

## OFFSHORING TAX ETHICS: THE PANAMA PAPERS, SEEKING REFUGE FROM TAX, AND TAX LAWYER REFERRALS

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*“[T]he legal profession has failed. . . . [L]awyers have become so deeply corrupt that it is imperative for major changes in the profession to take place . . . . [T]he term ‘legal ethics,’ . . . has become an oxymoron. Mossack Fonseca did not work in a vacuum—despite repeated fines and documented regulatory violations, it found allies and clients at major law firms in virtually every nation.”*<sup>1</sup>

### INTRODUCTION

The leak of more than eleven million files in the recent “Panama Papers” scandal revealed the offshore financial, legal, and tax planning facilitated by Panamanian law firm, Mossack Fonseca (“MF”), for more than 214,000 offshore entities with beneficial owners from around the world.<sup>2</sup> Although MF’s

American client list does not appear to include the sort of high-profile political figures who have emerged from reporting on the Panama Papers in other countries around the world[,] . . . the services offered by Mossack Fonseca . . . were in high demand by the rich and famous in the United States.<sup>3</sup>

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1. John Doe, explaining why he leaked the Panama Papers, *Panama Papers Source Offers Documents to Governments, Hints at More to Come*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 6, 2016), [https://panamapapers.icij.org/20160506-john-doe-statement.html#\\_ga=1.146079988.1102310913.1488823073](https://panamapapers.icij.org/20160506-john-doe-statement.html#_ga=1.146079988.1102310913.1488823073) [<https://perma.cc/2YKR-6HQL>] (reproducing John Doe’s statement).

2. See Lawrence J. Trautman, *Following the Money: Lessons from the Panama Papers, Part 1: Tip of the Iceberg*, 121 PA. ST. L. REV. 807, 807 (2017); *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html> [<https://perma.cc/V7PF-FSJS>].

3. Eric Lipton & Julie Creswell, *Documents Show How Wealthy Hid Millions Abroad*, N.Y. TIMES, June 6, 2016, at A1.

Despite the investigative research<sup>4</sup> and scholarly analyses<sup>5</sup> of the Panama Papers, many questions remain, including: How did U.S. clients get to the Panamanian law firm of Mossack Fonseca? What were the ethical responsibilities of the individuals (particularly lawyers) who connected these U.S. clients with MF, especially in cases where the U.S. clients sought offshore assistance in order to avoid or evade U.S. taxes? And what, if anything, should individuals in similar situations do differently in the future?

This Essay starts to answer these questions, and in doing so, fills a gap in the literature. Existing literature on lawyer referrals is relatively limited and generally focuses on referral fees,<sup>6</sup> lawyer referral services,<sup>7</sup> and malpractice actions for negligent referral.<sup>8</sup> And while there is literature about professional responsibility in cross-border matters, discussions of *referrals* to foreign counsel are relatively brief and tend to focus on malpractice risk for negligent referral or on aiding and abetting the unlicensed practice of law.<sup>9</sup> This Essay considers a specific, and previously unaddressed, type of cross-border referral—one for clients seeking help with offshore tax avoidance or evasion.<sup>10</sup> This situation raises different ethical concerns and implicates tax-specific penalty provisions and standards of conduct.

This Essay argues that, although the rules governing ethical tax practice generally do not prevent a U.S. lawyer from referring a client to a firm like MF

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4. See generally THE PANAMA PAPERS, [HTTPS://PANAMAPAPERS.ICIJ.ORG/](https://panamapapers.icij.org/) [[HTTPS://PERMA.CC/2FSE-8ER5](https://perma.cc/2FSE-8ER5)] (collecting information and reports of investigative journalists).

5. See, e.g., Usman W. Chohan, *The Panama Papers and Tax Morality* (Apr. 6, 2016) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759418](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759418)); James O'Donovan, Hannes F. Wagner & Stefan Zeume, *The Value of Offshore Secrets: Evidence from the Panama Papers* (May 29, 2017) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2771095](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771095)); Trautman, *supra* note 2.

6. See, e.g., 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 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 9.20 (4th ed. 2014 & Supp. 2017).

7. See, e.g., Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet*, 20 GEO. J. LEGAL ETHICS 769 (2007). See generally 2 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* §§ 60.03, 60.05 (4th ed. 2014 & Supp. 2017).

8. See, e.g., Bruce Ching, *Attorney Referral, Negligence, and Vicarious Liability*, 33 S. ILL. U. L.J. 217 (2009); Barry R. Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice?*, 17 TOURO L. REV. 639 (2001).

9. See, e.g., Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J. L. & COM. 301, 329–30 (1998); Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 69–70 (1992).

10. A forthcoming article that is related to this Essay will consider, more generally (i.e., in circumstances that are not tax specific), the moral culpability of lawyers who provide legal referrals for prospective clients seeking to pursue legal strategies of questionable (or worse) legality, and will provide recommendations about how lawyers should handle requests for such referrals. Heather M. Field, *Complicity by Referral*, 31 GEO. J. LEGAL ETHICS (forthcoming 2018).

for potentially aggressive tax planning, a lawyer who does so without very careful reflection “passes the buck” for ethical tax practice onto the next lawyer. Rather than expatriating responsibility for the tax practice ethics of representing the client, each lawyer should internalize more of that responsibility and should not blithely provide referrals.

This Essay proceeds by describing what the Panama Papers reveal about client referrals to MF, after which the Essay briefly explains how the general ethical rules, tax-specific standards of practice, tax penalty provisions, and other constraints apply to a U.S. lawyer making a referral to a firm like MF. The Essay then argues that lawyers should adhere to higher standards when considering such referrals.

