.01(3) of the Penal Code, namely that a vehicle "includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as 'habitation.'"¹²

Section 2 of S.B. 378 amended section 9.31 of the Penal Code by amending subsection (a) and adding subsections (e) and (f). Subsection (a) was amended to provide for a presumption of reasonableness in an actor's use of force. It provides that an actor's belief that the use of force was immediately necessary is presumed to be reasonable if the actor knew or had reason to believe that the person against whom the force was used had unlawfully and with force entered, or was attempting to enter, the actor's occupied habitation, vehicle, or place of business or employment. An actor's belief that the use of force was immediately necessary is also presumed reasonable if the actor knew or had reason to believe that the person against whom the force was used unlawfully and with force removed, or was attempting to remove, the actor from the actor's habitation, vehicle, or place of business or employment. In addition, an actor's belief that the use of force was immediately necessary is presumed to be reasonable if the actor knew or had reason to believe that the person against whom the force was used was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. However, the presumption of reasonableness is eliminated if the actor who used forced

10. See Press Release, Gov. Perry Signs Law Allowing Texans to Protect Themselves (Mar. 27, 2007), available at <http://governor.state.tx.us/news/press-release/2265/>.

11. Tex. Penal Code § 30.01(1).

12. Tex. Penal Code § 30.01(3).

against a person provoked the person against whom force was used and was engaged in criminal activity other than a Class C misdemeanor or traffic offense at the time the force was used. Subsection (e) eliminates an actor's duty to retreat before using force if the actor had a right to be present at a location, did not provoke the person against whom force was used, and was not engaged in criminal activity at the time the force was used. Subsection (f) prohibits a fact finder from considering whether an actor failed to retreat when deciding whether that actor reasonably believed that force was necessary.

Section 3 of S.B. 378 amended section 9.32 of the Penal Code. Previously, an actor was justified in using deadly force in defense of a person if the actor would be justified in using force against another under section 9.31, a reasonable person in the actor's situation would not have retreated, the actor reasonably believed the use of deadly force was necessary, and the actor used only the degree of force necessary. As amended, section 9.32 no longer contains any consideration of whether a reasonable person in the actor's situation would have retreated.

Section 4 of S.B. 378 amended section 83.001 of the Texas Civil Practice and Remedies Code. The amendment creates immunity from civil liability for an actor who justifiably uses force or deadly force under chapter 9 of the Texas Penal Code. Therefore, an actor who justifiably uses force or deadly force is immune from civil liability if he causes personal injury or death as a result of his use of force. The affirmative defense to civil action previously in this section was deleted.

Section 5 of S.B. 378 made application of the Act prospective.

Section 6 of S.B. 378 made September 1, 2007, the effective date for the changes.

IV. Self-Defense Law in Texas

Chapter 9 of the Texas Penal Code contains justification defenses that negate an individual's criminal responsibility for conduct that would otherwise be illegal. Subchapter C, titled "Protection of Persons," addresses the law of self-defense.

Penal Code section 9.31 details the general law governing self-defense and the use of force against another. Section 9.31 justifies an actor's use of force, but not deadly force, against a person. Section 9.31(a)(1)(A) states, "Except as provided in Subsection (b), a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."¹³

When evaluating an actor's use of force, the ultimate question is whether the actor's belief that he had to use force was reasonable. The first question in a self-defense analysis is whether the person whom force was used against was unlawfully

13. Tex. Penal Code § 9.31(a).

using or attempting to use force against the actor. The second question is whether the actor used only the degree of force necessary to protect himself. The third question is whether the actor's use of force was immediately necessary under the circumstances. If all three questions are answered affirmatively, the actor's use of force would be deemed justifiable and he would not be held criminally responsible unless he provoked the difficulty or was otherwise engaged in criminal activity other than a Class C misdemeanor or traffic violation.

In addition, section 9.31(a)(1) provides presumptions that the actor's belief that he had to use force was reasonable under specific circumstances. An actor's use of force against another is presumptively reasonable if the person against whom force was used was unlawfully and with force removing or attempting to remove the actor from the actor's habitation, vehicle, or place of business or employment. "The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor: (1) knew or had reason to believe that the person against whom the force was used: (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's *occupied habitation, vehicle, or place of business or employment.*"¹⁴ This 2007 amendment to section 9.31 expanded the Castle Doctrine to encompass an individual's vehicle and workplace. What constitutes a habitation or vehicle is defined under Texas Penal Code section 30.01:

- (1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:
 - (A) each separately secured or occupied portion of the structure or vehicle; and
 - (B) each structure appurtenant to or connected with the structure or vehicle.

....
- (3) "Vehicle" includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as "habitation."¹⁵

The removal of the requirement to retreat is found in Penal Code section 9.31(e):

A person who has a right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is *not* required to retreat before using force as described by this section.¹⁶

14. Tex. Penal Code § 9.31(a)(1)(A) (emphasis added).

15. Tex. Penal Code § 30.01.

16. Tex. Penal Code § 9.31(e) (emphasis added).

Penal Code section 9.31 also extended the use of self-defense without retreat to a person's car or workplace in addition to his home. Section 9.31(f) specifically prohibits a fact finder from considering whether an actor failed to retreat in determining if the actor reasonably believed his use of force was necessary if the actor was present at a location where he had a right to be and not otherwise engaged in criminal activity.¹⁷

Circumstances under which the use of force is not legally justified are listed in Penal Code section 9.31(b). The Code states that an actor will not be justified in the use of force in response to verbal provocation alone or to resist a lawful arrest or search. An actor may not legally use force if he consented to the exact force used or attempted by another. When considering the Castle Doctrine and stand-your-ground law, the limitations on the use of force found in section 9.31(b)(4) and 9.31(b)(5) are particularly important.

Penal Code section 9.31(b)(4) provides that if an actor provoked another's use or attempted use of unlawful force, the actor's use of force will not be justified unless he abandons the encounter, or clearly communicates his desire to abandon the encounter but reasonably believes he cannot safely abandon the encounter, and the other person continues or attempts to use unlawful force against the actor.¹⁸

Penal Code section 9.31(b)(5) states that an actor's use of force is not justified if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was either unlawfully carrying a weapon in violation of Penal Code section 46.02 or possessing or transporting a weapon in violation of section 46.05.¹⁹

Penal Code section 9.32 governs the use of deadly force in defense of a person. The statute first requires that an actor be justified in using force under section 9.31. The remainder of the section tracks the same language of section 9.31; the same presumptions and limitations are applicable.²⁰

The Penal Code establishes that deadly force is presumed to be reasonable if a suspect either "unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business" or was "committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated assault, robbery, or aggravated robbery."²¹ The statute requires that the person using deadly force should not "(2) provoke the person against whom the force was used" and "(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used."²² A person's use of deadly force is also justified

17. See Tex. Penal Code § 9.31(f).

18. See Tex. Penal Code § 9.31(b)(4).

19. See Tex. Penal Code § 9.31(b)(5).

20. See Tex. Penal Code § 9.32.

21. Tex. Penal Code § 9.31(a)(1)(A), (C).

22. Tex. Penal Code § 9.31(a)(2), (3).

“when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve the other’s life in an emergency.”²³ When considering the Castle Doctrine and whether an actor lawfully used deadly force in defense of his home, vehicle, or place of business or employment, a defendant must present affirmative evidence that the deadly force was used on or after September 1, 2007.²⁴

Applicable Code sections dealing with protecting a third person or third person’s property are found under Penal Code sections 9.33 and 9.43. Section 9.33, defense of third person, states the following:

A person is justified in using force or deadly force against another to protect a third person if:

- (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
- (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.²⁵

Section 9.43, protection of third person’s property, states:

A person is justified in using force or deadly force against another to protect land or tangible, movable property of a third person if, under the circumstances as he reasonably believes them to be, the actor would be justified under Section 9.41 or 9.42 in using force or deadly force to protect his own land or property and:

- (1) the actor reasonably believes the unlawful interference constitutes attempted or consummated theft of or criminal mischief to the tangible, movable property; or
- (2) the actor reasonably believes that:
 - (A) the third person has requested his protection of the land or property;
 - (B) he has a legal duty to protect the third person’s land or property; or
 - (C) the third person whose land or property he uses force or deadly force to protect is the actor’s *spouse, parent, or child, resides with the actor, or is under the actor’s care.*²⁶

Section 9.43(c) clearly does not extend protection to a neighbor’s property.²⁷

23. Tex. Penal Code § 9.34(b).

24. See *Krajcovic v. State*, 393 S.W.3d 282 (Tex. Crim. App. 2013).

25. Tex. Penal Code § 9.33.

26. Tex. Penal Code § 9.43 (emphasis added).

27. See Tex. Penal Code § 9.43(c).

The law governing the use of deadly force in a Castle Doctrine scenario is clear. Once the issue is raised at trial, the first challenge for the prosecution is to establish that the defendant, based on the facts of the case, is not entitled to a jury charge on self-defense. If the defendant claims self-defense and the issue is before the jury for deliberations, the prosecution must then establish that the defendant's actions were not reasonable under the circumstances. Obviously, the defense will want to establish that the defendant acted in a reasonable manner when using deadly force. Ultimately, once the issue of the use of deadly force in self-defense is raised at trial, the challenge for each the prosecution and the defense is to persuade the jury to adopt its respective position and render a verdict accordingly.

V. Justifiable Homicides in Texas

In June 2012, the *Houston Chronicle* published an article that took the position that justifiable homicides were on the rise in Texas due to the 2007 expansion of the Castle Doctrine.²⁸ The article reported that according to a 2012 study, Houston had the largest occurrence of justifiable homicides in Texas. In 2010, twenty-seven justifiable homicides occurred in Houston compared to the forty-eight total justifiable homicides in Texas.

One recent incident involving a combination of stand-your-ground law and the Castle Doctrine took place in Harris County with sixty-two-year-old Joe Horn. Horn shot and killed two men in his front yard whom he caught burglarizing his neighbor's home. A grand jury in Harris County concluded "the act was a justifiable use of deadly force and not murder."²⁹ Jeff Wentworth, who wrote S.B. 378, stated that "[i]t was not an issue in this case other than him saying incorrectly that he understood it to mean he could protect his neighbor's property."³⁰ Horn's defense was that the burglars were outside his home and appeared to be attempting the same crime as that committed at his neighbor's home. The question raised by the Joe Horn event is whether the stand-your-ground doctrine extends to a neighbor's property in addition to your own.

28. See Yang Wang & Dane Schiller, *Texas Justifiable Homicides Rise with 'Castle Doctrine,'* *Houston Chronicle*, June 13, 2012, www.chron.com/news/houston-texas/article/Texas-justifiable-homicides-rise-with-Castle-3676412.php.

29. See Brian Rogers & Dale Lezon, *Joe Horn Cleared by Grand Jury in Pasadena Shootings,* *Houston Chronicle* (June 30, 2008), www.chron.com/neighborhood/pasadena-news/article/Joe-Horn-cleared-by-grand-jury-in-Pasadena-1587004.php.

30. See Rogers & Lezon.

VI. Relevant Cases

A. *State v. Williams*³¹

The trial court did not err when it refused to instruct the jury on the issue of self-defense and sudden passion. On June 9, 1999, Williams, the appellant, initiated a confrontation with Joseph about Joseph's spanking of Demarcus, Williams's stepson. Before exiting his car to talk to Joseph, Williams pulled a .357 revolver from under his seat. During the conversation, Williams took off his belt and struck Joseph several times. Joseph attempted to grab Williams from the waist, and a fight for the gun ensued, resulting in the gun being discharged, striking a vehicle. Williams was able to gain control of the gun and allegedly told Joseph he was not going to shoot him. After Williams stated that to Joseph, Joseph allegedly ran towards Williams, causing Williams to shoot Joseph. Joseph was still attempting to grab Williams, and Williams shot Joseph once more.

The facts were clear that Williams initiated the confrontation with Joseph about the spanking of his stepson Demarcus. If the evidence is undisputed that force was not justified as a matter of law because of Texas Penal Code section 9.31(b)(5), a self-defense instruction is barred.

B. *Dyson v. State*³²

The court of criminal appeals affirmed the trial court's finding that the defendant wasn't entitled to a self-defense jury instruction. Dyson, the appellant, challenged his brother Cal to a fight at their grandparents' house. Cal refused to fight his brother, so Dyson left and walked to an adjacent house, where Cal and their father lived, to grab a pistol. Dyson fired the gun into the air and threatened Cal with the gun. Cal and his grandmother left to seek refuge in the grandparents' home. Dyson approached the grandparents' home and told his grandfather to send Cal out and fight him. After Cal didn't come out and fight, Dyson went back to his home next door, hit his father several times, and put the pistol up against his father. Dyson fired the pistol several times, including in the direction of the grandparents' home. When the police arrived at the grandparents' home they were told that Dyson was at the father's house next door. As the officers approached the father's home where Dyson was, they yelled out "police." Dyson responded by firing the pistol through the front door window, causing the officers to seek refuge behind a car parked in the front yard. Despite the officers yelling "police" again, Dyson fired a shotgun through the door, striking the car. An officer fired two shots at Dyson that missed but caused Dyson to surrender.

31. 35 S.W.3d 783 (Tex. App.—Beaumont 2001, pet. ref'd).

32. 672 S.W.2d 460 (Tex. Crim. App. 1984).

Dyson claimed that he fired the shots because he didn't hear the police identify themselves and he thought his brother Cal was coming to fight. The evidence was clear that Dyson provoked the attack; therefore, he was not entitled to a self-defense charge.

C. *Saxton v. State*³³

The court of criminal appeals reversed the fourteenth court of appeals' decision by holding that the state was not required to affirmatively produce evidence refuting a self-defense claim but instead to prove its case beyond a reasonable doubt. Saxton, the appellant, invited the deceased over for drinks, which led to a heated conversation over a mutual former girlfriend. The deceased became agitated over the conversation, causing him to drink more, and he declined to leave once Saxton had asked him to leave. Saxton then went to his bedroom to grab his pistol to try to convince the deceased to leave. The deceased was allegedly making threats toward Saxton, causing Saxton to be fearful for the safety of himself and his family. Saxton testified that the deceased lunged at him and the gun discharged at the deceased. Saxton's testimony was corroborated with evidence taken from the gun, a chemist's testimony, and photographs of Saxton's leg.

Saxton argued that the state had the burden to produce evidence that established beyond a reasonable doubt that Saxton did not act in self-defense. The court of criminal appeals stated the standard: "[R]ather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt."³⁴

D. *Elliot v. State*³⁵

The court of appeals affirmed the trial court's decision that Janet Elliot was not entitled to a jury instruction on self-defense. Janet and David Elliott were going through a divorce after eighteen months of marriage. The trial judge in the couple's divorce proceeding ordered that, while the divorce was pending, Janet could reside in David's home and use the car that David allegedly bought her. Janet feared that David would hide the car, so she hid the keys. Janet began recording answering machine messages left by Eric, David's son, in which Eric alluded to taking Janet's car. Janet recorded these conversations for about a month, edited them, and then sent a tape of

33. 804 S.W.2d 910 (Tex. Crim. App. 1991).

