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OCT 17 2000

CLERK, U. S. DISTRICT COURT,
EASTERN DISTRICT OF CALIFORNIA
Shubb

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN RE:)
)
ADOPTION OF NEW RULE)
REPLACING LOCAL RULE 16-271)
AND AMENDING LOCAL RULE)
16-240)
_____)

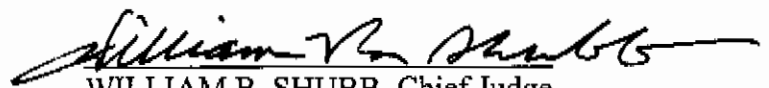
GENERAL ORDER NO. 384
(Supercedes General Order
No. 382)

The Judges of the Eastern District of California have voted to adopt the attached new rule, "Voluntary Dispute Resolution Program"; replacing Local Rule 16-271, and to adopt the amendments to Local Rule 16-240, "Status Conference". IT IS HEREBY ORDERED that the attached new Local Rule 16-271 and amendments to Local Rule 16-240 are effective October 2, 2000.

IT IS SO ORDERED.

DATED: October 17, 2000.

FOR THE COURT:



WILLIAM B. SHUBB, Chief Judge
Eastern District of California

LOCAL RULE 16-271

VOLUNTARY DISPUTE RESOLUTION PROGRAM

(a) INTRODUCTION.

(1) **Purpose.** Pursuant to the findings and directives of Congress in 28 U.S.C. §§ 651 *et seq.*, and in recognition of the economic burdens and delay in the resolution of disputes that can be imposed by full, formal litigation, this Local Rule governs the referral of certain actions to the Voluntary Dispute Resolution Program ("VDRP") at the election of parties.

It is the Court's intention that the VDRP shall allow the participants to take advantage of a wide variety of alternative dispute resolution methods. These methods may include, but are not limited to, mediation, negotiation, early neutral evaluation and settlement facilitation. The specific method or methods employed will be determined by the Neutral and the parties, and may vary from matter to matter.

(2) **Scope.** This Local Rule applies to all civil actions pending before any District Judge or Magistrate Judge in this District except that actions in the following categories are exempt from presumptive inclusion: (i) prisoner petitions and actions, including habeas corpus petitions, (ii) actions in which one of the parties is appearing *pro se*, (iii) voting rights actions, (iv) social security actions, (v) deportation actions, (vi) Freedom of Information Act actions, and (vii) actions involving the constitutionality of federal, state or local statutes or ordinances. The fact that a case falls in a category that is exempt from presumptive applicability of this Local Rule neither (1) precludes the parties to such a case from agreeing to participate in an Alternative Dispute Resolution ("ADR") process, nor (2) deprives the Court of authority to compel participation in an appropriate ADR proceeding.

(3) **Parties Retain the Option of Securing ADR Services Outside the Program Sponsored by the Court.** Nothing in this Local Rule precludes the parties from agreeing to seek ADR services outside the Court's program. ADR proceedings conducted outside this Local Rule, however, will not be subject to the provisions of this Local Rule.

(b) PROGRAM ADMINISTRATION.

(1) ADR Judge.

(A) **Appointment.** The Chief District Judge shall appoint one or more Judges or Magistrate Judges to serve as ADR Judge of this Court. When necessary or appropriate, including but not limited to instances where the designated ADR Judge is the assigned Judge for a particular action, the Chief District Judge shall appoint another Judge or Magistrate Judge to temporarily perform the duties of ADR Judge.

(B) Duties. The ADR Judge shall serve as the primary liaison between the Court and the VDRP staff, consulting with that staff on matters of policy, program design and evaluation, education, training, and administration. The ADR Judge shall rule on all disputes resulting from a party's request to be excused from appearing in person at any VDRP proceeding and shall hear and determine all complaints alleging violations of this Local Rule.

(2) VDRP Administrator. The VDRP Administrator shall be responsible for implementing, administering, overseeing, and evaluating the VDRP and procedures covered by this Local Rule. These responsibilities shall extend to educating litigants, lawyers, judges, and court staff about the VDRP and its rules. In addition, the VDRP Administrator shall ensure that appropriate systems are maintained for recruiting, screening, and training Neutrals, as well as for maintaining on an ongoing basis the Neutrals' ability to provide role-appropriate and effective services to the parties.

