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## Complicity by Referral

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# Complicity by Referral

HEATHER M. FIELD\*

## ABSTRACT

*Providing a legal referral to a prospective client after declining a proffered matter may seem relatively uncontroversial. Indeed, a lawyer who provides a legal referral, even for an aspiring law-breaker, would be quite unlikely to be subject to any professional sanctions or legal liability as a result. Yet, by providing a legal referral to a potential law-breaker, the lawyer advances the prospective client's highly questionable goals and becomes complicit in the client's efforts to circumvent the law. Thus, this article argues that the decision to offer a legal referral is much more morally fraught than previously understood. In response, this article provides guidance about the parameters that should govern a lawyer's decision about whether and to whom a lawyer should give legal referrals, particularly for matters where clients seek to achieve questionable (or worse) objectives. As the first article to examine the most basic referral scenario (i.e., without referral fees and without any continuing involvement by the referring lawyer), this article fills a gap in the ethics literature and empowers lawyers to make more morally defensible decisions when responding to common referral requests.*

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## INTRODUCTION

The brother-in-law (BIL) of a lawyer’s very good client calls the lawyer and asks for assistance on a new matter. After the initial conversation, the lawyer is concerned that BIL wants to be very (perhaps overly) aggressive. Exactly how aggressive is not entirely clear from the consultation conversation, but the lawyer decides not to get involved with BIL. The lawyer declines the representation, but when BIL asks for a referral to another lawyer who might assist, the lawyer wants to be helpful so as to not offend the good client from whom BIL obtained the lawyer’s name. Thus, the lawyer provides BIL with a referral to another lawyer who is reputed to be more aggressive.

This situation arises across practice areas. A prospective client may want help pursuing very aggressive tax reduction strategies, perhaps bordering on evasion.<sup>1</sup> A prospective client may want help protecting assets from swarming creditors or

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1. See, e.g., Press Release, Dep’t of Justice, Former Jenkins & Gilchrist Attorney Sentenced to 15 Years in Prison for Orchestrating Multibillion Dollar Criminal Tax Fraud Scheme (June 25, 2014), <https://www.justice.gov/opa/pr/former-jenkins-gilchrist-attorney-sentenced-15-years-prison-orchestrating-multibillion-dollar> [<https://perma.cc/8YWY-ZLHC>] (lawyer convicted for role in clients’ tax shelter activity).

a soon-to-be-ex-spouse, perhaps approaching fraud.<sup>2</sup> A prospective client may want help skirting regulatory restrictions applicable to its business, perhaps verging on law-breaking.<sup>3</sup> Wherever the law imposes limits, some clients will aspire to push, or even exceed, those limits.<sup>4</sup>

The lawyer clearly has discretion to decline to represent a potential tax evader, a potential fraudster, or other potential law-breaker.<sup>5</sup> But when a lawyer declines a matter, for an aspiring limit-pusher or otherwise, he<sup>6</sup> is almost certain to be asked for a referral. Lawyers often want to help, so they may want to provide referrals if they can think of lawyers' names to offer.

Providing a legal referral to a prospective client after declining a matter may seem uncontroversial. Lawyers regularly provide referrals and, except in limited circumstances,<sup>7</sup> they rarely think twice about doing so. Indeed, a lawyer who provides a mere referral, even for a client with extremely aggressive objectives, would be quite unlikely to be subject to any professional sanctions or legal liability as a result.<sup>8</sup> Yet, this article argues that by providing a legal referral the lawyer advances the prospective client's highly questionable goals, making the lawyer complicit in the prospective client's efforts to circumvent the law. The lawyer bears moral responsibility for making the referral even in the absence of professional sanctions or legal liability.

Of course, scholars have long recognized the tension between what legal ethics rules dictate (or allow) and what morality may demand.<sup>9</sup> There is extensive

2. See, e.g., *In re Disciplinary Action Against Sheahan*, 866 N.W.2d 929 (Minn. 2015) (lawyer suspended for "assisting his client in the fraudulent transfer of assets during a lawsuit," among other things); *State ex rel. Counsel for Discipline v. Horneber*, 708 N.W.2d 620 (Neb. 2006) (lawyer suspended for counseling client to violate property transfer requirement of divorce decree).

3. See, e.g., David Ruiz, *Uber's 'Greyball' Program Puts New Focus on Legal Dept.*, RECORDER (Mar. 3, 2017), <https://www.law.com/therecorder/almID/1202780546278/?sreturn=20180012095556> [<https://perma.cc/KQ63-ANJT>] (suggesting that lawyers who approved of Uber's plan to use its "greyball" program to evade regulators could be subject to disbarment).

4. Examples could be drawn from almost any practice area, from securities law and banking law, to employment law and environmental law, and even to issues such as legal restrictions on torture. See, e.g., W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005) (discussing the role of lawyers in helping clients who want to plan around the law, and considering tax, accounting, and restrictions on torture as examples) [hereinafter Wendel, *Professionalism*].

5. See *infra* Part I.A. The challenges faced by a lawyer who decides to *accept* the matter for a potential law-breaker are outside the scope of this article. See, e.g., Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) [hereinafter Pepper, *Counseling*].

6. Where pronouns are used, this article generally refers to client(s) using it/its or they/them/their and to the lawyer using he/him/his. I generally alternate my articles, with some articles using female pronouns for the lawyer and others using male pronouns. This article's approach is intended to avoid confusion that could arise if (a) gender-neutral pronouns were used for both lawyers and clients or (b) if the article alternated between female and male pronouns for the lawyer. This approach also avoids the awkwardness of "he/she."

7. For example, lawyers must carefully consider referrals if they want a referral fee. See MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2016) [hereinafter MODEL RULES].

8. See *infra* Part II.

9. See, e.g., O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); James Bart Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951);

literature on whether lawyers should be subject to moral scrutiny for the actions that the ethical rules allow (or require) them to take on behalf of clients.<sup>10</sup> While scholars have examined this issue in the context of a lawyer's decision about whether to accept a new client or matter,<sup>11</sup> the literature has not examined the lawyer's moral responsibility when deciding whether to provide a referral.

Thus, this is the first article to reveal the moral dilemma inherent in a lawyer's decision about providing a referral, particularly for a prospective client who seeks aggressive advice.<sup>12</sup> By exploring the tension between a lawyer's moral responsibility and his ethical/legal responsibility for legal referrals, this article empowers both individual lawyers and the broader legal profession to reassess how to handle legal referrals, especially for aggressive clients. Ultimately, this article contends that lawyers, when responding to referral requests, should do more than the minimum that is required to avoid professional sanctions and legal liability.

In response, this article provides guidance about whether and to whom lawyers should provide legal referrals,<sup>13</sup> particularly for clients seeking to achieve questionable (or worse) objectives. Thus, this article fills a gap in the literature. Rules and commentary about lawyer referrals address referral fees,<sup>14</sup> lawyer referral services

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Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

10. See, e.g., GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* §§ 1.02–1.04 (4th ed. 2015); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998); *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (D. Luban ed., 1984); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978) [hereinafter Freedman, *Personal Responsibility*]; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) [hereinafter Pepper, *Amoral*]; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Ethical Discretion*]; Wasserstrom, *supra* note 9; Wendel, *Professionalism*, *supra* note 4.

11. See, e.g., Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995) [hereinafter Freedman, *Justification*]; W. William Hodes, *Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977 (2000); W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987 (2006) [hereinafter Wendel, *Client Selection*]; David B. Wilkins, *Race, Ethics, and the First Amendment: Should A Black Lawyer Represent the Ku Klux Klan?*, 63 GEO WASH. L. REV. 1030 (1995).

12. A short forthcoming symposium essay examining how United States clients found the Panamanian law firm at the center of the “Panama Papers” scandal mentions that a lawyer who provides a referral to a potential offshore tax evader “passes the buck” onto the next lawyer, but that essay does not examine the moral culpability of the referring lawyer, nor does it provide a response to the moral dilemma revealed in this article. See Heather M. Field, *Offshoring Tax Ethics: The Panama Papers, Seeking Refuge from Tax, and Tax Lawyer Referrals*, 62 ST. LOUIS U. L.J. (forthcoming 2018) (invited symposium essay) [hereinafter Field, *Panama Papers*].

13. This article only addresses referrals by lawyers to other lawyers (i.e., to individuals who are also governed by the legal ethics rules). Referrals to non-lawyers are outside the scope of this article.

14. MODEL RULES R. 1.5(e); see, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 474 (2016) (referral fees when the referring lawyer has a conflict of interest); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 475 (2016) (safeguarding of fees subject to referral fee-splitting); Daniel R.

and agreements,<sup>15</sup> malpractice actions for negligent referral,<sup>16</sup> and working with referred co-counsel.<sup>17</sup> But the professional guidance and scholarly literature fail to address the most basic case: in what circumstances should a lawyer provide (or not provide) a “no strings attached” legal referral (i.e., with no fee-splitting and no continued involvement).<sup>18</sup> This lack of literature and guidance may suggest that academics and policymakers assume that once a lawyer decides to decline a matter the basic referral scenario is unproblematic, such that no guidance is needed. That assumption is misguided. Given a lawyer’s moral responsibility for providing a referral that furthers a prospective client’s questionable goals, lawyers need guidance about how to handle referral requests. This article supplies it.

Specifically, this article argues that the lawyer should not provide a referral if the subsequent representation would enable the client to violate the law. In all other cases, this article argues that a lawyer should analyze the referral request using the lawyer’s lawyering philosophy coupled with a risk-based analysis in which the lawyer assesses the risk of law-breaking or moral repugnancy posed by the client, the matter, and the referred lawyer. This approach helps the lawyer make a morally defensible decision about whether to contribute to the continuation of the matter via a referral. However, because of ongoing debates about lawyers’ moral accountability for actions taken in a professional capacity, and out of respect for lawyers’ moral autonomy, among other considerations, this article argues for voluntary, rather than mandatory, adoption of these recommendations. Thus, a lawyer’s failure to follow this article’s guidelines could subject the lawyer to criticism on moral grounds but should not result in professional sanctions or other legal liability.

In sum, this article makes two contributions to the literature: it identifies the act of making a legal referral as much more morally fraught than previously understood, and it is the first to provide guidance about when lawyers should (or should not) provide mere legal referrals, particularly for potential law-breakers.

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Alexander, *Referral Fees and Other Fee Arrangements Between Attorneys in Different States*, 27 J. LEG. PROF. 123 (2003); Rachel L. Bosworth, *Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era*, 84 TEX. L. REV. 509 (2005). See generally HAZARD, *supra* note 10, at § 9.20.

15. MODEL RULES R. 7.2(b)(2), (b)(4) & cmts. [6]–[8]; see, e.g., ABA MODEL SUPREME COURT RULES GOVERNING LAWYER REFERRAL & INFORMATION SERVICE (AM. BAR ASS’N 1993); Katherine Huneke & Nathan Mintz, Note, *Lawyer Referral Services and the Model Rules: Balancing Legal Accessibility with Professional Independence*, 15 GEO. J. LEGAL ETHICS 827 (2002); Geeta Kharkar, Note, *Googling for Help: Lawyer Referral Services and the Internet*, 20 GEO. J. LEGAL ETHICS 769 (2007). See generally HAZARD, *supra* note 10, at §§ 60.03, 60.05.

16. See, e.g., Briggs Cheney, *It’s Not Just About the Referral*, DIALOGUE, Summer 2004, at 9; Bruce Ching, *Attorney Referral, Negligence, and Vicarious Liability*, 33 S. ILL. U. L.J. 217 (2009); Barry Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice?*, 17 TOURO L. REV. 639 (2001); HAZARD, *supra* note 10, at ch. 5; RONALD E. MALLIN ET AL., LEGAL MALPRACTICE § 5.51 (2016).

17. See, e.g., MODEL RULES R. 5.1(c)(2); George M. Cohen, *The Multilayered Problems of Professional Responsibility*, 2003 U. ILL. L. REV. 1409, 1428–41 (2003); Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?*, 98 KY. L.J. 461 (2010).

18. Cf. Field, *Panama Papers*, *supra* note 12.

This article proceeds as follows: Part I elaborates on the basic referral scenario facing lawyers, using the example of the potential tax evader seeking legal assistance. Part II analyzes how the professional responsibility and legal liability rules apply to a lawyer who provides a referral for a potential law-breaker. Part III examines the moral responsibility of the referring lawyer. Part IV bridges the gap between the lawyer's professional responsibility and legal liability, on the one hand, and the lawyer's moral responsibility, on the other hand, by providing recommendations about how the lawyer should respond to referral requests, particularly those from potential law-breakers. This is followed by a conclusion.

## I. ELABORATING ON THE BASIC REFERRAL CASE

Referral requests are often more varied and nuanced than the introductory example. Thus, this section elaborates on the range of referral scenarios as background for this article's discussion of a lawyer's responses thereto.

Note that this article focuses on the prospective advising context, in which an individual seeks a lawyer's assistance in doing something in the future that may be illegal or immoral. The retrospective context, in which the client has already engaged in an arguably illegal activity and needs a lawyer to assist in the client's defense, is different and is outside the scope of this article.<sup>19</sup>

### A. DECLINING A NEW MATTER/CLIENT OR WITHDRAWING FROM AN ONGOING MATTER

Requests for lawyer referrals likely arise in two situations: (a) where the lawyer declines to accept a new client or a new matter for an existing client, or (b) where the lawyer withdraws from an ongoing matter for an existing client. In either situation, the prospective/existing client likely wants to continue to pursue its goals and may ask the declining/withdrawing lawyer for a referral to another lawyer.

#### 1. MANDATORY VS. DISCRETIONARY DECLINATION/WITHDRAWAL

A declination or withdrawal may be either mandatory or discretionary under the *Model Rules*.

A lawyer must decline or withdraw if "the representation will result in violation of the rules of professional conduct or other law."<sup>20</sup> This is a high standard,<sup>21</sup> and this rule does not require declination or withdrawal if the (prospective) client is merely an aspiring limit-pusher and thus a potential law-

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19. HAZARD, *supra* note 10, at §§ 1.02–1.04 (distinguishing between "helping a person commit an offense and defending a person charged with a completed offense").

20. MODEL RULES R. 1.16(a)(1).

21. HAZARD, *supra* note 10, at § 21.08 (noting the use of "will" rather than "is likely to").



breaker (or even an aspiring law-breaker) because the lawyer would, during the representation, have the opportunity to persuade the client to take a lawful approach.<sup>22</sup> The rule only mandates declination or withdrawal if and when the lawyer knows<sup>23</sup> that the representation will result in a violation of the law.

In other circumstances, a lawyer has discretion to withdraw or decline. For an existing client, a lawyer may withdraw from an existing representation for several reasons, including if “withdrawal can be accomplished without material adverse effect on the interests of the client,” if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent,” or if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>24</sup> Similar concerns may also lead a lawyer to decline a proffered matter for a prospective client (or to decline a new matter for a current client outside the scope of an existing representation). For prospective clients and new matters, however, the lawyer has even broader discretion because he is not legally or ethically obligated to accept any given representation except pursuant to a court appointment.<sup>25</sup> For example, a lawyer may decline a new matter for a reason as simple as not having enough time. Similarly, lawyers regularly decline and want to offer a referral when a prospective matter is outside the lawyer’s area of expertise.<sup>26</sup> Thus, a lawyer may exercise discretion to decline or, to a lesser degree, withdraw<sup>27</sup> from a matter in various situations, including (a) where a client wants to pursue legally questionable goals, to which the lawyer may or may not also have moral objections, and (b) where a client wants to pursue a matter that is highly likely to comply with the law but which the lawyer finds morally objectionable.