34. *Saxton*, 804 S.W.2d at 914.

35. 293 S.W.3d 781 (Tex. App.—Waco 2009, no pet.).

the recordings to the Plano Police Department. Janet did not have either Eric's or David's consent to record their telephone conversations.

Janet claimed that she was entitled to a jury instruction of self-defense because she was afraid that David might harm her after he had previously threatened her with violence in the past. However, recording a telephone conversation does not meet the statutory justification of self-defense, wherein a person is justified in using force against another when and to the degree she reasonably believes the force is immediately necessary to protect herself against the other's use or attempted use of unlawful force. Janet did not direct force against another by recording the telephone conversations, therefore the trial court's decision was affirmed.

E. *Krajcovic v. State*³⁶

The court of criminal appeals reversed the Fort Worth court of appeals' decision that Krajcovic was entitled to a jury instruction on the Castle Doctrine. Krajcovic, the appellant, provided a written statement that he had shot Shawn, the victim, during a struggle. Krajcovic claimed that Shawn was threatening both him and his son over \$200 that was owed by Krajcovic to Shawn. The gun discharged during the scuffle, causing Shawn to fall onto a bed in the house. Krajcovic then grabbed his son and left the house.

Krajcovic wanted a jury instruction on the Castle Doctrine, specifically on the 2007 amendments, which no longer required a duty to retreat. The trial court refused to instruct the jury on the Castle Doctrine because it couldn't be determined whether the shooting took place before or after September 1, 2007, when the amendments took effect. The court of criminal appeals held that there was no affirmative evidence to support a rational inference that the offense was committed on or after September 1; therefore, the trial court did not err in failing to instruct the jury on the Castle Doctrine.

F. *Mays v. State*³⁷

The court of criminal appeals affirmed the trial court's decision that Mays was not entitled to a justification defense. On May 17, 2007, Fran Nicholson called the Henderson County dispatcher to tell them that her neighbor, Mays, was shooting a handgun at his wife. Deputies arrived at the scene and questioned Mays, after which they attempted to arrest him. Mays then ran into his house to grab his deer rifle. Officer Valentine attempted to calm down Mr. Mays, and after twenty minutes, Mays climbed out of his window. Mays was startled when he saw the officers attempting to

36. 393 S.W.3d 282 (Tex. Crim. App. 2013).

37. 318 S.W.3d 368 (Tex. Crim. App. 2010).

corner him, dove back into his house through the window, and started firing at the officers. After killing two of the deputies, Mays was also wounded from the exchange of gunfire and surrendered to police.

Mays argued that he was entitled to justification defenses in the jury instructions. The court of criminal appeals disagreed, stating, "Texas law does not recognize the 'ordinary and prudent' paranoid psychotic for purposes of Penal Code justification defenses."³⁸ The court further stated that—

appellant fails to acknowledge that each of these justification defenses requires that the defendant reasonably believe that his conduct is immediately necessary to avoid a greater harm. As with the statutory mistake-of-fact defense, a "reasonable belief" is one that would be held by an ordinary and prudent person, not by a paranoid psychotic.³⁹

G. *Morales v. State*⁴⁰

The court of criminal appeals reversed and remanded, holding that the trial court erred when it submitted italicized portions of the jury charge that provided for the jury to determine whether Morales had a duty to retreat. A fight occurred on December 2, 2007, between the Kirby Block gang and Manett Boys gang. Juan, Morales's brother, and Enil Lopez were two of the individuals involved in the fight. At some point during the fight, Morales shot and killed Enil. There was conflicting testimony from witnesses about whether Lopez was armed and beating Juan or whether Juan had pulled baseball bats from a car and participated with others in beating Lopez.

The jury charge included instructions on defense of a third person. The trial judge modified his original instructions that included a duty to retreat, when no language in the statute suggests for a determination on whether a duty to retreat exists.

The Penal Code requires that a presumption that favors the defendant be submitted to the jury "if there is sufficient evidence of the facts that give rise to the presumption . . . unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact."⁴¹

The issue was whether Morales participated in a riot, because if so he wouldn't be entitled to a favoring presumption. The court of criminal appeals remanded the issue for a determination about whether Lopez initiated the riot. The third-person self-defense statutes apply to the crime of participating in a riot, as long as all of the actor's

38. *Mays*, 318 S.W.3d at 385.

39. *Mays*, 318 S.W.3d at 385.

40. 357 S.W.3d 1 (Tex. Crim. App. 2011).

41. *Morales*, 357 S.W.3d at 7 (quoting Tex. Penal Code § 2.05(b)(1)).

actions that would otherwise constitute participation are justified under one of the justification defenses.

H. *Whitney v. State*⁴²

The court of appeals affirmed the trial court's jury instruction of a statutory duty to retreat that tracked the language of the Texas Penal Code. Whitney's daughter Tashira and her boyfriend were involved in an argument. Tashira called Whitney, who then drove over to Tashira's apartment. A neighbor saw Whitney climb out of her car with a yellow-handled hammer. Tashira's boyfriend was picking up his belongings in the bedroom when Whitney came into the room. Tashira's boyfriend and Whitney started arguing, and Tashira closed the bedroom door. When the door opened again, Tashira's boyfriend approached Whitney, and then Whitney threw a cup of bleach-water into his face, causing the boyfriend to fall to the floor. Finally, Whitney struck the boyfriend in the back of the head with the yellow-handled hammer. The boyfriend died from his injuries shortly thereafter.

The court of appeals concluded that the 2007 amendments to sections 9.31(a) and 9.32(a)(2) did not completely abolish the duty to retreat if those provisions did not apply. The failure to retreat can be considered when the provisions of the self-defense statutes do not apply.

I. *Hernandez v. State*⁴³

The court of appeals affirmed the trial court's jury instruction limiting the defendant's right to self-defense. On April 29, 2005, Hernandez, Antonio Lopez, and Artemio Lopez were at their employer's shop. Gilberto, their employer, instructed them to drive to Omar Garza's apartment to retrieve a television. They were also instructed to talk to Omar about property that he allegedly stole from Gilberto. While on their way to Omar's apartment, Hernandez told the others that he was going to ask Omar to return the guns and jewelry he had stolen, and that he would do the talking. When they arrived at Omar's apartment, two men helped move the television into Gilberto's truck. Omar approached the men and began having a conversation with Hernandez, who asked Omar about the guns and the gold. Omar then pushed Hernandez and pulled out a small black automatic handgun. Hernandez then produced a firearm and shot Omar twice, killing him. The issue is whether the use of deadly force by Hernandez was justified when Hernandez argued that differences existed between Omar and Gilberto, not Omar and Hernandez. Circumstantial evidence of two bullet casings that

42. 396 S.W.3d 696 (Tex. App.—Fort Worth 2013, pet. ref'd).

43. 309 S.W.3d 661 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

did not match the bullets found in Omar's gun also suggested that Hernandez was illegally carrying a handgun.

The court of appeals held that the disagreement between Omar and Gilberto also involved Hernandez, and in addition he illegally possessed a weapon; therefore, Hernandez could not use a self-defense theory.

VII. Conclusion

The 2007 amendments to the Texas Penal Code expanded the Castle Doctrine. The doctrine now encompasses an individual's vehicle and place of business or employment. This expansion of the Castle Doctrine, combined with the removal of the duty to retreat, has afforded Texas citizens greater self-defense rights by law. But has the change in the law had a substantial impact? Texas grand juries have traditionally been very forgiving of an individual's use of force, even deadly force, to protect his home, family, and property. Only time will tell if that same lenient viewpoint will extend to the use of deadly force to protect the home, vehicle, or workplace of a third party.

CHAPTER 6

How Defendants Are Seen by the Jury in Gun Cases

Glenn E. Meyer

Abstract

Psychological factors can influence juries. One factor to be considered is whether the appearance of weapons can prime negative attitudes toward defendants. These attitudes can interact with issues of race, gender, and pro- or antigun attitudes. Human-factors issues and memory errors are also important in considering gun usage.

I. Background

There has been much of discussion in the legal literature of the standards for the use of lethal force in self-defense (Leverick, 2007) and factors that influence juries (Devine, 2012; Klein & Mitchell, 2010).

The starting point for this discussion is whether characteristics of firearms and related issues can influence jury decisions. Such issues can be the gender of the firearms user, race or ethnicity of the participants in the critical incident, firearms experience and training of the gun user, and human-factors issues. Related problems can be the memory of witnesses of firearms-related events.

An increase in self-defense shootings can be predicted as concealed-carry laws have spread across the United States. Roughly every other household may possess at least one gun (Saad, 2011). Gun sales have dramatically increased in recent years (Thurman, 2012). For example, federal background checks to purchase firearms increased by 25 percent from 2010 to 2011. Laws have eased the carrying of concealed handguns, with forty-three states offering easily obtained permits or no permits needed for carrying a handgun. In some states, one out of eleven people are able to carry a handgun on the street legally (Jonsson, 2012). At least 118 million handguns are in civilian hands, and eight million people have obtained the above-mentioned permits (Government Accounting Office, 2012). Studies have indicated that citizens use privately owned firearms more often than thought in self-defense situations (Kleck, 1997; Tark & Kleck, 2004).

There is a tendency of naive self-defense-oriented users to assume that they will always engage in a “good shoot.” It will be judged as such and thus they will be

praised. Issues such as gun choice, ammunition choice, posturing to friends or on the Internet about shooting to kill, and so forth, will not even come into play, as they will never see the inside of a courtroom. The discussion rages on the Internet among gun enthusiasts and law enforcement. Here are some fairly typical interchanges. The first is from AR15.com—a popular forum discussing that firearm (<http://ar15.com/archive/topic.html?b=1&f=5&t=1445493>):

I read a post a year or so ago regarding the potential for getting into deep poop for using a registered SBR in a self defense situation.

Reply: I'll use mine if needed. A good shoot is a good shoot.

Reply: While a good shoot is a good shoot regardless of the firearm used, juries are stupid and impressionable. The “ZOMG! Sawed-off Rifle bullet hose of death” would not be my first choice to see as Exhibit A. IOW, I could see a questionable shoot being labeled a bad shoot if an SBR is used.

From a police forum discussing the risk of modified weapons (<http://forums.officer.com/forums/archive/index.php/t-129352.html>):

In the 30+ years that I have been hearing this, NO ONE has been able to produce a court case where this was a factor. I carried modified or custom guns for all but the first 2 years of my career.

As I used to teach, if it's a good shoot (per your report and witnesses), using a modified gun and oddball ammo does not matter. If it's a bad shoot, having used your issued gun/ammo, with your entire chain of command standing there telling you to “shoot him” is not going to help.

The idea of a good shoot and finding a case misses several points. Given that a person is going to trial means that the state does not think it is a good shoot.

The influence of weapons related issues may not make it into legal databases as they affect the mind of a jury in a way that does not necessarily lead an issue that such data bases will report. Yes, if it's a good shoot it won't matter. But you're not the one deciding if it's your intentional act of extreme violence against another person was justified. If the DA/grand jury does not agree with you that it was justified, it won't be a good shoot unless your trial jury decides it was.

Frank Ettin, attorney—<http://thefiringline.com/forums/showthread.php?t=501122&highlight=suppressed>.

Certainly, the current discussion of the interaction of George Zimmerman and Trayvon Martin demonstrates that one cannot count on a defendant's shoot being a good shoot.

Anecdotally, we can see appearance issues operating. In a recent *Court TV* televised trial (*Florida v. Roten*, 2000), the defendant was accused of a hate crime shooting. Roten used a modified SKS (an older Soviet pattern 7.62 mm semiautomatic military rifle) with accessories that might make the rifle appear fiercer than some others. The commentator asked why anyone would need such a weapon. During the D.C.

sniper trial, the district attorney, James A. Willett “dramatized the importance of the weapon” (Dao, 2003) by assembling the assault rifle used in the attacks over a period of several minutes. Many people believe that certain types of guns are “good for only one thing—to kill” (Kleck, 1997, p. 16).

From the psychological literature, the operative principle seems to be the priming of aggressive ideation. The exposure to images of weapons or the weapons themselves can lead folks to act aggressively. The first major proponent of the concept was Berkowitz (1993, p. 70) who stated: “If we tend to think of guns . . . as instruments that are deliberately used to hurt others, rather than as objects of sport and enjoyment, the mere presence of a gun may stimulate us to assault others more severely than we intend.”

Such attitudes may be formed by media presentation of crimes and war in news and fictional portrayals. Aggressive thoughts can influence your view of a social interaction or make an aggressive resolution to a dispute seem more appropriate (Berkowitz & LePage, 1967; Bartholow et al., 2005).

Typical studies present images of weapons, weapons themselves, or models of weapons to experimental subjects (usually college students); aggression or negative affect are then collected (Anderson et al., 1998). Summarizing, such studies using reaction time measures to words, Bartholow et al. (p. 49, 2005) state that in experiments, a computer was used to prime participants with weapon words or weapon pictures, as well as nonweapon stimuli (e.g., plants and animals). Each of these primes was followed by either an aggressive or nonaggressive target word. The participants’ task was to read the word aloud as soon as they recognized it. The relative accessibility of aggressive thoughts was assessed by comparing participants’ response times to aggressive and nonaggressive target words following both weapon and nonweapon primes. The findings showed that identifying a weapon increases the accessibility of aggressive thoughts. Such articles might have an overreaching antifirearms cast. See, for example, *Does the gun pull the trigger? Automatic priming effects of weapon pictures and weapon names* (Anderson et al., 1998).

Other studies use an analog of aggressive behavior. Developed by Lieberman et al. (1999), a participant is presented a stimulus that may prime aggression and then given the opportunity to add anonymously various amounts of hot sauce to another person’s drink. While the ecological validity of the lab measure can be debated, it is standard. Klinesmith et al. (2006) used the technique to study weapons-based aggressive priming. Male participants interacted with a pellet gun model of a Desert Eagle handgun or a children’s toy. They then added as much hot sauce as they wanted to someone else’s drink. Participants manipulating the gun added more hot sauce, and this was correlated with an increase in testosterone (which mediates aggressive behavior). It was speculated that, for males, the presence of guns may increase societal violent behavior.

Thus, the weapon and related issues may make a juror be more punitive towards a defendant as negative affect accrues to the weapon user and the juror feels more aggressive toward the defendant.

Another suggested effect is that the exposure to the weapon influences the emotional aspect of decision and the cognitive construction of a critical incident. There are various models of jury decisions (Devine, 2012):

1. Bayesian and Stochastic—jurors use weighted models and probabilities to come to a decision. It is not seen as a likely psychological process.
2. Story Model—Jurors are active information processors that impose a chronological narrative organization on the issues. Information used includes cognitive and emotional schema, stereotypes, scripts, sequences of events. An example from Devine would be:
 - David insults Sheila at a bar (initial event).
 - She becomes upset (psychological reaction).
 - She picks a fight outside the bar for revenge (goal).
 - Haymaker thrown (action).
 - She breaks his jaw (consequence).