(3) Rules and Materials Available. The Clerk shall make pertinent rules and explanatory materials available to the parties.

(4) Parties May Request Referral to the VDRP at any Time. Notwithstanding any other provision of this Local Rule, parties, individually or in any combination, including parties to a counterclaim, cross-action or third-party action, may ask the assigned Judge, at any stage in the proceedings, to refer the case, in whole or in part, to the VDRP. The Court may enter an order of reference only if all parties voluntarily agree to the proposed reference. For the purposes of this Local Rule, the phrase "all parties" means all parties to an action or, in a complex action in which counterclaims, cross-actions or third-party actions are pending, all parties to a discrete sub-part of the complex action. The decision whether to enter an order of reference is within the Court's discretion, and includes the considerations set forth in sections (i)(3) and (4) below.

(c) REFERRAL TO VDRP.

(1) Notice of Availability. The Clerk shall provide a notice of the availability of VDRP with a citation to this Rule to all plaintiffs upon the filing of the complaint or a removal action. The notice will order the plaintiff to provide all other parties with copies of the notice at the time service is effected or, for parties already served, no more than fourteen (14) days after plaintiff receives the notice from the Court. After filing of the original complaint or a removal action, any party who causes a new party to be joined in the action shall promptly serve a copy of the notice on the new party.

(2) Authority of Assigned Judge and Magistrate Judge. As part of the status or scheduling conference or otherwise, the assigned Judge or Magistrate Judge may inform the parties of the availability of VDRP. See L.R. 16-240(a)(16). In general, actions may not be assigned to VDRP over the objection of a party. Nevertheless, when a complex action including counterclaims, cross-actions or third-party actions are pending, the Court may assign discrete sub-parts of the complex action to VDRP if all parties to the sub-part elect VDRP and the party objecting to VDRP is not a party to

the sub-part of the complaint, counterclaim, cross-action or third-party action to be assigned to VDRP.

(3) Request by the Parties. Parties may request referral to the VDRP by filing a Stipulation and Order reflecting the agreement of all parties to submit the action to VDRP pursuant to this Rule. See L.R. 5-134(a), (b), 83-141.

(d) VDRP SELECTION PROCESS.

(1) The Parties' Duty to Consider VDRP and Confer. In accordance with Local Rule 16-240(a)(16), unless otherwise ordered, in every case to which this Local Rule applies, the parties must confer about:

- (A)** whether the parties are willing to participate in the VDRP; and
- (B)** when the VDRP session, if any, should be held.

(2) The Parties' Duty to Report. The parties must report in their status conference report their shared or separate views about referral to VDRP, and when the VDRP session, if any, should occur. In these reports or statements, counsel must represent that they understand and have explained to their clients the local VDRP rules and process and that, with their assistance, their clients have carefully considered whether their case might benefit from participation in the VDRP. If all parties stipulate to using VDRP, this report or statement must be accompanied by a Stipulation and Order for VDRP Referral in conformity with section (i) below.

(e) PANELS OF NEUTRALS; SELECTION OF NEUTRALS.

(1) Panels of Neutrals. The VDRP Administrator shall ensure that a panel is maintained of persons who are trained and otherwise qualified to serve as Neutrals for the VDRP. Only persons who agree to serve on the terms set forth in this Local Rule and in any pertinent General Orders, and whose background, training, and skills satisfy the requirement that the Court establishes for the VDRP, shall be admitted to and remain as members of the panel for that process.

(2) Parties to Confer about Selection of Neutral and Confirm Neutral's Availability. Unless otherwise ordered, the parties may confer about and attempt to agree on a Neutral at the same time they confer, under subparagraph (d)(1)(A), above, for the purposes of discussing the appropriateness of the VDRP in the particular case and suggesting the time frame in which the VDRP session should be held. If authorized by the assigned Judge, the parties may nominate a Neutral who is not on the Court-approved panel. Before nominating a Neutral, the parties must have confirmed his or her availability and willingness to serve within the time frame they propose.