### I. MOSSACK FONSECA’S CLIENT REFERRALS & PRACTICE

The Panama Papers reveal that MF’s U.S. client referrals came from many different sources. Some clients found MF through referrals from family and friends.<sup>11</sup> Some clients may have found MF through its U.S. affiliates in Nevada and Wyoming.<sup>12</sup> And some U.S. clients were referred to MF through tax protector organizations, such as the Sovereign Society, which is a “self-described advocacy group for liberty and low taxes” and “an unapologetic promoter of tax avoidance.”<sup>13</sup>

But as MF itself explains,

[m]any . . . clients come through established and reputable law firms and financial institutions across the world, including the major correspondent banks . . . [and these] clients request our services after being duly advised by qualified professionals in their places of business.<sup>14</sup>

Major U.S. law firms, such as Arnold & Porter, Kaye Scholer, Greenberg Traurig, and White & Case, and many U.S. accounting firms also show up in the

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11. See Chohan, *supra* note 5, at 6 (“The Panama Papers are beginning to cast light on this in various cases where friends, parents, colleagues, in-laws, and other close relations are being found in synchronicity across the files from MF.”).

12. See Hamish Boland-Rudder, *Mossack Fonseca’s US Operations Under Pressure, Island Offices Closed*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 27, 2016), <https://panama.papers.icij.org/20160527-mossfon-nevada-resign-close-offices.html> [https://perma.cc/5NTN-U4X3] (reporting that MF’s Nevada affiliate resigned from more than 1,000 companies and the Wyoming local business partner cut ties to MF).

13. Kevin G. Hall, *Anti-Tax Group Fed U.S. Clients to Panama Papers Firm*, BULLETIN (June 2, 2016, 12:03 AM), <http://www.bendbulletin.com/home/4398179-151/anti-tax-group-fed-us-clients-to-panama-papers?referrer=fbblob> [https://perma.cc/Y723-RKX3].

14. *Statement Regarding Recent Media Coverage*, MOSSACK FONSECA (Apr. 1, 2016), [http://mossfonmedia.com/wp-content/uploads/2016/05/complete\\_statement.pdf](http://mossfonmedia.com/wp-content/uploads/2016/05/complete_statement.pdf) [https://perma.cc/TUJ8-6TA9].

Panama Papers database as intermediaries for clients getting advice from MF.<sup>15</sup> Similarly, major financial institutions such as HSBC and UBS served as intermediaries for clients of MF and helped to create thousands of shell companies.<sup>16</sup> Even where the banks, law firms, or accounting firms did not serve as direct intermediaries, they could have referred clients to MF. For example, leaked documents suggest that UBS could have been the source of the referral for at least one of MF's high-profile U.S. clients, the Ponsoldt family.<sup>17</sup>

The involvement of these financial institutions, accounting firms, and law firms as client intermediaries (or, more tangentially, as client referrers) does not, however, imply that these organizations or their people (or their clients) have necessarily done anything improper. Even the International Consortium of Investigative Journalists ("ICIJ"), one of the organizations that helped to break the Panama Papers story, explained that: "There are legitimate uses for offshore companies and trusts. We do not intend to suggest or imply that any persons, companies, or other entities included in the ICIJ Offshore Leaks Database have broken the law or otherwise acted improperly."<sup>18</sup> MF, not surprisingly, denied any wrongdoing, explaining that "it is legal and common for companies to establish commercial entities in different jurisdictions for a variety of legitimate reasons" and asserting that MF is a "responsible member[] of the global financial and business community" that "has operated beyond reproach."<sup>19</sup> Moreover, MF explained that they

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15. Brian Baxter, *Dozens of Big Firms to Appear in New 'Panama Papers' Database*, AM. LAW. (May 8, 2016), <http://www.law.com/americanlawyer/almID/1202757101004/> [<https://perma.cc/52G5-9PAW>] (showing each firm's involvement).

16. Rigoberto Carvajal et al., *Explore the Panama Papers Key Figures*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://panamapapers.icij.org/graphs/> [<https://perma.cc/28HC-TN64>].

17. Meeting Notes from Jan Stockhausen, Mossack Fonseca (Nov. 9, 2005) (available at <https://www.documentcloud.org/documents/2850951> [<https://perma.cc/WG4A-L3A6>]) (indicating that a representative of UBS joined Ponsoldt and the MF lawyer at their very first meeting).

18. *Explore Offshore Connections of Political Power Player, Disclaimer*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://offshoreleaks.icij.org/stories?r=paradise-papers> [<https://perma.cc/46CA-A6HA>].

19. MOSSACK FONSECA, *supra* note 14. Despite MF's denials of wrongdoing, both Jurgen Mossack and Ramon Fonseca, the founders of Mossack Fonseca, have been arrested and charged with money laundering. Will Fitzgibbon, Emilia Díaz-Struck & Michael Hudson, *Founders of Panama Papers Law Firm Arrested on Money Laundering Charges*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 11, 2017), <https://panamapapers.icij.org/20170211-mossfon-panama-arrests.html> [<https://perma.cc/A7SA-6H3Y>]. In addition, a Panamanian prosecutor investigating the MF firm in an "international corruption probe" reported that he believes that there is a "solid case" case against the firm. Will Fitzgibbon, *Panama Prosecutor Claims 'Solid Case' Against Mossack Fonseca*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Mar. 27, 2017), <https://panamapapers.icij.org/20170327-mossfon-prosecutor-update.html> [<https://perma.cc/Q7M8-UVFU>].

regret any misuse of companies that [they] incorporate or the services [they] provide and take steps wherever possible to uncover and stop such use. If [they] detect suspicious activity or misconduct, [they] are quick to report it to the authorities. Similarly, when authorities approach [them] with evidence of possible misconduct, [they] always cooperate fully with them.<sup>20</sup>