The story is used to explain why he is suing her to recover medical costs.

There are two criteria for evaluating a story:

1. Coverage—evidence and facts
2. Coherence—logical flow based on consistency, completeness, plausibility

The mental state of the actors is important, and the story model is seen as the leading model of decision making. Mental state as indicated by presented weapons issues telling the jury something about the defendant can be important. Various social decision processes have been postulated to drive how the story is constructed.

The juror strives to construct a coherent view of the critical incident very early on—perhaps in the opening statements. Presentations of witnesses and exhibits are evaluated as they fit into the story or discarded. Weapons characteristics and related issues can help form a story that indicates the defendant was irresponsible or “blood lusted.” The defendant had the weapons and wanted to use them. Certainly, the Trayvon Martin case is an example, with George Zimmerman portrayed as a wannabe cop. Media “experts” on the HLN Channel speculated that the fact he had a round chambered in his gun meant he was “ready to go.” If such a presentation is effective, the jurors will interpret the case through that filter. A “bad” gun—one designed primarily to kill—would help form a story of firearms misuse.

II. Initial Laboratory Studies on Weapons Effects

Laboratory research supports this view. Two early studies are informative. I note that many of the researchers in the field are not really conversant with correct firearms nomenclature.

First, Dienstbeir et al. (1998) hypothesized that handling or observing weapons would influence criminal proceedings. In their first experiment, participants assigned prison sentences for first offenses ranging from drunk driving through drug offenses, vandalism, arson, robbery, rape, and manslaughter. Participants chose a specific sentencing option from a fourteen-point scale, with sentences ranging from no prison time (1) to a death sentence (14). The participants either watched a sports presentation and handled a football or watched a target shooting presentation and then handled a .22 rifle and a Ruger Super Black Hawk .44 magnum pistol while simulating target-shooting for two minutes (p. 96). The weapons participants assigned significantly longer sentences than did those under the sports conditions.

In their second experiment, the authors postulated that greater salience of a weapon to a crime would lead to longer recommended sentencing. Two different crimes were presented to groups of four to ten subjects acting as jurors. One crime was a burglary of a gas station, the other a burglary of a department store. The first crime was always associated with burglary tools, the second with a gun (p. 99). There were videotaped depositions by a police officer concerning the crimes. The salience of the gun was varied by some mock jurors being given only a detailed verbal description of a "Tech-9 machine gun," others seeing the gun and its then being placed on the evidence table, and the last group passing the gun from juror to juror and then its being placed on the evidence table. The recommended sentence increased from a mean of 5.47 years to 6.60 years as the jurors had more gun exposure. The effect was more pronounced for women than for men. Women with lower gun familiarity gave longer sentences, but it was the opposite for men. The authors discuss the implications for the balance between probative and prejudicial effects of how weapons are presented and how appearance issues might influence (at that time) the debate about automatic assault weapons.

A second critical study in this area was conducted by Branscombe et al. (1993). The goal was to examine gender stereotypes and social inferences about a homeowner who shoots an intruder. The study postulated that those who violated stereotypical gender norms would be perceived more negatively. In the first study, a homeowner (male or female) heard a noise downstairs and saw a masked intruder with the stereo. A shot was fired that hit either the intruder or the wall. The participants had to vote guilty or not guilty if the homeowner was charged with criminal assault (this being before the current Castle Doctrine paradigm), give a confidence rating, and select a sentence. Thus you could be a competent or incompetent shooter, a male or female defendant. Sentencing was lenient and not guilty decisions were the norm. However, subjects were less confident that the incompetent shooter who missed the intruder was innocent compared with the competent male shooter who succeeded, and the opposite tendency for female shooters was observed. Competent female shooters created more doubt about their lack of guilt than did incompetent female shooters.

In their second experiment, there was a strong manipulation of competency (p. 118). A male or female observes their car being broken into by a teenager and goes outside with a .38 SPL revolver. The teenager is told to freeze but starts to run. The

homeowner fires and hits him, but in two ways. One is competent as an officer states: "She/he meant to shoot the kid, and the bullet hit its target. She/he definitely knew how to use a gun!" In the incompetent condition, the statement was: "She/he meant to shoot the kid, and the bullet ricocheted off the ground. She/he definitely did not know how to use a gun!" The officer adds, "While I sympathize with Mr./Ms. Crane's desire to protect his/her property, I cannot condone his/her actions. Because his/her life was not threatened, we are considering the possibility of charging him/her with armed criminal assault. At this time, we haven't decided whether or not to file charges against Mr./Ms. Crane."

Participants were asked to judge the actions of the homeowner by assigning blame, viewing about charging the homeowner, and punishment options.

The study's results demonstrate that as subjects' adherence to the belief that guns provide protection increases, so too does their desire to punish a skillful female shooter, while desire to punish a skillful male or unskillful female decreases. When the respondents strongly disagree with the notion that guns provide protection, the stereotype-inconsistent homeowners are treated more leniently than those who behave according to normative expectations. For those who do not believe guns protect, the skilled male is perceived as deserving particularly severe punishment. The researchers conclude:

For those individuals who believe that guns will protect their owners, stereotype-inconsistent targets, especially skilled female shooters, were evaluated less positively, were considered more to blame for the outcome, and as deserving greater punishment than stereotype-consistent targets. Less dramatic differences on these dependent measures were observed for those persons who do not believe that guns provide protection. In fact, there was a tendency for those who do not believe that guns provide protection to perceive the stereotype-inconsistent targets more positively, blame them less, and advocate less punishment relative to the stereotype-consistent targets. (p. 121).

They note that previous research indicates feminist views and viewing guns as protective are negatively related. It would seem that violating stereotypical norms can dramatically influence a juror's judgment.

III. Specific Firearms Issues

The above studies were rather general in nature. What about more specific and technical aspects of firearms usage? Defendants may be evaluated on the basis of the actual firearm and ammunition used, their training, and firearms usage history.

Three cases are informative and suggest that such things matter. They certainly negate the mantra of in a "good shoot" the truth will out.

A. Harold Fish

See www.nbcnews.com/id/15199221/ns/dateline_nbc-crime_reports/t/trail-evidence.

Mr. Fish was involved in an altercation with a man and his dog. The interaction led to Mr. Fish shooting the man. The firearm used was a 10 mm semiautomatic pistol. This caliber is a powerful one for a handgun. It was pointed out at trial that this is more powerful than the police normally use and that the pistol was loaded with hollow-point ammunition. Mr. Fish was characterized as using this combination knowing the end product of a shooting would be death. It was reported that the jury may have viewed this negatively.

B. Larry Hickey

See www.armedcitizensnetwork.org/images/stories/Hickey%20Booklet.pdf.

Mr. Hickey was involved in a physical altercation with three individuals that ended in gunfire. Hickey claimed that disparity in physical force necessitated using a firearm. Hickey had significant firearms training, which was brought up by the prosecution. A defense mock jury had a negative reaction and said he had too much training and should have known better. Interestingly, many firearms trainers use catchy phrases as mnemonic devices or perhaps to get a manly chortle out of a class. Two of the classics, "Always cheat, always win" and "One should treat everyone else in a polite manner while simultaneously having a plan to kill them," were brought up by the prosecution. The defense had to emphasize that the same instructors also taught de-escalation and avoidance. The negative statements were seen as powerful in closing arguments. From the jury research, they would fit into a negative construction of Hickey's actions.

Most quality firearms instructors will teach avoidance (Gochenour, 2006), as does Ayoob. Steele (2007) suggests that quality training will make it easier to defend a client. However, it may be a double-edged sword if a defendant seems to have ignored that part of class.

C. Gavriel R. Drennen

See http://billingsgazette.com/news/state-and-regional/wyoming/wyoming-supreme-court-hears-riverton-killing-appeal/article_9a1007be-e3b8-5c88-a9c0-fe36b32d7eea.html.

Mr. Drennen was involved in a shooting with a friend and renter. Pushed off a porch and fearing a continued assault, he fired several shots. The relevant issues at trial were that he was a competitive shooter and that he engaged in open carry. These were to show a murderous mindset that was prone to use a firearm. There was a fur-

ther mindset issue, as the last shot was fired with a delay after the first set of shots. This argued for premeditation.

We can see that in the real world, issues concerning the firearm and related processes are presented to the jury. They are certainly active if you are in court and you did not pass over the magic “good shoot” rainbow. Thus, we started a research program to investigate some of the issues of how weapon types, gender, and incident interact.

IV. Assault Rifles or Weapons and the Home Defender

The type of weapons that a citizen of the United States and of a particular state can possess is a matter of much controversy in state and federal venues. Bans on various types of semiautomatic weapons have been passed by both sets of governments, and that discussion is well known. However, such bans seem to have little effect on actual crime (Koper & Roth, 2001).

There is significant negative animus toward what are seen as firearms too dangerous for civilian use. This can extend even to police usage.

Many people believe that certain types of guns are “good for only one thing—to kill” (Kleck, 1997, p. 16). Ayoob (2000) and Rauch (2004), both law-enforcement authors, have commented on how juries can be influenced by media impressions of assault rifles. Owners are portrayed as deranged, and the militarized-appearing weapons are demonized. There has been significant debate over whether military-style weapons are appropriate for civilian law enforcement (e.g., Associated Press, 2002). In San Francisco, a police request for assault rifles led a councilperson to comment (Soltau, 2004): “Do we want our officers walking around with M-16s? It sends the wrong message to the community, which is already not trusting police officers and is frankly very fearful of them.” Some firearms companies try to sell pump action 5.56 mm rifles to police, as they did not look like military guns (e.g., www.remingtonle.com/rifles/7615.htm), or Ruger’s 9 mm and 40 SW carbine line. The inability of the latter to penetrate body armor led reviewers to speculate that, at least, you would be more successful if you shot them in the leg.

Nor is the gun universe universally happy with the AR-15 platform. In the gun media, there is the well-known Zumbo incident (Harden, 2007). Mr. Zumbo, a well-known hunting expert, opined in 2007:

Excuse me, maybe I’m a traditionalist, but I see no place for these weapons among our hunting fraternity. I’ll go so far as to call them “terrorist” rifles. They tell me that some companies are producing assault rifles that are “tack drivers.” Sorry, folks, in my humble opinion, these things have no place in

hunting. We don't need to be lumped into the group of people who terrorize the world with them, which is an obvious concern.

Bill Ruger, manufacturer of a competitive but more sporting-appearing rifle, previously aided in denouncing the military-derivative guns (Speir, 2002).

Such sentiments are congruent with those of failed presidential candidate Mitt Romney in early days: "These guns are not made for recreation or self-defense. They are instruments of destruction with the sole purpose of hunting down and killing people" (Borchors, 2012).

Psychological research, using the techniques discussed earlier, confirms that hunters or gun owners do not necessarily feel positive about "assault" weapons. Bartholow et al. (2005) found that assault weapons primed more aggressive ideation than did sporting firearms in their sample of gun-knowledgeable and sports-oriented individuals, as compared to less-knowledgeable participants. The former are more aware of the presumed more lethal purpose of assault weapons.

However, these authors are loose in their definition of "assault weapons" by gun world standards, as their study presented: "Assault guns included both handguns and assault rifles (semiautomatic and fully automatic 'machine guns'). Assault guns differ in appearance from hunting guns in several ways, including black or gray coloration, short barrels, and large ammunition magazines or 'clips.'"

In fact, defining what is an assault rifle or weapon is an ever-popular topic on the Internet and in the gun media. The term "assault" is seen as a pejorative, and various gun world entities proposed the use of "modern sporting rifles" for AR-15 types of weapons to distinguish them from fully automatic M-4 or M-16 firearms used by the military and police. It is thought that such palliatives and pointing out that they are *not* machine guns will placate people who are not positive towards these guns.

We decided to study the effect of assault rifle usage using juror decisions in an ambiguous homeowner defensive situation and in a police incident.

A. Meyer, G. E., Baños, A. S. Gerondale, T., Kiriazes, K., Lakin, C. M., and Rinker, A. C. (2009)

We conducted three experiments on whether the type of weapons used in a home-defense scenario and one with a police incident would influence a jury. The first three used the same classic defensive gun use conundrum that is ubiquitous in firearms training and similar to that used by Branscombe et al. (1993) and Dienstbier et al. (1998). Mock juror participants were presented with detailed written descriptions of a burglary scenario including defensive gun usage. The written presentations were created with the input of legal and law enforcement professionals to ensure that the arguments were valid and comparable to other jury simulation methodologies (Bornstein, 1999; Roesch et al., 1999). The scenarios also contained additional factual descriptions of the firearm (see figure 6-1 at the end of this chapter), the layout of the

home (figure 6-2), the fatal injuries, and other details. No inflammatory remarks were made about the guns.

First, the written presentation described the incident in factual terms: A homeowner hears a sound at night, downstairs, and investigates. The homeowner comes to the foot of the stairs and is armed. A burglar is discovered in the act of stealing a VCR. The homeowner challenges the burglar by pointing the firearm at him and ordering, "Don't move." The burglar responds with a curse and a threat to kill the homeowner. The burglar does not have a visible weapon. The homeowner then shoots the burglar twice, killing him. After the shooting, the homeowner immediately calls 911 and informs the police of the actions of the burglar described above.

The scenario is ambiguous regarding the need of the homeowner to shoot. While laws may vary state to state, in many this would be a defensible shooting if the homeowner saw the threat as credible. However, the homeowner did have the burglar at a disadvantage, and another jurisdiction might indict and try the homeowner.

Second, mock jurors read the prosecution's and the defendant's portrayal of the incident. The prosecution emphasized that there was no need to engage or shoot the burglar, and there was the possibility of retreat. The district attorney brought the charge of second-degree murder with a possible penalty of up to a twenty-five-year sentence against the defendant and argued the defendant was never truly in danger of grievous bodily harm, and could have retreated, or at least waited before firing the weapon.

The defense emphasized that the homeowner feared for his life or felt in danger of grievous bodily harm and did not have the duty to retreat. When the burglar turned, he feared that this younger man might rush him. The distance of fifteen feet could be closed in a second's time. Thus, the defendant felt there was sufficient disparity of force (difference in physical abilities) that the burglar could quickly put him at risk of significant harm. The defendant was also operating under the "Castle Doctrine": A person's home is his or her castle and one does not have to retreat in one's own home, nor should one be compelled to hide if one suspects an intruder is present.

The first study used a male defendant and six possible weapons, as seen in figure 6-1. These pictures were used in subsequent studies. The guns were a mixture of sporting guns and what might be classified as tactical or assault weapons by people not familiar with appropriate terminology. Women delivered to the homeowner defendant higher sentences than men (male average = 3.9 years, and female average = 5.7 years). Importantly, the average recommended sentence when the homeowner used the AR-15 weapon was 7.2 years for male subjects and 8.5 for females. This was significantly higher than any of the other gun types. The handguns had the lowest recommended sentences (in the two-to four-year range).

