

2017 Erwin N. Griswold Lecture Before the American College of Tax Counsel: A (Not So) Modest Proposal

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Reviewing the list of honorees and previous Griswold Lectures is a truly humbling and intimidating exercise. I am honored, albeit stunned, to be speaking to you all this evening. This quote seems apropos: “A successful tax lawyer, along with a good memory, needs to be able to speak well and write well, carefully avoiding verbosity and pomposity.”¹ I’ll try for the next 50 or so minutes to keep that advice in mind.

Unlike many of you, I am not a “natural.” I come from a blue collar New England family. No professionals, and certainly no tax lawyers. I was not particularly academic or intellectual—more of an intuitive “street fighter,” actually. I’ve been reasonably successful in several career paths—not unusual for women of my generation: among them telecommunications marketing and higher education administration—with a short dalliance in what I’ll refer to as the “hospitality sector.”

I came to the law late, and to tax law even later, having entered my first year of law school one month before my 31st birthday. My first elective class as a 2L was advanced income tax. The professor was fabulous and I left that class pronouncing tax the “last creative area of the law left.”

I still believe that.

After taking the only other tax class offered in law school, corporate taxation, I decided to pursue a joint JD MBA-Tax degree. And so, finally, at the ripe old age of 36, I embarked on my third career path: as a lawyer practicing (mostly) tax. I was heartened to read Dean Griswold’s personal explication of his late-in-life encounter with the tax law since I suspect we are “age contemporaries” in that respect.²

As you have probably anticipated, my remarks will be grounded in my experiences and observations made during my third career path as Director of the Office of Professional Responsibility and as a result will be somewhat personal and anecdotal in nature.

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¹Edmond N. Cahn et al., *What Makes a Successful Tax Lawyer? A Tax Law Review Symposium*, 7 TAX L. REV. 1, 5-6 (1951) (Professor Harry Rudich Comments).

²Erwin N. Griswold, *Is the Tax Law Going to Seed?*, AMERICAN COLLEGE OF TAX COUNSEL (Feb. 5, 1993), <https://www.actconline.org/media/meetings/Attachment%20C%20-%20Erwin%20N.%20Griswold%20Lecture.pdf>.

There are many of you who are far more knowledgeable than I about Circular 230's historical and technical underpinnings and evolution. However, I will boldly assert, as one of the longest (if not the longest) serving Directors of OPR, that I am the most knowledgeable about the practicalities of administering an imperfect, sometimes vague or ambiguous, set of rules intended to impose identical ethical standards on a wide range of tax professionals (not just lawyers), and which seem to have morphed over time into an impotent subset of the Internal Revenue Code.

In doing some additional reading for historical context, I rediscovered professor Michael Hatfield's two helpful law review articles: "Legal Ethics and Federal Taxes, 1945–1965: Patriotism, Duties and Advice,"³ and "Committee Opinions and Treasury Regulation: Tax Lawyer Ethics, 1965–1985."⁴ In his first article, Professor Hatfield reviews the writings and speakings of a generation of what he calls "tax heavyweights," including Dean Griswold, expressing their concern for the widespread ethical failures of tax lawyers during that era. Circular 230 and its application to tax lawyers, specifically, were on the periphery of that dialogue—most notable by their absence.

One aspect of the dialogue during that period stressed the tax lawyer's civic and moral duty to ensure the integrity and fairness of the tax system, and to curb the excesses of their entrepreneurial clients.⁵ Another part of the debate involved whether tax lawyers were so different from other lawyers that they required a separate and different set of ethical standards to apply in tax practice. At the center of that discussion was the necessity or wisdom of using Circular 230 to customize for tax lawyers the general ethical standards imposed on all lawyers.⁶

In his second article, Professor Hatfield explores how this focus on moral responsibility and civic duty succumbed to what he refers to as the "law of lawyering"⁷ and how we tax lawyers jumped on that "band wagon" along with Treasury and the IRS.