(3) Selection by the Parties or Randomly by the Clerk. Upon the filing of a Stipulation and Order for VDRP Referral, the assigned Judge or Magistrate Judge or the VDRP Administrator may assign a Neutral, or the VDRP Administrator may supply to the parties a list of not more than three (3) potential Neutrals, from which list the parties shall agree upon one. If the identity of the Neutral is by selection of the parties, counsel for the party first asserting jurisdiction in the Court shall report the selection of the parties, in writing, to the VDRP Administrator within fourteen (14) days following service of the list by the VDRP Administrator. If the parties are unable to agree upon a Neutral or fail to communicate their agreement to the VDRP Administrator, the VDRP Administrator may designate a Neutral drawn randomly from the panel of Neutrals to be the Neutral assigned to the action and shall notify the parties and the Neutral of that designation. The Neutral shall notify the VDRP Administrator within fourteen (14) days from notification of selection whether he or she is able and willing to serve as Neutral for the action, or whether he or she is unable or unwilling to serve as Neutral for that action. If a selected Neutral is unable or unwilling to serve, the VDRP Administrator shall select and notify another Neutral. When a Neutral has agreed to serve, the VDRP Administrator shall send notice to the Neutral and the parties of the selection.

(4) Documents Provided to the Neutral. Promptly after the Neutral is designated, the VDRP Administrator shall provide her or him with a copy of:

- (A) the Stipulation and Order for VDRP Referral;
- (B) each party's most recent pleading; and
- (C) any other order or document from the court file that sets forth requirements or stipulations related to the VDRP proceedings.

(f) DISQUALIFICATION OF NEUTRALS.

(1) Applicable Standards. No person may serve as a Neutral in a VDRP proceeding under this Local Rule in violation of:

- (A) the standards set forth in 28 U.S.C. § 455;
- (B) any applicable standard of professional responsibility or rule of professional conduct; or
- (C) any additional standards adopted by the Court.

(2) Mandatory Disqualification and Notice of Recusal. A prospective Neutral who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the VDRP Administrator a written notice of recusal. The parties may not waive a basis for disqualification that is described in 28 U.S.C. § 455(b).

(3) Disclosure and Waiver of Non-Mandatory Grounds for Disqualification. If a prospective Neutral discovers a circumstance that would not compel disqualification under rules of professional conduct or under 28 U.S.C. § 455(b), but that might be covered by 28 U.S.C. § 455(a) (impartiality might reasonably be questioned), the Neutral must promptly disclose that circumstance in writing to all counsel and the VDRP Administrator. A party may waive a possible basis for disqualification that is premised only on 28 U.S.C. § 455(a), but any such waiver must be in writing and delivered to the VDRP Administrator within fourteen (14) days of the party's receiving notice of the possible basis for disqualification. See L.R. 1-102(d).

(g) COMPENSATION OF NEUTRALS. Neutrals shall serve without compensation.

(h) IMMUNITY OF NEUTRALS. All persons serving as Neutrals under this Local Rule are deemed to be performing quasi-judicial functions and shall be immune to the extent provided by 28 U.S.C. § 655(c) and applicable authorities.

(i) STIPULATION AND ORDER FOR VDRP REFERRAL.

(1) File with Status Conference Report. If all parties stipulate to using VDRP, pursuant to section (d) of this Local Rule, counsel must file with their Status Conference Reports pursuant to Local Rule 16-240(a)(16), or with their statements they file separately to comply with this Local Rule, a Stipulation and Order for VDRP Referral.

(2) Contents of Stipulation And Order. The Stipulation and Order for VDRP Referral must:

- (A)** specify the time frame within which the parties propose the VDRP process will be completed and the date by which the Neutral must file written confirmation of that completion;
- (B)** suggest and explain any modifications or additions to the case management plan that would be advisable because of the reference to VDRP; and
- (C)** describe any pretrial activity, e.g., specified discovery or motions, that shall be completed before the VDRP session is held or that shall be stayed until the VDRP session is concluded.

(3) Protection Against Unreasonable Delay. In fixing deadlines in its Order of VDRP Referral, the Court will assure that the time allotted for completing the VDRP process is no more than is appropriate and that the referral does not cause unreasonable delay in case development, in hearing motions, or in commencing trial.