We replicated the experiment with students from the local community college who were older and had different socioeconomic status and life experiences than liberal arts students. We focused on two gun scenarios, the AR-15 and the Ruger Mini-14. Both are equally potent, but the latter looks less aggressive to some. The Mini-14 was explicitly excluded in the original assault weapons ban, perhaps due to its appear-

ance and the manufacturer's demonizing the AR-15 and high-capacity magazines (Speir, 2002). We also analyzed judgment of guilt versus innocence. In direct comparison, the AR-15 yielded significantly longer mean recommended sentences on the order of seven to nine years as compared to the Ruger (approximately two-and-a-half years). On the verdict side, the percent of guilty judgments was approximately 65 percent for the AR-15 versus 45 percent for the Ruger.

The third experiment added the significant factor of defendant gender. From the research cited before, a female using a weapon of war, assault rifle, or "evil black rifle" might be an added burden for the defense.

Thus, we tested the same burglary scenario with a female homeowner-shooter in addition to a male. Based on Branscombe et al. (1993), we expected mock jurors to judge female shooters more harshly. Interactions with weapon type might be expected, as using the AR-15 might violate gender stereotype more than the Mini-14.

Participants in this study were students in introductory psychology classes. The same materials and procedure were used again in this experiment. Participants were asked to make a guilty/not guilty judgment. Next, participants were asked to assign a sentence, assuming the defendant was found guilty, that could range up to twenty-five years. Except for the mention of the homeowner's gender, no specific points about risk based on being a female were made. Each participant saw only one scenario.

We found the overall effect of gun type was significant. AR-15 shooters were given longer sentences. The most telling finding was that female mock jurors gave female AR-15 shooters the harshest sentences—a mean of approximately eight years as compared to a male average of five-and-a-half years. In comparison, the lowest average recommended sentence was for a male shooting a Ruger Mini—about two-and-a-half years. Thus, gun type and gender could be a potent combination in sentencing. See the summarized data presented in figure 6-3 at the end of this chapter. Assault rifles were again seen negatively, and women using them were penalized. The violation of the gender stereotypes and societal norms were detrimental to their defense. We evaluate other women-specific issues later.

Note that the AR-15 was not specifically discussed as being an assault rifle or in some way unusual but only in technical terms and matched with equally lethal weapons. A law enforcement officer suggested that for the issue of weapon type to be important at trial, an attorney would have to bring it up, and a judge might not allow that. However, our studies and earlier studies indicate that the simple presence of the weapon can be influential. Attorneys should be cognizant of the gun presence, gender, and gun type effects and gender interactions so as to mount an effective defense for their client. Internet experts feel that the prosecution would have to make some great and overt commentary on the "evil" gun, but this may not be the case.

B. Police Perceptions of Weapon Types

Police use of assault rifles like the AR-15 is also controversial—and has increased after notorious shoot-outs (like the North Hollywood shoot-out of 1997) and as a response to terrorism and rampage shootings. Police may also have negative attitudes toward various weapon types.

An informal experiment was conducted at a force-on-force police training exercise, dealing with traffic stops in which a civilian is found to have a firearm. The training officer was aware of our results and was curious about how they would apply to officers. The type of firearm was varied between an AR-15, handgun, and pump-action shotgun. The gun was stored in a manner that was a minor violation of the law, and the officer might have some discretion in dealing with it. All the officers ($N = 45$) in the exercise stated they would arrest the driver with the AR-15. Only two said they would arrest the shotgun-carrying driver, and 75 percent said they would not arrest the driver with the handgun. A typical comment was that anyone carrying an assault rifle was looking for trouble. The training officer was surprised, as the officers were usually “gun friendly” and themselves carried assault rifles in their own cars.

So we explored a research scenario in which research participants were law enforcement officers with real-world experience using lethal force. We tested a police shooting gone awry. The basic scenario was that an officer arrived at the scene of a convenience store robbery. Three people fled through the front door, and the officer shot them by mistake, thinking they were perpetrators. The shots could have been fired from an AR-15 or a Glock (a standard police pistol). The officer was put on trial for aggravated assault. The participants in this study were, in fact, police officers—not college students. See figure 6-4 at the end of this chapter.

In summary, we found that weapons and gender effects are relevant to police officers as well as civilian mock jurors. The male officers using an AR-15 were sentenced harshly but not as harshly as females using a Glock. Women were also more likely to be viewed as guilty using the Glock. Overall, the results are consistent with gender-based expectations. Men should be competent with a rifle, but one might not expect women to be. However, all police officers should be competent, at least, with their service side arm. The fact that a female shooter made a shooting mistake with a simple handgun may result in more negative views of that shooter by male police officers.

Overall, this paper found a powerful effect for the appearance of assault rifles. Strategies to make them seem less dangerous, such as arguing about terminology, emphasizing recreational usage, or the constitutional right to possess them, have not as yet been explored in the jury setting. While these strategies might appeal to the rational part of the mind, the automatic and emotional part may still see them as “evil black rifles.”

C. Assault Rifle or Gun Type Effect May Depend on Incident

We next explored other scenarios to determine whether the weapons effect depended on the situation.

1. "It Just Went Off"

This experiment dealt with a classic excuse for a shooting. I thought there was a bad guy out there, and the gun just went off. In 1993, thirty people were accidentally killed by private citizens who mistook them for intruders. By comparison, police accidentally killed 330 innocent individuals in the same year (Lott & Mustard, 1997, n.8). For example, the case in which a Louisiana homeowner shot Japanese exchange student Yoshihiro Hattori in 1992 made national and international news. It led to protests and petitions from the Japanese government and citizenry (Ayoob, 1998). In that case, the student was looking for a party with a friend. They went to the wrong house and approached the homeowner. The latter and his wife were frightened by the seemingly threatening behavior of the student. The victim's refusal to stop at a verbal command (perhaps due to language difficulties) caused him to be killed. The homeowner was acquitted but later had a large judgment against him in civil court.

In a similar case but not as well known, Todd Vriesenga had an initial run-in with young people engaged in a Halloween prank at his house (CourtTV, 1993, *Michigan v. Vriesenga*—www.nytimes.com/1992/11/19/us/no-headline-969692.html). He chased them away waving a canoe paddle and shouting some obscenities. Later, a young man from the group decided to go up to the house to apologize. At this point, stories diverge. Vriesenga claimed the young man was trying to enter through the front door. Vriesenga retrieved a shotgun from the closet to defend himself and, as he pushed against the door, the gun went off accidentally. Forensics suggested that he actually raised the gun to his shoulder and fired through the door. Testimony from the other young people contradicted Vriesenga. In any case, Vriesenga was found guilty of misdemeanor use of a firearm to cause death and given a two-year sentence. Interestingly, in his testimony, Vriesenga seemed to be trying to minimize the aggressive aspect of the shotgun. He stated that when he saw someone approaching, "I reached in that closet for what I thought was nothing but some steel and some wood that would intimidate these people away." This seems a less-than-credible or ill-thought-out statement or one calculated not to prime an impression of going for a powerful weapon.

We switched to a tape methodology since the case fell into our paradigm to study and because of evidence that making the firearm more salient can influence sentencing (Dienstbier et al., 1998). While controversial, some studies of the effect of violent games suggest that exposure to violence may key aggressive attitudes (Anderson & Dill, 2000). Bornstein (1999) reported that it is ambiguous whether video demonstra-

tions in court increase guilty sentences. If there is an effect, it is probably not much (Bright & Goodman-Delahunty, 2006; Feigenson & Dunn, 2003). Kassin and Garfield (1991) reported that viewing a murder scene videotape led to lower conviction standards than nonvideo or irrelevant video conditions. Bernhardt et al. (2001) report that televised presentations about gun violence can key negative attitudes about gun usage. Kassin and Dunn (1997) found that computer-animated displays can influence juries. Thus, we decided to try a more visual medium. However, because we used a real trial, we could not study shooter gender.

We obtained a one-hour summary of the *Michigan v. Vriesenga* trial from *CourtTV* with permission to use it in our experiment (Court TV, 1993). The tape was edited in two ways. First, the length was cut to twenty minutes, as we edited out irrelevant breaks, testimony not felt essential, and commentary from *CourtTV* reporters. We also removed the state's forensic expert describing the shotgun that Vriesenga used. Instead, at the end of the video, we added a segment showing an expert (Karl Rehn from KRTraining of Austin, Texas) demonstrating one of four firearms. The expert described the gun in noninflammatory terms and then fired two shots from the firearm at a target. There was then a close-up of the target.

The firearms used were the AR-15, a Ruger 10/22 22LR rifle, a Winchester Defender shotgun, and a Winchester O/U shotgun (see figure 6-1 at the end of this chapter). The AR-15 was our operationally defined "evil" gun. The Winchester Defender 12-gauge shotgun, similarly, is a gun more designed for tactical use and not a sporting arm. It has a high capacity for a shotgun of eight rounds. It is black and anecdotally impressive to our students. Depending on jurisdiction, such shotguns have been subject to various legal strictures (Kleck, 1997). The Ruger 10/22, while a semi-automatic rifle and with a black synthetic stock, is not particularly impressive in appearance. It is a common "plinker" and can be found sitting benignly in Walmarts across the country. While all firearms are weapons of lethal force, this gun would not be seen as being close in power to the other weapons used. Legal bans on this type of firearm are not common in the United States (Kleck, 1997). The last firearm was a sporting shotgun (Winchester O/U) and very commonly used for hunting and various competitions. Being a 12-gauge firearm, it is a very lethal instrument. However, this type of gun is usually not specifically recommended in the firearms literature for self-defense use. It is however recommended by Vice President Joe Biden and should be shot in the air or through the door (Calmes, 2013).

Each gun was fired at standard B-27 targets. This target is a black twenty-five-inch by forty-five-inch humanoid male silhouette that portrays from the head to just below the hands. It is commonly used in law enforcement range target and civilian practice. The center of the target was covered with a Birchwood-Casey Shoot-N-C B24-10 7-inch circle for more visibility. When hit by a round, the Shoot-N-C leaves the bullet hole with a brilliant yellow ring to emphasize the placement of the shot.

The rifles each fired a small-caliber round of approximately .22 inches in diameter, so that the two holes in the target were relatively small. The shotguns were loaded with 00 buckshot that consisted of nine pellets .33 inches in diameter. The two shots

fired from each shotgun essentially vaporized the center of the target with an approximately four-inch-wide hole. In pretesting of the videos, observers were most impressed with the shotguns. It made some subjects wince to see the damage inflicted on the targets.

After presentations of the video, subjects were asked to choose between guilty and not guilty, and if a sentence was given, between two to twenty-five years.

In this case, there were no significant effects for gun type and participant gender. Sentence means ranged from six to eleven years with no discernible pattern. Guilty percentages ranged from 50 to 80 percent. While the AR-15 generated 80 percent guilt ratings, so did the Ruger 10/22.

2. *Vandalism*

The next study finds that weapon types may not make a difference if the incident is not as ambiguous as the burglary scenario. In this incident (based on a real case in San Antonio—Padilla, 1996), four young men were vandalizing a car. The incident was described to the participants. The summary is as follows:

In the driveway were four young men between the ages of sixteen and twenty-five. The men were vandalizing the Smiths' car. One man had a baseball bat and another had a can of spray paint. Shattered glass from the windows and headlights lay in the driveway, reflecting what little light was available. At this point, Mr. (Ms.) Smith raised his (her) firearm (see description above), and told the vandals, "Get off my property!" The man closest to Mr. (Ms.) Smith, twenty-year-old Mr. Jay Wright promptly responded, "Fuck you man!" Smith aimed his (her) gun and fired two shots. Both rounds hit Wright, and he died quickly. The others ran away. Mr. (Ms.) Smith immediately called 911 and the police arrived on the scene in four minutes. Mr. (Ms.) Smith told them the details of the incident as reported above.

Mr. (Ms.) Smith was subsequently charged with manslaughter with a possible penalty of a two-to-twenty-five-year sentence.

Defense and prosecution arguments were given. Illustrations of the crime scene, a video of the gun used, and an X-ray of the decedent's injuries were presented. The guns were either an AR-15 or Ruger Mini-14. We did not find a significant weapons effect. Women did give longer sentences. Shooter gender did not make a significant effect. Judgments of guilt were similar in not showing a weapons effect and tended toward not guilty, but with women being more prone to a guilty verdict, as seen in figure 6-5 at the end of this chapter.

3. *Concealed Carrier Shoots an Innocent*

In this experiment, we chose another classic scenario. The shooter is in a convenience store and chooses to intervene in an armed robbery where the shooter is not directly in the line of fire. Such occurrences happen in the real world. In many states,

use of deadly force would be justified in such an instance, as one can use deadly force to protect a third party. It is clearly allowed in the Texas Penal Code (State of Texas, 2014). However, in the course of the action, the robber is shot and flees but an innocent bystander is wounded. The charges revolve around the shooting of the innocent. Unlike the other experiments, the person shot was not the intended target of the shooter. The Texas Penal Code offers no relief against penalties for such action in this situation. Fear of injuring an innocent is a major concern for armed citizens. It also seemed a good scenario to elicit weapon effects on simulated jury decisions. The shooting of an innocent is part of the debate regarding whether guns are useful in intervention scenarios. It has been argued that people have an aversion to hurting innocents even to save another (Sunstein, 2005).

The scenario also gave us a reasonable one in which to test whether handguns can generate a weapons effect. It would be unusual for someone to carry a long arm into a store for self-defense. Meyer et al. (2009) found no indication of a difference in sentence between two handguns (SW 642 38 SPL revolver vs. a Glock 19 9 mm semi-automatic) in a home burglary situation. However, we had thought that the Glock might be an “evil”-looking gun and trigger attributions leading to a gun-type risk. The Glock line of firearms had gone through some bad publicity at the time of its introduction. Its plastic frame led to a bit of a legislative contretemps when it was incorrectly claimed the gun could pass undetected through airport metal screening devices (Kleck, 1991). The Glock was also the cover illustration used in a design journal’s review of the lethal aesthetic used to sell guns (Owen, 1996). However, Glockes are now commonplace and used by many police departments across the country. Watching a police drama or TV news report, you will see them repeatedly. Whether this would increase or decrease the effect of their appearance is an empirical question. Thus, the two guns used were relatively common and may not have had enough of an “aggressive” or “evil” appearance difference to produce an effect. Therefore, we added a handgun that is far from the norm of guns used for concealed carry and might have more of an effect—a “racegun.” It is designed for handgun competitions. Its appearance and the fact that the gun owner was a competitive and trained shooter might be even more of a negative prime acting against our Good Samaritan.

The intervention leads to the harming of an innocent by the Samaritan. Would mock jurors view this actor as criminally negligent? Would they also assign damages in a civil action? Levett et al. (2005) reviewed jury research and found the area of civil damages to be little investigated. We also decided to add monetary damages to this scenario. As the uninvolved innocent is shot, we felt that liability might be a sensitive measure, as subjects might have sympathy for the innocent suing that they might not have for the criminal. The awarding of damages may not be held to such a strict standard as criminal guilt (Levett et al., 2005). To our knowledge, the civil fate of a shooting Good Samaritan has not been studied.