## 2. UNDERSTANDING THE LAWYER’S DECISION

A lawyer’s decision to decline or withdraw depends on factors that include what he knows about the matter and the client’s objectives, at what point a matter becomes too aggressive for the particular lawyer, and how he prioritizes among legal, business, and moral risks.

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22. MODEL RULES R. 1.16, cmt. [2].

23. HAZARD, *supra* note 10, at § 1.24 (discussing what it means for a lawyer to “know” something); *see also* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 196–202 (2011).

24. MODEL RULES R. 1.16(b)(1)–(b)(2), (b)(4).

25. HAZARD, *supra* note 10, at § 1.04, n. 11.

26. MODEL RULES R. 1.16, cmt. [1] (“A lawyer should not accept representation in a matter unless it can be performed competently.”); MODEL RULES R. 1.1 & cmt. [1] (providing that competence, for purposes of undertaking a legal representation, includes being able to employ the “requisite knowledge and skill in a particular matter” (i.e., expertise)).

27. In addition, discretionary withdrawal can present ethical complications because of the existing lawyer-client relationship. Thus, when discussing withdrawal, this article assumes that (a) the lawyer fully discussed with the client the lawyer’s concerns and tried to persuade the client to follow the lawyer’s recommendations, and (b) the lawyer appropriately mitigated harm to the client upon withdrawal. MODEL RULES R. 1.16(d); HAZARD, *supra* note 10, at § 21.18.

A lawyer likely knows a lot about the matter's details and the client's goals when he withdraws from an ongoing matter. Even in ongoing representations, however, "it is often difficult to know when clients actually have an illicit purpose."<sup>28</sup> Nevertheless, if withdrawing, the lawyer likely had confidential conversations with the client about the matter and gained at least some meaningful insights into the client's objectives and the lawyer's ability to influence the client's behavior. These insights enable the lawyer to know whether mandatory withdrawal is required or whether discretionary withdrawal is allowed.

Where a lawyer considers declining a prospective matter or client, the lawyer often has less information on which to base this decision. This is partly because the lawyer may try not to receive confidential information before deciding whether to accept the representation<sup>29</sup> and because information is often revealed to the lawyer only during the course of working with the client. Also, clients rarely come to lawyers with well-formulated plans about how to achieve a particular goal. Rather, they sometimes articulate objectives for the representation—perhaps some goal they "heard from a friend or colleague" that they could achieve—and hope that the lawyer will provide the particular legal mechanics for achieving those objectives. Furthermore, prospective clients may be reluctant to reveal their true motives (particularly if they are extremely aggressive) during an intake conversation.

Consider an example in the tax context in which a taxpayer may approach a tax lawyer for assistance moving assets offshore to reduce United States tax liability, perhaps as the taxpayer heard that others have done. The taxpayer is unlikely to offer a concrete plan. Thus, it is often difficult for a lawyer to know based on an intake conversation whether the client seeks planning assistance that is clearly within the boundaries of the law (*e.g.*, ensuring that future distributions from a foreign corporate subsidiary to its United States corporate parent will benefit from the 100 percent participation exemption under new I.R.C. section 245A),<sup>30</sup> whether the client seeks planning assistance that pushes the limits of the law (*e.g.*, efforts by a multi-national corporation with foreign subsidiaries and a taxable year other than the calendar year to reduce the 2018 cash position of the foreign subsidiaries in order to minimize the impact of new I.R.C. section 965's deemed repatriation tax in a way that could be abusive);<sup>31</sup> or whether the client seeks planning assistance that clearly enables law-breaking (*e.g.*, moving assets

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28. HAZARD, *supra* note 10, at § 6.02.

29. MODEL RULES R. 1.18 & cmt. [4].

30. *See* I.R.C. § 245A (2018).

31. *See generally* Stephen E. Shay, *Treasury Can Close a Potential Loophole in the Treatment of Deferred Foreign Income in the Tax Cuts and Jobs Act – Will It Act?* (Dec. 26, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3093379](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093379) [<https://perma.cc/F2M5-MGZR>] (discussing such strategies and the possibility that the Treasury could curtail them by promulgating anti-avoidance regulations as authorized under I.R.C. section 965(c)(3)(F)).

offshore after which an individual U.S. taxpayer will illegally refuse to report or pay U.S. taxes on earnings on those assets).<sup>32</sup>

Nevertheless, the intake conversation likely provides the lawyer with some information about the matter and the prospective client's desired approach. The lawyer also likely obtains some insight into whether the prospective client is an aspiring limit-pusher. Some aspiring limit-pushers may be willing to break the law if it serves their business goals, and some clients may be more aggressive, actually aspiring to break the law and not get caught. Of course, given the lawyer's incomplete knowledge of the facts, limited insight into the client's objectives and intent, and the frequent indeterminacy of the law,<sup>33</sup> the lawyer often must decide whether to commit himself to a client without knowing quite how aggressive the client and matter will be.

Each lawyer has his own standards for determining at what level of legal uncertainty a legally questionable matter becomes "too aggressive," thus triggering his declination or withdrawal. Of course, some matters must be declined because they would "result in violation of the rules of professional conduct or other law."<sup>34</sup> But among matters that the lawyer has discretion to decline, lawyers take different approaches. Returning to the tax example, one tax lawyer might decline as "too aggressive" matters that likely involve mere tax avoidance, but on which he is unlikely to be able to opine at a "more likely than not" or higher level.<sup>35</sup> He may be disinclined to assist with even somewhat aggressive matters, and he may focus his practice on clients whose primary goal is compliance. Another tax lawyer might have no objection to assisting on matters that are somewhat more aggressive (*e.g.*, that have only "substantial authority" or "reasonable basis")<sup>36</sup> and might, instead, only decline matters where the client has a law-breaking (and not merely limit-pushing) intent. That lawyer might conclude that, even if the lawyer could nudge an aspiring tax-evader toward behavior that is compliant

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32. See generally JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INTERNATIONAL TAXATION ¶¶ B1.03, B1.08, C2.10 (2017) (discussing tax payment and reporting obligations of individual United States taxpayers with foreign earnings).

33. See Pepper, *Amoral*, *supra* note 10, at 624 (acknowledging the challenges of legal realism, which means that the law is not always "objectively out there to be discovered and applied").

34. MODEL RULES R. 1.16(a)(1); see also *supra* notes 20–23 and accompanying text.

35. Tax advisors are regularly asked to opine on the likelihood that a particular position will succeed on the merits if challenged. Thus, tax lawyers often discuss matters with reference to the level of confidence with which they could opine on them. Opinion levels are terms-of-art in tax law, including "will" (more than ninety-five percent chance of success on the merits), "should" (approximately seventy to seventy-five percent), "more likely than not" (more than fifty percent), "substantial authority" (approximately thirty-five to forty percent), and "reasonable basis" (approximately twenty to thirty percent). See, *e.g.*, Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 327 (2011). The exact numerical translations vary slightly, but the opinion levels have important implications for taxpayers and their advisers. For example, both taxpayers and their advisers can avoid common penalties for non-shelter transactions if (a) there was "substantial authority" or (b) there was "reasonable basis" and the position was disclosed. See I.R.C. §§ 6664(c), 6694. See generally Heather M. Field, *Aggressive Tax Planning and the Ethical Tax Lawyer*, 36 VA. TAX REV. 261, 270–74 (2017) (discussing tax opinion levels and their consequences in more detail) [hereinafter Field, *Ethical Tax Lawyer*].

36. See *supra* note 35 and accompanying text.

enough to avoid mandatory declination or withdrawal, clients that he must influence in that way are too aggressive for him. Other lawyers may not impose such limitations on the types of clients they will represent, and these lawyers would likely be willing to assist with all matters unless and until the rules mandate declination or withdrawal.

Even if lawyers draw the line at the same level of aggressiveness, they may make that decision for different reasons. A lawyer's decision to decline may be driven by concerns about his own legal or business risks, including risk of professional sanctions or penalties; risk that he might want to (or be required to) withdraw from the matter in the future, which can be complicated and uncomfortable; or risk of adverse reputational consequences for handling such legally questionable matters. Or his decision to decline or withdraw could be driven by moral qualms about assisting with such a legally questionable matter. For example, a lawyer may conclude that he does not want to represent a client that seeks to pursue a very aggressive (and legally questionable, but not clearly fraudulent) inversion because of (a) the increased risk of professional sanctions, penalties, or possible reputational impacts he could face for advising on aggressive matters, or (b) his moral opposition to any aggressive tax reduction efforts. Either (or both) of these very different reasons/concerns may lead a lawyer to decline a legally questionable matter.

In addition, a lawyer may decline or withdraw from matters that are not legally questionable. He may object to a matter on purely moral grounds even if the matter is legally certain. For example, a tax lawyer who considers all inversions and other efforts to shift profits offshore to be "unpatriotic"<sup>37</sup> and "immoral"<sup>38</sup> would decline to assist with any offshoring strategies, even if they clearly complied with the law.<sup>39</sup>

## B. PROVIDING THE REFERRAL

Regardless of whether a lawyer declines or withdraws, whether that decision is discretionary or mandatory, whether the lawyer really knows the client's intent, and whether the lawyer is motivated by legal, moral, or other concerns, a lawyer will often want to provide a referral for the party seeking assistance. This may be purely out of a desire to be helpful. Often, however, lawyers want to provide referrals for other reasons, including (a) loyalty to another client (as in the case of BIL, where the lawyer wanted to keep his good client happy), (b) a desire to generate goodwill among, and possibly referrals from, other lawyers, and (c) the possibility of earning referral fees.

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37. Barack Obama, *Weekly Address: Closing Corporate Tax Loopholes*, The White House (July 26, 2014) (discussing inversions).

38. Press Briefing Memo, Senate Finance Committee, Grassley Announces Bill to Rein in Corporate Expatriation (Apr. 11, 2002).

39. See Field, *Ethical Tax Lawyer*, *supra* note 35, at 287 (describing how a moralist lawyer would assist with various offshoring techniques).

If a lawyer decides to provide a referral, the referral may or may not come with “strings.” Specifically, the lawyer may completely cease to be involved in the matter or the lawyer may remain involved, serving as an intermediary between the client and the referred lawyer, serving as co-counsel with the referred lawyer, or otherwise.<sup>40</sup> Additionally, the referring lawyer may or may not earn a referral fee, which is allowed under the *Model Rules* if, among other requirements, “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the presentation.”<sup>41</sup> The most basic case, which is the focus of this article, is the “mere referral” with no strings attached—where the lawyer provides a referral to another lawyer, ceases any further involvement in the matter, and does not receive any referral fee.

## II. THE REFERRER’S PROFESSIONAL RESPONSIBILITY AND LEGAL LIABILITY

For a lawyer who wants to, or is required to, decline a matter because it is “too aggressive” and who wants to provide a “mere referral” (i.e., no referral fees and no continued involvement), what rules govern his behavior? This section discusses the referring lawyer’s responsibilities under the *Model Rules of Professional Conduct*, exposure to possible criminal charges, and exposure to malpractice liability when providing a legal referral to a potential law-breaker. Additional subject-specific professional responsibility and legal liability rules might apply to a referring lawyer depending on the relevant field of law. As an example, this section also discusses the tax-specific rules relevant for a lawyer providing a referral to a potential tax evader.

As illustrated below, these rules provide very few requirements or constraints on the lawyer who provides a potential law-breaker with a referral to another lawyer.

### A. THE MODEL RULES OF PROFESSIONAL CONDUCT

Although the *Model Rules*<sup>42</sup> explicitly address referral fees,<sup>43</sup> they do not directly address the basic “no strings attached” legal referral, either in general or for aspiring limit-pushers and potential law-breakers.

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40. See Stephen C. Sieberson, *Two Lawyers, One Client, and the Duty to Communicate: A Gap in Rules 1.2 and 1.4*, 11 U. N.H. L. REV. 27, 29–32 (2013) (describing different multi-lawyer models).

41. MODEL RULES R. 1.5(e)(1).

42. All United States lawyers are bound by the professional ethics rules adopted by the lawyer’s practice jurisdiction. Almost all jurisdictions use some variant of the *Model Rules of Professional Conduct*. See HAZARD, *supra* note 10, at § 1.15, App. B. Thus, to speak generally about lawyers’ obligations, this article refers to the *Model Rules* when analyzing a referrer’s ethical obligations. Each lawyer should, however, analyze his obligations under the version of the ethical rules applicable in his jurisdiction.

43. See *supra* note 14 and accompanying text. One comment to the rule about fee-splitting with referrers states that “[a] lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.” MODEL RULES R. 1.5, cmt. 7. This is wise regardless of whether there is fee-splitting. See Wendy Wen Yun Chang, *Must I Really Turn Down That Referral Fee?*, 28 GP SOLO 5 (July/Aug. 2011).

Other than the rules regarding mandatory and discretionary withdrawal or declination discussed above, the Model Rule most relevant when dealing with aggressive clients or prospective clients is Model Rule 1.2(d), which states that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” This rule, together with Model Rule 1.16 regarding mandatory withdrawal/declination, clearly precludes the lawyer from *representing* a potential law-breaker in a known violation of the law.<sup>44</sup> However, the *Model Rules*, the case law, and the related commentary do not directly address whether a lawyer violates Model Rule 1.2(d) (or any other rule) by *providing a referral* for a potential law-breaker.

Given the language of the rule, the referral will violate Model Rule 1.2(d) if (a) the lawyer knows the client’s conduct is criminal or fraudulent,<sup>45</sup> and (b) the referral constitutes prohibited “assistance” within the meaning of the rule.<sup>46</sup> Thus, if the lawyer reasonably believes that the client’s proposal is mere law avoidance (and not criminal or fraudulent), the lawyer would clearly not violate the rule by providing a referral. This is true regardless of whether a referral constitutes “assistance.” On the other hand, if the lawyer knows<sup>47</sup> that the client’s proposed conduct certainly (or likely) constitutes fraud or evasion, it is critical to determine whether providing a referral constitutes prohibited “assistance.”

What constitutes prohibited “assistance” is not entirely clear. Comment 9 to Model Rule 1.2 explains that there is a “critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”<sup>48</sup> It is only the latter that is problematic under Model Rule 1.2(d). Professor Joel Newman explains that a lawyer may answer client questions about possible conduct as long as the lawyer does not suggest, direct, encourage, or actively help a client take illegal action.<sup>49</sup> Professor Geoffrey Hazard explains that a key issue is the “causal proximity between the lawyer’s conduct and the client’s illegal purpose,” focusing on “active assistance,” and he explains that a lawyer who “perform[s] an act that

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44. See Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981); Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287 (1994); Pepper, *Counseling*, *supra* note 5.

45. HAZARD, *supra* note 10, at 1–76, n. 78.

46. It seems reasonably clear that provision of a referral, without more, is not “counsel[ing] a client to engage in [tax evasion].” MODEL RULES R. 1.2(d). Thus, the discussion focuses on whether a referral constitutes “assistance.” *Id.* (prohibiting the lawyer from “assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent”). However, when providing a referral, the lawyer should not affirmatively counsel or encourage the client to pursue the potentially illegal matter. See *id.*; MODEL RULES R. 1.4(a)(5); see also HAZARD, *supra* note 10, at §§ 6.34, 8.08.

47. HAZARD, *supra* note 10, at § 1.24 (discussing what it means for a lawyer to “know” something); see also Roiphe, *supra* note 23, at 196–20.

