SANCTIONING REFERENCE POINTS

INSTRUCTION MANUAL

Board of Funeral Directors & Embalmers

Prepared for
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COMMONWEALTH OF VIRGINIA

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Dear Interested Parties:

In the spring of 2001, the Virginia Department of Health Professions approved a workplan to study sanctioning in disciplinary cases for Virginia's 13 health regulatory boards. The purpose of the study was to "*…provide an empirical, systematic analysis of board sanctions for offenses and, based on this analysis, to derive reference points for board members…*" The purposes and goals of this study are consistent with state statutes which specify that the Board of Health Professions periodically review the investigatory and disciplinary processes to ensure the protection of the public and the fair and equitable treatment of health professionals.

Each health regulatory board hears different types of cases, and as a result, considers different factors when determining an appropriate sanction. After interviewing current and past Board of Funeral Directors and Embalmers members and staff, a committee of Board members, staff, and research consultants assembled a research agenda involving one of the most exhaustive statistical studies of sanctioned Funeral Directors and Embalmers in the United States. The analysis included collecting over 100 factors on all Board of Funeral Directors and Embalmers sanctioned cases in Virginia over a 6-year period. These factors measured case seriousness, respondent characteristics, and prior disciplinary history. After identifying the factors that were consistently associated with sanctioning, it was decided that the results provided a solid foundation for the creation of sanction reference points. Using both the data and collective input from the Board of Funeral Directors and Embalmers and staff, analysts spent 6 months developing a usable sanction worksheet as a way to implement the reference system.

By design, future sanction recommendations will encompass, on average, about 73% of past historical sanctioning decisions; an estimated 23% of future sanctions will fall above or below the sanction point recommendations. This allows considerable flexibility when sanctioning cases that are particularly egregious or less serious in nature. Consequently, one of the most important features of this system is its voluntary nature; that is, the Board is encouraged to depart from the reference point recommendation when aggravating or mitigating circumstances exist.

Equally important to recommending a sanction, the system allows each respondent to be evaluated against a common set of factors—making sanctioning more predictable, providing an educational tool for new Board members, and neutralizing the possible influence of "inappropriate" factors (e.g., race, sex, attorney presence, identity of Board members). As a result, the following reference instrument should greatly benefit Board members, health professionals and the general public.

Sincerely yours,

Sandra Whitley Ryals
Director

Cordially,

Elizabeth A. Carter, Ph.D.
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General Instructions

Overview

The Virginia Board of Health Professions has spent the last 5 years studying sanctioning in disciplinary cases. The study is examining all 13 health regulatory boards, with the greatest focus most recently on the Board of Funeral Directors & Embalmers. The Board of Funeral Directors & Embalmers is now in a position to implement the results of the research by using a set of voluntary Sanctioning Reference Points. This manual contains some background on the project, the goals and purposes of the system, and the offense-based sanction worksheet that will be used to help Board members determine how a similarly situated respondent has been treated in the past. This sanctioning system is based on a specific sample of cases, and thus only applies to those persons sanctioned by the Virginia Board of Funeral Directors & Embalmers. Moreover, the worksheet has not been tested or validated on any other groups of persons. Therefore, they should not be used at this point to sanction respondents coming before other health regulatory boards, other states, or other disciplinary bodies.

The Sanctioning Reference system is comprised of a single worksheet which scores case type, offense, and prior record factors identified using statistical analysis. These factors have been isolated and tested in order to determine their influence on sanctioning outcomes. Sanctioning thresholds found on the offense worksheet recommend a range of sanctions from which the Board may select in a particular case as well as corresponding monetary penalty ranges.

In addition to this instruction booklet, separate coversheets and worksheets are available to record the respondent's score, recommended sanction, actual sanction and any reasons for departure (if applicable). The completed coversheets and worksheets will be evaluated as part of an on-going effort to monitor and refine the SRPs. These instructions and the use of the SRP system fall within current Department of Health Professions and Board of Funeral Directors & Embalmers policies and procedures. Furthermore, all sanctioning recommendations are those currently available to and used by the Board and are specified within existing Virginia statutes.

Background

In April of 2001, the Virginia Board of Health Professions (BHP) approved a work plan to conduct an analysis of health regulatory board sanctioning and to consider the appropriateness of developing historically-based SRPs for health regulatory boards, including the Board of Funeral Directors & Embalmers. The Board of Health Professions and project staff recognize the complexity and difficulty in sanction decision-making and have indicated that for any sanction reference system to be successful, it must be *"developed with complete Board oversight, be value-neutral, be grounded in sound data analysis, and be totally voluntary"*—that is, the system is viewed strictly as a Board decision tool.