Participants were then presented with a written description of a shooting in a convenience store. In it, the shooter (varying in gender) is in a convenience store and has a handgun with him or her. The first gun was a Smith and Wesson 642 revolver.

This is a relatively common concealed-carry handgun. While potent, it is not necessarily fearsome in appearance. Such small revolvers sometimes are recommended for females. The second gun was a Glock 19 9 mm semiautomatic. Glocks are common sidearms for police and popular for self-defense use. A gun in this caliber is a quite potent handgun. Glocks, as mentioned above, did suffer from an initial media flap as being undetectable and perhaps "evil," but that soon passed (Kleck, 1991). Some see them as looking particularly aggressive (Owen 1996). The final pistol was a specialized competition handgun, supplied to us by KRTraining. Such handguns are typically called "raceguns" and are semiautomatics. The round fired (.38 Super) is as potent as the others used. The gun had a specialized electronic sight and other modifications for competition. It would be unusual for someone to carry this gun normally. Our scenario was that the shooter serendipitously had his firearm with him as he did not want to leave it in the car. We theorized that the gun's unusual appearance might elicit a different reaction than the other two.

In the scenario, the shooter/Samaritan was not in immediate danger but chose to engage the robber. An innocent bystander was seriously injured with permanent disability to one arm. The robber was wounded but fled without apprehension.

After reading the scenario, the subjects were shown a short videotape of each handgun being fired by an expert into a target. The gun was described in detail and its purpose mentioned. The printed materials contained the prosecution and defense statements (written with expert advice) and an X ray of the bystander's injuries. As before, the subjects then made a judgment of guilt or innocence on the charge of aggravated assault.

We then presented each subject with a civil trial scenario. The subjects were asked to make a judgment on both compensatory and punitive damages. The actual values were determined by consultation with legal experts to be reasonable. The compensatory question was a yes/no based on expenses. The punitive amount was based on the rationale that the shooter's actions were with disregard for the safety of the innocent bystander. The subjects chose an amount between \$0 and \$47,000. The standard of proof for civil damages differs from that of a criminal verdict, and this was explained in the scenario.

After the data were collected, the answers to four firearms-attitude-related questions were collected (see table 6-1 at the end of this chapter) based on previous research by Branscombe et al. (1991) and the responses summed. Using a median split of the summed responses (score of eighteen being the median); the participants were categorized as being positive or negative in gun-related attitudes. The median of eighteen has been found to be remarkably stable in other studies in our laboratory with hundreds of participants.

With all three dependent variables, an important point for the applied literature is that the actions were not seen as overwhelming positive. Intervention, therefore, has risks for the Good Samaritan.

a. Verdict

The most interesting factor is that there is a high rate of conviction for the criminal charges. The participants with the negative attitudes toward firearms were in favor of conviction 67.9 percent of the time, while the positive attitude group had a conviction rate of 48.9 percent. Thus, the overall rates were high and the difference was significant.

Examining the main effects of gun type, shooter gender, and subject gender did not find significance.

b. Punitive Damages

The participants across all conditions clearly were in favor of awarding punitive damages. The overall mean was \$10,838.44 (SE = 1569.5). The independent variables are gun type, shooter gender, firearms attitude, and subject gender. Two main effects were significant. Firearms attitude was potent with the high positive attitude group having a mean of \$7718.75 and the lower more negative attitude group a mean of \$13,958.42. Participant gender was also significant with males surprisingly awarding mean damages of \$14,040.24 versus females at \$7636.93. The main effect of gun type was not significant. The main effect of shooter gender was not significant.

c. Compensatory Damages

First, the overall rate of awarding compensatory damages was extremely high at 89.4 percent with the percentage breakdown for male subjects (87.8 percent) and female subjects (91.1 percent). Of all the possible main effects and interactions, only the gun type by firearms attitude interaction was significant. The racegun was seen more negatively for the participants with negative gun attitudes. This was not a factor for the other handguns.

d. Implications

It seems that this scenario was seen as relatively unambiguous by many subjects. There was no real reason to shoot. Conviction ratings did not suggest an easy "walk" for the Samaritan. Punitive and compensatory damages data did not indicate universal approval for the action taken. Gun attitudes did mitigate the negative views somewhat. Thus gun effects were small, except for the extreme-looking racegun, but that was based on gun attitudes. Gender, while potent in other studies, was not a factor in our results.

Our results pull together various threads in the professional and popular literatures. Gender main effects in several of the experiments were significant, with female subjects judging shooters more harshly than male subjects did. This is congruent with

the literature. We did find a gun-type risk in the burglary scenario for the AR-15—the classic assault rifle—for men and women. Interestingly, the three-way interaction between gun type, shooter gender, and subject gender was significant. The locus of the sentence interaction was due to women subjects giving the longest sentence to women shooters who used the assault rifle. These results are in accord with previous findings of harsher judgments of women who break gender-biased weapon-use stereotypes (Branscombe et al., 1993). They suggest that such a woman might be seen as more inherently culpable than a man if she used a weapon that was seen as inappropriate for the “gentler sex.” If one violates role stereotype in a confrontation, then blame can be shifted more to the violator. In this case, that would be the woman. Branscombe et al. (1993) found that women who violate gender stereotypes in a shooting situation (shooting competence) are judged more harshly. Using an AR-15 is likely to be such a violation and led to the harsher sentence. Similarly, this supports Dienstbier et al. (1998), as women tended to give longer sentences to women who used the AR-15. McCaughey (1997), in a feminist analysis of women who train in self-defense tactics, suggests they are at risk at trial for not seemingly womanly and victim-like. Branscombe and Weir (1992) found that a strong physical defense against a rapist led to a shorter sentence for the attacker. Based on norm theory, they state that behavior that does not fit classic schema of the female stereotype will be construed as abnormal. It is then easier to assign alternate outcomes. In general, using an AR-15 may make our shooter violate the norms of someone in a defensive mode. Does the gun mean that you are more prone to go on the offense? This may be even more damaging for women. Kazan (1997) states that in battered-women cases, those who are active in protecting themselves may not be seen as truly battered. Some women may feel less safe around guns in the community (Miller et al., 2001) and thus regard gun users in general as contributing to their lack of safety.

One reason why the main effects of gun type were marginal in some cases could have been because the experiment was conducted in Texas, a state quite imbued with a gun culture. Thus, the amount of previous experience might have caused people to not pay as much attention to the type of gun, but rather to who was using the gun. However, we did find significant gun effects when the self-defense scenario was more ambiguous (as in the burglary studies). When the situation is more likely a no-shoot scenario, then weapons type seems not to be influential with regard to the sentencing dependent variable. The convenience store, vandalism, and Halloween prank situations did not have a compelling need to engage the person who was shot. Anecdotally, the defendant in the Halloween prank (*CourtTV*) was an unsympathetic sort. His description of the gun as a piece of “wood and steel” may have minimized weapons effects as he seemed disingenuous. No scale really can measure psychometrically the need to shoot at this time, but such scenarios are qualitatively judged no-shoots in my experience and research with the self-defense training communities and some legal scholarship (Heller, 1998). Branscombe and Weir (1992) report that changing the scenario can weaken the effects as one move towards a ceiling or floor. Finkel et al. (1991) found wide variations in not guilty by reason of self-defense decisions with

women defendants in battered-women, rape, and a Goetz-like subway shooting. Branscombe et al. (1993) found similar ceiling effects in one of their studies to ours. Darley et al. (2000) found that sentencing behavior seems motivated by a need to give the guilty party their just deserts. The scenarios with small-gun effects may have been ones in which the moral nature of the act (an unnecessary shooting) led to the defendants getting their just deserts independent of the gun used. Olson and Darley (1999) found that lower sentences were given to folks who in self-defense situations killed someone who is stealing a car, is an unarmed attacker, or could safely retreat as compared to those who kill in response to a trivial threat. Failure to believe in the justice system led to longer sentences that may be related to our attitude findings. They further suggest that legal codes should be more in accord with community standards than those suggested in the Model Penal Code when determining self-defense standards. However, some of their scenarios were not realistic in accord with modern self-defense training. Perhaps scaling approaches could be developed to scale defensive gun-use scenarios and punishments as Harlow et al. (1995) did for intermediate penal sanctions.

4. A Positive Effect of Training and Video

In this study, we evaluated whether training might be a negative as suggested anecdotally. We presented the participants a Kitty Genovese scenario (Manning et al., 2007) with the bystander using lethal force. We were also interested in bystander effects.

All participants received a variant of the same scenario in written form first. A fifty-one-year-old male (intervener—Mr. Smith) enters a parking structure and sees a male (Johnson) in his twenties kicking, yelling at, and hitting a woman. The woman seems to be a stranger to her attacker. The bystander kills the attacker and then is brought to trial. Defense and prosecution present arguments about a charge of second-degree murder (Good Samaritan vs. crazed vigilante). Our focus was how participants actually view the use of lethal force in the bystander situation. Did they think it was justified? We also wanted to look at the effects of weapons priming. Would that negatively or positively affect the jury decision? Thus, we varied in the prosecution's presentation the defendant's level of training in firearms usage and vividness portrayal of the gun used. It is possible that a defendant with more training will be judged more negatively than one without and that a portrayal of a trained defendant using a weapon would be even more damaging to his case. In the presentation of the case, there were three conditions: (1) a simple description of the incident without detailed description of the weapon or a description of advanced handgun training; (2) a description of the incident plus a description of the defendant's intensive handgun training and a photograph of him at the training venue with a shot-up humanoid target—the latter had bullet holes in the center of the target and head; and (3) all the same descriptors as before plus a video presentation of the defendant in a series of training exercises. In these, the

defendant engaged a series of humanoid cardboard targets with a Glock handgun in scenarios that duplicated typical defensive handgun usage. Training was described as a typical series of courses:

- The First Pistol Course
- Beginning Defensive Tactics
- Intermediate Tactics
- Extreme Defensive Techniques
- Intensive Handgun Usage

A rating of guilt from one (sure of innocence) to seven (sure of guilt) was made. The participants also completed a self-rating of knowledge about firearms on a one-to-seven scale of not knowledgeable at all to very knowledgeable. The subjects were divided into two groups based on their self-perception of gun knowledge. Self-reports of one to four were in one knowledge category ($N = 192$), and the higher reports of five to seven were in the second knowledge category ($N = 67$).

There were significant differences according to participant gender with males being more likely to self-report high levels of firearms knowledge (males = 47.9 percent vs. females = 7.7 percent).

Participant gender had no effect or interaction. Gun knowledge did have an effect but, fascinatingly, seems due to the rather dramatic drop in the guilt ratings by the knowledgeable subjects presented with the most detailed description that included the video presentation, as seen in figure 6-6 at the end of this chapter. Thus for gun-friendly folks, more knowledgeable was to the better. Anecdotally, a female who was skilled in the martial arts said the video was convincing that the defendant knew what he was doing. While training might seem a negative to some, Nagtegaal et al. (2009) did not find that members of a Netherlands shooting association displayed necessarily higher levels of aggression.

V. Women's Issues, Training, and Firearms Attitude

Much of the self-defense discussion can encompass issues specific to women and how gender attitudes influence the legal process (Barrow & Mauser, 2002; Branscombe & Owen, 1991; Branscombe & Weir, 1992; Branscombe et al., 1993; Kazan, 1997). There is significant female/feminist positively oriented self-defense literature (Farnam & Nicholl, 2002; Hayes, 2009; Jackson, 2010; McCaughey, 1997; Stange & Oyster, 2000). McCaughey (1997) concludes that unprecedented numbers of women are learning to maim, knock out, and shoot men who assault them.

However, not all view women and guns favorably. Gender differences can be potent and controversial in firearms-based societal attitudes toward women's use of force (Homsher, 2001; McCaughey, 1997; Stange & Oyster, 2000). Homsher (2001) critiqued *Ms.* magazine's proposition that gaining equal rights did not include the Second Amendment and that adopting a male view of firearms usage was abhorrent. Dole

(2000, p. 11) states in analyzing media: “Despite widespread support for strong images of women in the media, mainstream-film viewers and academic feminists alike have hesitated to celebrate cinematic women with guns, even those who are upholders of law.” In film, “women using guns” tests the cultural and masculine meaning of such guns. Gender barriers might be fundamentally altered (p.19). This can be threatening to both males and females. One component of the feminist and public debates over *Thelma and Louise* might be their violent behavior evidenced by their use of guns (Keating, 2000). Active and physical self-defense by women may be viewed negatively as a violation of a gender stereotype of the passive woman. Hollander (2009) summarized the negative attitudes to women’s self-defense: (1) women’s resistance is impossible, (2) it is too dangerous, and (3) it blames the victim. Marsh and Goldberg (1996) found the general attitude was that women should comply in a robbery attempt. This leads to the question of whether firearms are seen as appropriate self-defense tools for women. Anderson (2001) in reviewing Stange and Oyster (2000) was of the opinion that teaching women to use guns disempowers them. Women are capable of being trained to physically resist men and do not need a firearm. Using guns should not be part of the female resistance paradigm, as they are part of a male instrumentality. Barrow and Mauser (2002) hold that such views may be common in the legal literature and precedents.

The current study attempts to explore further the issues revolving around the use of firearms in self-defense scenarios concerning women in jury scenarios. In the first study, the response is to a stalker. The second is that of a classic battered wife. How would the use of a firearm be perceived in a situation that was not immediately defensive? The third concerns whether a female shooter’s attractiveness would influence a verdict in a home-defense scenario. Also explored is how attitudes toward firearms and participant gender may influence the jury. Negative attitudes toward firearms may lead predictably to harsher views of females using guns. However, the sex of the participant may interact. A progun male might be more conservative in his view of female empowerment and thus negative. However, a progun view might lead him to celebrate the gun usage by a woman who is breaking gender stereotypes. Similar positive or negative predictions could be made for antigun males and female participants of either ilk. They lead to a set of empirical questions.

A. Shooting of Stalker

Stalking can be “generally defined as an intentional pattern of repeated intrusive and intimidating behaviors toward a specific person that causes the target to feel harassed, threatened, and fearful, or that a reasonable person would regard as being so” (Miller, 2012).

Questions were concerned with age, gender, and the gun attitude items in table 6-1 at the end of this chapter (based on Branscombe et al., 1993). The four questions (see table 6-1) were also related to popular concerns of the firearms-using public. The

answers were used to classify the participants into a gun-positive and gun-negative group. Using a median split of the summed responses (maximum score of twenty-eight, score of eighteen being the median), the participants were categorized as being positive or negative in gun-related attitudes. We have found the median of eighteen to be remarkably stable in other studies in our laboratory with hundreds of participants.

They were then presented with a written description of the stalker's shooting and the court consequences. The stalker's history was described in detail, and it was intense and threatening. In the actual incident, the stalker approached the defendant in her driveway but did not attack her. In one version, the woman simply bought a Glock handgun. In the other, she bought the handgun and proceeded to take a set of advanced firearms training courses. Participants made a rating of not guilty to guilty (one to seven) and recommended a sentence for second-degree murder of two to twenty-five years.