48. MODEL RULES R. 1.2 cmt [9].

49. Newman, *supra* note 44, at 289–303 (citing cases).

substantially furthers the [client's illegal] course of conduct" could violate the rule.<sup>50</sup>

Under a broad colloquial interpretation, a mere legal referral could be "assistance" because the referral helps the client to find the referred lawyer, thereby advancing the client's (possibly) illegal ends. It is much more likely, however, that a referral does not constitute prohibited assistance within the meaning of Model Rule 1.2(d) because "assistance," for purposes of the rule, generally contemplates a context where the lawyer represents the client,<sup>51</sup> as opposed to the mere referral context, where the lawyer *declines* to represent the client.<sup>52</sup> Providing a referral is, at most, akin to indirect or passive assistance or the provision of information that the client cannot, without direct or active assistance from the referred lawyer, "readily . . . put to illicit use."<sup>53</sup> Even armed with a referral, it is uncertain whether the client will actually engage in its (possibly) desired illegal conduct,<sup>54</sup> making a mere referral unlikely to be active assistance that violates the rule. Further, even if the referring lawyer knows that the referred lawyer regularly assists clients with very aggressive planning, providing a referral remains a step removed from the advice that directly enables the client's illegal goals. This is particularly true if the referring lawyer cautions *against* pursuing the client's goals when providing the referral and warns the client that no lawyer can assist with illegal conduct; the referring lawyer should provide this warning if the client's aims are clearly illegal.<sup>55</sup> Moreover, the less confident the referring lawyer is that the referred lawyer will assist with the client's illicit goals, the harder it is to argue that the referring lawyer is encouraging, actively helping in, or substantially furthering the client's achievement of those goals.

The cases most closely analogous to the potential tax evader (or other potential law-breaker) referral scenario are the old "migratory divorce" cases in which a lawyer helped a client find an out-of-state lawyer to assist the client in obtaining an out-of-state divorce, knowing that the client was not a

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50. Hazard, *supra* note 44, at 671–72, 683; *see also* HAZARD, *supra* note 10, at §§ 6.22, 10.39.

51. For example, the Restatement also focuses on active assistance, defining the concept of "assisting" a client to include "providing, with a similar intent, other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 94, cmt a.

52. This is likely so even under the relatively broad interpretation of "assistance" reflected in ABA formal opinions. *See, e.g.*, ABA Comm. on Ethics & Prof'l Resp. Form. Op. 93-376 ("[C]ontinued participation by the lawyer in the matter without rectification or disclosure would assist the client in committing a crime or fraud."); ABA Comm. on Ethics & Prof'l Resp. Form. Op. 87-353 ("[T]he language 'assisting a criminal or fraudulent act by the client' [within the meaning of Model Rule 3.3(a)(2), which uses language similar to Model Rule 1.2(d)] is not limited to the criminal law concepts of aiding and abetting or subordination.").

53. HAZARD, *supra* note 10, at § 6.25.

54. *See infra* Part III.A. (describing the causal link between the referral and the prospective client's (possible) illegal conduct).

55. MODEL RULES R. 1.4(a)(5). *See generally* HAZARD, *supra* note 10, at §§ 6.34, 8.08.

resident of that out-of-state jurisdiction.<sup>56</sup> These cases support the conclusion that, even if a lawyer knows that a client wants to use another lawyer's assistance to violate the law, the lawyer who merely makes a referral to a reputable lawyer should not be disciplined for an ethical violation. This conclusion, however, may be limited to the "no strings attached" scenario in which the referring lawyer does not serve as an intermediary for the client (i.e., the referring lawyer does not directly engage the referred lawyer for the client or otherwise involve himself with fees paid to the referred lawyer), and in which the referring lawyer's involvement ceases after he provides the client with the referred attorney's information<sup>57</sup> (i.e., where the client is left to engage the referred lawyer if and when the client chooses).

Together, this suggests that it is highly unlikely that a lawyer will violate Model Rule 1.2(d) by providing a potential law-breaker with a mere referral to another lawyer.<sup>58</sup> Moreover, as long as the referring lawyer only provides a referral and neither accepts a referral fee nor creates a co-counsel/supervisory relationship with the referred lawyer, the referring lawyer should not be subject to other Model Rules that could hold the referring lawyer responsible for the referred lawyer's compliance with the ethical rules.<sup>59</sup>

#### B. CRIMINAL CONSPIRACY OR AIDING AND ABETTING CHARGES

A lawyer who provides a referral to a potential law-breaker could be, but is quite unlikely to be, liable under criminal law for aiding and abetting, or for conspiracy to commit, the potential law-breaker's underlying criminal behavior—assuming the behavior turns out to be criminal.<sup>60</sup>

In the example of the potential tax evader, the underlying criminal behavior would likely be tax fraud under Section 7206(1) of the Internal Revenue Code.<sup>61</sup> Thus, the referring lawyer could be charged under 18 U.S.C. § 2 for aiding and abetting the underlying taxpayer's tax fraud under Section 7206

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56. See, e.g., *In re Feltman*, 237 A.2d 473 (N.J. 1968) (New Jersey lawyer providing a referral to an Alabama lawyer for a non-Alabama resident seeking an Alabama divorce); *In re Anonymous*, 80 N.Y.S.2d 75 (N.Y. App. Div. 1948) (New York lawyer engaging a Mexican attorney for a New York client seeking a Mexican mail-order divorce). See generally Newman, *supra* note 44, at 305–08 (discussing the migratory divorce cases).

57. But see Newman, *supra* note 44, at 308 (questioning whether the referring lawyer really "needs to wash one's hands of the matter as thoroughly as was suggested").

58. It is, however, not impossible to violate Model Rule 1.2(d) when providing a mere referral if, for example, when providing the referral, the lawyer strongly encourages the potential law-breaker to pursue a course of action that the lawyer knows is illegal and the lawyer provides the name of a lawyer who he knows regularly helps clients break the law. See MODEL RULES R. 1.2(d).

59. MODEL RULES R. 1.5(e), cmt. 5.1; see also Richmond, *supra* note 17, at 505–14 (discussing the additional ethical obligations of referring counsel that would arise if any of these additional things are part of the referring or referred lawyer relationship).

60. See generally Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998) (discussing the application of the criminal law to lawyers).

61. See I.R.C. § 7206(1) (1982) (making it a felony to willfully submit a false or fraudulent return).



(1). However, this charge would be quite unlikely to succeed because the prosecution would have to prove “willfulness” on the part of the tax lawyer. This is required because in order to sustain an aiding and abetting charge, the “accomplice must have the same criminal intent” as is required for the underlying offense,<sup>62</sup> and because tax fraud requires “willfulness” by the underlying taxpayer.<sup>63</sup>

It would be quite difficult to prove that a tax lawyer who declined a matter and provided a mere referral, even to a potential (or very determined) tax evader, “willfully” aided and abetted the underlying tax fraud because willfulness requires “a voluntary, intentional violation of a known legal duty.”<sup>64</sup> This willfulness standard “imposes a heavy burden on the prosecution.”<sup>65</sup> This burden would be difficult to meet if a lawyer explicitly declines to represent a potential tax evader and merely refers that individual to another lawyer who might (or might not) assist, among other reasons, because there is no legal duty to withhold referrals or otherwise to thwart a client’s ability to get advice on even very aggressive tax planning.<sup>66</sup> Moreover, willfulness is quite likely lacking in referral cases where the taxpayer’s desired tax strategy is only of questionable legality rather than certain illegality.<sup>67</sup>

In addition, the 18 U.S.C. § 2 aiding and abetting charge against a referring lawyer requires that the government present evidence that the *underlying taxpayer* evaded tax under Section 7206(1);<sup>68</sup> this imposes an additional burden on the prosecution, making the aiding and abetting charge against a referring lawyer difficult to mount.

The referring lawyer could also be charged under 18 U.S.C. § 371 for conspiracy to commit Section 7206(1) tax evasion or to defraud the United States.<sup>69</sup> This charge is also quite unlikely to succeed. For a conspiracy offense, “the *mens rea*

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62. See MICHAEL SALTZMAN & LESLIE BOOK, *IRS PRACTICE & PROCEDURE* ¶ 12.05[10][b] (citing cases and explaining that accomplice liability under 18 U.S.C. § 2 requires that an “accomplice must have the same criminal intent” as is required for the underlying offense and thus a “defendant must have the willfulness requirement to aid and abet the tax crimes requiring willfulness”); Department of Justice, 2012 Criminal Tax Manual § 21.03[2], <https://www.justice.gov/sites/default/files/tax/legacy/2015/03/26/CTM%20TOC.pdf> [<https://perma.cc/JUT4-4LG8>] (requiring the “government [to] show that (1) the perpetrator had the requisite criminal intent to commit the underlying offense and (2) the aider and abettor had the same requisite intent”) [hereinafter DOJ].

63. I.R.C. § 7206(1).

64. See *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Pomponio*, 429 U.S. 10, 10 (1976); *United States v. Hirschfeld*, 964 F.2d 318, 321–22 (4th Cir. 1992) (applying the same concept “willfulness” for tax advisor crimes as for taxpayer crimes), *cert. denied*, 506 U.S. 1087 (1993); see also SALTZMAN & BOOK, *supra* note 62, at ¶ 12.02[4]; DOJ, *supra* note 62, at ¶ 13.07.

65. See Michelle M. Kwon, *The Criminality of “Tax Planning”*, 18 FLA. TAX REV. 153, 163–71 (2015) (discussing the willfulness standard in criminal tax cases).

66. Further, the lawyer might intend to hinder the achievement of the illicit goals, for example, by providing a referral to a relatively conservative lawyer, hoping that the latter will curtail the potential law-breaker’s behavior.

67. BORIS BITTKER ET AL., *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 50.08[2] (willfulness excludes “the taxpayer’s resolution of debatable legal issues in his own favor”).

68. DOJ, *supra* note 62, at §§ 21.03[1], 21.05[1].

69. See 18 U.S.C. § 371; I.R.C. § 7206(1).

required is that the conspirator know that he is agreeing to undertake joint action” to achieve an illegal goal.<sup>70</sup> A lawyer who declines a matter, merely offers a referral to another lawyer who might handle the matter, and otherwise leaves the taxpayer to pursue the taxpayer’s tax matters as the taxpayer deems appropriate, could hardly be said to be agreeing with the taxpayer to take joint action, even if the taxpayer has an illegal tax evasion goal.

Thus, the threat of these criminal charges imposes virtually no constraint on a lawyer who declines a matter and provides a potential tax evader with a referral to another lawyer, although it is possible that the analysis could be different outside the tax area if the criminal charges underlying the conspiracy or aiding and abetting charges had different elements.

### C. MALPRACTICE LIABILITY

In limited circumstances, a referring lawyer could also be subject to a malpractice claim for negligent referral.<sup>71</sup> This could arise if the lawyer refers the prospective client to another lawyer who is then negligent when advising the client. Different jurisdictions in the United States take different approaches to this claim, with some not recognizing the cause of action, some recognizing the cause of action only if there is fee-splitting, and others allowing the cause of action slightly more broadly.<sup>72</sup> Even in more permissive jurisdictions, the referring lawyer is unlikely to be liable if the referring lawyer made a mere referral (i.e., where there is no fee-splitting<sup>73</sup> or other conflicts of interest,<sup>74</sup> and where the referring lawyer ceases involvement and does not make any representations about monitoring or supervising the other lawyer’s work<sup>75</sup>), and if the referring lawyer engaged in at least a minimal investigation of the referred lawyer’s credentials.<sup>76</sup>

The risk for the referring lawyer may be even lower in the aspiring limit-pusher scenario, particularly when the claim against the referring lawyer is based on vicarious liability for the referred lawyer’s malpractice (i.e., as opposed to direct negligence in giving the referral).<sup>77</sup> Consider a client-driven situation where a potential tax-evader sought, and the referred lawyer assisted in obtaining, tax benefits that were successfully contested by the IRS or that were determined to constitute tax fraud or evasion. If the referred lawyer was candid with the taxpayer about the risks and the taxpayer chose to pursue the aggressive strategy anyway, it is not

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70. SALTZMAN & BOOK, *supra* note 62, at ¶ 12.03[1]; see STEVEN R. TOSCHER ET AL., 636-3d TAX CRIMES I.B.1.; Erin M. Collins & Edward M. Robbins, Jr., *Civil & Criminal Tax Fraud*, in INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE DESKBOOK § 13:2.5[A] (2016); DOJ, *supra* note 62, at § 23.04[1].

71. See generally Temkin, *supra* note 16; MALLIN, *supra* note 16, at § 5.51.

72. See Ching, *supra* note 16, at 223–33.

73. *Id.* at 227–29; Temkin, *supra* note 16, at 663–76.

74. Ching, *supra* note 16, at 237–38.

75. *Id.* at 230–32; Temkin, *supra* note 16, at 655–62.

76. Temkin, *supra* note 16, at 653–55.

77. See Ching, *supra* note 16, at 223.

clear that the referred lawyer's actions constituted a breach of duty<sup>78</sup> or were the proximate cause of the harm suffered by the taxpayer.<sup>79</sup> That is, it may be the client—an aspiring tax law limit-pusher—rather than either the referred lawyer or the referring lawyer, that is at fault.

Thus, although a referring attorney could have exposure for negligent referral, the chances of success of such a claim are likely quite low assuming a mere referral and assuming the referring lawyer confirmed that the referred lawyer was admitted to practice and in good standing in the relevant jurisdiction. As a result, this possible, but low, malpractice exposure is unlikely to impose a meaningful restriction on a lawyer's decision about whether to provide a referral to a potential law-breaker.

#### D. SUBJECT-AREA SPECIFIC RULES

In some areas of law, subject-area specific conduct rules also apply to constrain the behavior of lawyers.<sup>80</sup> In tax, for example, the key subject-specific constraints on a lawyer's behavior come from Circular 230, which articulates the standards of practice applicable to tax professionals who practice before the IRS, and from the penalty provisions in the Internal Revenue Code. Each will be discussed briefly to illustrate the relevance of subject-area specific rules to a lawyer's decision about whether to provide a legal referral for an aspiring limit-pusher. As discussed further below, a tax lawyer who provides a mere referral to a potential tax evader is unlikely to be subject to sanctions under Circular 230 or penalties under the IRC.

Lawyers in other practice areas should perform similar analyses under the subject-area specific professional conduct rules relevant in their fields.

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78. Failure of a strategy to be sustained on the merits does not mean that the advice given was negligent. For example, if a lawyer opines that a position is supported by substantial authority (but not more) and the position is successfully challenged by the tax authority, it is still entirely possible that the lawyer discharged his responsibilities consistently with the standard of care. *See generally* HAZARD, *supra* note 10, at § 5.03.

79. *See generally* Jacob L. Todres, *Bad Tax Shelters—Accountability or the Lack Thereof: Ten Years of Tax Malpractice*, 66 BAYLOR L. REV. 602, 608–12 (2014) (discussing the requirements for tax malpractice claims); *see also* Hassebrock v. Bemhoft, No. 10-CV-679-JPG-DGW, 2014 WL 1758884 (S.D. Ill. May 2, 2014) (denying client's legal malpractice claim against attorney when client had been convicted of tax evasion with respect to the matter); *see generally* HAZARD, *supra* note 10, at §§ 5.25, 5.26; MALLEY, *supra* note 16, at §§ 22:1, 22:10.