Goals

The Board of Health Professions and the Board of Funeral Directors & Embalmers cite the following purposes and goals for establishing Sanctioning Reference Points:

- Making sanctioning decisions more predictable
- Providing an education tool for new Board members
- Adding an empirical element to a process/system that is inherently subjective
- Providing a resource for the Board and those involved in proceedings.
- "Neutralizing" sanctioning inconsistencies
- Validating Board member or staff recall of past cases
- Constraining the influence of undesirable factors—e.g., Board member ID, overall Board makeup, race or ethnic origin, etc.
- Helping predict future caseloads and need for probation services and terms

Methodology

The fundamental question when developing a sanctioning reference system is deciding whether the supporting analysis should be grounded in historical data (a *descriptive approach*) or whether it should be developed normatively (a *prescriptive approach*). A normative approach reflects what policymakers feel sanction recommendations should be, as opposed to what they have been. SRPs can also be developed using historical data analysis with normative adjustments to follow. This approach combines information from past practice with policy adjustments, in order to achieve some desired outcome. The Board of Funeral Directors & Embalmers chose a descriptive approach with a limited number of normative adjustments.

■ Qualitative Analysis

Researchers conducted in-depth personal interviews of some past and all current Board members, Board staff, and representatives from the Attorney General's office. The interview results were used to build consensus regarding the purpose and utility of SRPs and to further frame the analysis. Additionally, interviews helped ensure the factors considered when sanctioning were included during the quantitative phase of the study. A literature review of sanctioning practice across the United States was also conducted.

Methodology, continued

■ Quantitative Analysis

Researchers analyzed detailed information on Funeral Directors & Embalmers disciplinary cases ending in a violation between 1999 and 2006; approximately 51 sanctioning "events." Over 100 different factors were collected on each case in order to describe the case attributes Board members identified as potentially impacting sanction decisions. Researchers used data available through the DHP case management system combined with primary data collected from hard copy files. The hard copy files contained investigative reports, Board notices, Board orders, and all other documentation that is made available to Board members when deciding a case sanction.

A comprehensive database was created to analyze the offense and respondent factors which were identified as potentially influencing sanctioning decisions. Using statistical analysis to construct a "historical portrait" of past sanctioning decisions, the significant factors along with their relative weights were derived. These factors and weights were formulated into a sanctioning worksheet with four thresholds, which are the basis of the SRPs.

Offense factors such as financial gain and case severity (priority level) were analyzed as well as prior history factors such as substance abuse, and previous Board orders. Some factors were deemed inappropriate for use in a structured sanctioning reference system. For example, respondent gender was considered an "extra-legal" factor, and was explicitly excluded from the SRPs. Although many factors, both "legal" and "extra-legal" can help explain sanction variation, only those "legal" factors the Board felt should consistently play a role in a sanction decision were included in the final product. By using this method, the hope is to achieve more neutrality in sanctioning, by making sure the Board considers the same set of "legal" factors in every case.

Wide Sanctioning Ranges

The SRPs consider and weigh the circumstances of an offense and the relevant characteristics of the respondent, providing the Board with a sanction range that encompasses roughly 73% of historical practice. This means that 27% of past cases had received sanctions either higher or lower than what the reference points indicate, acknowledging that aggravating and mitigating factors play a role in sanctioning. The wide sanctioning ranges recognize that the Board will sometimes reasonably disagree on a particular sanction outcome, but that a broad selection of sanctions fall within the recommended range.

Any sanction recommendation the Board derives from the SRP worksheets must fall within Virginia law and regulations. If a Sanctioning Reference Point worksheet recommendation is more or less severe than a Virginia statute or DHP regulation, the existing laws or policies supercede any worksheet recommendation.

Three Sets of Sanctioning Factors

The Board indicated early in the study that sanctioning is influenced by a variety of circumstances. The empirical analysis supported the notion that not only case type, but certain offense factors and prior record impacted sanction outcomes. To this end, the Funeral Directors & Embalmers SRP system scores three groups of factors in order to arrive at a sanctioning recommendation. The first set of factors relates to the case type, the second relates to elements of the offense, and the third relates to the respondent's prior record.

So a respondent before the Board for an inspection case may not only receive points for acting as the manger of record, but also for having a past history of disciplinary violations.