As might be expected, the stalking victim shooter was viewed more negatively by those with negative firearms attitude in regard to guilt. In general, ratings to convict were in the middle range, perhaps expressing doubt about guilt (see figure 6-7 at the end of this chapter).

The effects of firearms training, participant gender, firearms attitudes, and the gender by firearms attitudes are significant for recommended sentence. Negative gun attitudes clearly led to longer sentences, and this was due to the males with negative gun attitudes as seen in the interaction. Male participants recommended longer sentences, and training was seen as negative for our stalking victim. The trained female stalking victim was particularly disliked by male participants. These results are in line with the idea that females should be passive victims and not engage in a proactive defense. Males would be more likely to hold such beliefs. Antigun males were particularly judgmental against female use of firearms. These results are in accord with other studies showing a more negative animus against females who act against gender stereotypes (Branscombe et al., 1993; Meyer et al., 2009).

B. Battered Wife Uses Firearm

Can a woman use lethal force against a partner or spouse who has a long-term history of battering her when she is not under immediate and actual threat of attack? There seem to be two central aspects to the issue. First, is it legitimate to use lethal force to prevent further attacks that may or may not occur? Is the probability of a later attack enough to warrant the use of lethal force and a claim of self-defense? The second main issue is whether the psychological consequences of being battered, such as the controversial battered woman's syndrome as a subset of post-traumatic stress disorder (PTSD), or PTSD by itself, can serve as a justifying or mitigating factor at trial (Leverick, 2007). Since its first use, the battered woman's syndrome has been quite controversial on many grounds (McCaughey, 1997).

In this experiment, a woman shoots and kills a sleeping abusive spouse (a scenario used in research—Greenwald et al., 1990; Terrance & Matheson, 2003). The previous studies found that simulated juries were not overly sympathetic to the defendant spouse. We focused on whether gun type (revolver, AR-15, or sporting shotgun) and participants' firearms attitudes would influence verdict and sentence judgments. The three guns were a Smith and Wesson 642, AR-15, and O/U shotgun. One might predict that the type of gun would influence these decisions, with the AR-15 leading to the battered spouse being treated more harshly. Kazan (1997) states that in battered women cases, those who are active in protecting themselves may not be seen as truly battered. Using a weapon with negative animus might fit into that belief structure.

Participants were presented with the battered wife scenario based on Terrance and Matheson (2003). Divided into three gun-type groups, they were presented with a videotape of an expert firing the firearms used in this study. Participants made a dichotomous guilty/not guilty judgment as well as a sentence recommendation (two to fifty years) for second-degree murder.

The battered wife was found guilty by a substantial majority of participants (82 percent), this being in agreement with past studies. Terrance and Matheson (2003) state that juries overwhelmingly produced guilty verdicts. Similarly, Greenwald et al. (1990) found 69 percent guilty verdicts. None of the factors of participant gender, gun attitudes, or gun type had any significant effect (see figure 6-8 at the end of this chapter).

Regarding sentencing, the participants were not easy on the defendant, with an average recommended sentence of 9.6 years ($MSE = .58$). The firearms attitude effect clearly shows that positive firearms participants recommend a lower sentence ($M = 7.9$, $MSE = .84$) than those with negative firearms attitudes ($M = 10.9$, $MSE = .77$). The high rate of juror displeasure seems to have wiped out a gun-type effect.

C. Defendant Attractiveness in Home-Defense Scenario

Attractiveness of a trial participant is one factor that can influence juries. One can consider whether the attractiveness of a victim influences the sentencing of the attacker or one can consider whether the attractiveness of a defendant committing a crime influences how the jury considers the defendant. A defensive gun user may be seen as an attractive victim or attractive defendant.

Devine (2012) reviews the literature on the issue of defendant attractiveness. The typical conclusion that the attractive defendant is treated better is either not found or weakly supported. Many other factors were poorly controlled or might have moderated the reported findings, such as the definition of attractiveness and unmeasured jury attitudes.

On the victim side of the equation, some suggestive evidence may come from the literature regarding sexual assault, rape myths, and jury views. Clarke and Lawson

(2009) reported that the attackers of attractive women are treated less harshly than those of overweight and seemingly unattractive women. Jurors can “understand” why one would attack an attractive woman. Thus, an attacker of an unattractive woman is more deviant and deserving of punishment. Clarke and Stemac (2011) expanded that finding in that males accepting of rape myths made more negative evaluations of the victim and more positive evaluations of the perpetrator. Similarly, Ryckman et al. (1998) found more negative attitudes toward a sexual assault victim who was larger than the attacker. It was felt that a large woman should be able to defend herself against a smaller male. Branscombe and Weir (1992) report that strong resistance to rape increased sympathy for the attacker. Herrera et al. (2012) found that in a battered woman scenario, the competent and attractive woman defendant was viewed more harshly by a sample of police officers. They were seen to handle themselves better and less likely to be a victim.

In this experiment, we used the scenario in which the female defendant hears a burglar downstairs as in Meyer et al. (2009). The burglar is carrying the defendant’s laptop computer. The defendant challenges the burglar. The defendant varies in attractiveness. The questions under consideration are the possibilities that being attractive would aid a defendant or possibly hurt her case. It could be the case that being attractive and using a firearm would be seen as reasonable, as an attractive woman is at more risk for sexual assault and fears such. On the other hand, an attractive woman might be seen as violating a gender stereotype, and this would be detrimental to her. Such factors might involve interaction with participant gender and firearms attitudes.

1. Verdict

The results for the verdict ratings data are presented in figure 6-9 at the end of this chapter. The analysis is straightforward. Attractiveness was a significant effect, as was gun attitude. Most important is that the effects seem driven by males with negative firearms attitudes (as seen in the significant three-way interaction of participant gender, firearms attitude, and attractiveness). For all the cells except that of negative firearms males judging attractive defendants, the verdict ratings were toward the not-guilty end of the continuum. There are small differences toward guilt for the attractive conditions than the others, but only the negative males/attractive defendant cell was clearly in the more-guilty range.

2. Sentence

Firearms attitude was significant, as the participants with negative gun attitudes suggested much stiffer sentences than those who were positive (figure 6-9). This result is clearly driven by gun-negative males being particularly harsh on attractive women.

D. General Discussion

“Historically, girls and women have been considered deviants or criminals for behaving in a variety of ways legally permitted for males” (McCaughey, 1997, p. 22). One fascinating aspect of the results is the particularly strong negative view of males with negative attitudes toward firearms. As seen in the stalker scenario, that male group recommended sentences approximately seven years longer than the female participants of either gun attitude or the positive-attitude males. In figure 6-9 at the end of this chapter (attractiveness/burglar scenario), the antigun males stood out from all other groups. Sentence recommendations increased approximately by five years and guilt recommendations increased from the not guilty or neutral range into the clearly guilty range. Previous literature, as mentioned above, has demonstrated that attractive women are seen almost as excusable targets for attack and not as ones who should be physically competent in defense. Why should antigun males be more prone to these attitudes? One might expect that antigun males would be liberal in social attitudes, as liberal attitudes are commonly associated with negative gun attitudes (Schlenker et al., 2012). That might predict celebrating strong women who defend themselves. However, if the negative attitude toward guns link conservative values with gun ownership, the female defendant is violating a basic premise of female behavior and thus is not valued. Violating a liberal female stereotype would be bad, as adopting a conservative solution puts you beyond the pale. This is an interesting finding, as usually more liberal males are less accepting of rape myths (Hammond et al., 2011). Did gun usage reverse the usual supportive views toward woman?

One answer might be found in the idea of prototypicality. Herrera et al. (2012) analyzed their negative findings toward attractive women as related to competent and attractive women not being in sync with a prototype of a female victim. That would lead to a negative evaluation. In our experiments, it is plausible that males with negative gun attitudes would have a prototypical view of women as not being gun users. Thus, such a use would produce quite negative evaluations by these male participants.

Branscombe and Weir (1992, p. 99) drew an interesting conclusion on analyzing their results and they may apply to ours: “Despite this, we are in no way suggesting that women should not attempt to prevent or resist victimization attempts. Rather, we have contributed to the literature indicating how cognitive processes influence judgments of victims.” Gun users and defense lawyers need to be aware of such issues for voir dire and case presentation. The seemingly contradictory attitudes of some males toward inappropriately strong women are something also to be explored further.

VI. Other Firearms-Relevant Psychological Factors

A. Negligent Discharges

Quite a few factors might lead to a gun that “just went off” (Norman, 1988; Hendrick et al., 2008).

1. Finger on the trigger and affordances. An affordance is a quality of an object or an environment that allows an individual to perform an action. For example, a knob affords twisting, and perhaps pushing, while a cord affords pulling. Thus when you grab your gun, it’s designed to guide your trigger finger to the trigger. Finger seeks the trigger, as it is a natural hold position. Finger extended is not a normal grip position.
A study reported on Policeone.com (www.policeone.com/police-products/firearms/articles/94371-Can-you-really-prevent-unintentional-discharges/) had police enter a room to make an arrest. Thirty-four officers drew their guns and all said they kept their fingers off the triggers. It wasn’t true for seven of them. The officers also engaged in physical activities to see if they would pull the trigger during activity. Twenty percent of those with single-action triggers did activate the trigger. Six percent with double-action guns did.
2. Reholstering the gun. Rushing the reholstering or being under stress can cause one to forget to remove the finger from the trigger.
3. Forgetting to check the gun. You don’t remember or know that a semiautomatic weapon may have a round in the chamber, even when the magazine is out.
4. Physical activity can activate single-action and even double-action guns. Similarly, specifically lightened trigger pulls on guns (the Glock 3.5 lb trigger) or competition guns with very light triggers are prone to accidental firing.
5. Not being able to stop shooting and continuing to fire when you shouldn’t. Research with simulators found that 68 percent of police fired an extra shot after the stop signal. This occurred because of perceptual narrowing (tunnel vision) causing them to miss the signal or processing of the signal not being fast enough to inhibit the fast-trigger-pull motor response.
6. Startles can generate fourteen pounds of trigger pull. That’s enough to activate most guns, even double-action ones.
7. Moving firearms can exert forces. A starting or stopping movement can cause the firearm to fire (finger on trigger). If you move a Colt 1911 in a swing of a few feet in a quarter of a second, you generate about seventeen pounds of force, well above what is needed to pull most triggers.
8. Other movement-based causes:

- Jumping motions, loss of balance, leg kicks, startle under stress.
- Contralateral or sympathetic contraction: Hand gripping gun is affected by “sympathetic” reflexive reactions to the movement of other limbs, causing uncontrollable contraction of gun-hand fingers.
- Naive shooters: Drawing a handgun and extending it out to a shooting position, one in five individuals unintentionally fire the weapon as it is brought up to eye level and pushed forward.
- Yips: An “uncontrollable, forceful spasmodic jerk” that is associated with an abnormally high heart rate.
- “Hand confusion”: Which hand has the light? Is it a taser? You activate the gadget and pull the trigger.
- Trying to catch a falling gun: The affordance gets your finger on the trigger. A modern handgun is probably drop safe—let it fall.

B. Race and Appearance

The recent George Zimmerman/Trayvon Martin (Shooting of Trayvon Martin, 2012) trial has brought race to the fore. Most analyses have been superficial and driven by sociopolitical views. There was little referencing of what is known about the interactions of race and firearms. Analyses of determining prejudice have been naive—even from seemingly knowledgeable commentators. Psychiatrist and columnist Charles Krauthammer (2013) stated:

In doing so, Obama was following the overwhelming evidence. A concurrent FBI investigation, which involved interviewing more than 30 of Zimmerman’s acquaintances, found zero evidence of Zimmerman harboring racial animus. Nor did he even mention race when first describing Martin to the police dispatcher. Race was elicited only by a subsequent direct question from the dispatcher.

Prejudice has overt (explicit) and covert (implicit) components. Because a person did not utter racist comments does not mean that in emotional and stressful situations that person will not make action decisions that are negative to persons of certain races or ethnicities. This has been well shown in the Implicit Association Test (<https://implicit.harvard.edu/implicit/>).

This may discomfort some. People of color are more at risk to be shot. An intentional but mistaken shooting of civilians by police is traumatic for all involved. A well-known case is that of Amadou Diallo who, on February 4, 1999, was shot seventeen times and killed near his Bronx apartment building when police mistook his wallet for a gun. He was mistaken for a rapist. When challenged, he pulled out his wallet. Exactly why the police opened fire at that moment is debated. They might have perceived a gun. What you perceive is a combination of what is there and an interaction with a cognitive hypothesis.

Under stress, the police might have perceived Diallo holding a gun. The Diallo incident generated a tremendous amount of follow-up research (Payne, 2001; Payne et al., 2002; Correll et al., 2002). To get to the bottom line, it was found that civilian and police subjects tended to misidentify common objects as firearms in the hands of African-Americans. They were more likely to shoot them in computer simulations. The effect is robust and has many replications. For instance, exposure to stories about black criminals increased the bias in the decision to shoot (Correll et al., 2007). Other research has shown that Caucasians tend to judge minority facial expressions as angrier than the corresponding expression on a nonminority (Hugenberg & Bodenhausen, 2004). Thus an armed citizen must be aware to correctly interpret a situation and not let overt or implicit prejudice based on appearance lead to incorrect action. Police have responded to these studies, and recent research suggests that intensive training, such as force-on-force scenarios, can reduce these effects (Plant et al., 2005), but this can depend on situation and technique (Sim et al., 2013). Similar effects have been found for people in Islamic dress—the turban effect (Unkelbach et al., 2008). These findings are another reason for the serious armed citizen to have significant training with realistic scenarios and stress inoculation. Thus, without actually testing defendants, it is naive to state that shootings were not influenced by race or ethnicity. Even a person who does not spout racism or acts positively in diverse situations may be subject to such effects. Also, a law-enforcement agency that does not demonstrate that its training does take such factors into account may be vulnerable in a “bad shoot.” The psychological implications of the research are starting to appear in law review articles (Lee, 2013). If you don’t like the message because it seems politically correct, too bad. That’s the way it is.

One common discussion on the Internet is whether an armed citizen should intervene in a critical issue. Should one seek out an active shooter in the mall or school (as some might suggest)? Should one run to the aid of a bystander? A person of color might stand more of a risk of being misidentified. This has been suggested as part of blue-on-blue shootings with undercover officers. In analyses of how a civilian should respond to an active shooter, police literature suggests that an armed civilian stands a real risk of being shot by first responders. Would race or ethnicity increase that risk? It would seem so from the data.

C. Memory and the Weapons Focus Effect

Since the 1980s it has been known that the presence of a weapon can interfere with eyewitness memory (Pickel, 1998; Steblay, 1992). Victims seem to concentrate on the weapon more than the perpetrator and the victim. This is especially true if shots were fired. For example, Stanny and Johnson (2000) found that memory for the perpetrator was about 45 percent as compared to 70 percent for the weapon. These dropped to about 35 percent and 50 percent, respectively, if a weapon was fired. Gender schemas were potent, as Pickel (1998) found a greater memory decrement for the perpetra-

tor if a woman held the weapon. Thus, testimony about the weapon might be more useful in identifying individuals if the weapon has been found and linked to a person.