80. Subject-area specific conduct rules arise in various practice areas. For example, the SEC prescribed standards of professional conduct for lawyers practicing before the SEC. Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release Nos. 33-8185; 34-47276, (Aug. 5, 2003) (to be codified at 17 C.F.R. pt. 205), <https://www.sec.gov/rules/final/33-8185.htm> [<https://perma.cc/X2KX-WAQN>]; *see generally* Robert B. Robbins, *Ethics and Professional Responsibility for Attorneys in Securities Transactions*, SU41 ALI-CLE 495 (2013); Mark A. Sargent, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867 (2004). Bankruptcy lawyers are also subject to bankruptcy-specific rules regarding their professional conduct. *See, e.g.*, 18 U.S.C. §§ 152–57 (bankruptcy crimes); 11 U.S.C. § 707(b)(4) (regarding the meaning of attorney signatures in bankruptcy matters). Other areas have subject specific rules as well. *See, e.g.*, Daniel Riesel & Victoria Shiah, *Ethical Considerations for the Clean Air Act Attorney*, SR033 ALI-ABA 305 (2009) (discussing ethics/conduct rules for environmental lawyers).

## 1. CIRCULAR 230

Like the generally applicable ethics rules, Circular 230<sup>81</sup> does not explicitly address referrals. The portion of Circular 230 most relevant to the potential tax evader referral situation provides that a tax professional can be sanctioned if he is “incompetent or disreputable.”<sup>82</sup> “Incompetence and disreputable conduct” include “willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.”<sup>83</sup> Thus, whether a referring lawyer is subject to sanctions under this part of Circular 230 for providing a referral to a potential tax evader depends on (a) whether making a referral is the type of action covered by the rule and (b) whether the referring attorney behaves with the requisite intent.

As to types of actions covered by the rule, providing a referral, even to a potential tax evader, is unlikely to constitute “assisting” or “counseling” the client in violating the law, as was discussed above with respect to the analysis under the *Model Rules*.<sup>84</sup> Circular 230 also prohibits the additional actions of “suggesting” and “encouraging” the violation of the tax law, but providing a referral is still unlikely to be sanctionable under Circular 230 if the lawyer merely responds to a client’s referral request (i.e., rather than affirmatively “suggesting” that the client should consider hiring a particular lawyer to assist the client in illegally reducing its tax burden) and if the lawyer does not “encourage” violation of the tax law when providing the referral.<sup>85</sup> The prohibition on “encouraging” does suggest, however, that the lawyer should affirmatively discourage potential tax evaders to decrease the risk that the mere provision of the referral could be construed as implicit encouragement.<sup>86</sup>

On the question of intent, a lawyer must act “willfully” (when assisting, counseling, or encouraging a client with violating the law) or “knowingly” (when counseling or suggesting an illegal plan to evade taxes) for his actions to be sanctionable under the portion of Circular 230 cited above. As explained above, “willfulness” would be quite hard to establish if a lawyer declines a representation because of the lack of “a voluntary, intentional violation of a known legal duty.”<sup>87</sup> In addition, “knowing” behavior requires that the lawyer must “know”

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81. 31 C.F.R. § 10.

82. *Id.* at § 10.50(a).

83. *Id.* at § 10.51(a)(7).

84. *See supra* Part II.A.

85. Circular 230 is more explicit than Model Rule 1.2(d) about “suggesting” and “encouraging.” Model Rule 1.2(d) does not explicitly prohibit such actions, but encouragement is inadvisable even under the less explicit language of Model Rule 1.2(d). *See supra* notes 48–55 and accompanying text.

86. This is consistent with Model Rule 1.4(a)(5). *See supra* note 55 and accompanying text.

87. *See supra* notes 64–66 and accompanying text.

the plan is “illegal” and “know” it will evade federal tax.<sup>88</sup> Establishing that a referring lawyer “knew” either of these things is difficult if the referring lawyer declines to advise directly on the matter and only provides a referral to someone who might advise on the matter; there is greater risk that the lawyer “knows” if he has been representing the client and then withdraws. Further, the knowingly standard only applies to “counseling or suggesting . . . an illegal plan to evade” taxes; this standard does not apply to “assisting” or “encouraging,” which are the actions most likely to be implicated by someone who is providing a referral. Thus, even if the lawyer “knows” that the client’s desired plan is (likely) illegal, merely providing a referral seems unlikely to violate this part of Circular 230 if he does not suggest the plan or counsel the client about the plan.

It is important to note, however, that Circular 230’s definition of “incompetent or disreputable conduct” is inclusive and not exclusive.<sup>89</sup> Thus, the fact that a mere referral is unlikely to constitute any of the listed types of misconduct does not preclude the Office of Professional Responsibility from arguing that providing a referral for a potential tax evader is sanctionable under Circular 230 as “incompetent or disreputable conduct” particularly if the referring lawyer knows that the client intended to illegally evade tax. Such an approach would, however, depart from current practice.

## 2. I.R.C. TAX PENALTIES

The Internal Revenue Code also contains penalty provisions that apply to tax advisers. The penalty provisions most likely to apply to a lawyer who provides a referral to a potential tax evader are the civil and criminal penalties for aiding and abetting taxpayers in understatements or fraud or evasion.

### a. Civil Penalty for Aiding & Abetting Understatement of Tax Liability

Section 6701 imposes a civil tax penalty for aiding and abetting the understatement of tax. Specifically, Section 6701 applies to:

Any person who (1) aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document, (2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and (3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person[.]<sup>90</sup>

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88. Jonathan G. Blattmachr & Mitchell M. Gans, *Circular 230*, in CIRCULAR 230 DESKBOOK: RELATED PENALTIES, REPORTABLE TRANSACTIONS, WORKING FORMS § 4:18.1[F] (2017) (discussing the knowingly standard); see *supra* note 47 and accompanying text (what it means for a lawyer to “know”).

89. 31 C.F.R. § 10.51(a).

90. I.R.C. § 6701(a).

Despite the broad applicability of Section 6701,<sup>91</sup> providing a referral, even for a potential tax evader, is unlikely to meet the statute's requirements. This is for multiple reasons.

First, the assistance provided by giving a referral is unlikely to be enough to trigger Section 6701. Under Section 6701, a person only "assists in . . . the preparation or presentation of any . . . document"<sup>92</sup> if the person is "*directly* involved in the aiding or assisting in the preparation of a false or fraudulent document under the tax laws."<sup>93</sup> Even if a lawyer knows that the taxpayer wants help with tax evasion, providing a referral to another tax adviser is, at most, *indirect* involvement in the preparation of any false or fraudulent tax document because the document is directly prepared by the referred (not the referring) lawyer. This distinction between direct and indirect involvement is similar to the distinction between active and passive assistance relevant in the application of the *Model Rules*.<sup>94</sup>

In addition, while the Section 6701 penalty also applies to someone who "procures" a false or fraudulent document, the term "procures" generally refers to a person's actions via a subordinate (or via any person whose actions are controlled or overseen by the alleged procurer).<sup>95</sup> Where an individual merely makes a referral and thereafter ceases to be involved with the matter or the other lawyer, the referrer should not be treated as having "procured" the materials produced by the referred lawyer.

Second, to impose a Section 6701 penalty, the adviser must have actual knowledge that the document would (if used) result in an understatement of tax liability.<sup>96</sup> A referring lawyer whose involvement ends after making the referral does not know the details of ultimate client representation. Thus, he is unlikely to have the actual knowledge required by Section 6701, especially if the referring lawyer is uncertain as to whether the client's desired plan would result in an understatement of tax. Even if he believes that the client is determined to violate the law, the lawyer likely still lacks the actual knowledge required by Section 6701 if he is uncertain whether the referred lawyer will assist the client in pursuing the tax evasion plan.

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91. See David Weisbach & Brian Gale, *The Regulation of Tax Advice and Advisers*, 130 TAX NOTES 1279 (Mar. 14, 2011).

92. I.R.C. § 6701(a)(1).

93. S. Rep. 97-494, at 275-76 (1982) (emphasis added); I.R.M. § 20.1.6.14.1; see also I.R.M. § 20.1.6.14.5 (all examples involving direct action).

94. See *supra* Part II.A.

95. S. Rep. 97-494, at 275-76 (1982); I.R.C. § 6701(c); SALTZMAN & BOOK, *supra* note 62, at ¶ 7B.16[1].

96. I.R.C. § 6701(a)(3); see, e.g., *Rodrigues v. United States*, 797 F. Supp. 122 (D.R.I. 1992) (applying an actual knowledge standard); see also ALAN J. TARR & PAMELA JENSEN DRUCKER, 634-3d CIVIL TAX PENALTIES VIII.B.2.b (2005); SALTZMAN & BOOK, *supra* note 62, at ¶ 7B.16[1] (collecting cases).

### b. Criminal Penalty for Aiding or Assisting in Fraudulent or False Statements

Section 7206(2), which imposes criminal penalties for willfully aiding and abetting tax fraud,<sup>97</sup> “cover[s] much of the same ground as [Section 6701],” but with “a higher standard of proof required.”<sup>98</sup> Thus, the Section 7206(2) criminal penalty is even more unlikely to apply to a referring lawyer than is the Section 6701 civil penalty, which is itself unlikely to apply, as discussed above.

## E. CONCLUSION ABOUT THE REFERRER’S PROFESSIONAL RESPONSIBILITY AND LEGAL LIABILITY

The foregoing illustrates that a lawyer has a very low risk of being subject to professional sanctions or legal liability (whether civil or criminal) as a result of providing a mere referral to a potential law-breaker. Even taking together the *Model Rules*, the risk of criminal charges, the exposure to malpractice liability, and practice-area specific rules (as in the tax example), referring lawyers are subject to very minimal constraints. In sum, when providing a mere referral the lawyer should refer to a lawyer that he reasonably believes is competent to handle the matter and confirm that the referred lawyer is admitted to practice and in good standing in the relevant jurisdiction.<sup>99</sup> And particularly if the matter is (or is close to being) a matter that must be mandatorily declined, the lawyer, when providing the referral, should discourage the potential law-breaker and warn him against proceeding.

Yet this leaves a referring lawyer relatively unconstrained when providing a mere referral for a potential law-breaker in connection with a matter that is too aggressive for the lawyer to handle personally. This is likely true even if the lawyer concludes that there is a high probability that the aspiring limit-pusher wants to engage in criminal or fraudulent behavior.

## III. THE REFERRER’S MORAL RESPONSIBILITY

The conclusion in Part II that a referring lawyer *can* provide a mere referral for a potential law-breaker with very low risk of sanctions or liability does not,

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97. I.R.C. § 7206(2) (providing that it is a felony, subject to a fine of up to \$100,000 and up to 3 years of imprisonment, to “[w]illfully aid[] or assist[] in, or procure[], counsel[], or advise[] the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter . . .”); see TOSCHER, *supra* note 70, at I.A.4. See generally Collins & Robbins, *supra* note 70, at § 13:2.4.

98. BITTKER, *supra* note 67, at ¶ 50.08[1]. The types of actions covered by Section 7206(2) are similar to those covered by Section 6701, and, as discussed above, a lawyer who provides a mere referral is unlikely to have taken such actions. See DOJ, *supra* note 62, at ¶ 13.08 (providing examples of the actions subject to sanction under 7206(2), which all involving affirmative/direct participation); see also *supra* Part II.D.2.a (discussing the actions that are required to sustain a Section 6701 penalty). In addition, Section 7206(2) requires “willful” behavior by the tax advisor, which makes it harder to establish criminal liability under Section 7206(2) than to establish civil liability under Section 6701. I.R.C. § 7206(2) (“willfully”); see *supra* notes 64–66 and accompanying text (discussing the challenge of proving willfulness).

99. The referring lawyer should also ensure that that the referral is actually a “mere” referral, without referral fees, continuing involvement, or undisclosed conflicts of interest. See *supra* notes 73–75 and accompanying text.

however, mean that the lawyer *should* provide the referral. This section argues that a lawyer who provides a referral for a potential law-breaker bears some moral responsibility for advancing the potential law-breaker's goals and for the actions ultimately taken by the potential law-breaker with the help of the referral. To explore the degree of and rationale for this moral culpability, this section describes the causal link between the referring lawyer and the client's actions, and then discusses the referring lawyer's moral culpability pursuant to the legal profession's concept of the lawyer's role, the referring lawyer's own individual concept of ethical lawyering, and broader notions of moral culpability of secondary actors.

#### A. THE CAUSAL LINK BETWEEN THE REFERRING LAWYER & THE POTENTIAL LAW-BREAKER'S ACTIONS

Providing a referral to a potential law-breaker helps the potential law-breaker get the assistance that the referring lawyer would not directly provide. Specifically, having the name of another lawyer who might assist makes it easier for the potential law-breaker to continue to pursue its limit-pushing (and perhaps, limit-breaking) goals. Knowing whom to call for legal assistance makes the potential law-breaker one step closer to achieving its potentially illicit goals. Thus, providing the referral facilitates the potential law-breaker's ultimate actions. In contrast, declining to provide a referral denies the potential law-breaker help finding the lawyer it needs, thereby making it at least somewhat harder for the potential law-breaker to continue to pursue its possibly illicit goals. If the potential law-breaker wants to proceed after a lawyer has declined its matter, it must start anew, looking for names of lawyers who might be willing to assist.

Moreover, the aspiring limit-pusher, upon receiving a referral, may infer that the referring lawyer tacitly approves of or encourages the potential law-breaker's limit-pushing plans, which could embolden the potential law-breaker. This may be true even if the referring lawyer did not intend to imply approval, and even if the referring lawyer explicitly cautioned the potential law-breaker. In contrast, declining to provide a referral would more clearly signal disapproval.

Of course, providing a referral does not guarantee that even an aspiring law-breaker will ultimately get the legal assistance needed to violate the law. A referring lawyer may provide the referral, but the referred lawyer might be able to influence the potential law-breaker to take a lawful course of action, in which case, no (potentially) illegal actions would arise as a result of the referral. However, even in this case, the referring lawyer still furthered the potential law-breaker's pursuit of limit-pushing, and perhaps law-breaking, goals, even if someone else prevented it from achieving those goals. Alternatively, the referring lawyer might provide the referral, but the referred lawyer might also decline the representation, perhaps referring the potential law-breaker to yet another lawyer.



That chain may continue, with each referred lawyer declining and referring the potential law-breaker to someone else. If this happens repeatedly, the potential law-breaker may ultimately be dissuaded from its desired course of action. Even if the potential law-breaker ultimately abandons its limit-pushing or breaking efforts, the referral perpetuates a pattern in which the potential law-breaker continues to spend time and energy, and to demand time and energy from others, in pursuit of potentially noncompliant, rather than compliant, goals. And if the chain of referrals does ultimately enable the potential law-breaker to find a lawyer who will help it achieve illicit goals, the causal link to the illegal actions connects back to each referrer in the chain, although the causal link to the original referrer grows more attenuated with each additional referral.

Admittedly, refusing to provide a requested referral does not ensure that the potential law-breaker will be stopped from achieving its limit-pushing or breaking goals. It is possible that, without the referral, the potential law-breaker might not be able to find a lawyer to help. However, even without a referral, the potential law-breaker could use the internet, friends and family, and other resources to find another lawyer to assist. At a minimum, however, declining to provide a referral means that the potential law-breaker must incur increased costs of searching for another lawyer and that the first lawyer does not contribute to the potential law-breaker's pursuit of its limit-pushing or breaking goal.

Thus, the referral (or lack thereof) is not determinative of whether the potential law-breaker will (or will not) ultimately achieve illicit goals. Refusing to provide a referral may dissuade the marginal potential law-breaker who was on the fence about proceeding, but refusing to provide a referral is quite unlikely to deter a determined law-breaker. On the other hand, providing a referral may embolden the marginal potential law-breaker and makes it easier for any potential law-breaker to find a lawyer to help it pursue its goals. As a result, a lawyer's decision about whether to provide a referral may not affect compliance (except perhaps in the most marginal cases), but the decision does determine whether the lawyer contributes, even slightly, to the potential law-breaker's pursuit of and possible success at noncompliance. That is, the lawyer, through its referral decision, may not be able to stop a potential law-breaker, but he does make a choice about whether he will be a part of the potential law-breaker's efforts to push limits or break the law.