(4) Assigned Judge's Continuing Responsibility for Case Management. Neither the parties' agreement to participate in the VDRP nor the Court's referral of an

action to VDRP shall reduce the assigned Judge's power and responsibility to maintain overall management control of a case before, during, and after the pendency of the VDRP process.

(j) COMMUNICATIONS BY NEUTRAL BEFORE VDRP SESSION. Promptly after being appointed to serve in a case, the Neutral may hold a brief joint telephone conference with all counsel involved in the VDRP, or may communicate in writing with all counsel involved in the VDRP, to discuss:

- (1) fixing a convenient date and place for the VDRP session (the session shall be held as soon as reasonably possible, but no more than ninety (90) days after the Neutral is selected, unless otherwise ordered by the Court);
- (2) the type of session desired by the parties (i.e. settlement conference, evaluation or other dispute resolution process) and the procedures that will be following during the session;
- (3) who shall attend the session on behalf of each party;
- (4) what material or exhibits should be provided to the Neutral before the session or brought by the parties to the session;
- (5) any issues or matters that it would be especially helpful to have the parties address in their written pre-session statements;
- (6) any other matters that might enhance the utility of the VDRP proceeding.

(k) WRITTEN VDRP STATEMENTS.

(1) **Service Deadline.** Unless otherwise directed by the Neutral, at least seven (7) days prior to the VDRP session, each party shall submit to the Neutral and serve on all other parties a written VDRP statement not to exceed ten (10) pages. Statements shall not be filed with the Court, and the assigned Judge or Magistrate shall not have access to them.

(2) **The Content of the Statements.** Unless otherwise directed by the Neutral, each statement must:

- (A) give a brief statement of the facts;
- (B) identify the pertinent principles of law;
- (C) identify the significant legal and factual issues that are in dispute;

- (D) identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions;
- (E) identify by name and role with respect to the litigation and the litigants the person(s) in addition to counsel who will attend the session as representatives of the party filing the statement with decision-making authority; and
- (F) identify or attach particular document(s) or other physical evidence, if any, central to an understanding of the dispute and an appreciation of the merits of each party's case.

(I) ATTENDANCE AT THE VDRP SESSION

(1) In Person Attendance. All parties and their lead counsel, having authority to settle and to adjust pre-existing settlement authority if necessary, are required to attend the VDRP session in person unless excused under section (2), below. Insurer representatives also are required to attend in person, unless excused, if their agreement would be necessary to achieve a settlement.

(A) Corporations and Other Non-Governmental Entities. A corporation or other non-governmental entity satisfies this attendance requirement if represented by a person who has, to the greatest extent possible, authority to settle, and who is knowledgeable about the facts of the case and the corporation's or non-governmental entity's position in the action.

(B) Governmental Entities. A governmental entity satisfies this attendance requirement if represented by a person who has, to the greatest extent possible, authority to settle, and who is knowledgeable about the facts of the case, the governmental entity's position in the action, and the procedures and policies under which the governmental entity can enter into, finalize and perform settlements.

(2) Requests to be Relieved of Duty to Appear in Person.

(A) Duty to Confer. No one may ask the Neutral to be relieved of the duty to attend a VDRP session in person, unless that person first has conferred about the matter with the other parties who will be participating in the session.

(B) Standard. A person may be excused from attending a VDRP session in person only on a showing that personal attendance would impose a serious and unjustifiable hardship.

(3) Participation by Telephone When Appearance in Person is Excused. Every person who is excused from attending a VDRP session in person must be available to participate by telephone, unless otherwise directed by the Neutral.

(m) CONFIDENTIALITY OF VDRP PROCEEDINGS

(1) Generally Applicable Provision. Except as provided in this Local Rule, and except as otherwise required by law or as stipulated in writing by all parties and the Neutral, all communications made in connection with any VDRP proceeding under this Local Rule shall be privileged and confidential to the fullest extent provided by applicable law.