Two theoretical explanations are current (Fawcett et al., 2011). The first is the arousal/threat hypothesis. Physiological arousal focuses attention on the central threat—the weapon. The second is the unusual item hypothesis. More unusual items draw attention (in this case, the weapon). Debate continues over which is correct and real-world effects as compared to laboratory ones. Laboratory retention intervals are much shorter than real-world ones. Witnesses more knowledgeable about weapons and crime may be less vulnerable to the effect. Since eyewitness mistakes have been found in many false convictions, this is important. An investigator may want to specifically ask witnesses about their attentional focus.

VII. Conclusions

Our findings would have impact for several areas of study. They confirm the general role of gender stereotype in decision making. Also, the effects of weapons priming negative attributions seems to be supported. Legal applications may be two-fold. Prosecuting and defense attorneys may want to take weapons and gender interactions into account during voir dire. Prosecutors may want to construct alternatives for shooters to suggest that they did not have to shoot and especially with such powerful weapons. Homeowners seeking to defend themselves may want to consider their selection of weapons based on research and their gender. The significant effects seem to focus on the AR-15 versus other weapons. This is, of course, dependent on the scenario as discussed above. See figure 6-10 at the end of this chapter. In fact, we did not find that video presentations could overcome the scenario effect. Emphasizing the lethality of the gun may not be a good gambit for the defense. One important point in our study is that the weapon is not specifically discussed as being an assault rifle or in some way unusual. It is described in technical terms. A law-enforcement officer commented to us that for the issue of weapons type to be important, an attorney would have to bring it up, and a judge might not allow that. However, as earlier studies indicated, the simple presence of the weapon can be influential. As Branscombe et al. (1993) point out in response to suggestions that females not use guns as they may be at differential risk, a defense attorney should be cognizant of such risks, as persuasive techniques may be used to diffuse them. The attorney might construct counterfactuals that indicate no matter what the defendant did, it would have come out the same—if she or he had a “nice” gun.

Determining attitudes toward firearms usage seems critical. We found that the answers to the four simple questions in table 6-1 at the end of this chapter could produce very strong effects. The interaction with gender is important.

Attorneys may also consider that modern human-factors work and cognitive science are influencing evaluations of gun issues. Perceptual constructive processes were

potent in the Diallo case. Implicit and explicit factors in prejudice affect shoot/no shoot decisions. Gender stereotypes and attractiveness variables from social psychology can influence jury decisions. Naive statements will no longer suffice.

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**Ruger Mini-14 .223 Caliber Semiauto,
Variable capacity (5 to 30 rounds)**



**AR-15 .223 Caliber Semiauto;
Variable Capacity (5 to 30 rounds)**



**Winchester 1300 Defender 12 gauge pump action shotgun;
8 rounds**



**Ruger 10-22 22 LR Semiauto;
10 rounds**



**Winchester Over/Under 12 gauge shotgun;
2 rounds**



**Glock 19 9 mm
Semiauto pistol;
10 to 15 rounds**



**Firearms Used
In Scenarios**

**STI Frame Race Gun
with Red Dot Sight -
38 Super; 17 rounds**



**Smith and Wesson 642
38 SPL Revolver;
5 rounds**

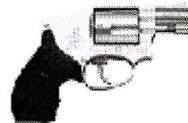


Figure 6-1. Firearms images used in the scenarios.

ATTRACTIVENESS SCENARIO

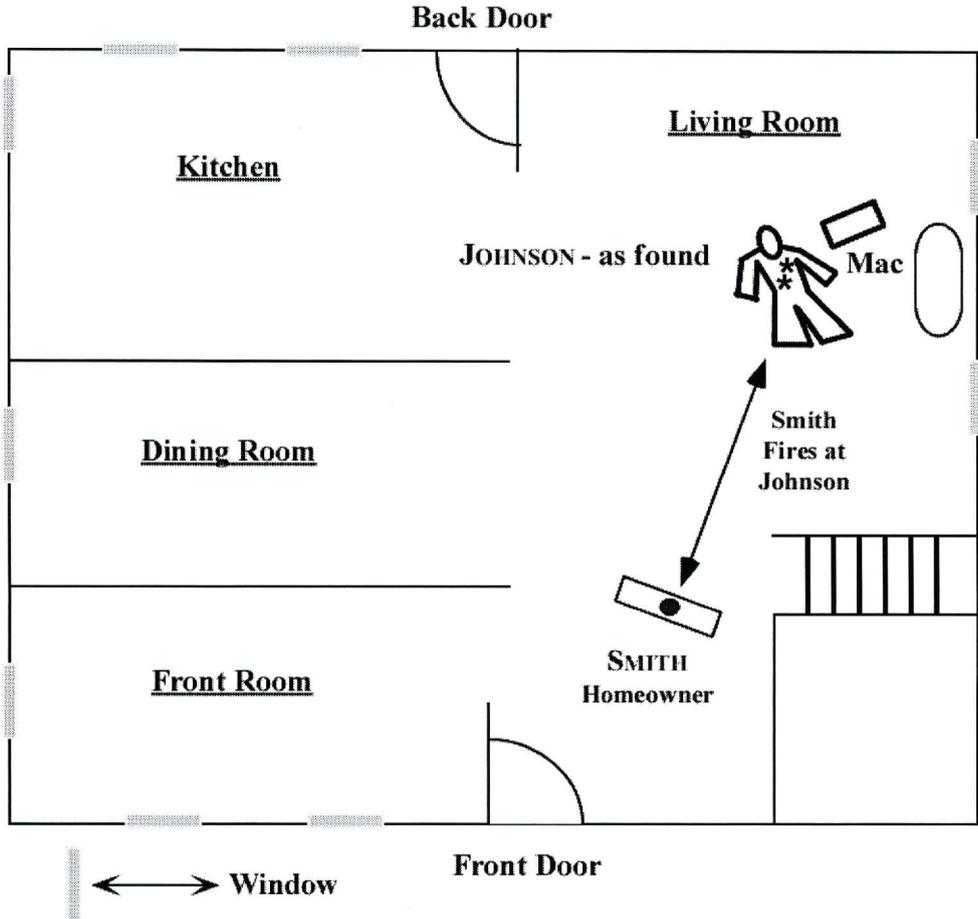


Figure 6-2. Attractiveness burglary layout—similar versions used in experiments using the burglar scenario.

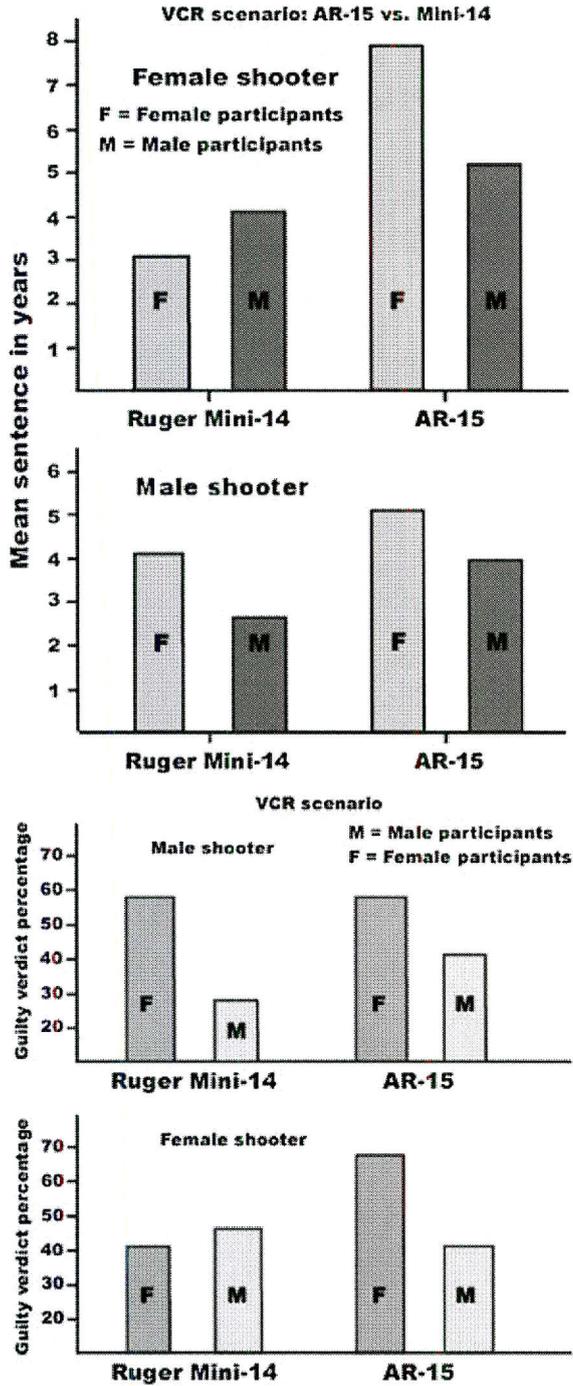


Figure 6-3. Results from Meyer et al., 2009.

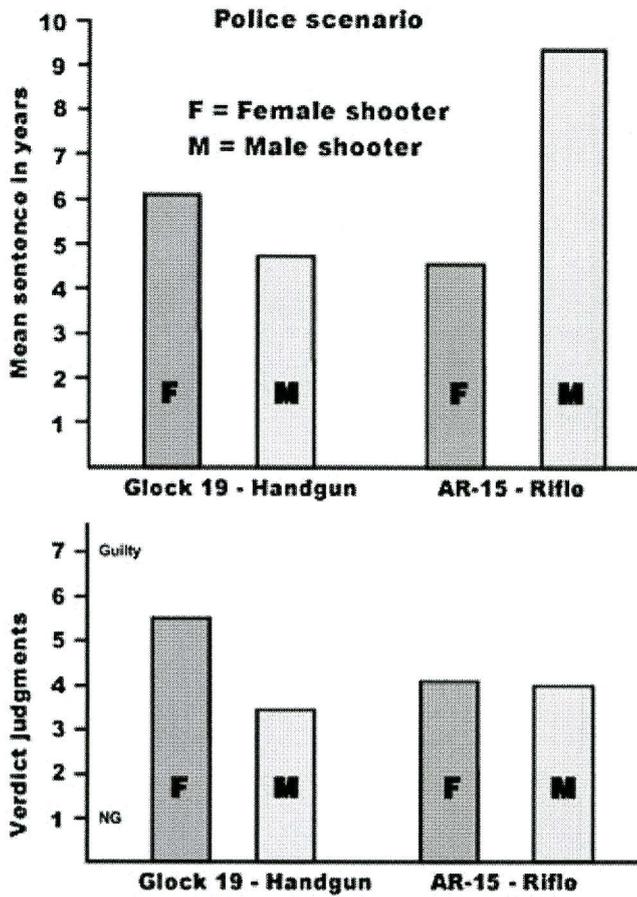


Figure 6-4. Police officers' view of a police shooting of an innocent.

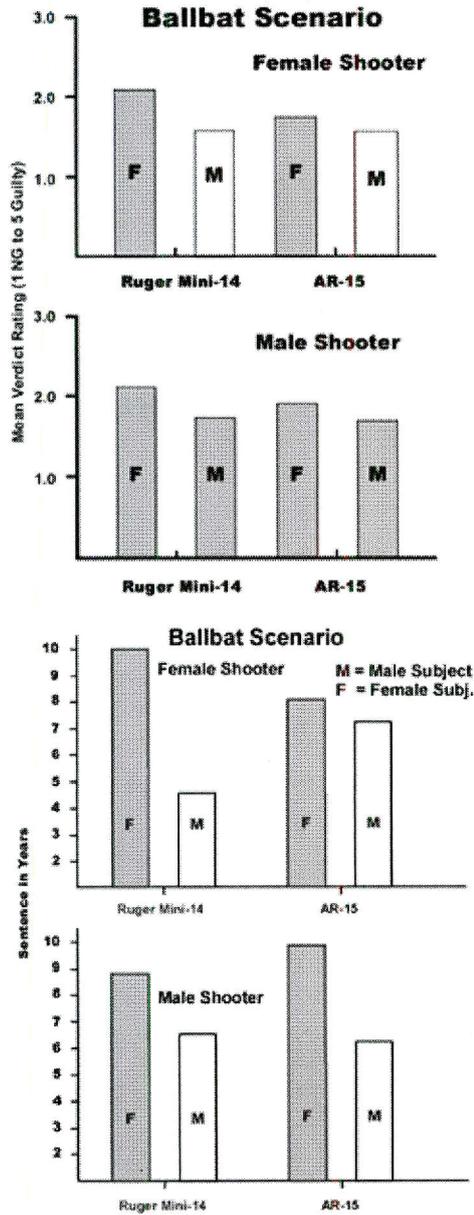


Figure 6-5. Results: Vandalism of a car: ballbat scenario.

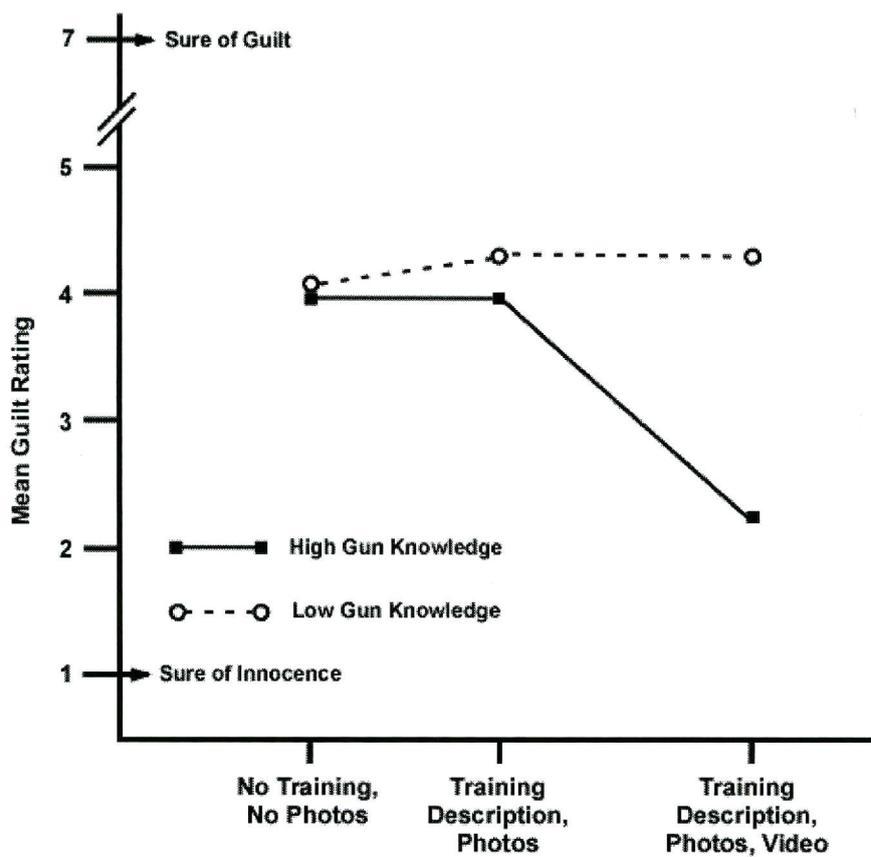


Figure 6-6. Guilt ratings for the bystander intervention scenario.