#### B. MORAL CULPABILITY BASED ON THE PROFESSION'S CONCEPTION OF THE LAWYER'S ROLE

A lawyer's moral responsibility for providing a referral to a potential tax-evader or other potential law-breaker derives, at least in part, from the profession's understanding of the lawyer's moral responsibility for the actions of, and actions on behalf of, his client.

Voluminous scholarship discusses the lawyer's moral responsibility.<sup>100</sup> The "traditional view" reflects a nonaccountability principle, pursuant to which, "[a]s long as what the lawyer and client do is lawful, it is the client who is morally accountable not the lawyer."<sup>101</sup> By relieving the lawyer of moral responsibility for legal actions that he takes on behalf of his client, the principle of nonaccountability embraces "role-differentiated behavior" in which "it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do."<sup>102</sup> Model Rule 1.2 (b) affirms this notion of role-differentiation and explains that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>103</sup>

The concepts of nonaccountability and role-differentiation have generated considerable controversy among scholars and legal philosophers. For example, Professor Stephen Pepper defends the "amoral role" of lawyers on grounds including that "liberty and autonomy are a moral good," and that the exercise of such autonomy is often dependent on access to the law.<sup>104</sup> As a result, "if the conduct which the lawyer facilitates . . . is not unlawful—then . . . what the lawyer does is a social good [because t]he lawyer is the means to . . . meaningful autonomy, for the client."<sup>105</sup> Others may accept nonaccountability for criminal defense lawyers<sup>106</sup> or, more broadly, for lawyers serving as advocates<sup>107</sup> but reject it for lawyers in other contexts, particularly for lawyers who represent corporate clients<sup>108</sup> or who are otherwise engaged in transactional or other planning work.<sup>109</sup> This context-specific rejection of the principle of nonaccountability turns, in part, on the "absence of a third-party arbiter" that can be entrusted "to reach a correct decision;"<sup>110</sup> that is,

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100. See *supra* notes 9–11 and accompanying text.

101. Pepper, *Amoral*, *supra* note 10, at 614; Postema, *supra* note 10, at 73; Schwartz, *supra* note 10, at 671, 674; see generally HAZARD, *supra* note 10, at §§ 6.02, 6.12.

102. Wasserstrom, *supra* note 9, at 5; see generally HAZARD, *supra* note 10, at § 1.04.

103. MODEL RULES R. 1.2(b).

104. Pepper, *Amoral*, *supra* note 10, at 616–17.

105. *Id.* at 617; see also Fried, *supra* note 10, at 1073 (moral insulation of lawyers enables clients to exercise their autonomy and access the law).

106. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 154 (1988) (in contexts outside of criminal defense, such as civil litigation or transactional work, "anything . . . that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well"); Wasserstrom, *supra* note 9, at 5–13 (expressing uneasiness about the role-differentiated behavior for lawyers, particularly outside of the criminal defense context).

107. Schwartz, *supra* note 10, at 669–71; see HAZARD, *supra* note 10, at § 29.02 (summarizing the debate about the lawyer's role in the advocacy context).

108. See Painter, *supra* note 10, at 511–12, 578 (arguing that that lawyers and clients are often "interdependent" particularly in the corporate context, in which case "lawyers cannot categorically deny moral responsibility for the conduct of their clients").

109. See, e.g., *id.*; Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U. L. REV. 275, 280–94 (2011); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487 (2009).

110. Schwartz, *supra* note 10, at 671, 677.

without a judge or similar party to determine the correct outcome of a matter, a lawyer in transactional or other planning matters should be more accountable for results achieved with his assistance. Further, Professor Murray Schwartz, among others, argued that the nonadvocate should not be “granted the extraordinary insulation from moral accountability provided the advocate” because “lawyers outside the adversary system should not be obliged to assist all clients as a condition of being licensed to practice law.”<sup>111</sup> Professor Deborah Rhode and Professor David Luban, among others, reject the principle of nonaccountability more broadly and argue that “lawyers must assume personal moral responsibility for the consequences of their professional actions”<sup>112</sup> or that, at the very least, as Professor Gerald Postema argued, each lawyer should seek to “integrat[e] his own sense of moral responsibility into [his role as a lawyer].”<sup>113</sup> Yet others focus less on personal morality *per se*. For example, Professor William Simon argues for understanding the lawyer’s role as one that must promote justice (meaning legal merit).<sup>114</sup> And Professor Bradley Wendel argues that lawyers must seek to implement the “achievement represented by law,” with “due regard to the meaning of legal norms,”<sup>115</sup> because the law, “achieve[d through] a pluralistic democracy,” reflects society’s collective moral judgment, which should generally supplant lawyers’ personal morality when they are acting in their professional capacity.<sup>116</sup>

This debate about the lawyer’s role need not be resolved to conclude that the lawyer bears at least some moral responsibility for providing a referral to a potential law-breaker. This is because the lawyer’s moral responsibility for making a referral is an extension of the lawyer’s moral responsibility for his initial decision to accept or decline a proffered client engagement. Lawyers generally have the discretion to decline to represent a client for moral reasons<sup>117</sup> or “to limit on moral ground the

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111. *Id.* at 695.

112. Rhode, *supra* note 10, at 643; David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101, 1101 (2010) (“[Lawyers] cannot hide behind their role or the adversary system to release themselves from the moral obligations they would have if they weren’t lawyers.”); *see also e.g.*, Michael Hatfield, *The Effect of Legal Professionalization on Moral Reasoning: A Reply to Professor Vischer and Professor Wendel*, 104 NW. U. L. REV. COLLOQUY 300, 301 (2010).

113. Postema, *supra* note 10, at 82.

114. SIMON, *supra* note 10, at 138. When scholars who focus on compliance with the law consider the morality of the lawyer’s role, some view it as derived from the legality of the client’s pursuits. *See, e.g.*, Simon, *Ethical Discretion*, *supra* note 10, at 1113–19; Fred Zacharais, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1394, 1404–05 (2004). These perspectives inform efforts to impose sometimes controversial gatekeeping functions on lawyers, through which lawyers become directly responsible for preventing client misconduct. *See, e.g., id.*; Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003). *Cf.* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Liability Strategy*, 2 J.L. ECON. & ORG. 53 (1986) (endorsing a gatekeeping function, but primarily from the perspective of incentives rather than professional ethics).

115. Wendel, *Professionalism*, *supra* note 4, at 1168–69.

116. W. Bradley Wendel, *Civil Obedience*, 104 COLUM L. REV. 363, 366, 403–04, 412–17 (2004) [hereinafter Wendel, *Obedience*].

117. MODEL RULES R. 6.2 cmt [1].

objectives he will pursue for [the client].”<sup>118</sup> Thus, the initial decision to represent a client or handle a matter is, itself, an exercise of the lawyer’s moral autonomy and is thus open to criticism on moral grounds.<sup>119</sup> Just as a lawyer’s decision whether to represent a client is an exercise of his moral autonomy, so too is the lawyer’s decision about whether to provide a referral to the prospective client. And just as the lawyer may be subject to criticism on moral grounds for accepting or rejecting a proffered representation, the lawyer may be similarly subject to moral judgment for his decision about whether to offer a referral. Admittedly, a lawyer’s moral culpability for providing a referral to a potential law-breaker is less than his moral culpability for agreeing to represent the potential law-breaker<sup>120</sup> because the lawyer has less involvement with, and provides less assistance to, the prospective client when providing a mere referral.<sup>121</sup> Yet, providing the referral does help the potential law-breaker implement its moral choices,<sup>122</sup> and the lawyer has the moral autonomy to decline to provide a referral (and thereby to decline to help the client further its goals) or to provide a referral only to another lawyer that he believes would take an approach similar to his own. Thus, the lawyer becomes open to moral judgment based on the referral decision.

The foregoing analysis arguably applies regardless of whether one accepts the principle of nonaccountability. Rejecting nonaccountability, either in general or in prospective planning matters such as those considered by this article, makes it particularly compelling to hold a lawyer morally responsible for his choice of clients, and thus for his decision to provide a referral for a potential law-breaker. Where “the lawyer is morally accountable for the job [he] performs and is not shielded from moral criticism on the grounds that [he] is just doing [his] job,” the “choice to adopt a particular project is [also] a moral choice” for which the lawyer bears moral responsibility.<sup>123</sup> Lawyers, especially when treated as morally accountable for their work on behalf of clients, should be “encouraged to choose projects that reflect their vision of personal morality”<sup>124</sup> and should “be ready to defend their choice of representation with reference to its social value and not simply to the justice system in which

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118. Hodes, *supra* note 11, at 982; Schneyer, *supra* note 10, at 1565–66.

119. Freedman, *Personal Responsibility*, *supra* note 10, at 199, 204–05; Hodes, *supra* note 11, at 982, 990. See also Hatfield, *supra* note 112, at 301; HAZARD, *supra* note 10, at § 6.12.

120. The lawyer’s moral culpability (whether for work done in representing the client, for his decision to represent a client, or for his decision to provide a referral to a client he declines) is, of course, less than the client’s moral culpability for the actions it takes with a lawyer’s assistance. For example, a lawyer who agrees to assist with, or who provides a referral for a taxpayer who wishes to pursue, very aggressive tax avoidance is not *himself* a very aggressive tax avoider or evader. HAZARD, *supra* note 10, at § 6.12 (a lawyer “still [has] a moral account to settle (for agreeing to take up the client’s matter rather than taking a pass)” but it is not for “endorsing the client’s views or activities”).

121. See Rhode, *supra* note 10, at 644 (“[M]oral responsibility depends on a variety of factors, including the significance of harm and the agent’s degree of involvement, knowledge and capacity to affect action.”).

122. Painter, *supra* note 10, at 554 (a lawyer shares moral responsibility if he provides assistance to his client to enable the client to implement the client’s moral choices).

123. Hatfield, *supra* note 112, at 306. See also McMorro & Scheuer, *supra* note 109, at 308.

124. Hatfield, *supra* note 112, at 306.

lawyers practice.”<sup>125</sup> If a lawyer is morally responsible for work he does on behalf of a client and for his decision to accept a client in the first instance, the lawyer should be similarly morally responsible for providing the referral that assists in the continuation of the prospective client’s matter. That is, a lawyer should only assist in the matter’s perpetuation (i.e., through a referral) if such perpetuation also reflects the lawyer’s vision of personal morality and if he can defend the decision to provide a referral with reference to the merit of the client or matter. Thus, a lawyer who provides a referral and thereby helps a prospective client pursue potentially immoral or illicit goals is subject to moral criticism for his contribution to the furtherance of the prospective client’s plans. Even if the lawyer provides a referral to another lawyer he believes would also decline to assist the prospective client, providing any referral “passes the buck” on to that next lawyer,<sup>126</sup> and as Professor David Luban colorfully explained, “mutual buck-passing either annihilates all responsibility or else generates Chicken Games in which everyone tries to throw the burdens of responsibility on someone else, with unfortunate consequences for all.”<sup>127</sup>

Even accepting the nonaccountability principle, there is “moral significance” to the decision to take on a matter<sup>128</sup> and to provide a referral because the lawyer has moral discretion to decline either or both.<sup>129</sup> Indeed, if lawyers are free from moral responsibility for lawful actions taken on behalf of a client during a representation, it may be particularly important that the lawyer take his moral judgments “into account in making the initial decision whether to enter into a particular lawyer-client relationship” *because* his moral judgments become subordinated to the needs of the client after the representation has commenced.<sup>130</sup> Moreover:

because lawyers do have an almost unlimited discretion in selecting which clients and causes to accept or reject, . . . [scholars argue that] it is perfectly proper for other lawyers or social critics to either condemn or praise lawyers on moral grounds for the choices they make [about which clients and matters to handle].<sup>131</sup>

Lawyers similarly have great discretion when deciding whether, when, and to whom to provide a referral. Thus, even if a lawyer is immune from moral condemnation for his lawful actions taken *during* a given representation, the potential for moral critique

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125. McMorrow & Scheuer, *supra* note 109, at 308.

126. Field, *Panama Papers*, *supra* note 12.

127. David Luban, *The Social Responsibility of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 976 (1995) (in the context of discussing whether lawyers should bear responsibility for the work they do for clients and the impact that work may have on others).

128. Wilkins, *supra* note 11, at 1039–40.

129. Freedman, *Personal Responsibility*, *supra* note 10, at 199, 204–05 (regarding client selection); Hodes, *supra* note 11, at 982 (same). *But see* Fried, *supra* note 10, at 1077–80 (acknowledging lawyer’s discretion to choose clients, including for reasons of the lawyer’s personal moral preference, but implying that such a choice should not be subject to judgment on moral grounds because “every exercise of the profession is morally worthwhile” and because imposing just moral judgment on the decision would logically lead to an objectionable conclusion about how lawyers ought to be obligated to allocate their services).

130. Freedman, *Personal Responsibility*, *supra* note 10, at 199.

131. Hodes, *supra* note 11, at 982.

should apply not only to the lawyer's decision *at the outset* to accept or decline a particular client representation, but should also extend to the lawyer's decision whether and to whom to provide a referral if he declines the representation.

Notwithstanding the foregoing, the strictest view of the nonaccountability principle rejects holding lawyers morally accountable for client selection if doing so "leads to foreclosure of a person's access to the law."<sup>132</sup> Applying the same analysis to referrals suggests that it might be inappropriate to hold lawyers morally accountable for perpetuating questionable matters through referrals because holding lawyers so accountable would likely discourage lawyers from providing referrals, thereby limiting access to the law at least in some cases. That said, the premise of this article is that a lawyer has declined a matter due to his discomfort with the morality or legality of the proposed matter and is then deciding whether to provide a referral.<sup>133</sup> Unless that declination was mandatory, that lawyer has already rejected the strictest view of the nonaccountability principle by making a discretionary and possibly morally-driven decision about client selection,<sup>134</sup> which could *itself* limit the client's access to the law. Thus, the lawyer's next step (i.e., whether to provide a referral) should adhere to the principles that the lawyer already embraced and should not be governed by the strictest approach to nonaccountability, which may have argued against declining the matter in the first instance. Moreover, the refusal to provide a referral limits access to the law only marginally more than the declination of the matter in the first instance because other lawyers may be found if the prospective client is willing to incur the time and costs of search; refusal to provide a referral merely means that the first lawyer refuses to reduce these costs for the client.<sup>135</sup> Further, perhaps if the first lawyer's discomfort stems from how (il)legally aggressive the client seeks to be, reducing this client's access to the law may actually advance justice and good faith interpretations of law rather than inhibiting them.<sup>136</sup>

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132. Pepper, *Amoral*, *supra* note 10, at 634.

133. *See supra* Part I.B.

134. Pepper, *Amoral*, *supra* note 10, at 617–18 (explaining that "refus[ing] to facilitate that which the lawyer believes to be immoral, is to substitute the lawyer's beliefs for individual autonomy [of the client]" and explaining that access to a lawyer should not "depend on an individual lawyer's conscience").

135. *Cf.* Rhode, *supra* note 10, at 621 ("Unless the lawyer is the last in town, his or her refusal to aid certain endeavors will not necessarily preempt client choice. It may simply impose the psychological and financial cost of finding alternative counsel.").

