

# TABLE OF CONTENTS

<b>PREFACE</b> .....	<b>i</b>
<b>CHAPTER 1: DISCOVERY: OVERVIEW AND RULES</b> .....	<b>1</b>
I. DEFINITION AND PURPOSE.....	1
II. ROLE OF THE ADMINISTRATIVE JUDGE IN INITIAL DISCOVERY MATTERS.....	2
III. RESPONSIBILITY OF THE PARTIES IN PURSUING DISCOVERY.....	3
IV. OVERVIEW OF PROCEDURES.....	5
A. TIME LIMITS AND PROOF OF FILING.....	5
1. Filing Using Electronic Filing Under 5 CFR 1201.14.....	6
2. Filing by Mail.....	6
2. Filing by Facsimile.....	6
3. Filing by Commercial Delivery.....	7
4. Filing by Personal Delivery.....	7
5. Proof of Filing.....	7
B. DISCOVERY INVOLVING NONPARTIES—DIFFERENCES.....	7
C. INITIAL DISCOVERY REQUESTS AND RESPONSES.....	8
D. SUBSEQUENT DISCOVERY REQUESTS AND RESPONSES.....	9
E. METHODS OF OBTAINING ADDITIONAL TIME FOR DISCOVERY.....	9
V. THE PRICE OF NOT USING DISCOVERY OR USING IT POORLY.....	10
A. FAILURE TO USE DISCOVERY.....	10
B. INCOMPLETE OR DEFICIENT DISCOVERY.....	10
C. HOW DISCOVERY MAY AFFECT CASE BEING JUDGED ON THE RECORD.....	11
VI. METHODS OF DISCOVERY.....	12
VII. THE RULES OF DISCOVERY.....	12
VIII. THE CODE OF FEDERAL REGULATIONS.....	13
IX. THE <i>JUDGES' HANDBOOK</i> .....	17
X. THE JUDGE'S DISCRETION.....	18
XI. THE FEDERAL RULES OF CIVIL PROCEDURE.....	20
XII. DISCOVERY DURING JURISDICTIONAL CASES.....	21
A. ENFORCEMENT PROCEEDINGS.....	22
B. LAST CHANCE AGREEMENTS.....	22
C. PROBATIONARY APPEALS.....	22
D. INVOLUNTARY SEPARATIONS/CONSTRUCTIVE SUSPENSIONS/ALLEGED SUSPENSIONS OF OVER 14 DAYS.....	22
E. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT.....	22
F. VETERANS EMPLOYMENT OPPORTUNITY ACT.....	23
G. WHISTLEBLOWER REPRISAL.....	23
XIII. DISCOVERY DURING A DISMISSAL WITHOUT PREJUDICE.....	23
XIV. DISCOVERY DURING ENFORCEMENT PROCEEDINGS OR ATTORNEY FEES CLAIMS.....	24
XV. SAMPLE MOTIONS—REQUESTS FOR SUSPENSION/DISMISSAL WITHOUT PREJUDICE, OR EXTENSION OF DISCOVERY.....	24
A. MOTION FOR A SUSPENSION UNDER 5 CFR 1201.28.....	25
B. MOTION FOR A DISMISSAL WITHOUT PREJUDICE.....	25
C. MOTION TO EXTEND TIME FOR DISCOVERY.....	26
<b>CHAPTER 2: NON-DISCOVERY TOOLS</b> .....	<b>27</b>
I. FREEDOM OF INFORMATION ACT.....	28
A. SAMPLE—FREEDOM OF INFORMATION ACT REQUEST.....	28
B. SAMPLE—FREEDOM OF INFORMATION APPEAL LETTER.....	29
II. PRIVACY ACT.....	29
A. SAMPLE—PRIVACY ACT REQUEST.....	30
III. INFORMAL CONTACTS WITHOUT USE OF DISCOVERY PROCEDURES.....	30
<b>CHAPTER 3: INSTRUCTIONS TO PARTIES</b> .....	<b>31</b>
I. SAMPLE #1.....	31
II. SAMPLE #2.....	34
III. SAMPLE #3.....	36