By the 1960s, the leading tax lawyers had concluded that the practice of tax law was different enough to warrant special guidance beyond the ABA Model Rules, and that the instrument for that guidance should be Circular 230, helped along by the constant participation and guidance of the ABA Tax Section membership.

It's not my intention to criticize that focus, but apparently, not everyone got that "memo." In Jim Holden's 1999 Griswold lecture "Dealing With the

³Michael Hatfield, *Legal Ethics and Federal Taxes, 1945–1965: Patriotism, Duties and Advice*, 12 FLA. TAX REV., 1, 1 (2012) [hereinafter *Hatfield I*].

⁴Michael Hatfield, *Committee Opinions and Treasury Regulation: Tax Lawyer Ethics, 1965–1985*, 15 FLA. TAX REV. 675 (2014) [hereinafter *Hatfield II*].

⁵See Hatfield I, *supra* note 3, at 16-28.

⁶See Hatfield I, *supra* note 3, at 27.

⁷Hatfield II, *supra* note 4, at 731.

Aggressive Corporate Tax Shelter Problem,”⁸ he advocated for a new version of what became section 10.35 because the advice-givers apparently needed more explicit guidance to curb the excesses of the tax strategies they were devising for their eager clients.

A year later, Carr Ferguson lamented that the “heat of competition to burn down the corporate income tax has led to practices virtually unheard of” ten years earlier.⁹

I believe, as Jim and Carr expressed, that there is a place in the practice of tax law for a moral compass to be used to test the clever technical strategies we devise for our entrepreneurial clients. I also believe that just because the language can “get you there,” does not mean ethical considerations can be thrown to the wind. In today’s hyper competitive legal and tax planning environment there is still a place for “rules” and “consequences.”

However, after more than six years in the OPR Director position, I am less convinced that Circular 230 can serve as the guidance needed for the entire tax professional community. The disparities in education and sophistication levels among the practice groups are huge.

Consider the only statistics we have publicly available:

PTIN holders at the end of 2016.

Total: 733,834

Attorneys – 4% (31,700)

Unlicensed/unenrolled – (nearly 60%) 429,209

Of the 60% unlicensed PTIN holders, only 15% (62,509) have opted in to the IRS’ Voluntary Annual Filing Season program through calendar 2016 (the second full year in operation). That means that over 365,000 tax return preparers are still preparing tax returns even though they cannot represent their taxpayer clients before the IRS at any level.

I realize that the PTIN statistics understate the numbers of lawyers who may be engaging, or dabbling in, tax practice. I also realize that except for a few, the issue of regulating tax return preparers is a low priority for most lawyers. My point in reciting these statistics is not to launch into yet another call for the much-needed legislation from Congress. Plenty of others have done, and continue to do that. Rather it is to set the stage for the conclusions I’m going to share.

After administering Circular 230 for six plus years, I have concluded:

- 1) That Circular 230 is no longer a viable document for communicating or administering standards of conduct for all tax professionals;

⁸James P. Holden, 1999 *Erwin N. Griswold Lecture before the American College of Tax Counsel: Dealing with the Aggressive Corporate Tax Shelter Problem* (Jan. 15, 1999), in 52 *TAX LAW.* 369 (1999).

⁹M. Carr Ferguson, 2000 *Erwin N. Griswold Lecture before the American College of Tax Counsel: How Will a Court Rule?* (2000), in 53 *TAX LAW.* 721, 723 (2000).

2) That Circular 230 is “broken” to a degree that perfunctory amendments to reflect recent case law or earlier drafting oversights will be insufficient to restore its viability;

3) That the Office of Professional Responsibility is currently, and will remain, invisible and is in danger of slipping deeper into irrelevancy if something is not done to keep Circular 230 principles in the forefront of tax professionals’ thinking; and,

4) The Office of Professional Responsibility cannot maintain any meaningful level of independence so long as it remains under the thumb, politically, administratively and financially, of the Internal Revenue Service.