In addition, banks such as HSBC and Credit Suisse have “denied claims that they have helped clients avoid tax through the use of offshore companies” and assert that they provide assistance for clients only for legitimate purposes.<sup>21</sup> Commentators caution against “rushing to judgment about tax evasion or avoidance, given that the [Panama Papers] reveal little about tax law compliance.”<sup>22</sup>

Nevertheless, the Panama Papers led to the resignation of Iceland’s Prime Minister<sup>23</sup> and Spain’s Minister of Industry,<sup>24</sup> and other prominent world figures are facing serious political, legal, and other repercussions because of being named in the Panama Papers.<sup>25</sup> At the very least, being named in the Panama Papers generates suspicion because offshore entities can enable tax evasion and money laundering through various strategies.<sup>26</sup> Further, “[t]ax authorities would likely ask why [clients] and their advisers would hide what they were doing [by using offshore entities] if they thought it was legal.”<sup>27</sup>

At least 150 inquiries, audits, or investigations by tax and other authorities in seventy-nine countries and territories (involving over 6,520 people) were announced within eight months of the leak.<sup>28</sup> In addition, tax agencies from

20. MOSSACK FONSECA, *supra* note 14.

21. Sinead Moore, *Panama Papers: Banks Including HSBC and Credit Suisse Deny Helping Clients Avoid Tax Using Offshore Companies*, ECONOMIA (Apr. 6, 2016), <http://economia.icaew.com/news/april-2016/panama-papers-banks-deny-helping-clients-avoid-tax-using-offshore-companies> [<https://perma.cc/YH5D-H5WJ>].

22. Genevieve Tokić, *What the Panama Papers Reveal About Tax Avoidance and Evasion*, 83 TAX NOTES INT’L 305, 306 (2016); *see also* Trautman, *supra* note 2, at 832–38.

23. Steven Erlanger, Stephen Castle & Rick Gladstone, *Iceland’s Prime Minister Steps down amid Panama Papers Scandal*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/world/europe/panama-papers-iceland.html> [<https://perma.cc/7K8B-BFRT>].

24. *See* Martha M. Hamilton, *Pakistan’s PM Leaves Country, Spanish Minister Resigns*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 15, 2016), <https://panamapapers.icij.org/20160415-pakistan-pressure-spain-resignation.html> [<https://perma.cc/H389-7NJS>].

25. *See* Trautman, *supra* note 2, at 7–26 (discussing several high-profile individuals worldwide); *see also* Will Fitzgibbon, *Where Are They Now? A Year Later, Mixed Fortunes for Panama Papers Line-Up*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2017), <https://panamapapers.icij.org/20170403-anniversary-where-are-they-now.html> [<https://perma.cc/KH4E-W4GF>].

26. Arthur J. Cockfield, *Breaking Bad: What Does the First Major Tax Haven Leak Tell Us*, 83 TAX NOTES INT’L 691, 693, 695–96 (2016) (describing a few such strategies).

27. Tokić, *supra* note 22, at 308.

28. Will Fitzgibbon & Emilia Díaz-Struck, *By the Numbers: Eight Months of Panama Papers Global Impact*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Dec. 1, 2016), <https://panama>

thirty countries are collaborating in their Panama Papers-inspired tax investigations, including through a recent event that “included the largest ever simultaneous exchange of information” and that focused investigatory attention on “enablers” (i.e., “professional bankers, lawyers, and accountants”) who “enable offshore cash flows” and who are alleged to “mis-use their status to undermine the systems of rules and practices that shape modern societies.”<sup>29</sup>

## II. WHAT RESPONSIBILITY DID REFERRING LAWYERS HAVE?

To the extent that MF clients might have been engaging in tax avoidance or evasion using MF’s services, it raises a question about the ethical obligations of the people, particularly the U.S. lawyers, who connected these clients with MF. As big as the Panama Papers leak was (and at 2.6 terabytes, it was the biggest leak in history as of the date of the leak),<sup>30</sup> this question is relevant for a much bigger audience than just the U.S. lawyers/law firms revealed in the leak. This is for at least two reasons.

First, the leak identifies only the U.S. law firms who served as *intermediaries* for such matters, but it does not reveal those lawyers who merely *referred* matters to MF and did not remain involved.<sup>31</sup> The number of referrers may be much larger than the number of firms with ongoing roles as intermediaries.

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[papers.icij.org/blog/20161201-impact-graphic.html](https://papers.icij.org/blog/20161201-impact-graphic.html) [<https://perma.cc/669M-ZM87>]; see Trautman, *supra* note 2, at 838-40 (describing the international reaction including enforcement efforts around the world). In addition to enforcement actions, various jurisdictions, including Panama, have also made changes to (or have initiated studies about the possibility of changing) their laws in response to the perceived abuses revealed by the Panama Papers. See Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. (forthcoming 2018) (manuscript at 28–29, 38, 63–64) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2918550](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2918550)) (describing such initiative).

29. Will Fitzgibbon, *Tax Agencies Draw up ‘Target List’ of Offshore Enablers*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Jan. 20, 2017), <https://panamapapers.icij.org/20170120-oecd-target-list.html> [<https://perma.cc/Z8E2-6M2C>] (quoting in part John Christensen, Chair of the Board of the Tax Justice Network) (internal quotation marks omitted).

30. Luke Harding, *What Are the Panama Papers? A Guide to History’s Biggest Data Leak*, GUARDIAN (Apr. 5, 2016, 5:42 AM), <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers> [<https://perma.cc/N3DB-TQ83>].