(2) Limitations on Communication with Assigned Judge. No person may disclose to the assigned Judge any communication made, position taken, or opinion formed by any party or Neutral in connection with any VDRP proceeding under this Local Rule except as otherwise:

- (A)** stipulated in writing by all parties and the Neutral;
- (B)** provided in this Local Rule; or
- (C)** ordered by the Court – after application of pertinent legal tests that are appropriately sensitive to the interests underlying VDRP confidentiality – in connection with proceeding to determine:
 - (i)** whether, a signed writing or otherwise sufficient evidence is produced that appears to constitute a binding agreement, the parties entered an enforceable settlement contract at the end of the VDRP session, or
 - (ii)** whether a person violated a legal norm, rule, court order, or ethical duty during or in connection with the VDRP session.

(3) Authorized Studies and Assessments of Program. Nothing in this Local Rule shall be construed to present any participant or Neutral in a VDRP proceeding from responding to an appropriate request for information duty made by persons authorized by the Court to monitor or evaluate any aspect of the Court's VDRP or to enforce any provision of the Local Rule. The identity of the sources of such information provided for purposes of monitoring or evaluating the VDRP shall be appropriately protected.

(n) NEUTRAL'S VDRP COMPLETION REPORT.

(1) Timing and Limited Content. By the deadline fixed in the Stipulation and Order for VDRP Referral, or, if no such deadline was fixed, no later than fourteen (14) days after the VDRP session has been concluded, the Neutral shall submit to the

VDRP Administrator (copying all parties) the Neutral's VDRP Completion Report that reports only the date on which the parties completed the VDRP process.

(2) Prohibition on Disclosure of Confidential Communications or Neutral's Opinions. Except as otherwise provided in this Local Rule, the Neutral's VDRP Completion Report must not disclose to the assigned Judge any confidential communication or any opinions or thoughts the Neutral might have about the merits of the action, about how the action should be managed, or about the character of any party's participation in the VDRP proceeding. The Neutral may communicate an alleged abuse of the VDRP process to the ADR Judge.

(o) PARTIES JOINT VDRP COMPLETION REPORT.

(1) By the deadline fixed in the Stipulation and Order for VDRP Referral, or, if no such deadline was fixed, no later than fourteen (14) days after the VDRP session has been concluded, the parties must jointly file the Parties' Joint VDRP Completion Report in which they report to the assigned Judge:

- (A)** whether the action in its entirety was resolved or settled during the VDRP session, and if so, when a request for dismissal will be filed with the Court;
- (B)** if the action in its entirety was not resolved or settled, whether any resolution, stipulation or agreement was reached on any part of the action, including but not limited to any stipulation or agreement regarding facts, issues, procedures or claims; and
- (C)** the current status of the action, including an update, as appropriate, on the subjects set forth in Local Rule 16-240.

(2) Where appropriate, a Dismissal or Stipulation and Order for dismissal of the action, pursuant to Federal Rule of Civil Procedure 41, may be filed in lieu of the Parties' Joint VDRP Completion Report if the Dismissal or Stipulation and Order for dismissal is filed within fourteen (14) days after completion of the VDRP session.

(p) VIOLATIONS OF THIS LOCAL RULE

(1) Complaints Alleging Material Violations. A complaint alleging that any person or party has materially violated this Local Rule must be presented in writing directly to the ADR Judge or a Judge who has been designated by the Chief Judge to hear the matter and to whom the underlying case is not assigned (the "designated Judge"). Copies of any such complaint must be sent to all counsel and the Neutral at the time they are presented to the ADR Judge or designated Judge. Any such complaint must be accompanied by a competent affidavit, must not be filed or lodged with the Court, and must not be presented to the Judge to whom the underlying case is assigned for litigation.

(2) Proceedings in Response to Complaint. Upon receipt of an appropriately presented and supported complaint of material violation, the ADR Judge or designated Judge shall determine whether the matter warrants further proceedings. If further proceedings are warranted, the ADR Judge or designated Judge may issue an order to show cause why sanctions should not be imposed. Any such proceeding shall be conducted on the record, and the ADR Judge or designated Judge shall have the discretion as to whether the proceedings should be under seal. The ADR Judge or designated Judge shall afford all interested persons an opportunity to be heard before deciding whether to impose or recommend a sanction.