I do not claim to have all the answers for responding to what I see as this current state of affairs. I certainly understand the political realities that are involved.

The rest of my remarks will attempt to explain some of my reasons for reaching these conclusions and to offer some suggestions as to what might be done. I hope by doing this to start a productive dialogue.

1. Circular 230 Is Not Viable in Its Current Iteration

I gave little thought to the other types of practitioners who are subject to Circular 230, their technical training, sophistication levels or attitudes toward Circular 230—until I became OPR Director.

What I learned about these non-lawyer practitioners is that the education and training they receive to become tax practitioners (assuming there has been any education and training) is insufficient to give many of them the depth of understanding required for Circular 230 to have any impact on their behavior, except to the extent they fear the consequences of a violation, even if they don’t recognize the behavior that constitutes a violation.

At one end of the spectrum are those who are unlicensed, but who, under the IRS Annual Filing Season program, can obtain some practice rights by agreeing to educate themselves at a very minimal level and to be bound by Circular 230, whatever that might mean to them.

At the other end of the spectrum are the tax lawyers, who in their efforts to assist the IRS in its various campaigns to discourage the audit lottery conduct, have caused the promulgation of regulations, some of which were written, clearly, with sophisticated lawyers in mind.

The conflict of interest, solicitation and fee provisions all mirror the ABA Model Rules. While the former covered opinion rule had no ABA model rule equivalent, we all know that dense provision was squarely aimed at the writers of sophisticated tax shelter opinions—predominantly lawyers.

Sprinkling Circular 230 with these “laws for lawyering” has caused at least two unintended results. First, non-lawyers are being asked to adhere to ethical constructs without the benefit of a law school education. Second, many of the non-lawyers have come to believe they are in fact authorized to practice

as pseudo-lawyers, and are competent to give legal advice so long as an issue has something to do with tax.

Since my retirement from OPR, I have been monitoring a few listservs for tax return preparers, both licensed and unlicensed. I have been amazed at the sophisticated level of the questions being raised, and, more frighteningly, answered, in these chat rooms. Despite the complexity of some of the questions, whether they involve estate planning, corporate formations, partnership dissolutions, or employee benefits, I have not observed to date a single thread where anyone suggested the involvement of a lawyer or another expert might be appropriate. Granted, the Enrolled Agent group is better equipped to handle some level of sophisticated tax planning, and many are very conscientious. But there are only 54,000 of them.

The question I was most frequently asked after new section 10.35 on competency was placed in Circular 230 in 2014, was: "how will I know when I'm not competent?" I tried, but found it very difficult to articulate in any meaningful way an answer to someone who had to ask the question.

As Director, it was my philosophy that OPR's primary mission was outreach and education both to licensed and unlicensed tax practitioners; with its secondary mission being to pursue discipline, only when necessary to protect the taxpaying public and/or the tax administration system from incompetent or unscrupulous conduct.

How can OPR discipline someone who is unaware of the rules, what they mean, or how they work? So, the bulk of my extensive public speaking for six years was an effort to put practitioners "on notice" of their obligations to tax administration and to their tax clients. This was a considerable challenge considering the broad spectrum of sophistication levels in the tax professional community. In pursuit of that mission, I gave approximately 100 presentations a year, reaching approximately 50-60,000 people annually.

When I began speaking, my first questions to any audience (outside of tax section meetings) were 1) how many have heard of Circular 230; 2) how many have read Circular 230; and 3) how many have heard of OPR. Unless the room was filled with EAs, only one or two hands would go up.

Conferences I attended, including those sponsored by the ABA Tax Section, contained panel after panel of substantive tax planning discussions without a single minute devoted to the practitioners' obligations under Circular 230 in those contexts.

I believe my efforts over the six years to make Circular 230 a "household" word in tax practice (even if poorly understood in some circles), and to enhance the stature and visibility of OPR at every level were reasonably successful. My concern now is that the momentum is being lost.