31. The Panama Papers database tracks intermediaries but does not try to track mere referrers. Moreover, names of referrers might not be known to MF (e.g., if the referrer suggested that the client call MF, the client did so on its own without any facilitation by the referrer and without mentioning the referrer); if known, might not be recorded in MF’s client records (e.g., if no referral fee was to be paid, MF might not have thought it important to write down the name of the referrer); and/or if recorded, might not have been extracted by the journalists analyzing the leaked data. See *generally Frequently Asked Questions*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://offshoreleaks.icij.org/pages/about> [<https://perma.cc/KP7T-VQ22>] (discussing the data in the database).

Second, the leak only revealed documents and clients of MF, but MF is not the only foreign law firm that assists multinationals with offshore planning strategies. MF is reported to be only the “*fourth* biggest provider of offshore services,”<sup>32</sup> meaning that there are three other larger firms that help (potentially) many more clients pursue similar transactions. And there are smaller law firms helping such clients as well. Those other firms might have higher proportions of U.S. clients than MF did given MF’s stated preference “not to have American clients.”<sup>33</sup> Thus, there could be a lot more U.S. lawyers who are serving as intermediaries for clients, or who referred clients, in connection with offshore tax reduction efforts.

Given the potential prevalence of referrals for offshore tax avoidance/evasion,<sup>34</sup> this Part briefly<sup>35</sup> discusses the key rules that constrain the lawyer when he considers whether and to whom to make a referral after declining or withdrawing from a representation.<sup>36</sup>

#### A. *Can the Lawyer Ethically Make the Referral?*

A tax lawyer’s ethical obligations are defined by the general ethical rules applicable to all lawyers and the tax-specific ethics rules, including the Circular 230 standards of practice and the Internal Revenue Code’s (the “Code”) penalty provisions. This Section will briefly discuss how each set of these rules applies to the scenario involving a request for a referral in connection with potentially aggressive offshore tax planning. Additional potential constraints on the lawyer’s behavior will be considered briefly in Section II.B.

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32. Luke Harding, *Mossack Fonseca: Inside the Firm that Helps the Super-Rich Hide Their Money*, GUARDIAN (Apr. 8, 2016), <https://www.theguardian.com/news/2016/apr/08/mossack-fonseca-law-firm-hide-money-panama-papers> [<https://perma.cc/93MT-RXGQ>] (emphasis added).

33. Michael Hudson et al., *Panama Papers Include Dozens of Americans Tied to Fraud and Financial Misconduct*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 9, 2016), <https://panamapapers.icij.org/20160509-american-fraudsters-offshore.html> [<https://perma.cc/L8V-K-SDL2>] (quoting Ramón Fonseca, MF co-founder) (internal quotation marks omitted).

34. In addition, the concerns discussed herein could also be relevant in the purely domestic referral context, where a lawyer refers an aspiring tax evader (or aspiring non-tax law breaker) to another lawyer for assistance with tax avoidance/evasion that does not involve offshore structuring.

35. For a more comprehensive analysis of the rules described in this section, see Field, *supra* note 10.

36. Declining a representation is allowed, and sometimes required, under the Model Rules. See MODEL RULES OF PROF’L CONDUCT r. 1.16 (AM. BAR ASS’N 2011). A lawyer is generally not under any obligation to accept a new client or a new matter from an existing client. In addition, a lawyer must *not* agree to take on a new matter (and, if the lawyer is already handling the matter, the lawyer must withdraw) if “the representation will result in violation of the Rules of Professional Conduct or other law.” *Id.* r. 1.16(a)(1). The lawyer also has the discretion to withdraw from an ongoing matter for several reasons, including if “withdrawal can be accomplished without material adverse effect on the interests of the client” or if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” *Id.* r. 1.16(b)(1), (b)(4).

### 1. The Model Rules of Professional Conduct<sup>37</sup>

The Model Rules of Professional Conduct address referrals primarily in the context of fee-splitting,<sup>38</sup> and one of the comments states that a “lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.”<sup>39</sup> This is a good practice even absent fee-splitting.<sup>40</sup>

Otherwise, the Model Rule most relevant<sup>41</sup> to the aggressive offshore tax avoidance/evasion lawyer referral context is Model Rule 1.2(d), which provides that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”<sup>42</sup> If the tax lawyer believes that the prospective client’s proposal is mere avoidance (rather than fraud and/or criminal evasion), the lawyer would not violate the model rule by providing a referral.<sup>43</sup> However, even if the lawyer knows<sup>44</sup> that the taxpayer’s proposed conduct likely (or certainly) constitutes tax fraud/evasion,<sup>45</sup> providing a referral is still unlikely to violate Model Rule 1.2(d) because the provision of a referral is unlikely to constitute “assistance” that is prohibited under Rule 1.2(d).<sup>46</sup> This

37. This Essay generally uses the Model Rules of Professional Conduct as the applicable ethical guidelines. The model rules have been adopted in the vast majority of states, though some states have made amendments. HAZARD, JR. ET AL., *supra* note 7, at app. B. Thus, while the exact professional responsibility rules can vary from state to state, using the Model Rules for the analysis herein allows this Essay to speak generally about the ethical obligations that likely apply to most lawyers in most U.S. jurisdictions.

38. MODEL RULES OF PROF’L CONDUCT r. 1.5.

39. *Id.* r. 1.5, cmt. 7.

40. See Wendy Wen Yun Chang, *Giving Credit Where It’s Due*, GPSOLO, July/Aug. 2011, at 26, 27 (noting that “irrespective of fee issues,” a lawyer should only refer a case to a lawyer who is competent to handle the matter).