Sanctioning Thresholds

The SRP worksheet uses four thresholds for recommending a sanction. Once all factors are scored, the corresponding points are then added for a total worksheet score. The total is used to locate the sanctioning threshold recommendation found at the bottom of the worksheet. The SRP worksheet recommends both a sanction range and a monetary penalty range. For instance, a respondent having a total worksheet score of 60 would be recommended for a Monetary Penalty to Treatment/Monitoring. The monetary penalty amount corresponding to a score of 60 is $500 to $2,000.

Voluntary Nature

The SRP system is a tool to be utilized by the Board of Funeral Directors & Embalmers. Compliance with the SRPs is voluntary. The Board will use the system as a reference tool and may choose to sanction outside the recommendation. The Board maintains complete discretion in determining the sanction handed down. However, a structured sanctioning system is of little value if the Board is not provided with the appropriate coversheet and worksheet in every case eligible for scoring. A coversheet and worksheet should be completed in cases resolved by Informal Conferences and Consent Orders that come before Informal Conference committees. The SRPs can also be referenced and used by agency subordinates where the Board deems appropriate. The coversheet and worksheet will be referenced by Board members during Closed Session.

Worksheets Not Used in Certain Cases

The SRPs will not be applied in any of the following circumstances:

- Formal Hearings — SRPs will not be used in cases that reach a Formal Hearing level.

- Mandatory suspensions – Virginia law requires that under certain circumstances (conviction of a felony, declaration of legal incompetence or incapacitation, license revocation in another jurisdiction) the licensee must be suspended. The sanction is defined by law and is therefore excluded from the SRPs system.

- Compliance/reinstatements – The SRPs should be applied to new cases only.

- Action by another Board – When a case which has already been adjudicated by a Board from another state appears before the Virginia Board of Funeral Directors & Embalmers, the Board often attempts to mirror the sanction handed down by the other Board. The Virginia Board of Funeral Directors & Embalmers usually requires that all conditions set by the other Board are completed or complied with in Virginia. The SRPs do not apply as the case has already been heard and adjudicated by another Board.

- Confidential Consent Agreements (CCA) - SRPs will not be used in cases settled by CCA.

Case Selection When Multiple Cases Exist

When multiple cases have been combined into one "event" (one order) for disposition by the Board, only one coversheet and worksheet should be completed and it should encompass the entire event. If a case (or set of cases) has more than one offense type, one case type is selected for scoring according to the offense group that appears highest on the following table and receives the highest point value. For example, a respondent found in violation for an inspection deficiency and misappropriation of property would receive forty points, since Fraud is above Inspections Deficiency on the list and receives the most points. If an offense type is not listed, find the most analogous offense type and use the appropriate score.

Sanctioning Reference Points Case Type Table

Case Type	Included Categories	Point Assignment
Fraud	Mishandling of pre-need funds Misappropriation of Property Performing unwarranted/unjust services Falsification/Alteration of Documents Misdemeanor Conviction	40
Business Practice Issues	Business Practice Issues Rudeness Failure to provide general price list Failure to provide contract or terms of contract Solicitation	20
Unlicensed Activity	Aiding/Abetting Unlicensed Activity No valid license-qualified to practice Practice Beyond Scope of License Practice on Lapsed/Expired License Facility Operating without Permit Licensure Eligibility	20
Inspections Deficiency	Inspection Deficiencies/Facility Violation	10

Completing the Coversheet and Worksheet

Ultimately, it is the responsibility of the Board to complete the SRP coversheet and worksheet in all applicable cases.

The information relied upon to complete a coversheet and worksheet is derived from the case packet provided to the Board and respondent. It is also possible that information discovered at the time of the informal conference may impact worksheet scoring. The SRP coversheet and worksheet, once completed, are confidential under the Code of Virginia. However, complete copies of the SRP Manual, including blank coversheets and worksheets, can be found on the Department of Health Professions web site: www.dhp.virginia.gov (paper copy also available on request).

Scoring Factor Instructions

To ensure accurate scoring, instructions are provided for scoring each factor on the SRP worksheet. When scoring a worksheet, the numeric values assigned to a factor on the worksheet *cannot be adjusted*. The scoring weights can only be applied as 'yes or no'- with all or none of the points applied. In instances where a scoring factor is difficult to interpret, the Board has final say in how a case is scored.

Coversheet

The coversheet is completed to ensure a uniform record of each case and to facilitate recordation of other pertinent information critical for system monitoring and evaluation.