In addition to the unmanageability of a single set of rules applicable to such a disparate population, huge swaths of Circular 230 regulations have been swept from relevance either because of failures to draft regulations which conform to statutory revisions or clarifying notices; or by recent case law which I'll discuss in a minute.

2. Circular 230 Is “Broken”

I’m not telling anyone in this room anything surprising when I say Circular 230 is “broken.” The surprise may be that I think it was broken well before the *Loving*¹⁰ and *Ridgely*¹¹ decisions in 2014, although those cases certainly brought many of the issues to the forefront.

The *Loving* case told us that mere tax return preparation was not “practice” that could be regulated by Circular 230. Not only could the IRS not regulate unlicensed return preparers, since return preparation was not “practice” before the IRS, the legitimacy and authority of Circular 230 and OPR were immediately called into question with respect to anything done under the guise of tax return preparation.

The *Ridgely* case told us in the ordinary refund context, that even a CPA was doing the equivalent of mere tax return preparation, again, outside the scope of Circular 230 and OPR jurisdiction, notwithstanding that CPAs are automatically authorized to practice before the IRS. *Ridgely* called into question the very definition of who is a practitioner, and when is someone subject to Circular 230 and OPR jurisdiction, further eviscerating Circular 230’s status and influence on ethical conduct in tax practice.

The combination of these two cases has caused the clever among us to find great sport in identifying other sections in Circular 230 that are jeopardized by these recent case developments—10.34 and 10.37 being the most notable—and have resulted in the absurdity that individuals convicted of felonies, including tax crimes, can continue to prepare tax returns with impunity, unless and until, the justice department successfully brings an injunctive or criminal action.

The worst may be yet to come in a case which has received little public attention to date: *Sexton v. Hawkins*¹² which is pending in a Nevada district court. When the judge finally gets around to issuing his written opinion based on his oral grant of summary judgment in the case to plaintiff, it is likely to tell us that if you have already been suspended or disbarred under Circular 230, you are immune from having to answer to OPR inquiries regarding any conduct allegedly in violation of your suspension/disbarment.

Sure, OPR can investigate, but it may not require the disciplined practitioner to participate in that investigation because in the eyes of the court, he’s no longer a practitioner subject to section 10.20.¹³

Because the Circular has been amended so many times in direct reaction (perhaps overreaction) to the tax “maladie du jour”; because it has not been amended to reflect current case law, legislation or clarifications issued

¹⁰*Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

¹¹*Ridgely v. Lew*, 55 F. Supp. 3d 89 (D.D.C. 2014).

¹²No. 2:13-cv-00893-RFB-VCF, 2014 WL 5503200 (D. Nev. Oct. 30, 2014).

¹³Reg. § 10.20 (requiring a “practitioner” to provide information to OPR during its investigation into alleged violations of Circular 230, unless there is a good faith belief that the information is privileged).

in obscure notices; because multiple sections were drafted for, and can be understood (if at all), only by lawyers; and, because the IRS has tried to define ethical behavior in black and white with Internal Revenue Code penalty provisions in mind, the regulations in their current form have become vague, ambiguous, outdated and, in some instances unadministrable.

By way of examples:

1) There are multiple sections in the regulations (10.2, 10.3, 10.4, 10.5, 10.6, 10.8, 10.9) which still reference “Registered Tax Return Preparers”, a status the IRS was forced to discontinue in the wake of *Loving*.

2) In the 2011 amendments, all references to “the Director, OPR” were replaced by “Internal Revenue Service” thereby obliterating even the appearance of independence for OPR and creating a false impression for IRS field personnel that they had authority to discipline practitioners without the bothersome and time consuming requirement to make a referral to OPR.