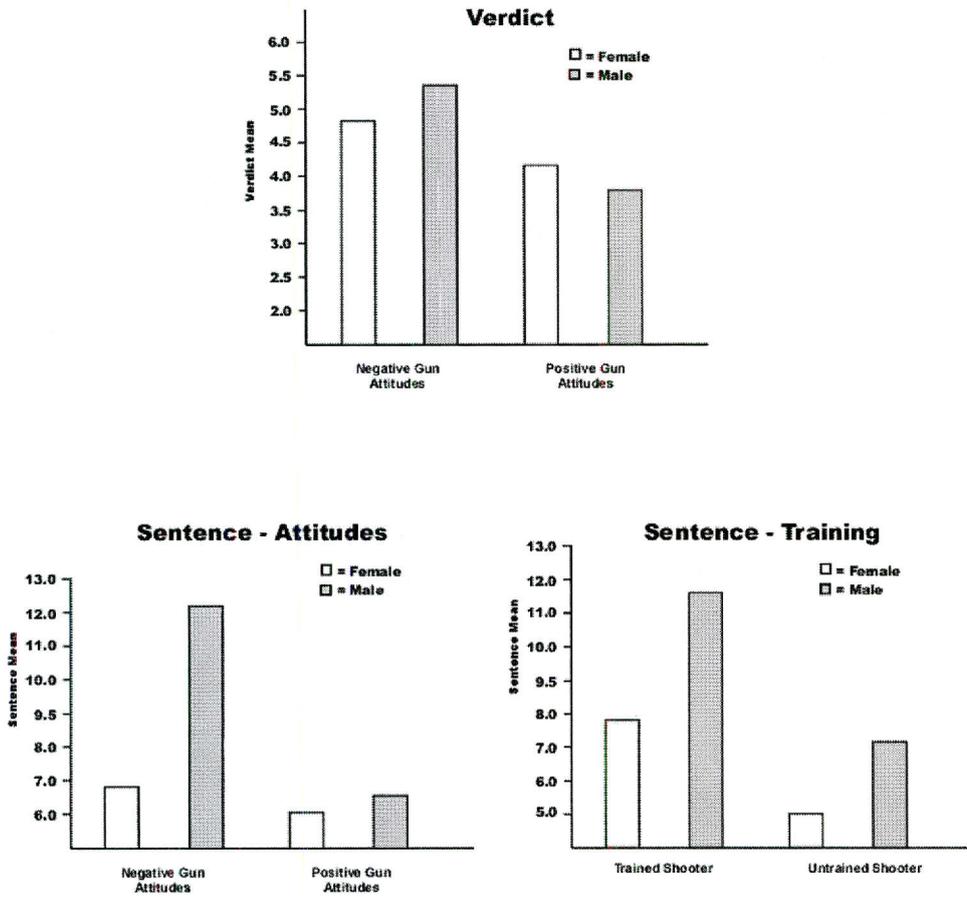


Figure 6-7. Stalker verdict and sentence—attitudes and training.

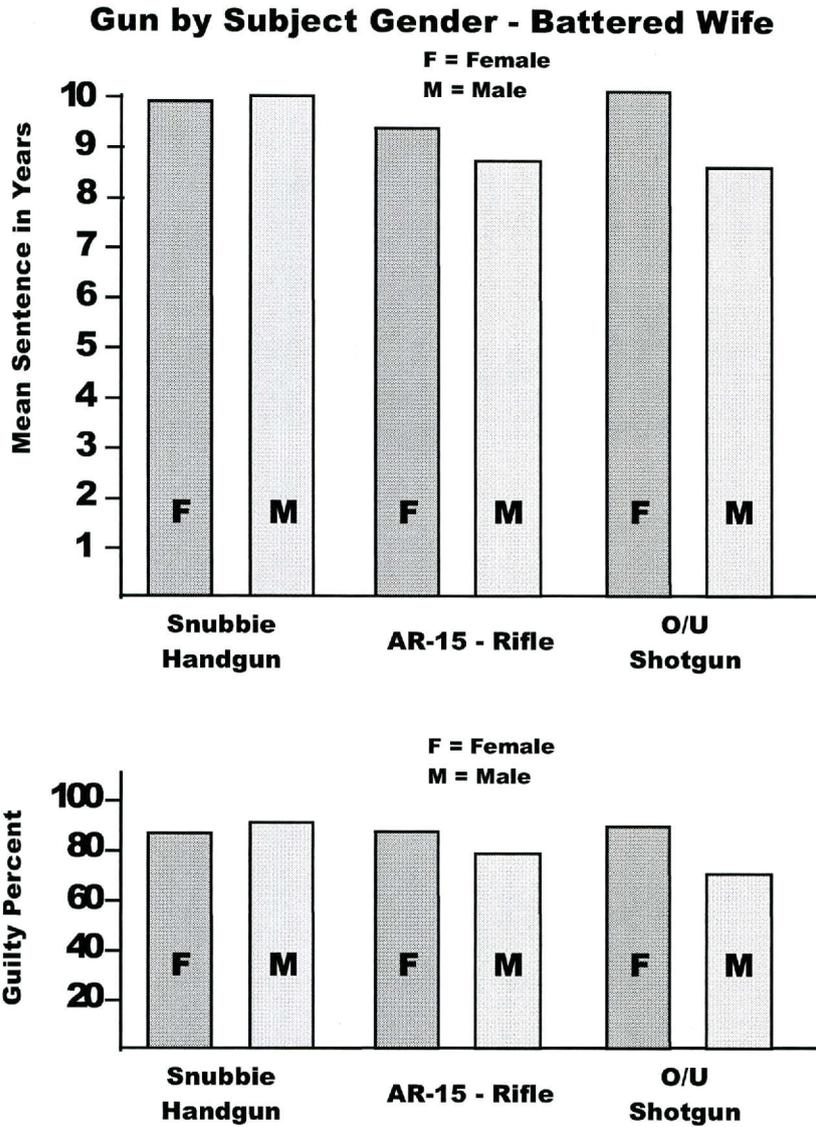


Figure 6-8. Mean sentences and guilt verdict percentages in battered wife scenario.

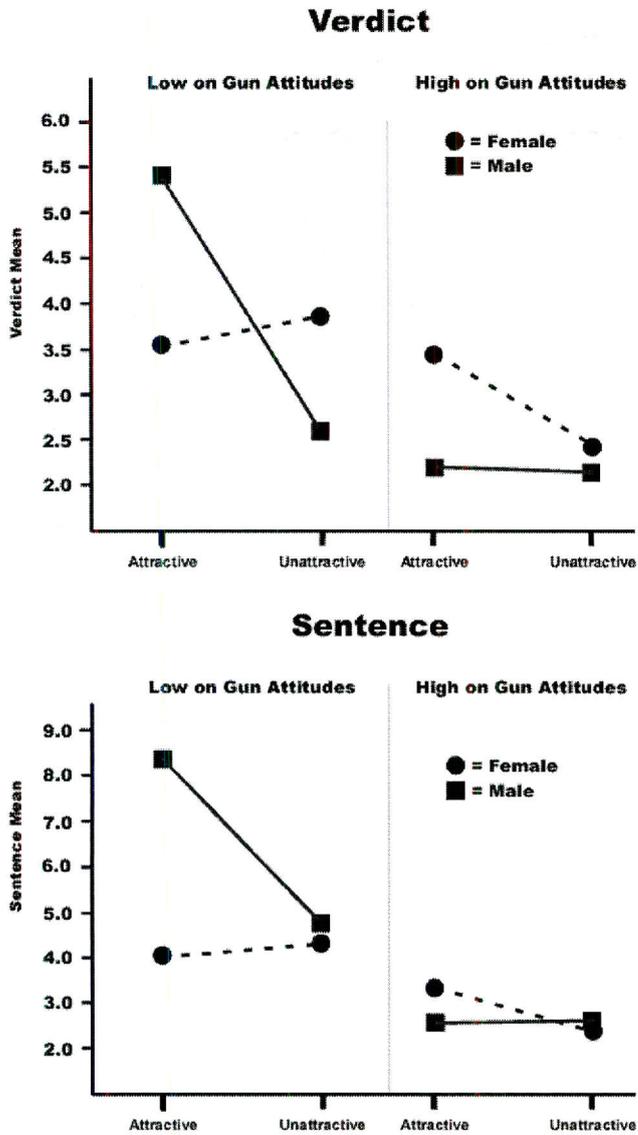


Figure 6-9. Verdict and sentence data for the attractive/unattractive burglary scenario.

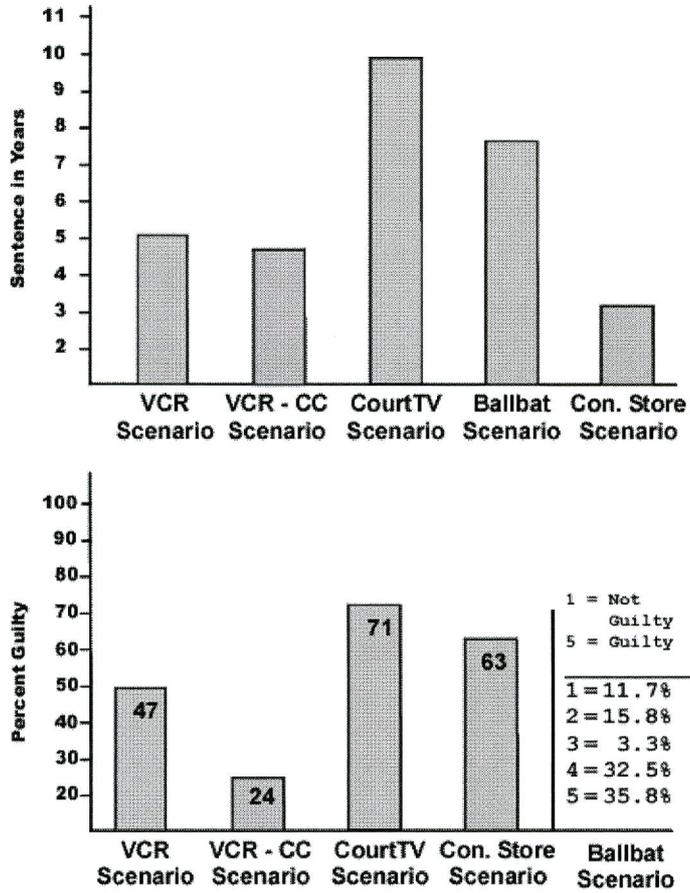


Figure 6-10. Verdict and sentence data for the various scenarios.

1. Do you think adult law-abiding citizens should be able to possess firearms?

1 2 3 4 5 6 7
Strongly Disagree Strongly Agree

2. Do you think that people have the right to use lethal force to protect self?

1 2 3 4 5 6 7
Strongly Disagree Strongly Agree

3. Do you think that people have the right to use lethal force to protect property?

1 2 3 4 5 6 7
Strongly Disagree Strongly Agree

4. Rate your knowledge of firearms

1 2 3 4 5 6 7
Not Very Knowledgeable Very Knowledgeable

Procedure: Sum scores and those scoring 18 and above are classified as progun. Below as antigun. Based on a stable median split with hundreds of participants.

Table 6-1. Firearms attitude questions.

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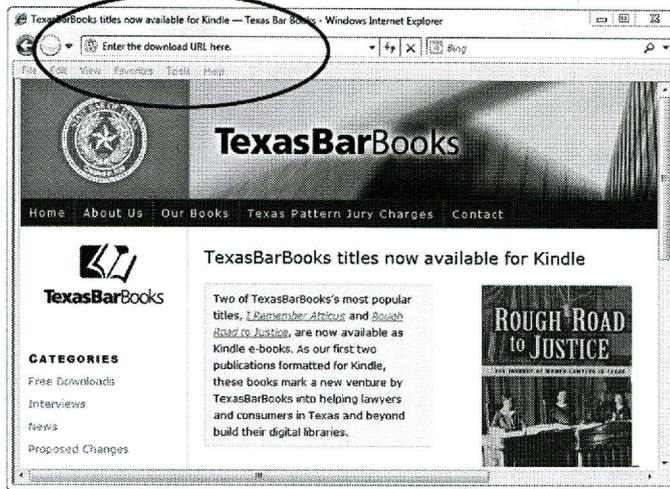
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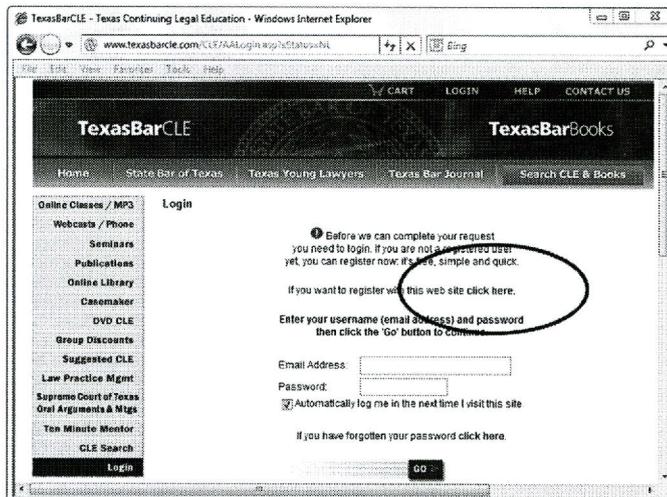
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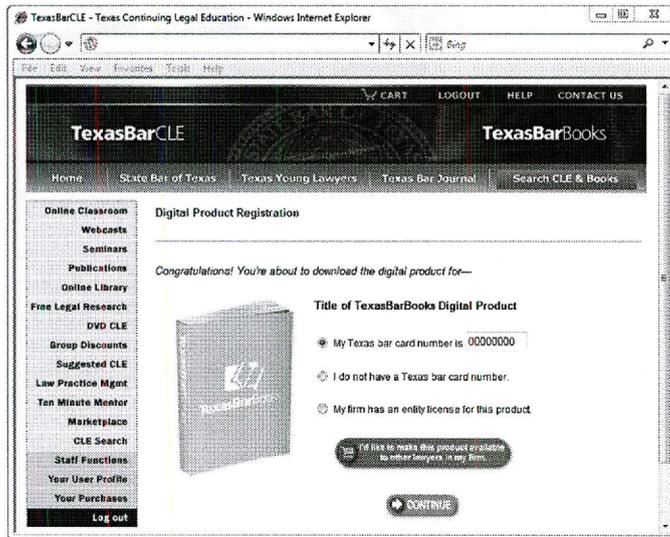
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