136. Simon, *Ethical Discretion*, *supra* note 10, at 1136 (if a client's difficulty in getting a lawyer "reflects a valid assessment of the legal merits of the client's claims and goals, there should be no concern at all [about the client's 'unpopularity' and limited access to the law]"); Schwartz, *supra* note 10, at 693–94 (implying that it is not necessarily a bad result if "all reasonably available lawyers refuse to assist because they have concluded that the client's proposal entails immoral ends or means"). *Cf.* Wendel, *Professionalism*, *supra* note 4, at 1213–18. In addition, if the notion of morality that is relevant for assessing the propriety of a lawyer's actions is not individual morality but rather society's compromise about moral values as reflected in the achievement of the law, then the lawyer should make choices that "implement the law as society has agreed upon." Wendel, *Obedience*, *supra* note 116, at 382–85. Thus, the lawyer's choices (whether during a representation, when choosing clients, or when deciding whether to provide a referral) should be subject to moral critique, based not on individuals' personal moral values, but based on whether the lawyer implements society's collective moral judgment (as reflected in the law) or, at least, implements a professional identity sanctioned by the norms of the legal profession. *See* Wendel, *Client Selection*, *supra* note 11, at 1017–22, 1033.

The foregoing analysis does not depend on the reasons for the lawyer's decisions. Even if the lawyer's client selection or referral decisions were not made on moral grounds, the lawyer, when choosing to accept or reject a matter and when choosing to provide or not provide a referral, had opportunities to make morally-based choices.<sup>137</sup> Thus, he remains open to critique for declining to make a morally-motivated choice.

Of course, notions of morality vary from individual to individual,<sup>138</sup> and thus different lawyers may make different moral choices in the same situation. Thus, the foregoing generally does not demand that the lawyer decline to make a referral if he declines a matter.<sup>139</sup> Rather, it merely contends that the lawyer, when choosing whether to make a referral should consider the moral implications of his choice and be prepared to publicly justify (and accept criticism or praise for) that choice.

### C. MORAL CULPABILITY BASED ON THE INDIVIDUAL LAWYER'S LAWYERING APPROACH

Regardless of the resolution of the debate within the legal profession about the nonaccountability principle and its implications, a lawyer's approach to lawyering provides an individualized, rather than profession-wide, baseline against which that lawyer's moral culpability for referrals can be assessed. Each lawyer has his own professional identity that reflects his "answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? And what place do ethical-social values have in my core sense of professional identity?"<sup>140</sup> That professional identity incorporates a philosophy of lawyering,<sup>141</sup> which reflects "the basic principles that a lawyer uses to deal with the discretionary decisions that the lawyer faces in the practice of law."<sup>142</sup>

137. Rhode, *supra* note 10, at 623 ("[T]o decline to take a moral stance is in itself a moral stance and requires justification as such.").

138. See Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 10, at 123, 128. *But see* Wendel, *Client Selection*, *supra* note 11, at 1017–20 (the relevant notion of morality is not each individual's personal morality, but rather society's collective morality as reflected in the compromise of the law).

139. *But see infra* Part IV.A. (recommending that no referral be provided if the declination/withdrawal was mandatory pursuant to 1.16).

140. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 135 (2007), [http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary\\_pdf\\_632.pdf](http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf) [<https://perma.cc/33HL-5QNM>]; see also Heather M. Field, *Fostering Ethical Professional Identity in Tax: Using the Traditional Tax Classroom*, 8 COLUM. J. TAX L. 215, 222–25 (2017) (summarizing various formulations of the definition of "professional identity") [hereinafter Field, *Professional Identity*].

141. Field, *Professional Identity*, *supra* note 140, at 236 ("[A] lawyer can adopt one (or more) of several different philosophies of lawyering as the basis of [his] ethical professional identity.").

142. Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 75 (2000) [hereinafter Crystal, *Philosophy*].

Each lawyer's approach to lawyering is informed by the debate within the larger legal profession about the lawyer's role, but his individual choice likely reflects the aspects of that debate which most resonate with him. For example, a lawyer who prioritizes client autonomy would likely adopt a "hired gun" approach to lawyering, "acting at the direction of the boss/client, taking no responsibility for injury to other people."<sup>143</sup> A lawyer who believes that "lawyers are morally accountable for the actions that they take on behalf of their clients," may adopt a "philosophy of morality," "assert[ing] moral control over [his] clients" and, "in situations in which lawyers had professional discretion . . . [he] would take the action that the lawyer believed to be indicated by principles of morality."<sup>144</sup> Alternatively, a lawyer who believes that it is his responsibility to "promote justice," where "justice" is understood to mean "internal merit,"<sup>145</sup> might adopt a legalist philosophy, acting as if he were an "unbiased, well-informed judge" in accordance with "what a good-faith interpretation of the legal rule would require in an ideal world without problems of proof, political bias, or unequal wealth."<sup>146</sup> These are merely three examples of a larger range of possible lawyering philosophies.<sup>147</sup>

Whatever a lawyer's philosophy of lawyering, the lawyer's moral responsibility for providing a referral can be judged against the lawyering guidelines that the lawyer chooses for himself. Does the decision to provide a referral advance the lawyer's vision of moral lawyering? If not, the lawyer is subject to criticism on moral grounds—not for failure to adhere to other lawyers' interpretations of the profession's standards, but rather for failure to adhere to his own guidelines for moral lawyerly behavior.

For example, if a lawyer who adopts a moralist philosophy declines a proffered matter because he believes that the client's objectives are immoral, then providing a referral and thereby helping the client to advance its immoral aims would be hypocritical. Similarly, if a legalist lawyer believes that all lawyers ought to take only those actions that advance internal legal merit, then he could be subject to moral critique for providing a referral to a potential law-breaker. In contrast, if the legalist lawyer believes that it is acceptable for the profession to assist even

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143. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 3, 16–29 (2d ed. 2009). See Crystal, *Philosophy*, *supra* note 142, at 86–87; Margaret Ann Wilkinson et al., *Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer*, 28 *LOY. U. CHI. L.J.* 373, 380 (1996) ("[T]he only responsibility of a hired gun is to pursue the goals that have been defined by the client alone.").

144. Crystal, *Philosophy*, *supra* note 142, at 89–90; SHAFFER & COCHRAN, *supra* note 142, at 3, 30–41.

145. Simon, *Ethical Discretion*, *supra* note 10, at 1090, 1096–98.

146. Ostas, *supra* note 109, at 516–18; see also Nathan M. Crystal, *Using the Concept of "Philosophy of Lawyering" in Teaching Professional Responsibility*, 51 *ST. LOUIS U. L.J.* 1235, 1242–44 (2007) (discussing a philosophy of lawyering based on "institutional values" rather than morality) [hereinafter Crystal, *Teaching*].

147. See SHAFFER & COCHRAN, *supra* note 143, at 5–15, 42–65 (also describing the "godfather" and "friend" models); Field, *Ethical Tax Lawyer*, *supra* note 35, at 280–95 (describing six distinct lawyering philosophies).



aggressive clients to further their autonomy but merely prefers not to assist personally with any matter that is not likely to comply with the law, providing the referral should not draw similar moral condemnation.

Many lawyers have not explicitly identified their lawyering philosophies,<sup>148</sup> but the way a lawyer makes common discretionary decisions reflects his implicit notion of how he conceives of the lawyer's role. That provides enough insight into the lawyer's approach to hold the lawyer accountable for the moral coherence of his choices. When the lawyer declines a proffered matter, he should be able to justify the reasons for the declination.<sup>149</sup> His justification for declining the matter can then be compared to his justification for providing (or not providing) the referral to determine whether the decisions are consistent; this analysis would be very similar to that described above for the lawyer who had clearly articulated his lawyering philosophy. Thus, for example, if the lawyer declines a potential tax-evader's matter because the taxpayer wishes to take a very aggressive tax position and the lawyer does not think that taxpayers should pursue or lawyers should assist with such aggressive avoidance techniques, providing a referral for that potential tax evader would be inconsistent. In contrast, providing a referral presents no inconsistency if a lawyer declines a matter merely because it is outside his area of expertise, because he lacks the time to serve the client well, or because, although he does not object to lawyers assisting clients in pursuit of aggressive matters, he does not want to assist with such matters personally.

Ultimately, inconsistency between the justification for declining the matter in the first instance and the justification for providing the referral merits criticism on moral grounds because the lawyer may be failing to live up to his own lawyering principles. For that, a lawyer bears moral responsibility.

#### D. BROADER CONCEPTS OF MORAL CULPABILITY FOR ACCOMPLICES

A referring lawyer's moral responsibility could also be judged based on broader theories of blameworthiness and culpability that underpin the rules that impose legal liability,<sup>150</sup> particularly as applied to criminal sanctions for parties

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148. *But see* Crystal, *Philosophy*, *supra* note 142, at 94–98 (encouraging lawyers to be explicit about their lawyering philosophies); Field, *Ethical Tax Lawyer*, *supra* note 35, at 318–19 (same).

149. *See, e.g.*, Freedman, *Justification*, *supra* note 11, at 112.

150. *See, e.g.*, MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS (2009); H.L. A. HART & A.M. HONORÉ, CAUSATION IN THE LAW (1959). This article's discussion of the moral culpability of referring lawyers generally does not draw on notions of responsibility in tort law, in large part because, although tort law is heavily based on the concept of "fault," the wrongs in tort are often not considered "moral wrongs." *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 921–22, 930–32, 986 (2010) (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 204 (1881), for the idea that "tort law was thus fault-based in the sense of rejecting strict liability, but was not fault-based in the sense of conditioning liability on the commission of a morally wrongful act"). In contrast, criminal law much more closely links legal responsibility with moral blame. *See* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1526–44 (1992).

who assist, influence, or encourage, but do not personally commit, a wrongful act.<sup>151</sup> However, in contrast to the analyses provided above, providing a referral to a potential law-breaker is unlikely to make the referring lawyer morally responsible under criminal notions of accomplice complicity. Although there is debate among scholars about exactly what mental state and specific actions should be required for accomplice liability,<sup>152</sup> higher thresholds of blameworthiness are generally required when imposing criminal sanctions rather than merely reprobation.

For example, for a secondary actor to be blameworthy enough to be criminally-punishable for the crimes of another, the secondary actor “must act with the intention of influencing or assisting the primary actor to engage in the conduct constituting the crime,”<sup>153</sup> or at least provide assistance “with the knowledge that it will promote or facilitate a crime.”<sup>154</sup> These concepts of intent and knowledge implicate the secondary actor’s moral agency (i.e., his ability to tell right from wrong and make judgments based on that understanding, such that it is appropriate to evaluate him and potentially hold him accountable for his actions).<sup>155</sup>

Although scholars debate about what the precise contours of these intent and knowledge measures of blameworthiness are and should be for imposing criminal liability,<sup>156</sup> providing a referral, even to an aspiring law-breaker, is unlikely to demonstrate the intent or knowledge that is sufficiently blameworthy to merit criminal sanctions. For example, the fact that the referring lawyer declines a matter provides evidence that the referring lawyer may not intend to assist the prospective client in criminal conduct;<sup>157</sup> the referring lawyer may merely intend that someone else dissuade the client from pursuing its illicit objectives. Moreover, even if the referred lawyer accepts the referred representation, the

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151. See, e.g., Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007); see also generally WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW §§ 13.2, 13.3 (2d ed. 2017).

152. See, e.g., Dressler, *supra* note 151; Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131 (2015).

153. Kadish, *supra* note 150, at 346–55; see LAFAVE, *supra* note 151, at § 13.2(b), (c). *But see* Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1, 10 (2014) (arguing that the intent requirement for accomplice liability should be lower).

154. LAFAVE, *supra* note 151, at § 13.2(b), (d); see Matthew A. Smith, *Advice and Complicity*, 60 DUKE L. J. 499, 529 (2010) (discussing the knowledge standard for treating a lawyer as criminally complicit).

155. Arenella, *supra* note 150, at 1520–26; see also Peter A. French, *Complicity: That Moral Monster, Troubling Matters*, 10 CRIM. L. & PHIL. 575, 576–77, 587–89 (2016) (contending that internal intent is what matters for purposes of moral accountability).

156. See, e.g., Kadish, *supra* note 151, at 349–55 (describing “strains in application” of the intent requirement); Sarch, *supra* note 152, at 134, 162–72 (arguing that the mens rea standard for complicity should focus on the defendant’s “attitude of condoning the underlying crime”).

157. A referring lawyer could intend to assist the client in very aggressive (even possibly non-compliant), but not criminal, conduct. See Schwartz, *supra* note 10, at 685 (“[N]ot all outcomes which are neither criminal nor fraudulent are ‘legal.’”).

referring lawyer's lack of involvement in the subsequent representation and the referring lawyer's knowledge that the referred lawyer has a professional obligation not to knowingly assist with criminal or fraudulent conduct make it hard to conclude that the referring lawyer knows that a referral will ultimately facilitate criminal activity.<sup>158</sup> That is, when a lawyer provides a referral for a potential law-breaker, he quite likely does so without a mental state that is blameworthy enough to merit criminal sanctions.

Further, some notions of criminal culpability for accomplices depend on contribution to the harm caused,<sup>159</sup> which reflects the "fair attribution" of the harm created to the actor's moral agency.<sup>160</sup> This approach would likely relieve a referring lawyer of accountability if the prospective client does not ultimately commit a criminally wrongful act or if the client does commit a crime but does not do so with the assistance of the referral. In addition, the intervention of another lawyer who voluntarily agrees, rather than declines, to take responsibility for advising and assisting the client, may serve to "break the causal chains" that could otherwise have existed between the referring lawyer and the client's ultimate criminal conduct, thereby relieving the referring lawyer from moral culpability, at least for criminal law purposes.<sup>161</sup>

A full exploration of criminal accomplice liability, its requirements, and its philosophical underpinnings is outside the scope of this article, but even this brief discussion demonstrates that the degree of blameworthiness that would merit criminal sanction is quite likely lacking in the case of the lawyer who provides a mere legal referral to a potential law-breaker.

#### E. OVERALL ASSESSMENT OF THE REFERRER'S MORAL RESPONSIBILITY

Ultimately, the extent of a referring lawyer's moral responsibility for referrals, particularly those provided to potential law-breakers, depends on the

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158. See Smith, *supra* note 154, at 528–33 (discussing factors that could help determine whether a "lawyer's conduct crossed a boundary from advice into [criminal] complicity").

159. Kadish, *supra* note 151, at 355–68 (explaining that "the doctrine of complicity . . . requires a result. It is not a doctrine of inchoate liability" and "the secondary party must have succeeded in contributing to [the criminally unlawful result]," although that contribution need not be a but-for cause of the result). *But see* French, *supra* note 155, at 587–88 (arguing that moral responsibility ought not to turn on the "moral luck" of whether a particular result arises). Some scholars argue that it would be "more morally justifiable" if sanctions for accomplices were "proportionate to the degree of participation in the crime, their degree of control or hegemony over others, or the harm they actually caused" and were not necessarily equal to the sanction imposed on the principle. Dressler, *supra* note 151, at 140; *see also* Moore, *supra* note 151, at 420–51 (discussing differences in blameworthiness of different types of accomplices); Sarch, *supra* note 152, at 148–72 (arguing that whether accomplice liability is warranted should depend on whether the purported accomplice condoned the crime rather than using a derivative approach based on the underlying crime); Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1486–90 (2002) (examining the mental state that should be required for accomplice liability, recommending a "modified derivative approach"). When considering a referring lawyer's moral responsibility under criminal law, it is the existence, rather than degree, of criminal sanction that is of primary concern.