3) Section 10.27, as printed in the current iteration of Circular 230, fails to reflect clarifications made to the contingent fee provision for refund claims and for whistleblower representation. These clarifications were issued in a 2008 notice¹⁴ which contained a commitment to insert the clarifying language into the section the next time the Circular was amended. Despite two subsequent amendments to the Circular in 2011 and 2014, this has not happened.

Of course, some of this may be irrelevant in light of *Ridgely* which has triggered an even greater need for clarification of OPR’s current position on contingent fees.

4) Section 10.34(a)’s application to anyone but enrolled agents and the annual filing season opt-ins is in serious question because of the *Loving/Ridgely* combination. When, if ever, is a non-EA/AFS tax return preparer subject to Circular 230?

5) In 2007, the statute was amended to authorize Treasury to regulate appraisers engaged in tax-related valuations. The regulations were amended at that time in obscure ways which did not identify appraisers as practitioners but authorized their disqualification to produce reports or testimony in tax disputes. The vagueness and ambiguity of the regulatory language has made it very difficult, if not impossible, for OPR to address the valuation transgressions occurring in the appraisal community.

6) In 2004, Congress added a monetary penalty to the statute and a corresponding regulation was inserted into Circular 230. While the provision has been invoked only once in thirteen years, it has had the unwanted effect of further intertwining Circular 230 with the Internal Revenue Code civil penalty regime.

¹⁴Notice 2008-43, 2008-1 C.B. 748.

7) In 2011, amendments to Circular 230 included the addition of subsections 10.51(a)(14)-(18). These were nothing more than iterations of pre-existing IRC penalties for failing to sign a tax return, failing to file electronically, failing to get a PTIN, and representing a taxpayer without authorization; contributing further to the dilution of Circular 230 as legitimate ethics, and reinforcing both internally and externally the perspective that Circular 230 was just another tax enforcement tool. I will confess that I was so opposed to those additions, that I insisted they be enforced by the Return Preparer Office—an administrative function within the IRS.

8) More than a year ago, Congress amended the statute to add a new subsection (b) stating that any properly Enrolled Agent can use the identifying credentials EA or E.A., in addition to “Enrolled Agent.”¹⁵ This is not earth shattering to say the least but anyone who goes to the IRS website for a copy of the Circular and the statute will not find any reference to the new statutory subsection.

In its current iteration Circular 230 encourages practitioners to focus on the minutiae (Who’s covered? How can I get into trouble? To which provisions should I pay the most attention? If I give oral, rather than written, advice, or attach a disclaimer to all my written communications, can I avoid the covered opinion rule?) rather than to focus on broad foundational principles of ethical conduct which could be considered and utilized to analyze fact-specific behavior in daily practice.

Just as with the tax law generally, there is a greater focus on out-witting the rules in Circular 230 than in thinking about their overall purpose and the potential benefits of adhering to them. The more rules that have been added to Circular 230, the more it has become part of the “catch me if you can” mentality that also drives the audit lottery game.

I have come to believe that Circular 230 cannot continue as a one-size-fits-all set of ethical rules. Nearly all the provisions governing enrollment matters, continuing education, and tax penalty look-alikes would be far better off as guidance apart from any practice standards.

On my second day as Director, I met with then-Commissioner Shulman. He asked me what the “plan” was. I told him I would like to scrap Circular 230 and start over.

He thought I was kidding.

I have great empathy for the efforts of any Director of OPR who tries to administer the office in the current environment.

3. OPR Is Currently “Invisible”

The proliferation of outlandish tax shelters schemes in the late 90’s and early 2000’s was slowed, in my opinion, not because of the insertion of section

¹⁵Consolidated Appropriations Act, Pub. L. No. 114-113, sec. 410, § 330, 129 Stat. 3121 (2015).

10.35 into Circular 230, but because of a number of highly visible criminal prosecutions and professional firm implosions during that period.

The greater value of Circular 230 is not in how many practitioners are disciplined, but rather the *in terrorem* effect it has on the behavior of practitioners fearing public professional humiliation or loss of livelihood. This effect is only successful if there is respect for the rules and those who administer them.

