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9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**
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12 RUBEN HERRERA,

13 Plaintiff,

14 v.

15 CIUMMO AND ASSOCIATES; and
16 ALLICIA BORREGO,

17 Defendants.
18
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1:14-cv-01492-AWI-GSA

**FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL
WITHOUT LEAVE TO AMEND**

(Doc. No. 1)

20 **INTRODUCTION**

21 Plaintiff Ruben Herrera (“Plaintiff”), appearing pro se, filed the instant complaint on
22 September 22, 2014 against the law firm Ciummo and Associates and Allicia Borrego, one of the
23 firm’s attorneys. (Doc. No. 1.) The Complaint alleges a single claim under 42 U.S.C. § 1983. *Id.*
24 The Court has screened the Complaint and RECOMMENDS that the Complaint be DISMISSED
25 WITHOUT LEAVE TO AMEND.

26 **DISCUSSION**

27 **A. Legal Standard**

28 Under 28 U.S.C. § 1915(e)(2), the Court must conduct an initial review of the Complaint

1 to determine whether it “state[s] a claim on which relief may be granted,” is “frivolous or
2 malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If
3 the Court determines that the Complaint fails to state a claim, it must be dismissed. *Id.* Leave to
4 amend may be granted to the extent that the deficiencies of the Complaint can be cured by
5 amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

6 A complaint must contain “a short and plain statement of the claim showing that the
7 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
8 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
9 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
10 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff must set
11 forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face.’”
12 *Ashcroft v. Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 555). While factual allegations
13 are accepted as true, legal conclusion are not. *Id.* at 678.

14 In determining whether a complaint states an actionable claim, the Court must accept the
15 allegations in the complaint as true, *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738,
16 740 (1976), construe pro se pleadings liberally in the light most favorable to the Plaintiff, *Resnick*
17 *v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s favor.
18 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of pro se plaintiffs “must be held to
19 less stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338,
20 342 (9th Cir. 2010) (holding that pro se complaints should continue to be liberally construed after
21 *Iqbal*).

22 Despite this, however, a complaint must be dismissed where “none of the legal points are
23 arguable on their merits.” *Goland v. United States*, 903 F.2d 1247, 1258 (9th Cir. 1990)

24 **B. Plaintiff’s Allegations**

25 Plaintiff alleges that Defendants were appointed by Fresno County Superior Court to
26 represent him in a commitment hearing under the Sexually Violent Predator Act, codified in
27 California Welfare and Institutions Code § 6600 *et seq.* He further claims that he was treated with
28 “obvious contempt” by Defendant Borrego and that Defendants lacked the necessary experience

1 to represent him in this matter. (Doc. No. 1 at 5.) More specifically, he notes that Defendant
2 Borrego met with him only once in person to discuss case strategy and that he was treated curtly
3 when he contacted Defendants' office to complain about Defendant Borrego.¹ *Id.*

4 Plaintiff notes that he previously filed a motion requesting the appointment of new
5 counsel, but that his motion was "denied without opinion." *Id.* It is unclear from the face of the
6 Complaint whether Defendants' representation of Plaintiff has concluded or what the outcome of
7 his case (if any, at this point) was.

8 **C. Analysis**

9 Even construing all of Plaintiff's allegations in a light most favorable to Plaintiff, the
10 Complaint cannot establish a claim under 42 U.S.C. § 1983 as a matter of settled law. To state a
11 claim under § 1983, a plaintiff "must allege a violation of a right secured by the Constitution and
12 laws of the United States, and *must show that the alleged deprivation was committed by a*
13 *person acting under color of state law.*" *West v. Atkins*, 487 U.S. 42, 48 (1988) (emphasis
14 added). Plaintiff asserts that he was denied due process and equal protection by Defendants, his
15 court-appointed defense attorneys, who were acting under color of state law. It is well-settled,
16 however, that attorneys do "not act under color of state law when performing a lawyer's
17 traditional functions as counsel to a defendant in a criminal proceeding." *Polk County v. Dodson*,
18 454 U.S. 312, 325 (1981) (upholding dismissal of a § 1983 claim by a pro se prisoner against a
19 public defender that alleged that she failed to adequately represent him in criminal proceedings).
20 Thus, none of Plaintiff's legal claims are arguable on their merits and they do not state a claim for
21 which relief can be granted.

22 Nor can any amendment cure this deficiency. The problem with the Complaint is not that
23 Plaintiff has simply failed *to allege* that Defendants were acting under color of state law; the
24 problem is that, as a matter of settled law, Defendants *could not have been* acting under color of
25 state law in representing Plaintiff. Consequently, there is no way to remedy the Complaint's
26 insufficiency by providing leave to amend.

27 ¹ It is unclear from the Complaint precisely which of Defendant Borrego's strategic decisions Plaintiff objects to—
28 although he claims that he provided Defendant with a packet "to be submitted to the jury as evidence," he later
complains that Defendant set "his case for trial." (Doc. No. 1 at 5.)

