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INTERVIEW

# Karen L. Hawkins

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Karen L. Hawkins was, until July 2015, Director of the Office of Professional Responsibility (OPR) of the IRS. At the time she was appointed by the IRS Commissioner to serve as the Director of OPR, Karen was Chair-Elect of the Tax Section.

**Q** You now live in Oregon, a long way from Washington, DC. Tell us about your new home.

**A** I'm on the coast—a 7-iron from the beach (for the non-golfers, that's about 135 yards). I bought in a brand-new small development so was able to do some customizing of the three-story stand-alone structure, but it's all about the view. My third floor has breathtaking views of ocean, sky, and beach. Right now, two of those are the bluest you'll ever see, but the winter storms will be spectacular.

**Q** Do you think coming from a small, West Coast law firm affected the way you approached your position as OPR director?

**A** No. Being a tax lawyer for the previous 30 years affected the way I approached the position.

**Q** Your goals as OPR director were to enhance the credibility, visibility and stature of the Office of Professional Responsibility and Circular 230 at all levels of professional tax practice. You spoke to thousands of practitioners during your tenure. What was so important to you about making all those speeches, panel presentations, and trips?

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**A** One of the things that frustrated me about listening to previous directors was the vague way in which they responded to the all-important question from practitioners: "What will get me in trouble?" I don't believe that everyone instinctively knows what "the right thing to do" is all of the time; or how to distinguish a "foot-fault" from a serious transgression. Most of the case law available in 2009 dealt with practitioners' own tax non-compliance, so vague principles were not helpful in interpreting anything in Circular 230 except section 10.51(a)(6) [willful failure to file returns or pay tax]. I believed (then and now) that the real harm being done to taxpayers and the tax system involved violations of the various due diligence provisions in Circular 230 which occur in epidemic proportions. I believed that the Director is responsible for articulating the ways in which the various "rules" will be interpreted and that the OPR approach to discipline needed to be absolutely transparent in order to withstand scrutiny. As part of an administrative agency, OPR has a responsibility not to act in arbitrary or capricious ways, abuse its discretion or act contrary to law. It also owes practitioners timely and consistent investigations and determinations. Practitioners need to trust that the system is treating them fairly even when they are alleged to have behaved badly. I believed that the more visible, transparent and, if you will, "out-front" I was with practitioners, the more they would pay attention to the rules and think about them in everyday application before acting, rather than after the fact. OPR is not a function that should ambush practitioners. It was important to communicate up front how we were going to interpret and apply the rules, not after the behavior had occurred. OPR reached 60,000 to 75,000 practitioners annually during my tenure as Director. Circular 230 became a part of the everyday lexicon of thousands of tax professionals. I think my mission was accomplished.

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**Q** What changes or developments are you most proud of from your time at OPR?

**A** Getting away from an inventory that made OPR a sub-function of the IRS Collection Division was an important accomplishment. OPR had no credibility as long as it was acting almost exclusively as a tax compliance function.

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Another thing I am very proud about is the level of Circular 230 consciousness that was raised in practitioners at every level. I can recall when, even at the Tax Section, discussions about Circular 230 occurred only at the Standards of Tax Practice Committee meetings. The rest of the committees presented programs on "pure" substantive material. Over my 6 years as Director, that attitude changed dramatically; as a result, discussion of the Circular 230 implications of foreign tax planning, employee benefits advice, corporate tax advising and even obligations to low-income taxpayers was occurring on a pretty regular basis at each meeting. Perhaps even more significantly, I was being asked to sit on panels for committees like Employee Benefits, Corporate, Partnerships, and Estate Planning that wanted to inject a level of ethical discussion into their substantive materials. It has been really gratifying.

When I started speaking in mid-2009, the only practitioner group (as a whole) who knew Circular 230 existed and its connection to OPR was the Enrolled Agents. For the first few years before each presentation, I would ask the questions: "Who has heard of Circular 230?" and "Who knows what OPR does?"—hardly any hands would go up. By 2014, I stopped asking those questions and started asking "How many of you have heard me speak before?" because most of the room had.

I also like to think that OPR's reputation was enhanced considerably during my tenure, but that's harder for me to measure except subjectively.

**Q** What were your biggest frustrations from your time at OPR?

**A** I don't know if I really had any big frustrations except the usual ones you hear from people like me who weren't raised in the government work environment: too many meetings; too much process and not enough implementation; long time-frames to accomplish anything.

I suppose I could say *Loving* and *Ridgley* were "frustrations," but that's not exactly correct for me. I'm a litigator; stuff happens; you regroup and move forward. I was certainly disappointed by the results in both those cases and by the lack of anticipatory strategizing that occurred during the process. In my opinion, the Agency was more "flat-footed" than it needed to be.

**Q** What was the most common practitioner problem you saw in your time as OPR director, and what advice do you have for a practitioner who never wants to hear from OPR?