IV.	SAMPLE #4.....	37
V.	SAMPLE #5.....	38

**CHAPTER 4: DEPOSITIONS..... 39**

I.	DEFINITION AND PURPOSE.....	39
A.	REASONS TO TAKE DEPOSITIONS.....	39
B.	REASONS FOR CONSIDERING <i>NOT</i> TO TAKE DEPOSITIONS.....	40
C.	DEPOSITIONS IN LIEU OF LIVE TESTIMONY.....	41
D.	PROCEDURE AND OPTIONS ON RECORDING A DEPOSITION.....	41
E.	RIGHT TO ATTEND A DEPOSITION.....	43
II.	FAILURE TO APPEAR.....	43
III.	DEPOSITION OF A NONPARTY—DIFFERENCES.....	43
IV.	DEPOSITION OF A NONPARTY—OUTSIDE OF THE UNITED STATES.....	46
V.	TIPS FOR TELEPHONIC AND VIDEOCONFERENCE DEPOSITIONS.....	46
A.	AUDIO DEPOSITIONS-CONSIDERATIONS.....	46
B.	VIDEO CONFERENCE DEPOSITIONS-CONSIDERATIONS.....	46
VI.	DEPOSITIONS UPON WRITTEN QUESTIONS.....	47
VII.	<i>DUCES TECUM</i> DEPOSITIONS.....	47
VIII.	PREPARING FOR THE DEPOSITION.....	48
A.	PREPARING THE WITNESS.....	48
B.	HOW TO PREPARE IF YOU ARE TAKING THE DEPOSITION.....	50
C.	HOW TO PREPARE IF YOU ARE TAKING THE DEPOSITION OF AN EXPERT WITNESS.....	51
D.	UNDERSTAND THE BURDENS OF PROOF AND THE ISSUES INVOLVED.....	55
E.	RIGHT TO REVIEW TRANSCRIPTS.....	55
IX.	SAMPLE DEPOSITION NOTICES.....	56
A.	DEPOSITION NOTICE—BETWEEN PARTIES.....	56
B.	<i>DUCES TECUM</i> DEPOSITION NOTICE TO A PARTY.....	56
C.	MOTION TO THE JUDGE FOR A SUBPOENA <i>DUCES TECUM</i> .....	56
1.	Serving the Subpoena.....	57
2.	The Order From the Judge.....	57
D.	DEPOSITION NOTICE FOR VOLUNTARY NONPARTY DEPOSED IN LIEU OF LIVE TESTIMONY AT THE HEARING.....	59

**CHAPTER 5: INTERROGATORIES..... 61**

I.	DEFINITION AND PURPOSE.....	61
II.	SIGNING OF RESPONSES.....	62
III.	DRAFTING INTERROGATORIES.....	63
IV.	SAMPLE INTERROGATORIES.....	65
A.	SAMPLE OF AN INTERROGATORY, WITH AN OBJECTION AND RESPONSE.....	65
B.	APPEAL THAT DOES NOT IDENTIFY CLAIMS.....	65
C.	QUESTIONS TO AGENCY TO IDENTIFY INDIVIDUALS.....	66
D.	FALSIFICATION AND MISREPRESENTATION.....	67
E.	MISUSE OF A GOVERNMENT OWNED VEHICLE.....	67
1.	Agency to Appellant.....	68
2.	Appellant to Agency.....	68
F.	ABSENCE WITHOUT LEAVE.....	68
1.	Agency to Appellant.....	68
2.	Appellant to Agency.....	69
G.	DISPARATE PENALTY BASED ON <i>DOUGLAS</i> FACTORS.....	70
1.	Appellant to Agency.....	70
H.	UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT DISCRIMINATION CLAIMS.....	70
I.	DISPARATE PENALTY BASED ON DISCRIMINATION.....	71
1.	Agency to Appellant.....	71
J.	DISPARATE PENALTY BASED ON REPRISAL FOR EEO ACTIVITY.....	71
1.	Agency to Appellant.....	71
2.	Appellant to Agency.....	72
K.	FAILURE TO ACCOMMODATE A MEDICAL CONDITION.....	72
1.	Appellant to Agency.....	72
2.	Agency to Appellant.....	73
L.	PROBATIONARY PERIOD—MARITAL STATUS CLAIM OR PARTISAN POLITICAL REASONS.....	73
M.	<i>DOUGLAS</i> FACTOR ASSESSMENTS.....	73