160. Arenella, *supra* note 150, at 1520, 1522–23.

161. Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 *CAL. L. REV.* 827, 828 (2000).

framework for assessment. The referring lawyer's culpability varies depending on whether moral responsibility is evaluated against professional norms, self-created standards, the requirements for imposing criminal sanctions, or otherwise, and it depends on precisely how those norms, standards, and requirements are defined. It depends on whether the prospective client's goal is criminal, something aggressive but less culpable, or clearly legal but immoral in the opinion of the referring lawyer. It depends on how much the referring lawyer knows about those goals.<sup>162</sup> And it depends on whether the referring lawyer's moral culpability is tied to the mere furtherance of the client's goals (whether or not ultimately achieved) or whether it depends on the client's actual achievement of those goals.

However, these factors go to the degree, context, and consequence of the referring lawyer's moral responsibility rather than to its existence. A referring lawyer risks bearing moral responsibility and being subject to judgment on moral grounds for providing a referral, at least to some degree and at least under some frameworks.

#### IV. BRIDGING THE GAP BETWEEN THE REFERRER'S PROFESSIONAL OBLIGATIONS/LEGAL LIABILITY & THE REFERRER'S MORAL RESPONSIBILITY

Lawyers should take seriously the moral responsibility they bear for providing referrals, and they can do so by adhering to higher standards than those proscribed by the professional conduct and legal liability rules. Doing more than the minimum required to avoid sanctions and liability also protects lawyers from adverse consequences that could arise if the applicable authorities are interpreted more broadly, if the applicable rules change, or if the referring lawyer inadvertently retains more involvement in the referred matter than he intended.<sup>163</sup> This section makes recommendations about how lawyers can handle referral requests in a manner that better lives up to their own, and the profession's, sense of moral responsibility.

Out of deference to each lawyer's own moral autonomy and given questions about the degree, context, and consequence of lawyers' moral culpability for

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162. Under any of the frameworks discussed above, the *amount* of moral responsibility and the *harshness* of any judgment levied on moral grounds should depend partly on what the lawyer knows about the matter being referred. A lawyer who provides a referral despite knowing that the prospective client is quite determined to break the law should be judged more harshly than a lawyer who provides a referral without knowing what the prospective client's true intentions are. However, even a lawyer who provides a referral without knowing the client's true intentions remains open to moral judgment for, among other things, perpetuating a questionable matter about which he clearly had some qualms. Moreover, a lawyer should not be able to reduce his moral responsibility for a referral by being willfully blind to a prospective client's intentions. Thus, although a lawyer's knowledge of the facts of the referred matter may affect how harshly he is judged for his referral decision, lack of detailed knowledge about the matter ought not to absolve him entirely from any moral judgment for his referral decision.

163. See Field, *Panama Papers*, *supra* note 12.

referrals, the recommendations set forth below are voluntary, not mandatory. Thus, the below does not propose changes to the rules that govern lawyers' professional conduct or that otherwise impose liability on lawyers. However, voluntary adoption of the approach described herein will enable lawyers to make more morally defensible decisions when responding to requests for referrals.

#### A. THE EASY CASES—JUST SAY NO

The egregious cases, when the lawyer mandatorily declines or withdraws because he knows that the client's behavior will violate the law, are the easiest. The lawyer should refuse to provide a referral.

The client should not take actions that violate the law, and no lawyer should assist the client with such actions. A lawyer who provides a referral knowing that the client will insist on using the representation to violate the law, incrementally encourages and furthers the client's known illegal goals. Thus, the refusal to provide a referral protects the rule of law and curtails client autonomy and access to the law in precisely the situations where they should be curtailed. Such refusal is consistent even with the strictest version of the nonaccountability approach to the lawyer's professional role. And such refusal advances and is consistent with any ethical lawyer's individual approach to lawyering.

#### B. THE HARDER CASES—TOOLS FOR MAKING MORALLY DEFENSIBLE REFERRAL DECISIONS

The question of whether to provide a referral is more challenging when the lawyer declines or withdraws discretionarily. In these situations, a lawyer should respond to the moral concerns raised in this article by analyzing the referral request using his lawyering philosophy and a risk-based analysis in which he gauges the risks posed by the client, the matter, and the referred lawyer.

##### 1. USING A LAWYERING PHILOSOPHY AS A GUIDE

Using one's lawyering philosophy as a guide for making difficult discretionary decisions helps the lawyer maintain his "personal integrity [and] inner moral compass,"<sup>164</sup> thereby helping him stay true to the type of lawyer he wants

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164. Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 530 (1994); see also AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 204, 213 (1992) (citing "a lawyer's personal sense of morality" as an important guide and identifying "promoting justice, fairness, and morality in one's own daily practice" as a fundamental value of the profession); SHAFER & COCHRAN, *supra* note 143, at 1–2 (prefacing the book's discussion of lawyering philosophies by posing questions about the morality of lawyers); Field, *Ethical Tax Lawyer*, *supra* note 35, at 297–99 (arguing that having a lawyering philosophy helps a lawyer make "difficult discretionary decisions" in a principled way).

to be.<sup>165</sup> Thus, whatever a lawyer's philosophy of lawyering, his personal conception of the lawyer's role should inform his decisions<sup>166</sup> about whether to accept a proffered representation and whether to provide a referral to a prospective client whose matter he declines. If he declined the representation truly due to lack of expertise, time, or admission in a particular jurisdiction, he should have no qualms about providing a referral if he knows of competent counsel. If he declined the representation because he did not want to handle such an aggressive matter, he should use the same analytical approach (i.e., relying on his philosophy of lawyering and his assessment of the client's plan or goals) to help him decide whether to provide a referral.

Returning to the example of the potential tax evader, a lawyer who adopts a legalist philosophy of lawyering (i.e., only wanting to assist on matters where the tax treatment is more likely than not to be correct) would decline a matter that he thought had less than fifty percent chance of success on the merits. His subsequent decision whether to provide the potential tax evader with a legal referral should depend on whether he believes all lawyers should take a legalist approach or whether he believes that more aggressive lawyering approaches are acceptable within the profession (just not for him). If the former, he should not provide the referral because providing a referral encourages tax practice that is contrary to his vision of a moral tax profession. If the latter, he might be willing to provide a referral depending on how aggressive the client seeks to be. If the client's goals are within what he views as acceptable tax practice for other lawyers (e.g., perhaps he believes that it is acceptable for other tax lawyers to assist on matters as long as there is "reasonable basis"), he would provide a referral if the matter likely meets that standard, but he would not provide a referral for more aggressive clients or plans.

If the lawyer lacks an explicit philosophy of lawyering, he should articulate for himself his justification for declining the matter, and then ask himself what that same reasoning would mean for the referral decision.<sup>167</sup>

Thus, the lawyer can use his lawyering approach, which informed his decision to decline the matter, to help him make another difficult discretionary decision<sup>168</sup>—about whether to provide the requested referral. Admittedly, these judgment calls may be clearer when withdrawing than when declining because, in the latter, the lawyer has limited information about the client or

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165. Field, *Ethical Tax Lawyer*, *supra* note 35, at 300–01 (arguing that using a lawyering philosophy as a guide for principled decision-making helps a lawyer "practic[e] in accordance with [his] values").

166. *Id.* at 297–98; Crystal, *Philosophy*, *supra* note 142, at 93; Crystal, *Teaching*, *supra* note 146, at 1240.

167. A slightly different way to think about this is for the lawyer to ask himself whether he is willing to remain involved enough to earn a referral fee under the *Model Rules*. See *supra* note 41 and accompanying text. If he is not, he should be able to articulate why not, and those reasons can provide guidance about whether he should (perhaps not) provide a referral at all.

168. See Field, *Ethical Tax Lawyer*, *supra* note 35, at 296–99 (encouraging tax lawyers to use their lawyering philosophy to guide them in making difficult discretionary decisions).

matter on which to judge the moral coherence of his actions.<sup>169</sup> However, using a lawyering philosophy to inform the lawyer's referral decision enables the lawyer to use his internal sense of honorable practice to determine whether he wants to assist with the continuation of the matter. This approach prevents him from merely punting on the moral choice and deferring to the referred lawyer. As a result, the lawyer takes more personal moral responsibility for the referral and its consequences.<sup>170</sup>

## 2. EMPLOYING A RISK-BASED APPROACH

Whether the referral request follows a withdrawal or declination, a lawyer should employ a "risk-based approach"<sup>171</sup> to help him determine whether providing a referral is consistent with his vision of moral lawyering and, more broadly, with the profession's concept of the lawyer's role. Under this approach, the lawyer assesses the risks posed by the referred lawyer and the risks posed by the client or matter. As the risk of law-breaking or moral repugnancy increases, the lawyer would be increasingly cautious about whether and to whom to provide a referral.

### a. Gauge Risks Posed by the Referred Lawyer

Guidance about assessing the risks posed by a lawyer or firm to whom a referral may be provided can be drawn from literature regarding (a) avoiding claims for negligent referral,<sup>172</sup> and (b) discharging ethical obligations when identifying and working with local or co-counsel.<sup>173</sup>

Good practices include doing more research about referral possibilities, beyond merely confirming admission to practice in the relevant jurisdiction.<sup>174</sup> Steps include, for example, doing a background check on the lawyer,<sup>175</sup>

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169. See *supra* Part I.A.2.

170. There is a risk here, though, that declining to make the referral, particularly in situations where the prospective client's matter is not particularly aggressive, limits the client's access to the law. See *infra* Part IV.C.3.

171. See, e.g., AM. BAR. ASS'N, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 1–2 (2010), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_taskforce\\_gtfgoodpracticesguidance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf) [<https://perma.cc/28N8-VX3R>] (encouraging a risk-based approach to curtail lawyers' involvement in clients' money laundering and terrorist financing) [hereinafter ABA, GOOD PRACTICES].

172. See Temkin, *supra* note 16; see also Steven L. Cantor & Alexandre M. Denault, *Legal Ethical Issues in International Estate Planning*, 42 EST. PLAN. 31, 34 (2015) (making recommendations that "mitigate against the risk of culpability for negligent referral").

173. See, e.g., Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 79–81 (1992–93) (providing guidance regarding selecting foreign counsel); Richmond, *supra* note 17. Some recommendations from these other contexts are not particularly relevant in the mere referral context because they involve considerations relevant to managing co-counsel-type relationships between the referring lawyer and the referred lawyer. See, e.g., Cohen, *supra* note 17, at 1428–41, 1446–51, 1454–61 (regarding competence, confidentiality, and conflicts issues in multi-lawyer relationships).

174. See Richmond, *supra* note 17, at 485–87.

175. Cantor & Denault, *supra* note 172, at 34.

reviewing publications of, and distinctions earned by, the lawyer;<sup>176</sup> checking the “lawyer’s fluency in the language to be used in communication” with the referred client (particularly if the referral is to foreign counsel);<sup>177</sup> and trying to “determine the . . . lawyer’s expertise in [the relevant type of] transactions, general reputation for honesty, . . . and education and training.”<sup>178</sup>

This type of investigation enables the referring lawyer to better assess the risk that the other lawyer would help the client engage in unlawful or highly questionable activity. This allows the referring lawyer to better gauge whether he would be facilitating law-breaking (or morally repugnant activity) by referring a client to a particular lawyer.

In addition, referring counsel might want to confirm that the counsel has adequate and up-to-date malpractice insurance, possibly requesting malpractice indemnification from the referred lawyer.<sup>179</sup> These steps would be most relevant where the referring lawyer is concerned about liability for negligent referral.

#### b. Evaluate Risks Posed by the Client/Matter

In addition to considering the risks posed by the referred lawyer, a referring lawyer should evaluate the risks posed by the client and the client’s matter.

Insight into how to do so can be gleaned from the Financial Action Task Force’s (“FATF”) recommendations for inhibiting money laundering and terrorist financing, which served as a model for the risk-based approach recommended herein.<sup>180</sup> The FATF’s specific recommendations for legal professionals<sup>181</sup> have been implemented in the United States by the American Bar Association (“ABA”) via voluntary good practices for lawyers.<sup>182</sup> These resources provide useful guidance for lawyers considering referrals for potential law-breakers because both the FATF’s concern and the referral question considered herein focus on lawyers who assist potential law-breakers, even if unintentionally.<sup>183</sup> Further, lawyers assisting clients with aggressive tax avoidance, questionable asset concealment, or conduct arguably approaching fraud, may undertake

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176. *Id.*

177. Lutz, *supra* note 173, at 80.

178. *Id.*

179. Temkin, *supra* note 16, at 677.

180. FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS 4, 11, 15, 31 (Feb. 2012), [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) [<https://perma.cc/YJT2-Q5ZG>].

181. FIN. ACTION TASK FORCE, RBA GUIDANCE FOR LEGAL PROFESSIONALS (Oct. 23, 2008), <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf> [<https://perma.cc/8J52-7FMU>].

182. ABA, GOOD PRACTICES, *supra* note 171, at 3; *see generally* Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. PROF. LAW. 83, 96–97 (2010); Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing*, 59 N.Y.L. SCH. L. REV. 487, 505–06 (2015).

183. *See* Terry, *supra* note 182, at 501–03 (discussing efforts to “help[] lawyers avoid *unwittingly* assisting clients who are engaged in money laundering or terrorist financing”) (emphasis in original).



activities similar to those of concern to the FATF (*e.g.*, managing, buying, or selling client funds/assets, or creating or operating companies, legal persons, or other arrangements for the client).<sup>184</sup> Thus, a lawyer considering providing a referral to someone who would undertake these activities should consider the risks flagged in the FATF guidance and ABA good practices. Even for different potential law-breaking activities that may be less similar to activities involving money laundering or terrorist financing, a risk-based approach inspired by FATF helps lawyers identify potential red flags for consideration when determining whether furthering the matter (even incrementally) through a referral would be morally questionable under norms of professional conduct or would be inconsistent with the lawyer's own approach to moral lawyering.

Importing some of the FATF recommendations, as implemented by the ABA,<sup>185</sup> into the context of referrals for potential law-breakers suggests that the referring lawyer should do at least minimal "client due diligence," considering risks in three specific risk categories (*i.e.*, country/geographic risk, client risk, and service risk), and accounting for various risk variables. Client due diligence would include "identify[ing] and appropriately verify[ing] the identity of each client on a timely basis,"<sup>186</sup> possibly "identify[ing] . . . and verify[ing] the identity of the beneficial owner,"<sup>187</sup> and "obtain[ing] information to understand the client's circumstances and business depending on the nature, scope, and timing of the services to be provided."<sup>188</sup> This client due diligence provides the referring lawyer with information that helps him to evaluate "client risks," "country/geographic risks," and "service risks" associated with the potential referral.<sup>189</sup>

For example, consider what "client due diligence" would entail when considering a referral for a potential tax evader.<sup>190</sup> When evaluating "client risks," the lawyer should look for client-specific factors that suggest a higher chance of tax evasion. Factors could include whether the client is engaged in "unusual activity," has a "cash intensive business," has "certain criminal convictions," has "no address/multiple addresses," or seems to have or be seeking "arrangements without any apparent legal or legitimate tax, business, economic or other reasons."<sup>191</sup> When evaluating "country/geographic risks",

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184. See ABA, GOOD PRACTICES, *supra* note 171, at 12; Shepherd, *supra* note 182, at 127 (citing a situation where a bank surmised that a transaction was motivated by either money laundering or tax evasion efforts).

185. Many of the FATF recommendations as implemented by the ABA are not applicable to the referral context because they assume an ongoing representation. Thus, the discussion herein focuses on the FATF recommendations relevant to client intake. See ABA, GOOD PRACTICES, *supra* note 171, at 32–34.