41. Referrals to foreign lawyers could arguably also raise concerns about whether such a referral violates Model Rule 5.5(a)’s prohibition on assisting others in the unauthorized practice of law. See MODEL RULES OF PROF’L CONDUCT r. 5.5(a). This concern could arise if the matter clearly raised U.S. law issues, but the lawyer to whom the matter was referred was not licensed to practice in the United States. See, e.g., *Bluestein v. State Bar of Cal.*, 529 P.2d 599, 605–06 (Cal. 1974). However, if the referral discussed herein (involving both foreign and U.S. legal issues) refers the matter to a foreign firm with lawyers eligible to practice in both jurisdictions (e.g., as with MF), that should avoid a problem under Model Rule 5.5(a). See Brand, *supra* note 9, at 329–30; Lutz, *supra* note 9, at 69–73.

42. MODEL RULES OF PROF’L CONDUCT r. 1.2(d).

43. See HAZARD, JR. ET AL., *supra* note 6, § 1.24 (explaining that there needs to be proof of the lawyer’s “knowledge” before there is a violation of the rules).

44. *Id.* (discussing what it means for a lawyer to “know” something).

45. See generally 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).

46. See MODEL RULES OF PROF’L CONDUCT r. 1.2(d). It seems reasonably clear that provision of a referral, without more, is not “counsel[ing] a client to engage in [tax evasion].” See *id.* Thus, the analysis focuses on whether a referral constitutes “assistance.”

is because Rule 1.2(d) contemplates “active assistance”<sup>47</sup> where the lawyer is representing the client,<sup>48</sup> as opposed to the mere referral context, in which the lawyer *declines* to represent the taxpayer. This conclusion is supported by case law,<sup>49</sup> which suggests that even if a referring lawyer knows that a client wants to use a foreign lawyer’s assistance to violate the law, the lawyer who merely makes a referral to a reputable foreign lawyer should not be disciplined for an ethical violation, as long as the referring lawyer (a) does not directly engage the foreign lawyer on the client’s behalf or otherwise involve himself with the fees paid to the foreign lawyer,<sup>50</sup> and (b) ceases to be involved in the representation after making the referral,<sup>51</sup> leaving the client to engage the referred lawyer if the client so chooses.

## 2. Circular 230

Circular 230, which articulates standards of practice applicable to tax professionals who practice before the Internal Revenue Service (“IRS”), also does not explicitly address referrals.<sup>52</sup> Instead, Circular 230 takes an approach that is similar to the Model Rules and provides that a tax professional can be sanctioned for “incompetence and disreputable conduct,” which includes “[w]illfully 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>53</sup> As with the above analysis of Model Rule 1.2(d), a lawyer’s actions are unlikely to violate Circular

47. Hazard, Jr., *supra* note 45, at 671–72, 682.

48. For example, the Restatement of the Law Governing Lawyers also focuses on active assistance, defining the concept of “assisting” a client to mean “providing, with a similar intent, other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency.” 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94, cmt. a (AM. LAW INST. 1998).

49. *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 45, at 305–08 (discussing the migratory divorce cases).

50. *See, e.g., Feltman*, 237 A.2d at 474 (quoting *Nappe v. Nappe*, 120 A.2d 31, 36 (N.J. 1956)) (“[C]ounsel may suggest the name of a reputable attorney in such other state so that his client may be advised by such lawyer who has the competence to give the necessary legal advice with reference to the contemplated action. We deem it advisable to state this warning, however, that at that point the attorney should terminate the relationship of attorney and client, present his bill and be paid for his services. Any participation thereafter in the divorce proceeding in the foreign state may form a foundation of a charge . . .”).

51. *Id. But see* Newman, *supra* note 45, at 308 (questioning whether the referring lawyer really “needs to wash one’s hands of the matter as thoroughly as was suggested”).

52. *See* 31 C.F.R. § 10 (2015) (no mention of referrals).

53. 31 C.F.R. §§ 10.50, 10.51(a)(7).

230 if the lawyer declines the representation and merely provides a referral to a foreign lawyer who might assist with the aggressive offshore tax planning. This is for at least two reasons.

First, providing a referral, even to an aspiring tax evader, is unlikely to constitute the type of action covered by this rule. Specifically, a referral is unlikely to constitute “assisting” or “counseling” the client in violating the law, as discussed above with respect to the Model Rules. Further, providing a mere referral in response to a request is unlikely to constitute either “suggesting” an illegal plan to evade taxes or “encouraging” a prospective client to violate the law. That said, a referring lawyer may want to affirmatively discourage aggressive taxpayers in order to avoid the risk that the referral could be construed to be implicit encouragement.<sup>54</sup>

Second, providing a mere referral is unlikely to reflect the “willful” or “knowing” intent required for a lawyer’s actions to be sanctionable under Circular 230. “Willfulness,” which requires “a voluntary, intentional violation of a known legal duty,”<sup>55</sup> would be quite hard to establish if a lawyer declines a representation.<sup>56</sup> “Knowing” requires that the lawyer “knows the plan is ‘illegal’ and knows it will evade federal tax or its payment.”<sup>57</sup> Again, where the lawyer provides a mere referral and is not actually the lawyer advising directly on the matter, it would be hard to establish that he “knew” these things.

### 3. I.R.C. Tax Penalties

Of the Code’s many penalty provisions, the most likely to apply to a lawyer who provides a referral for aggressive tax planning are the civil and criminal penalties for aiding/abetting taxpayers in understatements or fraud/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.<sup>58</sup> Section 6701 has a broad scope and is intended to reach

54. See MODEL RULES OF PROF’L CONDUCT r. 1.4(a)(5) (AM. BAR ASS’N 2011) (explaining that the lawyer should warn clients that the lawyer cannot assist with a client’s illegal conduct).