The greater value of OPR is not in the publication of annual disciplinary numbers but rather in its outreach and education efforts and the publication of final agency disciplinary decisions: all of which help explain the Circular 230 provisions; provide guidance to practitioners on how to apply the rules to their practice behavior; and describe what kind of conduct is, or is likely to, result in some form of public discipline.

One of my objectives as Director was to get practitioners to think about how Circular 230 might apply to an action to be taken or advice to be given before, not after, the fact. I tried to say something about the rules and OPR's position on their interpretation every chance I got. I used final agency disciplinary decisions to highlight unacceptable behavior and to show that only egregious conduct would be punished to lend credibility to the disciplinary process. Never mind that OPR might not be called upon to act on a specific position—the point, and what created the press (and therefore the visibility of the office)—was the possibility of action. The press reported what I said, or the cases I discussed, or the interpretations I espoused, and practitioner listened and talked about it—sometimes for months. As a result, Circular 230 and OPR became “hot topics” in most professional tax circles. The Circular and OPR had, for many, made it from the back of their minds to their frontal lobes.

I am currently concerned about the lack of transparency and visibility surrounding current OPR activities. In December 2014, while I was still Director, I had the unpleasant task of withdrawing public access to all administrative law judge and appellate authority disciplinary opinions (*i.e.*, Final Agency Decisions). The triggering event for that action was the discovery that sometime around 2004, OPR received erroneous legal advice regarding its authority to make final agency decisions available to the public without violating section 6103.

The technicalities are not important at this moment but the end result has been to shroud OPR disciplinary actions and results, to the extent any are occurring, in complete secrecy. Practitioners can no longer learn from others' mistakes. Nor can they defend against allegations of misconduct by looking for supporting case precedent before a complaint is filed.

The pendulum has swung so far in the direction of emasculating Circular 230 and OPR, and once again shrouding the disciplinary process in mystery, that I fear both have become meaningless.

In 2017, OPR has regressed to being the “black hole” it was once described as by a former OPR Director.

And today OPR is certainly as invisible as Jim Holden lamented it was in 1999.

4. OPR Is Not “Independent”

Since at least the early 1980s, Circular 230 has been used (I might venture to say “abused”) by the IRS to mitigate taxpayers’ and their advisors’ propensities to play audit lottery. This, despite the plethora of penalty provisions numerous accommodating Congresses have inserted into the Internal Revenue Code. Over the years more and more provisions in Circular 230 have become nothing more than iterations of Revenue Code penalty provisions in ethics trappings. The provisions at 10.34 (relating to the due diligence required in preparing, signing, submitting returns and other documents to IRS) and the subsections in 10.51(a) I mentioned earlier are the most obvious examples.

OPR does not, and cannot, generate its own cases—it is dependent on referrals from whatever source. Prolific external referral sources include TIGTA, CI and DOJ-Tax. Internal referrals come primarily from IRS field personnel alleging misconduct during examination, collection and appeals activity.

Even though section 10.53 makes it mandatory for IRS personnel to make referrals of Circular 230 misconduct, only the most committed took the time to refer a practitioner when serious Circular 230 misconduct was observed. This is because the IRS employees get no credit for writing up the documentation necessary to support the referral. In some cases, field personnel are actively discouraged, even ordered, not to make a referral to OPR.

The bulk of IRS referrals ranged from practitioner tax non-compliance, to referrals based on the mistaken belief that OPR would get an aggressive and/or uncooperative practitioner “out of the way” in short order. Circular 230 was a convenient threat to garner practitioner cooperation. This behavior abated considerably while I was Director, but it never completely stopped.

Let me give you a couple of examples:

- 1) One practitioner was referred for discipline because she had tried to record a meeting with revenue agents without first asking permission.
- 2) Another practitioner was referred to OPR because he had referred a revenue officer to TIGTA for alleged misconduct under the Section 1203 provisions and because the TIGTA investigation had not resulted in any consequences to the RO, the practitioner’s referral was alleged to be harassment.