If the Board feels the sanctioning threshold does not recommend an appropriate sanction, the Board is encouraged to depart either high or low when handing down a sanction. If the Board disagrees with the sanction recommendation and imposes a sanction greater or less than the recommended sanction, a short explanation should be recorded on the coversheet to explain the factors or reasons for departure. This process will ensure worksheets are revised appropriately to reflect current Board practice. If a particular reason is continually cited, the Board can examine the issue more closely to determine if the worksheets should be modified to better reflect Board practice.

Aggravating and mitigating circumstances that may influence Board decisions can include, but should not be limited to, such things as:

- Prior Record
- Dishonesty/Obstruction
- Motivation
- Remorse
- Restitution/Self-corrective action
- Multiple offenses/Isolated incident

A space is provided on the coversheet to record the reason(s) for departure. Due to the uniqueness of each case, the reason(s) for departure may be wide-ranging. Sample scenarios are provided below:

Departure Example #1
Sanction Threshold Recommendation: Recommend Formal or Accept Surrender
Imposed Sanction: Monetary Penalty of $2,000, Inspection
Reason(s) for Departure: Respondent was particularly remorseful and had already begun corrective action.

Coversheet, *continued*

Departure Example #2
Sanction Threshold Recommendation: No Sanction/Reprimand to Monetary Penalty
Imposed Sanction: Reprimand, Terms – CE
Reason(s) for Departure: Respondent displayed a lack of knowledge that could be corrected with further education

Determining a Specific Sanction

The bottom of the SRP worksheet lists four sanction thresholds that encompass a variety of specific sanction types. In addition, the table recommends monetary penalty ranges: Up to $1000, $500 to $2000, $1000 to $5000, and $5000 or more. Monetary penalty amounts do not include inspection fees or CE costs.

The table below lists the sanctions most often used by the Board that fall under each threshold. After considering the sanction recommendation, the Board should fashion a more detailed sanction(s) based on the individual case circumstances.

Sanctioning Reference Points Threshold Table

Worksheet Score	Available Sanctions	Monetary Penalty Recommendation
0-49	No Sanction Reprimand Monetary Penalty Stayed Monetary Penalty	Up to $1000
50-99	Monetary Penalty Stayed Monetary Penalty Treatment/Monitoring: Probation Continuing Education Inspection Shall not be Manager of Record	$500 to $2000
100-199	Treatment/Monitoring: Probation Continuing Education Inspection Shall not be Manager of Record Stayed Suspension C.O. for the Suspension C.O. for Revocation Recommend Formal Accept Surrender	$1000 to $5000
200 or more	Stayed Suspension C.O. for the Suspension C.O. for Revocation Recommend Formal Accept Surrender	$5000 or more

Sanctioning Reference Points - Coversheet

- Complete *Case Type* section.
- Complete the *Offense Factors* section.
- Complete the *Prior Record* section.
- Determine the *Recommended Sanction* and *Monetary Penalty Range* using the scoring results and the *Sanction Thresholds*.
- Complete this coversheet.

Case Number(s) ☐☐☐☐☐☐ ☐☐☐☐☐☐ ☐☐☐☐☐☐

Respondent Name _____ First _____ Last

License Number _____

Case Category
- ❑ Fraud
- ❑ Business Practice Issues
- ❑ Unlicensed Activity
- ❑ Inspection Related

Sanction Threshold Result
- ❑ 0-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200 or more

Imposed Sanction
- ❑ No Sanction
- ❑ Reprimand
- ❑ Monetary Penalty - $_____
- ❑ Stayed Monetary Penalty - $_____
- ❑ Inspection and Associated Fees
- ❑ Probation
- ❑ CE _____ hours
- ❑ Stayed Suspension
- ❑ C.O. for the Suspension - duration in months _____
- ❑ C.O. for Revocation
- ❑ Recommend Formal
- ❑ Accept Surrender
- ❑ Other Sanction: _____
- ❑ Terms: _____

Reasons for Departure from Sanction Threshold Result: _____

Worksheet Preparer (name): _____ **Date completed:** _____

Confidential pursuant to §54.1-2400.2 of the Code of Virginia.

Board of Funeral Directors & Embalmers - SRP Worksheet Instructions

Case Type

Step 1:
(score only one)

Enter the point value that corresponds to the case type. If a case has multiple aspects, enter the point value for the case type that is highest on the worksheet list.