RULE 16-240

STATUS CONFERENCE

(a) Conference. After an action has been filed, the assigned Judge or Magistrate Judge shall order the holding of one or more status conferences for the purpose of entering a pretrial scheduling order, and further status conferences may be held at any time thereafter, with or without the written request of any party. See Fed. R. Civ. P. 16. All parties receiving notice of any status conference shall appear in person or by counsel and shall be prepared to discuss such subjects as may be specified in the order noticing the conference and shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. Such subjects may include:

- (1) service of process on parties not yet served;
- (2) jurisdiction and venue;
- (3) joinder of additional parties and amendment of pleadings;
- (4) the formulation and simplification of the issues, including elimination of frivolous claims and defenses;
- (5) the disposition of pending motions, the timing of a motion for class certification, see L.R. 23-205, the appropriateness and timing of summary adjudication under Fed. R. Civ. P. 56, and other anticipated motions;
- (6) anticipated or outstanding discovery, and the control and scheduling of discovery, including deferral of discovery under Fed. R. Civ. P. 26(d), whether to hold a discovery conference under Fed. R. Civ. P. 26(f), and other orders affecting discovery pursuant to Fed. R. Civ. P. 26 and 29 through 37;
- (7) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Fed. R. Evid. 702;
- (8) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the Court on the admissibility of evidence;
- (9) further proceedings, including setting dates for further conferences, for the completion of motions and discovery and for pretrial and trial; the appropriateness of an order adopting a plan for disclosure of experts under Fed. R. Civ. P. 26(a)(2)(B), Cal.Code Civ.Proc. § 2034, or an alternative plan, the appropriateness of an order establishing a reasonable limit on the time allowed for presenting evidence;

(10) modification of the standard pretrial procedures specified by these Rules because of the relative simplicity or complexity of the action;

(11) the appropriateness of an order for a separate trial pursuant to Fed. R. Civ. P. 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(12) the appropriateness of an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Fed. R. Civ. P. 50(a) or a judgment on partial findings under Fed. R. Civ. P. 52(c);

(13) appropriateness of special procedures such as reference to a special master or Magistrate Judge or the Judicial Panel on Multidistrict Litigation, or application of the Manual for Complex Litigation;

(14) the prospects for settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or these Rules, provided, however, that counsel shall not, in the absence of a written stipulation, reveal any offers made or rejected during settlement negotiations, and counsel shall specify whether they will stipulate to the trial Judge or Magistrate Judge acting as settlement Judge and waive any disqualification by virtue thereof;

(15) whether the action is required to be heard by a District Court composed of three Judges, see L.R. 24-203, or whether the action draws in issue the constitutionality of a statute or regulation under circumstances requiring notice as set forth in L.R. 24-133;

(16) the appropriateness of alternate dispute resolution, such as this District's Voluntary Dispute Resolution Program (VDRP), or any other alternative dispute resolution procedure; and

(17) any other matters which may facilitate the just, speedy and inexpensive determination of the action.

(b) Reports. The Court may require the submission of preconference reports on some or all of the foregoing subjects. See also L. R. 16-271(d)(2).

(c) Exceptions to Mandatory Scheduling Order Requirement. The following categories of civil actions are excepted from the mandatory scheduling order requirement pursuant to Fed. R. Civ. P. 16(b):

(1) actions brought solely under 42 U.S.C. §§ 405(g), 1383(c)(3), and 1395ff to review a final decision of the Secretary of Health and Human Services;

(2) actions brought to enforce Internal Revenue Service summonses filed pursuant to 26 U.S.C. §§ 7402(b) and 7604(a), and actions to quash administrative summonses filed pursuant to 26 U.S.C. § 7609(b)(2);

(3) actions for writs of entry in connection with the enforcement of Internal Revenue Service tax liens;

(4) actions to enforce collection on promissory notes involving federally insured loans and direct federal loans in which the prayer for relief is less than \$25,000;

(5) actions to enforce cease and desist orders issued by the National Labor Relations Board, 29 U.S.C. § 301;

(6) actions to enforce arbitration awards;

(7) actions under 46 U.S.C. §§ 2302, 4311(d) and 12309(c); and

(8) petitions for writs or actions seeking relief under the Federal Civil Rights Acts, by incarcerated persons acting in propria persona.