Many of the disciplinary investigations done by OPR were focused on the “low-hanging fruit,” with case inventory driven by the encouragement given to IRS field personnel to refer practitioners who were personally not compliant with their own tax obligations.

Literally dozens of practitioners were being referred to OPR for “delay” during examination and collection representation, and others were referred because some field personnel made a practice of checking the tax compliance record of a practitioner who submitted a power of attorney. When I challenged, and rejected, those referrals, some of the IRS field personnel asked for a legal opinion from counsel. The response was tepid to say the least.

Again, most of these practices abated, but did not disappear, during my tenure as Director.

It seemed to me that many IRS personnel were abdicating their responsibility to enforce the filing and payment obligations of tax professionals and the preparer penalty regime in the Internal Revenue Code in favor of letting Circular 230 referrals, or threats of Circular 230 referrals facilitate their tax enforcement efforts. As I mentioned earlier, it was not helpful when the 2011 revised regulations were released replacing “Director, OPR” with “IRS” throughout the regulations.

In addition, many on the OPR staff came from other parts of the IRS bringing with them a tax enforcement mentality. Some of the lawyers would actively look for compliance violations to avoid developing the necessary facts to support discipline based on behavior. In 2009, 85% of the OPR case inventory consisted of practitioner tax non-compliance. In other words, by 2009 OPR had become little more than a specialty division within the IRS’ tax compliance enforcement mechanism with the bulk of its inventory being “road-kill.”

Public representations from the IRS were to the contrary:

In 1982 in the face of a firestorm of opposition to the standards being proposed for written tax shelter opinions, in response to practitioner concerns that IRS oversight of tax advisors created a conflict of interest with the treasury acting as both prosecutor and judge in the regulation of their conduct, the preamble stated that the Treasury officer who enforces Circular 230 regulations was independent of the service.¹⁶ Of course, in 1982 that would have been the case since the Director of Practice was reporting to the Treasury General Counsel at that time.¹⁷

In finalizing revisions to section 10.34(a) in 2011, again in response to practitioner comments, the preamble stated that the due diligence standards in that provision differed from the penalty standards in section 6694 in “limited” ways to reflect “the different purposes” of the two regimes, and to reflect the philosophy that the practice standards under Circular 230 should “provide broader guidelines that are more appropriate for professional ethics standards.”¹⁸

Those preambles may have stated the intended philosophical position of the service, but they were not reflective of the day-to-day practice. By 2009, OPR staff seldom questioned allegations of misconduct received from IRS personnel. There was a presumption of correctness, and the motives for a referral were never questioned. The mere imposition of a 6694(b) penalty served as justification for discipline without any consideration of the underlying

¹⁶47 Fed. Reg. 56,144, 56,146 (Dec. 15, 1982).

¹⁷The office was reconstituted as OPR in January 2003, along with its delegation to the Commissioner of Internal Revenue. *See* 71 Fed. Reg. 6421, 6422 (Feb. 8, 2006).

¹⁸76 Fed. Reg. 32,286, 32,292 (June 3, 2011); Prop. Reg. § 10.34, 76 Fed. Reg. 32,286, 32,308 (June 3, 2011).

facts and circumstances surrounding the practitioner's conduct. OPR staff embraced their tax enforcement role with enthusiasm.

I have no doubt that, despite my six-year effort to reverse this mentality, there remain those in the IRS and OPR who believe this is the correct role for OPR to play.

This is more than just an optics issue. The Director has enormous power to affect the livelihood and career of a practitioner. There are safeguards, of course, but the pre-hearing disciplinary process conducted by OPR, vests all authority in the Director and, potentially by delegation, OPR staff. Far more cases are settled than are litigated. The moral sensibilities of the Director and OPR staff control many of the outcomes. And without transparency in the process, there can be no checks and balances.