1.	Agency to Appellant .....	74
2.	Appellant to Agency; Rewording for Either Party .....	74
N.	WITNESS INFORMATION .....	74
O.	WITNESS STATEMENT RELATED INFORMATION .....	75
1.	Agency to Appellant .....	75
2.	Appellant to Agency .....	75
P.	OTHER EMPLOYMENT THAT MAY AFFECT AGENCY ACTION OR BACK PAY .....	75
Q.	HARMFUL ERROR.....	76
R.	COMPENSATORY DAMAGES.....	77
S.	WHISTLEBLOWER REPRISAL .....	79
1.	Appellant to Agency .....	79
2.	Agency to Appellant .....	80
T.	PERFORMANCE CASES.....	81
1.	Agency to Appellant .....	81
2.	Appellant to Agency .....	81
3.	Performance Standard Questions.....	81
4.	Performance Improvement Period Questions.....	81
U.	QUESTIONS TO AGENCY PERSONNEL OFFICES.....	82
V.	“CLEAN-UP” INTERROGATORIES .....	82
<b>CHAPTER 6: REQUESTS FOR DOCUMENT PRODUCTION.....</b>		<b>83</b>
I.	DEFINITION AND PURPOSE.....	83
II.	PROCEDURE.....	87
III.	SAMPLES OF INSTRUCTIONS FOR PRODUCTION OF DOCUMENTS.....	88
A.	SAMPLE #1 .....	88
B.	SAMPLE #2.....	89
IV.	SAMPLES OF SPECIFIC REQUESTS .....	89
A.	FOLLOW-UP TO INTERROGATORIES.....	89
B.	GENERAL CLOSE-OUT REQUESTS .....	89
C.	APPELLANT TO AGENCY .....	89
D.	AGENCY TO APPELLANT .....	90
E.	PAIRING DOCUMENT REQUESTS TO INTERROGATORIES .....	91
<b>CHAPTER 7: PHYSICAL AND MENTAL EXAMS.....</b>		<b>93</b>
I.	DEFINITION AND PURPOSE.....	93
II.	RULE 35—THE FEDERAL RULES OF CIVIL PROCEDURE .....	93
III.	THE <i>HASLER</i> DECISION .....	93
IV.	HINTS ON USING RULE 35.....	95
V.	SAMPLE MOTION FOR A RULE 35 EXAM .....	96
VI.	SAMPLE MEDICAL RELEASE FORM.....	96
<b>CHAPTER 8: REQUESTS FOR ADMISSIONS.....</b>		<b>99</b>
I.	DEFINITION AND PURPOSE.....	99
II.	SAMPLES .....	100
A.	AWOL CASE .....	100
B.	FALSIFICATION/MISREPRESENTATION .....	101
C.	DISCRIMINATION .....	101
D.	INABILITY TO PERFORM/LIGHT DUTY .....	101
<b>CHAPTER 9: MOTIONS TO COMPEL DISCOVERY.....</b>		<b>103</b>
I.	DEFINITION .....	103
II.	PURPOSE.....	103
III.	JUDGE’S RESPONSIBILITIES IN DISCOVERY MATTERS .....	105
IV.	PROCEDURES .....	105
A.	STEPS TO TAKE BEFORE FILING A MOTION.....	105
B.	BOARD TREATMENT OF <i>PRO SE</i> APPELLANTS .....	106
C.	BE TIMELY IN FILING ANY MOTION AND ANY OPPOSITION TO THE MOTION .....	106
D.	WHAT A MOTION TO COMPEL MUST CONTAIN.....	108
E.	THE JUDGE’S RULING AND PRESERVING OBJECTIONS TO RULINGS.....	109
F.	WHAT IF THE JUDGE FAILS TO RULE ON A MOTION? .....	110