Fraud
Mishandling of pre-need funds
Misappropriation of property
Performing unwarrented/unjust services
Falsification/alteration of documents
Misdemeanor conviction

Business Practice Issues
Business practice issues
Rudeness
Failure to provide general price list
Failure to provide contract/terms of conctract
Solicitation

Unlicensed Activity
Aiding/abetting unlicensed activity
No valid license – qualified to practice
Practice beyond scope of license
Practicing on lapsed/expired license
Facility operating without a permit
Licensure eligibility

Inspections/Records
Inspection Deficiencies/Facility Violation

Step 2:
Enter Case Type Score

Enter the point value that corresponds to the case type. If a case has multiple aspects, enter the point value for the case type that is highest on the worksheet's list.

Offense Factors Score

Step 3:
(score all that apply)

Enter "40" if there are two or more violations being found by the Board on the present day.

Enter "40" if this was an act of commission. An act of commission is interpreted as purposeful or with knowledge.

Enter "30" if there is a criminal or civil action related to this offense.

Enter "20" if the respondent was the Manager of Record (MOR) at the time of the incident.

Enter "10" if the offense involves a decedent or a third party acting on behalf of the decedent. Third party involvement includes, but is not limited to, family members who have dealt business with the respondent for services. Third party involvement is not limited to family members.

Enter "10" if there was financial or material gain by the respondent.

Enter "10" if multiple respondents were associated with the case. When multiple respondents are involved there will be a "companion case" with another respondent's name and case number found in the investigation report.

Enter "10" of the case involved a facility violation. These points may be scored regardless of the case type assigned points in Step 1.

Step 4:
Enter Offense Factor Score

Prior Record Score

Step 5:
(score all that apply)

Enter "40" if the respondent has one or more prior Virginia Board of Funeral Directors violations.

Enter "10" if the respondent has any prior *similar* Virginia Board of Funeral Directors violations. Similar violations would be those that are contained under the same major case type heading listed in Step 1. For example, if the case being heard concerns a "Facility Operating without a Permit" and the respondent has a prior violation for "Aiding/Abetting Unlicensed Activity" enter 10 points.

Step 6:
Enter Prior Record Score

Total Worksheet Score

Step 7:
Add Step 2, Step 4, and Step 6 for a Total Worksheet Score

Step 8: Determining the Sanction Recommendations

The Total Worksheet Score corresponds to the Sanctioning Reference Points recommendations at the bottom of the worksheet. To determine the appropriate recommended sanction, find the score range on the left that corresponds to the Total Worksheet Score that was calculated. That range then corresponds to a "Sanction Recommendation." For instance, a Total Worksheet Score of 60 is recommended for "Monetary Penalty to Treatment/Monitoring."

"Monetary Penalty Ranges" in the last column correspond to the point ranges in the first column. However, in order for a sanction to be considered in agreement with the worksheet recommendation, it only has to correspond with the Sanction Recommendation column (agreement or disagreement with the Monetary Penalty Ranges column is not used when tracking compliance with the SRP worksheets).

Step 9: Coversheet
Complete the coversheet including the SRP sanction result, the imposed sanction and the reasons for departure if applicable.

Funeral Directors & Embalmers - Sanctioning Reference Points Worksheet

Case Type (score only one)	Points	Score
Fraud	40	
Business practice issues	20	
Unlicensed activity	20	
Inspections related	10	
Case Type Score		

score only one

Offense Factors (score all that apply)		
Two or more concurrent founded cases	40	
Act of commission	40	
Concurrent action against respondent	30	
Respondent was the MOR at the time of the incident	20	
Any decedent involvement	10	
Financial or material gain by the respondent	10	
Multiple respondents associated with case	10	
Case involved a facility violation	10	
Offense Factors Score		

score all that apply

Prior Record (score all that apply)		
One or more prior violations	40	
Were any of the previous violations similar to the instant offense	10	
Prior Record Score		

score all that apply

Total Worksheet Score
(Case Type + Offense Factors + Prior Record)

Recommendations for Sanctioning

Score	Sanction Recommendation	Monetary Penalty Ranges
0 - 49	No Sanction/Reprimand to Monetary Penalty	Up to $1,000
50 - 99	Monetary Penalty to Treatment/Monitoring	$500 - $2,000
100 - 199	Treatment/Monitoring to Recommend Formal or Accept Surrender	$1,000 - $5,000
200 or more	Recommend Formal or Accept Surrender	$5,000 or more

Respondent Name: _____ Date: _____

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