Prior to 2003, when the office was called the "Director of Practice," the Director reported to the Treasury General Counsel.

While it may have made administrative sense in 2003, delegating responsibility for the administration of Circular 230 to the Commissioner of the Internal Revenue Service, in my opinion, lacked foresight. In 1999, Jim Holden lamented the low esteem in which that office was held and its invisibility to the professional tax community. He called for a Director who would be "a highly visible, highly respected figure within the tax community, making substantial contributions to tax administration, proposing new and better standards of practice, and enforcing existing standards."¹⁹ I would add "independence" to Jim's criteria. Placing OPR within the confines of the IRS administration, hindered not helped, attainment of Jim's vision for OPR.

Practitioners were right to express the conflict concerns they had even in 1982. It makes no sense to me to have the function with the potential to destroy careers housed within, and financially and administratively dependent upon, the agency most likely to be adversarial to those being regulated. As Jim succinctly observed "it is anomalous to have one's adversary in control of the disciplinary machinery." I would add that especially in a time of limited resources it takes a very strong personality to fight for budget share, and to resist the internal pressures to ignore OPR's stated missions in favor of contributing to the agency's general tax enforcement mission. Jim felt this conflict could be mitigated by giving OPR a status relative to that afforded the Taxpayer Advocate with "comparable independence from the general workings" of the IRS.

I won't pretend to speak for her, but will observe that even the Taxpayer Advocate Service is not free of institutional pressures, both administrative and economic, requiring strong leadership to stay focused on mission.

My view is that OPR and the practitioner community would be better off if that office was reconstituted in the same manner as was the Treasury Inspector General for Tax Administration, completely outside the machinations and pressures of IRS tax enforcement activity.

¹⁹ See Holden, *supra* note 8, at 376.

5. Conclusion

To succeed with its missions, OPR needs high visibility; total independence; a clear legislative mandate; a coherent set of regulations that offer high level foundational principles to serve as ethical guidance for practitioners to follow; disciplinary enforcement authority, including subpoena and injunction power, to pursue those who choose to ignore their responsibilities; authority to publicize final disciplinary decisions; support from the tax community for the necessary legislation; and, a more visible public shaming of tax planning devices and those who promote them by hawking outcomes clearly unintended by a statute, regardless of how creatively the words can be manipulated to justify the advice.

To start, my (not so) modest proposal is:

- 1) There should be the equivalent of a restatement of tax ethics in the form of a complete rewriting of the relevant regulations currently in Circular 230. Existing rules regarding regulation of return preparers, enrollment matters, and penalty issues should either be placed in a separate set of regulations, or reconstituted as Revenue Code provisions;

- 2) The Office of Professional Responsibility should be reconstituted as a separate agency within the Treasury Department, reportable directly to either the Assistant Secretary for Tax Policy or the Treasury General Counsel; and,

- 3) Administrative hearings for discipline should be conducted before one or more properly appointed Administrative Law Judges housed within Treasury by lawyers within OPR, not Chief Counsel's Office.

These are ambitious thoughts to say the least. And some of you may disagree with me on some, or all, of what I've suggested but there can be no doubt that since 2014 OPR and Circular 230 have been, and continue to be, eviscerated nearly beyond recognition. I would think we all care about that.

This College is founded on the principles of promoting sound tax policy and engagement in thoughtful discussion with the government about matters affecting the tax system. As part of its mission to improve the tax system, the College provides recommendations to Congress and the Internal Revenue Service for improving the nation's tax laws and the way that they are interpreted and administered. ACTC is perfectly positioned to take a closer look at the past and current state of standards of practice, and to influence future outcomes.

I hope some of what I have said will inspire you to take a closer look at what level of contribution the College might make to create a viable, visible and effective body of ethical rules for professionals; and a visible, effective, and independent office to administer them.

Thank you, Joan, for giving me this opportunity to speak to the College and thank you all for listening.