

## Health Care Providers Should Note Recent Fraud Conviction

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By **Bart Daniel and Elle Klein**

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On Nov. 20, 2018, former speech therapist Gena Randolph was sentenced to 111 months in federal prison and ordered to pay \$580,937.44 on convictions of criminal health care fraud. This sentence is noteworthy in that it fell above the applicable sentencing guidelines range and practitioners need to be aware of its implications.

Randolph had been excluded from Medicaid and Medicare after her 2012 conviction for filing false claims with the South Carolina Medicaid program. Federal regulations provide that exclusion from future participation in federal health care programs is mandatory upon the conviction of a program-related crime or a felony conviction relating to health care fraud.[1] For purposes of this exclusion, “federal health care program” includes programs funded in whole or in part by the United States.[2] Additionally, federal law specifies exclusions from the state-administered Medicaid programs in many instances.[3] Thus, Randolph was prohibited from participating in any federal health care program after her 2012 conviction.

Over the course of the four-day trial in July, the government presented evidence showing that Randolph disguised her ownership and control over Palmetto Speech and Language Associates and Per Diem Healthcare Services, both of which were submitting claims to Medicare and Medicaid. As part of the fraudulent scheme, Randolph submitted thousands of claims worth over \$2 million dollars both for speech therapy services that either were provided by other speech therapists and for services that were never rendered. In addition to hearing testimony from the speech therapists in whose names Randolph submitted fraudulent claims, the jury received evidence showing that Randolph submitted claims for services to beneficiaries who were dead. A federal jury convicted Randolph on one count of health care fraud[4], one count of aggravated identity theft,[5] and three counts of making false statements relating to health care matters.[6] She was found not guilty on one charge of false statements relating to health care matters.

The United States Sentencing Guidelines apply to any federal offense classified as a felony or high-level misdemeanor.[7] The sentencing judge first determines what sentencing range the convictions fall within and considers this range in conjunction with other statutory factors.[8] Because these guidelines are merely advisory[9], a court may sentence a defendant outside the applicable guideline range, if it finds and delineates certain enumerated factors. If the sentence falls outside the applicable guideline range, the court should explain its reasoning[10] and must be “within the statutorily prescribed range and ... reasonable.”[11]

In an unrequested and unexpected upward departure, United States District Judge Richard M. Gergel sua sponte sentenced Randolph to 111 months in federal prison. Based on



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Randolph's convictions, the guidelines placed her in a sentencing range between 78 months and 97 months. The Assistant United States Attorney, Matt Austin, requested that Randolph be sentenced on the higher end of the range and argued for several enhancements. First, the government requested a two-level enhancement for abuse of position of trust. It argued that Randolph continued to occupy a position of trust with Medicare and Medicaid after being excluded because while her own individual position of trust with the health care programs ended upon her conviction and exclusion, her use of nominees to run her businesses and submission of claims she provided under other providers' names who had not been excluded allowed her to step into their shoes and enjoy the benefits she should have lost. She effectively continued to occupy a position of trust.[12]

Second, the government requested an enhancement for obstruction of justice for committing perjury.[13] At trial, Randolph stated that she was a licensed speech pathologist despite losing her license after her 2012 fraud conviction. In the Fourth Circuit, a sentencing court can apply the obstruction of justice enhancement based on perjury if (1) the defendant gave false testimony, (2) concerning a material matter, (3) with the intent to deceive.[14]

United States Attorney for the District of South Carolina Sherri Lydon said, "This case should serve as a warning sign to health care providers tempted to try to take advantage of the size of our health care system, hoping that false and fraudulent claims will go unnoticed among the thousands of claims processed every day. When providers like Ms. Randolph break the rules, American taxpayers are forced to bear the cost. Her sentence will help recover that cost and discourage fraudulent billing by other providers in the future."

South Carolina Senior Assistant Deputy Attorney General Nancy Cote, whose office had been involved in the defendant's previous conviction, cited the partnership and close working relationship with the Office of Inspector General and the U.S. attorney in bringing Randolph to justice.

Austin explained, "the fact that the defendant had been convicted previously of similar fraud and gave untruthful testimony at trial are likely the reasons for the court's upward departure."

This case is significant for several reasons. Courts are now considering health care offenses more seriously and sentencing them accordingly. When advising clients of potential sentencing outcomes, defense attorneys need to alert defendants of the possibility of a judge ordering an upward departure in egregious cases. Additionally, it further bolsters the efforts of the U.S. Department of Justice and U.S. Attorney's Office. Victories such as these will only incentivize the DOJ and U.S. attorney to seek heftier sentences and fines in the future. Finally, it emphasizes the high priority the DOJ and the U.S. attorney have placed on investigation and prosecution of health care fraud.

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[1] 21 U.S.C § 1320a-7(a)A

[2] 42 U.S.C. §§ 1320a-7(a), 1320a-7b(f)(1).

[3] See 42 U.S.C. § 1396(a)(a).

[4] 18 U.S.C § 1347

[5] 18 U.S.C. § 1028A(a)(1)

[6] 18 U.S.C. § 1035(a)(2).

[7] U.S. Sentencing Guidelines Manual § 1B1.9 [hereinafter “Guidelines Manual”].

[8] See [United States v. Hughes](#), 401 F.3d 540, 546 (4th Cir. 2005).

[9] [United States v. Booker](#), 125 S. Ct. 738 (2005).

[10] 18 U.S.C. § 3553(a).

[11] [United States v. Hughes](#), 401 F.3d 540, 546 (4th Cir. 2005).

[12] The government also cited to [United States v. Bolden](#), 325 F.3d 471 (4th Cir. 2003). In that case, the U.S. Court of Appeals for the Fourth Circuit upheld enhancements for a director of a nursing facility who submitted false supply invoices to Medicaid. The court found the director held a position of trust and her abuse of the trust allowed her to conceal her offenses.

[13] U.S.S.G § 3C1.1; [United States v. Dunnigan](#), 507 U.S. 87 (1993).

[14] [United States v. Sun](#), 278 F.3d 302, 313-314 (4th Cir. 2002)