G.	STEPS TO TAKE AFTER A MOTION IS FILED .....	111
V.	DRAFTING A MOTION TO COMPEL.....	111
VI.	SAMPLE MOTIONS—PARTIES.....	113
A.	AGENCY TO APPELLANT—INSUFFICIENT RESPONSE; CERTIFICATE OF SERVICE .....	113
B.	APPELLANT TO AGENCY—INSUFFICIENT RESPONSE.....	116
C.	NO DISCOVERY RESPONSE RECEIVED .....	118
D.	MOTION TO COMPEL PRODUCTION OF DOCUMENTS OR THINGS.....	118
E.	MOTION TO COMPEL DEPOSITION.....	120
F.	FILING AN EXCEPTION TO A JUDGE’S RULING TO PRESERVE IT FOR PETITION FOR REVIEW .....	122
VII.	SAMPLE MOTIONS—NONPARTIES.....	123
A.	MOTION FOR A SUBPOENA FOR A NONPARTY .....	123
B.	MOTION FOR THE ISSUANCE OF <i>SUBPOENA DUCES TECUM</i> .....	124
VIII.	RESPONSE TO MOTION TO COMPEL.....	124
A.	SAMPLE—RESPONSE TO MOTION TO COMPEL—TOO BROAD, NOT RELEVANT.....	125
B.	SAMPLE—RESPONSE TO MOTION TO COMPEL—DEPOSITION OF WITNESS NOT IN CONTROL OF PARTY .....	126
C.	SAMPLE—OBJECTIONS TO MOTION TO COMPEL—ASSERTION OF PRIVILEGE .....	127

**CHAPTER 10: PROTECTION AGAINST DISCOVERY ..... 131**

I.	GENERAL GUIDANCE AND REGULATIONS.....	131
II.	WHAT TO DO IF DISCOVERY REQUESTS SEEM IMPROPER.....	132
III.	AREAS THAT MAY NOT BE PROPER FOR DISCOVERY .....	132
IV.	TYPES OF PRIVILEGES .....	133
A.	PRIVACY ACT.....	133
1.	Asserted by an Agency.....	133
2.	Asserted by Appellant .....	134
B.	GOVERNMENT PRIVILEGES .....	134
1.	Executive Privilege.....	134
2.	State Secrets Privilege .....	135
3.	Deliberative Process.....	135
4.	Criminal Proceeding Pending.....	135
5.	Law Enforcement Privilege .....	136
6.	OSC Communications to Appellant .....	136
C.	OTHER TYPES OF PRIVILEGE.....	136
1.	Attorney-Client Privilege or Work Product.....	136
2.	Attorney Work Product .....	136
3.	Attorney Client Privilege.....	137
4.	Attempts to Call an Attorney as a Witness .....	139
5.	Doctor-Patient Privilege .....	141
V.	DISCOVERY THAT IS BURDENSOME, OVERLY BROAD, UNDULY REPETITIOUS, IRRELEVANT .....	141
A.	DISCOVERY INFORMATION NOT POSSESSED.....	142
B.	INFORMATION ALREADY IN THE POSSESSION OF THE REQUESTOR.....	142
C.	HIGH LEVEL OFFICIALS.....	142
D.	PRIVILEGE AGAINST SELF-INCRIMINATION.....	142
VI.	METHODS OF RESPONDING TO REQUESTS WHICH MAY BE IMPROPER.....	143
A.	PROTECTIVE ORDERS .....	143
B.	<i>IN CAMERA</i> REVIEW.....	145
C.	MOTIONS TO QUASH OR LIMIT SUBPOENAS.....	145
D.	LIMITING DEPOSITIONS OF PARTIES.....	146
E.	REDACTION .....	146
VII.	SAMPLES .....	147
A.	OBJECTION TO DEPOSITION .....	147
B.	MOTION FOR A PROTECTIVE ORDER AND SEALING OF RECORD .....	148
C.	UNDULY BURDENSOME AND IRRELEVANT .....	149

**CHAPTER 11: SANCTIONS ..... 151**

I.	DEFINITION AND USE .....	151
II.	PROCEDURES AND GUIDANCE.....	152
III.	RANGE OF SANCTIONS .....	154
A.	SANCTION AGAINST THE AGENCY .....	155
B.	SANCTIONS AGAINST THE APPELLANT.....	156

IV.	SAMPLES .....	158
A.	BASIC FORMAT .....	159
B.	MOTION FOR SANCTIONS—NO RESPONSE RECEIVED .....	159
C.	MOTION FOR SANCTIONS—FAILURE TO APPEAR FOR DEPOSITION .....	160
D.	MOTION FOR SANCTIONS—BAD FAITH RESPONSE.....	162
E.	OBJECTION TO MOTION FOR SANCTIONS .....	165
<b>CHAPTER 12: USE OF DISCOVERED INFORMATION .....</b>		<b>167</b>
<b>APPENDIX: FEDERAL RULES OF CIVIL PROCEDURE .....</b>		<b>171</b>
<b>TABLE OF CASES.....</b>		<b>185</b>