55. *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973)); see also *United States v. Hirschfeld*, 964 F.2d 318, 322 (4th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993) (applying the same concept of “willfulness” for tax advisor crimes as for taxpayer crimes); MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE & PROCEDURE* 12.02[4] (rev. 2d ed. 2002 & Supp. 2017-3); TAX DIV., U.S. DEP’T OF JUSTICE, *CRIMINAL TAX MANUAL* § 13.07 (2012 & updated 2016) [hereinafter *CRIMINAL TAX MANUAL*], <https://www.justice.gov/sites/default/files/tax/legacy/2012/12/05/CTM%20Chapter%2013.pdf> [https://perma.cc/TA66-B7MW].

56. See *infra* Section II.A.3.b.

57. JONATHAN G. BLATTMACHR, MITCHELL M. GANS & DAMIEN RÍOS, *Circular 230*, in *THE CIRCULAR 230 DESKBOOK* § 4:18.1[F] (2017) (discussing the “knowingly” standard); see also HAZARD, JR. ET AL., *supra* note 6, § 1.24 (discussing what it means for a lawyer to “know”).

58. I.R.C. § 6701 (2012).

beyond preparers and promoters, to anyone who facilitates understatements.<sup>59</sup> Despite the breadth of § 6701, making a referral is unlikely to meet the statute's requirements for imposing the penalty. This is because § 6701 only applies to someone who is "directly involved in the aiding or assisting in the preparation or presentation of a false or fraudulent document under the tax laws,"<sup>60</sup> who "procures" a false or fraudulent document (i.e., through subordinates),<sup>61</sup> or who advises with respect to such false or fraudulent documents.<sup>62</sup> A mere referrer is quite unlikely to do any of these things. In addition, to impose a § 6701 penalty, the adviser must have actual knowledge that the document would (if used) result in an understatement of tax liability.<sup>63</sup> A referring lawyer whose involvement ends after making the referral would be unlikely to have such actual knowledge, especially if the referring lawyer is uncertain as to whether the taxpayer's desired plan would constitute avoidance or evasion.

b. Criminal Penalties for Aiding or Assisting in Fraudulent or False Statements

Section 7206(2)'s criminal penalties for aiding and abetting tax fraud are even less likely to apply than the § 6701 civil penalty. This is because § 7206(2)<sup>64</sup> is similar to § 6701, which as discussed above is unlikely to apply to a referral, but with "a higher standard of proof" required.<sup>65</sup> Specifically, § 7206(2) requires "willful" behavior by the tax advisor.<sup>66</sup> Proving "willfulness" "imposes a heavy burden on the prosecution,"<sup>67</sup> and this *mens rea* requirement

59. David Weisbach & Brian Gale, Special Report, *The Regulation of Tax Advice and Advisers*, 130 TAX NOTES 1279, 1297 (2011).

60. S. REP. NO. 97-494, at 275-76 (1982); INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 20.1.6.14.1 (2017); *see also* INTERNAL REVENUE SERV., *supra* note 60, § 20.1.6.14.5 (all examples involving direct action).

61. I.R.C. § 6701(c); S. REP. NO. 97-494, at 275-76 (1982); SALTZMAN & BOOK, *supra* note 55, ¶ 7B.16[1].

62. I.R.C. § 6701(a)(1).

63. I.R.C. § 6701(a)(3); *see, e.g.*, *Rodrigues v. United States*, 797 F. Supp. 122, 124 (D.R.I. 1992) (applying an actual knowledge standard); *see also* ALAN J. TARR & PAMELA JENSEN DRUCKER, CIVIL TAX PENALTIES, 634-3d TAX MGMT. (BNA), at A-146 (2012); SALTZMAN & BOOK, *supra* note 55, ¶ 7B.16[1] (collecting cases).

64. *See generally* STEVEN R. TOSCHER ET AL., TAX CRIMES, 636-3d TAX MGMT. (BNA), at A-5 (2011); ERIN M. COLLINS & EDWARD M. ROBBINS, JR., *Civil & Criminal Tax Fraud*, in 2 INTERNAL REVENUE SERVICE PRACTICE AND PROCEDURE DESKBOOK § 13:2.4 (4th ed. 2016).

65. BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *Interest, Civil Penalties, and Tax Crimes*, in FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 50.08[1] (3d ed. 2002 & 2018 Cum. Supp. No. 1).

66. I.R.C. § 7206(2) (2012). It is a felony for a tax adviser to "willfully aid[] or assist[] in . . . the preparation or presentation . . . of a return . . . or other document, which is fraudulent or false as to any material matter." *Id.*

67. Michelle M. Kwon, *The Criminality of "Tax Planning"*, 18 FLA. TAX REV. 153, 163-71 (2015) (discussing the willfulness standard in criminal tax cases).

is highly unlikely to be met when a tax adviser explicitly declines to represent a taxpayer and merely refers the taxpayer to another lawyer who might assist. Thus, given the “willfulness” requirement and given that § 7206(2) generally requires affirmative/active participation by the lawyer,<sup>68</sup> there is little risk that a lawyer would be subject to criminal penalties under § 7206(2) for merely providing a lawyer referral to an aspiring tax avoider/evader.

### B. *Other Constraints on a Lawyer Making the Referral*

The general ethical rules, the tax standards of practice, and the tax penalty provisions in the Code are not the only potential constraints on a tax lawyer’s behavior. A lawyer who provides a referral for assistance with potentially aggressive tax planning should also consider other potential exposure.