**I think there is an attitude among some of those who do the most sophisticated tax advising that it's all about how cleverly they can parse statutory language to justify whatever the client has asked for. I'm not sure when the profession stopped asking itself whether something was "the right thing to do," but that concept is clearly missing from many repertoires these days.**

**A** I have emphasized repeatedly in my speeches that it's all about specific facts and circumstances, so it's hard for me to list the top 10 transgressions. Every one has its own wrinkles. I'd say generally that a failure to do adequate due diligence for the issue/work involved, whether it be advising on a filing position or how to make a deal with collection or preparing a tax return, resulted in the most referrals from IRS enforcement personnel.

Many practitioners have an odd sense that if they don't ask tough questions, they won't hear bad answers and therefore can avoid having to give the client bad news. Tax return preparers especially practice the "don't-ask-don't tell" philosophy of tax advising. If the taxpayer understood the nuances of all the tax laws that apply to a particular situation, s/he would not need to pay an advisor. Part of being a competent tax professional is asking the tough questions and, when necessary, addressing the "bad news" appropriately.

I also think many practitioners take on matters that they are not competent to handle and then think their due diligence is adequate if they've read an article on the topic. I was stunned at how many tax professionals did not read the relevant law at issue and failed to do adequate probing of the client's facts before advising on, or taking, a position. Assuming the law "should" be "X" or shooting from the hip is never adequate due diligence. Nor is blindly relying on client information when there are discrepancies, unfounded assumptions or relevant factual omissions. Too many return preparers assume they are "home-free" if they use all the information provided by the client on a pre-prep systemizer/questionnaire.

Also, I think there is an attitude among some of those who do the most sophisticated tax advising that it's all about how cleverly they can parse statutory language to justify whatever the client has asked for. I'm not sure when the profession stopped asking itself whether something was "the right thing to do," but that concept is clearly missing from many repertoires these days. I come from a gentler era in tax advising when only the unprofessional shysters engaged in ludicrous tax structuring. Now, especially in this era of anemic funding for the IRS, the mantra at every level seems to be: "catch me if you can."

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Getting away with something is not the same as giving good, appropriate tax advice; nor is it an indicia of someone's competence.

**Q** Any common patterns in the cases you saw? Are there any OPR "traps for the unwary" out there?

**A** There still are a lot of practitioners out there who think filing their own returns and paying the tax is something their clients must do, but is not necessary for them.

The biggest "pattern" is the lack of due diligence, however you want to say it: shooting from the hip when advising or preparing a tax return; failing to ask detailed questions; failing to recognize a lack of competence to perform the service being charged for.

After all the speaking I have done, if there are any "traps for the unwary," someone wasn't paying attention!

**Q** The ABA Tax Section supports Treasury regulation of non-attorneys, and your vision as OPR director was to bring reasonable but firm oversight to the unregulated return-preparer industry. Did you still share that vision by the time you left?

**A** I absolutely believe that the agency should have the authority to regulate all interactions by all persons regarding matters administered by the IRS. And I have been grateful for the Tax Section's support on this issue, although it was my understanding that the ABA parent organization was not supportive of such a broad perspective.

It has been referenced repeatedly that tax return filing is the single most likely interaction a taxpayer will have with his/her government. And for many, it is the most serious financial transaction in which s/he will engage. To allow untested, uneducated individuals to charge for services in connection with tax advice or tax preparation is an unconscionable oversight by Congress.

Notwithstanding what the *Loving* courts said about the Title 26 penalty regime, the penalty approach will never solve the problem of incompetence or lack of integrity. Penalties are there to punish after the fact and require enormous resources to administer—resources the IRS apparently will not have for the foreseeable future. The goal that Commissioner Shulman and I shared was to address the incompetence and instill the integrity (or at least an understanding of a practitioner's ethical obligations to a client) before the advice is given, before the return is prepared, before representations are made to the IRS. With the invalidation of the regulations governing return-preparer oversight, that effort has

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experienced a major set-back. With the *Ridgley* decision, respect for what OPR and Circular 230 are intended to accomplish has been further eroded.

**Q** *Loving* says Circular 230 doesn't cover return preparers, *Ridgely* says Circular 230 doesn't cover regular refund claims, and the *Sexton* and *Davis* cases seek to stop OPR and IRS from regulating who can file tax returns on behalf of clients. Is there any hope of saving Circular 230 and OPR through litigation, or do we need to wait for Congress to act?

**A** You've mischaracterized the cases. *Loving* says "mere" tax return preparation does not constitute the act of representation. Even Judge Boasburg acknowledged that in some instances return preparers might be subject to Circular 230 and explicitly stated that CPAs and attorneys were covered by the regulations. *Ridgley* emphasizes that "ordinary" refund claims are so similar to "mere" tax return preparation that *Loving* must be followed as precedent. *Davis* was settled without consequence so we really cannot draw any conclusions from that. *Sexton* is not about filing tax returns: it's about giving sophisticated, written, tax-planning advice while suspended from practice. That being said, I do think it will be best if Congress acts to resolve the authority once and for all, but the proposals I have seen so far are inadequate. More recently, the AICPA is playing the "unfair competition" card—a red herring, in my opinion, but one which seems to be making headway in light of no organized or vocal opposition to the contrary.