186. *Id.* at 9.

187. *Id.* (internal footnote omitted). This recommendation is more controversial, and under the FATF guidelines, "[l]awyers may use a risk-based approach when determining the extent to which they are required to identify the beneficial owner." *Id.*

188. *Id.* at 10.

189. See *id.* at 15.

190. This section highlights the risks discussed in the FATF guidance that are most likely to provide insight into the potential for tax evasion.

191. See ABA, GOOD PRACTICES, *supra* note 171, at 17–21.

lawyers should “take into account the client’s domicile, the location of the transaction, and the source of the funding.”<sup>192</sup> In the tax evasion context, this likely means that a client seeking a referral to a lawyer in a known tax haven poses a greater risk of tax evasion. As to “service risks,” lawyers should be alert to services, which if requested of lawyers, present a heightened risk of tax evasion. Such services could include where the lawyer is requested to form “shell companies” or help “conceal[] beneficial ownership.”<sup>193</sup> Also, “extraordinary legal fees,”<sup>194</sup> which in the tax context could include a percentage of the realized tax savings as part of the fee, could indicate a greater possibility of tax evasion.

When evaluating the risks, lawyers should consider “risk variables”<sup>195</sup> that provide information about the likelihood that the client will pursue law-breaking behavior. Continuing with the potential tax evader example, the referring lawyer could consider the “nature” and “regularity/duration” of his preexisting relationship with the client (if any);<sup>196</sup> the longer the relationship and the less evasion-focused the client has been, the lower the future risk. The referring lawyer could also consider the “reputation and publicly available information about the client,” whether there is a “geographic disparity” between the client and the legal work that the client wants done, and what that disparity may mean for the likelihood that the client is seeking assistance with evasion.<sup>197</sup>

Together, these inquiries and assessments help the lawyer evaluate the likelihood that the client would use (or try to use) the referral to pursue illegal tax evasion, remembering, however, that no one factor is dispositive. For potential law-breakers in other areas of law, the lawyer would, of course, need to tailor the inquiries to focus the client due diligence on “client risks,” “country/geographic risks,” “service risks,” and “risk variables” that are relevant to the particular type of law-breaking that the lawyer thinks the client might want to pursue. However, the FATF framework, as implemented by the ABA, and the application of that framework to a referral for a potential tax evader provide guidance about how to assess the law-breaking risk posed by a particular client or matter. And if morality (rather than legality) is what led the lawyer to decline or withdraw from the matter, the lawyer could use a similar risk-based analysis, tweaking the details of the diligence questions, to assess the risk that the client would use the referral to pursue a morally repugnant course of action.

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192. *Id.* at 15–16.

193. *See id.* at 266.

194. *See id.* at 25.

195. *See id.* at 28–32.

196. *Id.* at 28–30.

197. *See id.* at 29, 31.

### c. Putting the Pieces Together in the Harder Cases

The approach recommended herein accepts that facts are often uncertain or unknown and that the legality and morality of positions are often unclear, especially with limited facts. Of course, limited facts make it harder for a lawyer to evaluate a proffered matter, to decide whether to accept or reject that matter, and to determine whether to provide a referral if the lawyer declines the matter. But the lawyer can still employ a risk-based approach to a referral question and can still make a well-considered referral decision using the facts that he has. Moreover, any lack of information or clarity about the proffered matter can be understood as factors that increase the risk associated with the client or matter. But the presence of risk, even a relatively high level of risk, is not determinative of whether the lawyer should provide the referral. Rather, the lawyer must exercise his judgment using whatever information and insights he has.

Ultimately, the higher the risk the lawyer perceives (whether that risk comes from the particular referred lawyer, the client's approach, the details of the matter, a lack of knowledge of the details, or otherwise) and the less that taking that risk is consistent with the lawyer's professional identity, the more the lawyer should consider not providing a referral. If the lawyer provides a referral despite high risks and despite possible inconsistency with his lawyering philosophy, the lawyer should strongly caution the client when giving the referral or provide referrals to lawyers he knows to practice in accordance with his lawyering philosophy (*e.g.*, conservative rather than aggressive, or sharing his view of morality). In addition, the lawyer should consider recommending multiple lawyers and letting the client choose among them, thereby reducing the link between the referring lawyer and the referred lawyer.<sup>198</sup>

## C. IMPACTS OF THE RECOMMENDED REFERRAL APPROACH

### 1. PROMOTING GREATER PERSONAL RESPONSIBILITY FOR REFERRALS WHILE RESPECTING LAWYERS' MORAL AUTONOMY

The foregoing approach to referrals encourages and empowers lawyers to take more personal responsibility for their contribution to potential law-breakers' goals. Explaining the moral concerns created by referrals for potential law-breakers increases the salience of these concerns, hopefully dissuading lawyers from blithely punting to the next lawyer the responsibility for dealing with a challenging client that has morally or legally questionable objectives. And by furnishing an analytical framework for considering referral requests,

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198. Cantor & Denault, *supra* note 172, at 34. The referring lawyer does not impose his judgment about the identity of the right counsel. Instead, he merely provides options and empowers the client to judge which other lawyer is most well-suited to assist.

this article provides concrete steps that help lawyers make morally defensible decisions about whether to contribute to the perpetuation of declined matters.

Although this article's approach pushes lawyers to take more personal responsibility when making referrals, it still respects lawyers' moral autonomy by providing a framework within which a lawyer can determine for himself whether and to whom to provide a referral. Except in the mandatory declination or withdrawal situation, no particular result is dictated. Similarly, the use of a risk-based approach, rather than a "rule-based" approach (which would demand "compliance with particular laws, rules, or regulations irrespective of the [lawyer's assessment of the] underlying quantum of risk"<sup>199</sup>), empowers each lawyer to use his own judgment. Thus, this article's recommendation acknowledges that lawyers have a range of perspectives about choices that are morally defensible and those that deserve critique, and it encourages each lawyer to implement his own perspective consistently, thereby respecting each lawyer's moral autonomy. Ultimately, a lawyer has to live with himself and with how he discharges his role, and the foregoing framework helps him respond to referral requests in a manner that reflects his sense of morality both as a lawyer and as a person.

## 2. PROVIDING A MORALLY-FOCUSED RESPONSE TO THE REFERRAL COMPLICITY PROBLEM

In addition, the voluntary approach recommended herein responds directly to the concerns raised herein—moral responsibility, which is an internally-driven matter of conscience rather than an externally-imposed matter of rules. Indeed, "moral behavior is, by definition, voluntary,"<sup>200</sup> and charging someone with moral accountability for a decision does not mandate that professional sanctions or legal liability also attach to that decision.<sup>201</sup> Thus, this article's recommendation responds to a moral quandary with a framework through which lawyers can make more morally defensible decisions, but it leaves unchanged the rules of professional conduct and legal liability discussed in Part II above.

Imposing mandatory professional conduct rules limiting lawyers' discretion about referrals to potential law-breakers would be too much, at least without more consensus within the profession about (non)accountability and the lawyer's

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199. ABA, GOOD PRACTICES, *supra* note 171, at 1–2 (describing the approach taken by the FATF, as adopted by the ABA).

200. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1377 (1995).

201. See Schwartz, *supra* note 10, at 696 ("This conclusion [that nonadvocates should not be insulated from moral accountability for their actions on behalf of clients] . . . imposes no substantive or professional liability if the nonadvocate proceeds to assist the client, even though the lawyer believes that the behavior is immoral or unjust."); Painter, *supra* note 10, at 513–14 ("It is also important to distinguish this discussion of moral responsibility—responsibility for adherence to one's own moral principles—from two related topics: legal responsibility, whether a person is responsible for conduct incurring criminal or civil liability, and professional responsibility, whether a person is responsible for violating agreed upon standards of professional ethics.").

role.<sup>202</sup> There is similarly no consensus about whether lawyers are and ought to be gatekeepers, either in tax law<sup>203</sup> or more generally.<sup>204</sup> This ambivalence and the fact that the *Model Rules* “neither require a lawyer to fulfill a gatekeeper role, nor do they permit a lawyer to engage in the reporting that [a broadly conceived gatekeeping] role could entail” explain the voluntariness of the guidelines for lawyers in combatting money laundering and terrorist financing.<sup>205</sup> Similarly, mandatory gatekeeping responsibilities ought not to be required for lawyers responding to referral requests.

Lawyers should, however, consider voluntarily embracing slightly heightened responsibility for compliance, using the framework advanced herein. Part of the theory behind lawyers as (even voluntary) gatekeepers is “that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing.”<sup>206</sup> The referral context provides such an opportunity: when responding to a referral request, the lawyer can make it more difficult for a prospective client to pursue limit-pushing or law-breaking aspirations. Moreover, while research demonstrates that lawyers may have difficulty being effective gatekeepers due to cognitive biases, including lawyers’ identification with their clients,<sup>207</sup> the referral context, in which the lawyer is declining to represent a client and thus has already distanced himself from that client, may pose fewer challenges. This means that the referral decision may present an opportunity for lawyers to discharge gatekeeping responsibilities effectively if they want to serve in that capacity.

Even though this article’s recommendations are voluntary, some will think this article goes too far, putting too many burdens on referring lawyers, particularly when they are making decisions based on relatively little information and do not really know what a client will do or what another lawyer will advise. Others may think that this article’s recommendations do not go far enough, leaving too much to the lawyer’s discretion and allowing lawyers to weasel out of standing up to potential law-breakers. Perhaps at some point, the rules governing professional conduct of lawyers ought to formally

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202. See *supra* Part III.B.; Painter, *supra* note 10, at 558. It is fairly clear that, in the vast majority of situations, the moral culpability of a referring lawyer is unlikely to merit criminal punishment as an accomplice to whatever actions the client ultimately takes. See *supra* Part III.D. Thus, no changes to the criminal penalties are likely warranted at least based on the considerations discussed herein.

203. See, e.g., Linda Galler, *The Tax Lawyer’s Duty to the System*, 16 VA. TAX REV. 681, 688, 693 (1997); Rachelle Y. Holmes, *The Tax Lawyer as Gatekeeper*, 49 U. LOUISVILLE L. REV. 185 (2010); Richard Lavoie, *Am I My Brother’s Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813 (2013).

204. See, e.g., JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006); Campbell & Gaetke, *supra* note 114; Kraakman, *supra* note 114; Zacharais, *supra* note 114.

205. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 463, at 2 (2013).

206. *Id.* at 1.

207. See Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75, 110–11 (1993).

incorporate some or all of the recommendations herein.<sup>208</sup> But the divergence of likely responses to this article's recommendations<sup>209</sup> is yet another reason this article stakes out a middle ground that urges lawyers to take more responsibility and gives them a framework to help them do so but leaves to their discretion whether and how to use that framework. Ultimately, in this article that is the first to identify the mere referral decision as so morally fraught, it is enough to provide lawyers with tools for more morally defensible decision-making.

### 3. INCREASING COMPLIANCE (PERHAPS) BUT LIMITING ACCESS TO THE LAW

Lawyers who adopt this article's recommendations may make fewer referrals for potential law-breakers or may make referrals to more conservative lawyers who are unlikely to assist in the pursuit of legally questionable goals. This may have the salutary effect of increasing compliance, but this also restricts access to the law. Access to the law is often regarded as a social good that advances client autonomy,<sup>210</sup> and the Preamble to the *Model Rules* encourages lawyers to "seek improvement of . . . access to the legal system."<sup>211</sup> However, the Preamble's references to improving access to justice focus primarily on "those who because of economic or social barriers cannot afford or secure adequate legal counsel."<sup>212</sup> A client seeking assistance with potential law-breaking is unlikely to be such a person. Indeed, declining to provide a referral to a client seeking assistance with objectives that are very legally questionable could advance other goals of the *Model Rules* because the lawyer may avoid assisting, even indirectly, a client in behavior that is likely to be criminal or fraudulent.<sup>213</sup>

Reducing access to the law through fewer referrals is more troubling for matters that are clearly legal but that the lawyer finds morally repugnant. A lawyer should consider this concern when deciding whether to provide a referral for a matter that he has declined for purely moral reasons. Yet, a referral is not the *sine qua non* of a client's ability to continue pursuing its goals. Even if one lawyer declines the legal but morally questionable matter and declines to provide a referral, the client is likely to be able to use other resources to find lawyers who may see a business opportunity in representing clients in matters that are clearly legal even if morally questionable.<sup>214</sup>

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208. The best candidate for a mandatory rule is the recommendation that lawyers not provide referrals in mandatory declination/withdrawal situations. See *supra* Part IV.A. To argue for mandatory changes to referral practices, however, proponents would have to make a case that is not focused primarily on moral culpability.

209. When presenting a version of this project, I received both comments: that the recommendations go too far and not far enough. Although I have revised the recommendations in response to that feedback, I suspect that the comments would remain.

210. See, e.g., Pepper, *Amoral*, *supra* note 10, at 616–17.

211. MODEL RULES pmb1 ¶ 6.

212. *Id.*

213. See MODEL RULES R. 1.2(d).

214. See Wendel, *Client Selection*, *supra* note 11, at 1015 ("As a practical matter, very few clients will find themselves truly foreclosed from obtaining access to their legal entitlements because of morally motivated refusals by lawyers to represent them.").

#### 4. IMPOSING ADDITIONAL COSTS, WHILE CREATING ADDITIONAL BENEFITS

This article's recommendations admittedly impose additional costs on the referring lawyer.<sup>215</sup> The lawyer will spend more uncompensated time and effort considering the referral decision. The lawyer may do more work to ascertain additional information to make a more thoughtful decision. When doing so, the lawyer may learn confidential information, which could create future conflicts.<sup>216</sup> The lawyer may upset clients or other professional connections if he declines to make a referral, and this may reduce the likelihood that those connections will refer future work to him, which could affect his business and livelihood.

But these costs also yield benefits. In addition to the benefits discussed above, undertaking additional analysis of the referral decision demonstrates a good faith effort to avoid facilitating law-breaking, which could assist the lawyer in case of more aggressive enforcement strategies against, or revised rules applicable to, lawyers. By helping the referring lawyer identify trustworthy (and well-insured) other lawyers and by ensuring that the law-breaking risk is relatively low, the referring lawyer reduces his exposure if he inadvertently remains more involved in the matter than he anticipated. By gathering information that enables him to avoid providing referrals to the most aggressive other lawyers and for the most aggressive clients/matters, he also reduces the risk of any adverse reputational impact were he to be publicly revealed as connected to such lawyers and matters.

I contend that the benefits outweigh the costs, but each lawyer must judge for himself. And if the cost of the additional analysis is too high, the lawyer can skip the analysis recommended herein and just opt not to provide the referral. That imposes costs on the client—diminished access to legal services and the cost of having to, without assistance, identify counsel to help with limit-pushing or breaking. But, as discussed above, it is not necessarily a bad thing to make it a little harder for a potential law-breaker to find counsel.

#### CONCLUSION

Referrals connect clients with lawyers who help clients access the law to achieve their goals. But referrals also yoke the referring lawyer to the client's (possibly illicit) objectives. Thus, lawyers, particularly when dealing with aspiring limit-pushers or aspiring law-breakers, should be wary of offering referrals blithely and purely as a matter of course after declining or withdrawing from a matter. Instead, lawyers should provide more thoughtful, more morally defensible responses to referral requests and should take more personal responsibility for the consequences of referrals they provide. This article explains how.

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215. See Temkin, *supra* note 16, at 674–75.

216. See MODEL RULES R. 1.18.