This could include risk of criminal charges either under 18 U.S.C. § 2 for aiding and abetting the evasion of tax<sup>69</sup> or under 18 U.S.C. § 371 for conspiracy to commit tax evasion or defraud the United States.<sup>70</sup> But given the requirements to sustain such charges (particularly with respect to intent), these charges are unlikely to succeed if brought against a lawyer who provided a mere referral.<sup>71</sup>

In addition, a referring lawyer could become subject to a malpractice claim for negligent referral.<sup>72</sup> Once again, however, the risk is quite low for a lawyer providing a mere referral to an aspiring tax evader because, among other reasons, even in jurisdictions that are more permissive in allowing negligent referral claims, the referring lawyer is unlikely to be liable as long as (a) there is no fee-splitting or other conflicts of interest, (b) the referring lawyer ceases involvement and does not make any representations about monitoring/supervising the foreign counsel’s work, and (c) the referring lawyer engaged in at least a minimal investigation of the foreign counsel’s credentials.<sup>73</sup>

## III. WHY REFERRING LAWYERS SHOULD DO MORE THAN THE MINIMUM

Even taking a relatively conservative view of the foregoing authorities, they impose relatively few constraints on lawyers who provide mere referrals (i.e., with no referral fee and no continuing involvement in the referred matter) to taxpayers seeking assistance with aggressive cross-border tax planning. Summarizing the lessons learned above yields the following: The referring lawyer should only provide referrals to a lawyer that he reasonably believes is

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68. See, e.g., CRIMINAL TAX MANUAL, *supra* note 55, § 13.07 (providing examples, all involving affirmative participation); see also *supra* Section II.A.3.a (discussing the actions that are required to sustain a § 6701 penalty).

69. 18 U.S.C. § 2 (2012).

70. 18 U.S.C. § 371 (2012).

71. See SALTZMAN & BOOK, *supra* note 55, ¶¶ 12.03[1], 12.05[10]; CRIMINAL TAX MANUAL, *supra* note 55, § 21.05[1].

72. See generally Temkin, *supra* note 8, at 650–55.

73. See *id.* at 653–76; Ching, *supra* note 8, at 227–32, 237–38.

competent to handle the matter. The referring lawyer should ensure that the referred lawyer is licensed in the relevant jurisdiction and should be alert to adverse public information about the referred lawyer. The referring lawyer should disclose any conflicts of interest. And if the referring lawyer believes that the taxpayer's desired tax strategy is highly likely to violate the law, the referring lawyer should be careful not to encourage the taxpayer; indeed, he should discourage such a strategy when providing the referral.

This list is fairly minimal. The Model Rules, Circular 230, the tax penalty provisions, the potential criminal charges, and the risk of malpractice claims for negligent referral do not, even together, impose meaningful limitations on the ability of the lawyer to provide a referral for aggressive offshore tax planning. Yet, as this Part argues, there are several reasons why referring lawyers should do more than the minimum required to avoid professional sanctions or liability.

#### A. *The Rules Could Be Interpreted More Broadly*

The IRS, U.S. Department of Justice ("DOJ"), or other relevant authorities could try to take a more expansive view of the law than is discussed above. They could try to read the "assisting," "counseling," "suggesting," and "encouraging" language of the relevant provisions more broadly to include things that might be said as part of making a referral. They could also try to argue that the lawyer meets the relevant *mens rea* standard particularly if he knows or has reason to know that the taxpayer intends to commit tax evasion. Even if a lawyer successfully overcomes such charges, he spends time and energy combatting them, and the charges could adversely affect his reputation. In addition, Circular 230's list of "incompetence and disreputable conduct" that is sanctionable is inclusive, not exclusive.<sup>74</sup> Thus, the IRS's Office of Professional Responsibility, which is responsible for enforcing Circular 230,<sup>75</sup> could argue that providing a referral (especially if it is clear that the referring lawyer knew that the client intended to pursue illegal tax evasion) constitutes "disreputable conduct" even though this action is not explicitly listed.

There is precedent for such shifts in enforcement strategies. The DOJ rarely used to pursue tax professionals in tax evasion matters, but as part of the effort to combat tax shelters, the DOJ dramatically increased its pursuit of the tax professionals that enabled the taxpayers' tax evasion.<sup>76</sup> The DOJ or other authorities could further expand their efforts to target any lawyer who refers

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74. 31 C.F.R. §10.51(a) (2015) ("Incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 includes, but is not limited to . . .").

75. *OPR: Frequently Asked Questions (FAQ's)*, INTERNAL REVENUE SERV. (Aug. 12, 2017), <https://www.irs.gov/tax-professionals/frequently-asked-questions-faqs> [https://perma.cc/3JBY-PJ9D].

76. See Scott A. Schumacher, *Magnifying Deterrence by Prosecuting Professionals*, 89 IND. L.J. 511, 515–30 (2014) (summarizing this history and shift in policy).

matters that the lawyer knows are likely to involve offshore tax evasion. Although such a shift might sanction practitioners who are less culpable than the taxpayers themselves, pursuing referring lawyers could advance some of the policy goals of criminal prosecution, including deterrence and efforts to preserve the integrity of the tax system.<sup>77</sup>

*B. The Applicable Rules Could Change*

The applicable rules could change. For example, the United Kingdom is considering specific rules to sanction middlemen for being “enablers of non-compliant behaviour,” including by “arranging access and providing introductions to others who may provide services relevant to evasion.”<sup>78</sup> Although this effort focuses on middlemen who receive referral fees,<sup>79</sup> a more expansive approach could be taken. More generally, to the extent that enforcement efforts increasingly focus, at least in part, on limiting the “supply of aggressive tax planning” services and on limiting taxpayer access to information about that supply,<sup>80</sup> referrers could be targets of law reform.