The thing about *Loving* and *Ridgley* is that they were both what I call "pre-emptive" strikes; that is, there was no practitioner involved who was actually being investigated by OPR. It was easier for the courts to focus on the "pure" language and parse it in a vacuum to their liking. I've testified at administrative disciplinary hearings where some of the same arguments were raised in defense but the bad acts of the practitioner propounding them made those arguments less compelling to the court. It's less easy to be a purist when there's a real victim or victims involved.

**Q** What's different in the practice of tax since you started? What long-term trends or cycles have you observed?

**A** Tax schemes are like locusts—there seems to be a ten-year cycle. By that measure, I think we are about due for another round of abuses. The problem is that just as bugs become immunized to the poisons meant to eradicate them, so do scammers, who find more sophisticated ways to game the system. The other sad aspect, in my opinion, is that greed is blinding even the highest levels of the tax profession. It's no longer about getting it "right" for the client and the system. It's about playing the audit lottery and the cost-benefit analysis of getting caught.

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In my early years of practice, you could sit with fellow "tax geeks" and speculate about hair-brained schemes that could technically be read into a specific statute or regime of statutes. Then everyone would laugh and acknowledge that implementing a transaction using such an analysis would not be the right thing to do (for the client or the system). The difference now is that there does not appear to be a "conscience" in the room when some of these schemes are being developed. It's all about the cost of getting caught being outweighed by the tax advantages produced. Hmmmm, this is the first time I have felt as old as I am!

**Q** You credit mentors you met through the ABA Tax Section (like Jules Ritholz and Marvin Garbis) for helping your professional development. How would you encourage younger and diverse members of the Section to find and cultivate mentors?

**A** I think this is a two-way street. More seasoned tax professionals need to be aware of those around them who might benefit from mentoring. I was fairly assertive about attracting the attentions of those I thought would serve as good role models—the mentoring just fell into place after the relationships were established.

If young tax lawyers want to be respected and included, they must perform the tasks to which they have committed; volunteer for the drudgery as well as the fun stuff; exercise absolute discretion; maintain confidences and be visible as much as feasible. I also think that the younger generation's digital "culture" cuts against recognition by us older folks. Case in point: I had occasion to attend an event for tax lawyers a year or so ago where a number of LL.M. students were in attendance. One of them had recently drafted an article on *Loving*. One of the hosts for the evening assumed this student would want to meet me, so we were placed at the same table. My efforts at conversation (*Loving* and otherwise) were substantially thwarted by the student's constant reading and sending of text messages and departures from the table to make or receive calls. There was no question this student was bright, but I wrote him off immediately as someone I did not care to spend any further effort on. Whether you are with a client or a potential mentor, staying "in the moment" is a key skill that seems to be lost on many (not necessarily younger) tax lawyers.

**Q** What advice do you have for individuals, the Tax Section, and our profession on how to foster diversity in the tax bar?

**A** We are all more comfortable with those we perceive as "like us," whether that is as a result of education, politics, religion, color, sexual orientation, or being tax law nerds. I am honored to have been a part of Council when the Young Lawyers Forum and the Tax

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Law Challenge were initiated. I think those two efforts have been enormously successful in attracting the future leaders of the Section.

As to other kinds of diversity, I think the efforts have to be a bit more overt because we cannot assume that certain individuals know they will be welcome or can easily see the benefits of being involved. I have been off Council for 6 years so I apologize if I am unaware of any efforts already on-going in this context, but I think the Section should be far more overt in seeking the diverse membership it purports to want. That for me means funding visits to non-traditional campuses and events to interact with the students; being willing to solicit, listen to, and then adopt suggestions from more diverse points of view; making efforts not just to be welcoming but also to recruit diversity of involvement in all Section initiatives.

**Q** What's next for you, Karen?

**A** Well, I'm still waiting for my furniture to arrive from the East Coast (which I hope will be soon), and I am still busy being mesmerized by the incredible view that greets me every morning. I also accepted speaking invitations at nine different tax conferences between August and the middle of December, so I'm not going to sleep anytime soon.

I have an energizer bunny for a mother who just turned 93 in August. I will be spending some time deciding how best to situate her (she's living in northern California) vis-à-vis me for the future now that I know what my new mailing address will be.

I have not been particularly organized about long-term planning at the moment, but I see my highest and best uses going forward as expert witnessing, Circular 230 risk analysis and consulting, educational (speaking and/or teaching), and writing. I have agreed to write a column three times a year on ethics for the CCH *Journal of Tax Practice and Procedure*. I'm also considering speaking engagements (for pay) with a couple of CLE providers who have approached me.

It goes without saying that I intend to continue with Tax Section activities. The current chair has already asked me to serve on a couple of committees, which I am more than happy to do. I hope the Standards of Tax Practice Committee will accept my involvement when appropriate. And, as you saw in Chicago, I am happy to contribute to the Section's CLE activities, again, as appropriate. ■

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