*C. The Referring Lawyer Might Inadvertently Do More than Mere Referral*

The referring lawyer might inadvertently remain involved in a matter he intended to decline completely and refer out. This could occur if, for example, the referring lawyer continues to advise the client on other matters. To the extent that any connections between a continuing matter and the referred matter arise down the road, the referring lawyer’s involvement with respect to the referred matter might look more like co-counsel, or primary counsel coordinating with local counsel,<sup>81</sup> which could increase the lawyer’s exposure under the authorities described above.

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77. *Id.* at 543–47 (describing “relative culpability,” “deterrence,” and “preserving the integrity of the tax system” as goals and theories underlying criminal tax prosecutions).

78. *U.K. Consults on New Tax Avoidance Penalties*, WORLDWIDE TAX DAILY (Aug. 17, 2016), LEXIS, 2016 WTD 160-23, at ¶ 2.12 (publishing a U.K. consultation regarding “sanctions for those who . . . facilitate the use of tax avoidance arrangements”).

79. *Id.*

80. *See, e.g., EU Drafts Report on Financial Sector’s Role in Tax Planning*, WORLDWIDE TAX DAILY (Apr. 26, 2016), LEXIS, 2016 WTD 80-12, at ¶ 6.1.2 (a policy study requested by European Parliament’s Special Committee on Tax Rulings, which discusses limiting the “supply of aggressive tax planning”).

81. *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).

*D. Adverse Reputational Consequences Could Apply*

A lawyer could suffer an adverse reputational effect if he regularly referred matters to, and was known to have a relationship with, a lawyer or firm that becomes the subject of a Panama Papers style leak or that is otherwise publicly accused of wrongdoing. This harm could arise even if the particular referrals that the referring lawyer made were legitimate. As in the case of the Panama Papers, the perception of wrongdoing can taint everyone associated with the matter.<sup>82</sup>

*E. Referring Aspiring Tax Evaders Does Facilitate Tax Evasion (Even If No Sanction Applies)*

Even if providing a referral to an aspiring tax evader does not subject the referring lawyer to sanctions or liability, providing a referral to a lawyer who might be willing to assist the taxpayer does facilitate tax evasion, at least under the dictionary definition of “facilitate,” meaning “to make easier” or to “help bring about.”<sup>83</sup> The reality of that situation is that, by providing a referral (rather than declining to provide a referral), the referring lawyer helps the taxpayer pursue its desired tax avoidance/evasion goals.<sup>84</sup> Armed with a referral, the taxpayer becomes constrained only by the ethics of the lawyers to whom the matter is referred.

As a result, making a referral means that the referring lawyer punts, allowing the referred lawyer’s interpretation of the ethical rules to substitute for his own. To the extent that the lawyer embraces the idea that he owes a responsibility to the legal system as an officer of the law<sup>85</sup> and/or the (not wholly uncontroversial) idea that tax lawyers should serve as gatekeepers,<sup>86</sup> the lawyer abdicates those responsibilities by connecting the aspiring tax evader with another lawyer who may not share those values and who may instead assist the aspiring tax evader with its illicit objectives. Moreover, providing the referral may be inconsistent with the lawyer’s own vision of ethical lawyering<sup>87</sup> because the lawyer

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82. See, e.g., *supra* notes 22–28 and accompanying text.

83. *Facilitate*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/facilitate> [<https://perma.cc/QLS2-6J5S>].

84. See Field, *supra* note 10 (elaborating on the causal link and discussing the referring lawyer’s moral culpability for the client’s ultimate actions and/or for furthering the client’s pursuit of illicit goals).

85. See MODEL RULES OF PROF’L CONDUCT pmbL ¶ 1 (AM BAR ASS’N 2011).

86. See, e.g., 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); Linda Galler, *The Tax Lawyer’s Duty to the System*, 16 VA. TAX REV. 681, 688, 693 (1997) (reviewing BERNARD WOLFFMAN, JAMES P. HOLDEN & DEBORAH H. SCHENK, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (3d ed. 1995)).

87. See generally Heather M. Field, *Aggressive Tax Planning & the Ethical Tax Lawyer*, 36 VA. TAX REV. 261 (2017) (describing different possible visions).

empowers the taxpayer to pursue matters that the lawyer believes should not be pursued (or at least with respect to which he is unwilling to assist).<sup>88</sup>

#### CONCLUSION

For a lawyer who wants to be more cautious than required when responding to a request for a referral for assistance with offshore tax planning, options include declining to provide a referral and complying with additional good practices that were developed in other contexts, such as for matters that could involve money laundering or financing of terrorist activities.<sup>89</sup> Although a comprehensive discussion about exactly what steps should be taken by this lawyer is outside the scope of this Essay,<sup>90</sup> this Essay makes the case that a lawyer should think very carefully before providing a referral to an aspiring offshore tax evader. When considering whether to make a referral, lawyers can and should do more than is required to avoid sanctions and liability. Lawyers should internalize, rather than offshore, more responsibility for ethics and compliance.

Ultimately, by taking more personal responsibility for the consequences of the referrals they make, lawyers can make it ever so slightly harder for aggressive taxpayers to get assistance with tax evasion. This would simultaneously enhance the integrity of the tax profession and improve compliance.

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88. See Field, *supra* note 10 (discussing the extent to which a lawyer's individual approach to lawyering makes the lawyer morally culpable for such referrals).

89. See, e.g., ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 463 (2013); AM. BAR ASS'N, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (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/YS8S-8KH8>]; see also 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; Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N.Y.L. SCH. L. REV. 487 (2014–15).

90. See Field, *supra* note 10 (discussing how lawyers should meet this higher standard).