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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

R. WAYNE JOHNSON,
Plaintiff,
v.
WILLIAM L. SCHMIDT,
Defendant.

Case No. 1:17-cv-01447-LJO-EPG

ORDER FOR PLAINTIFF TO:

- (1) FILE A FIRST AMENDED COMPLAINT; OR,**
- (2) NOTIFY THE COURT THAT HE WISHES TO STAND ON HIS COMPLAINT, SUBJECT TO FINDINGS AND RECOMMENDATIONS TO THE DISTRICT JUDGE CONSISTENT WITH THIS ORDER**

(ECF No. 1)

THIRTY (30) DAY DEADLINE

Plaintiff R. Wayne Johnson, appearing *pro se* and *in forma pauperis*, is a prisoner in the custody of Texas Department of Criminal Justice. On October 26, 2017, Plaintiff commenced this action against William L. Schmidt, Esq. alleging violation of Texas Government Code § 82.0651(b)-(c). (ECF No. 1).

The Court has screened the complaint and has determined that Plaintiff has failed to state any cognizable claims. The Court will grant Plaintiff leave to amend his complaint to state a claim. In the alternative, Plaintiff may notify the Court that he wishes to stand on the current complaint, in which case the Court will issue findings and recommendations to the district judge

1 recommending dismissal of this action consistent with this order.

2 **I. LEGAL STANDARD**

3 Under 28 U.S.C. § 1915(e)(2), the Court must conduct a review of a *pro se* complaint to
4 determine whether it “state[s] a claim on which relief may be granted,” is “frivolous or
5 malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If
6 the Court determines that the complaint fails to state a claim, it must be dismissed. *Id.* An action
7 is frivolous if it is “of little weight or importance: having no basis in law or fact” and malicious if
8 it was filed with the “intention or desire to harm another.” *Andrews v. King*, 398 F.3d 1113, 1121
9 (9th Cir. 2005). Leave to amend may be granted to the extent that the deficiencies of the
10 complaint can be cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

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

19 In determining whether a complaint states an actionable claim, the Court must accept the
20 allegations in the complaint as true, *Hosp. Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S. 738, 740
21 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff, *Resnick v.*
22 *Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s favor. *Jenkins*
23 *v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* plaintiffs “must be held to less
24 stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342
25 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally construed after
26 *Iqbal*).

27 **II. PLAINTIFF’S ALLEGATIONS**

28 Plaintiff’s allegations are difficult to understand. From what the court can glean, Plaintiff

1 alleges that Defendant, an attorney practicing in Fresno, California, solicited employment in
2 Prison Legal News in violation of Texas Government Code § 82.0651(b)-(c). Plaintiff attaches to
3 the Complaint a copy of the advertisement from the Prison Legal News.

4 **III. DISCUSSION**

5 Texas Government Code § 82.0651 provides, in pertinent part:

6 a) A client may bring an action to void a contract for legal services
7 that was procured as a result of conduct violating Section 38.12(a)
8 or (b), Penal Code, or Rule 7.03 of the Texas Disciplinary Rules of
9 Professional Conduct of the State Bar of Texas, regarding barratry
10 by attorneys or other persons, and to recover any amount that may
11 be awarded under Subsection (b). A client who enters into a
12 contract described by this subsection may bring an action to recover
13 any amount that may be awarded under Subsection (b) even if the
14 contract is voided voluntarily.

15 (b) A client who prevails in an action under Subsection (a) shall
16 recover from any person who committed barratry:

17 (1) all fees and expenses paid to that person under the contract;

18 (2) the balance of any fees and expenses paid to any other person
19 under the contract, after deducting fees and expenses awarded
20 based on a quantum meruit theory as provided by Section
21 82.065(c);

22 (3) actual damages caused by the prohibited conduct;

23 (4) a penalty in the amount of \$10,000; and

24 (5) reasonable and necessary attorney's fees.

25 (c) A person who was solicited by conduct violating Section
26 38.12(a) or (b), Penal Code, or Rule 7.03 of the Texas Disciplinary
27 Rules of Professional Conduct of the State Bar of Texas, regarding
28 barratry by attorneys or other persons, but who did not enter into a
contract as a result of that conduct, may file a civil action against
any person who committed barratry.

In turn, Tex. Penal Code Ann. § 38.12 (West) provides, in pertinent part:

(a) A person commits an offense if, with intent to obtain an
economic benefit the person:

(1) knowingly institutes a suit or claim that the person has not been
authorized to pursue;

(2) solicits employment, either in person or by telephone, for
himself or for another;

(3) pays, gives, or advances or offers to pay, give, or advance to

1 prospective client money or anything of value to obtain
2 employment as a professional from the prospective client;

3 (4) pays or gives or offers to pay or give person money or anything
4 of value to solicit employment;

5 (5) pays or gives or offers to pay or give a family member of a
6 prospective client money or anything of value to solicit
7 employment; or

8 (6) accepts or agrees to accept money or anything of value to solicit
9 employment.

10 Similarly, Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct of the State
11 Bar of Texas provides, relevant part:

12 (a) A lawyer shall not by in-person contact, or by regulated
13 telephone or other electronic contact as defined in paragraph (f)
14 seek professional employment concerning a matter arising out of a
15 particular occurrence or event, or series of occurrences or events,
16 from a prospective client or nonclient who has not sought the
17 lawyer's advice regarding employment or with whom the lawyer
18 has no family or past or present attorney-client relationship when a
19 significant motive for the lawyer's doing so is the lawyer's
20 pecuniary gain. . . .

21 (f) As used in paragraph (a), "regulated telephone or other
22 electronic contact" means any electronic communication initiated
23 by a lawyer or by any person acting on behalf of a lawyer or law
24 firm that will result in the person contacted communicating in a
25 live, interactive manner with any other person by telephone or other
26 electronic means. For purposes of this Rule a website for a lawyer
27 or law firm is not considered a communication initiated by or on
28 behalf of that lawyer or firm.

19 In essence, relevant to Plaintiff's claim, Texas Gov't Code § 82.0651 prohibits an attorney
20 from soliciting employment in person or by telephone. Plaintiff alleges that Defendant solicited
21 employment in Prison Legal News. Tex. Gov't Code § 82.0651 does not prohibit this conduct.
22 Plaintiff alleges no other allegations that could fairly be construed to violate § 82.0651.

23 Thus, Plaintiff fails to state any cognizable claim for relief.¹

24 **IV. CONCLUSION AND ORDER**

25 The Court finds that the Complaint fails to state any cognizable claims upon which relief

26 _____
27 ¹ Additionally, Plaintiff seeks damages in the amount of \$100,000. Tex. Gov't Code § 82.0651 provides for recovery
28 of actual damages caused by any prohibited conduct and a penalty in the amount of \$10,000. Plaintiff's allegations,
taken as true, would not meet the \$75, 000 amount in controversy threshold to invoke the Court's subject matter
jurisdiction. *See* 28 U.S. Code § 1332.

1 may be granted. Under Rule 15(a) of the Federal Rules of Civil Procedure, “leave to amend shall
2 be freely given when justice so requires.” Accordingly, the Court will provide Plaintiff with time
3 to file an amended complaint curing the deficiencies identified above. *Lopez v. Smith*, 203 F.3d
4 1122, 1126-30 (9th Cir. 2000). Plaintiff is granted leave to file an amended complaint within
5 thirty days, if he chooses to do so.

6 Plaintiff should note that although he has been given the opportunity to amend, it is not for
7 the purpose of changing the nature of this suit or adding unrelated claims. *George v. Smith*, 507
8 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

9 Plaintiff is advised that an amended complaint supersedes the original complaint, *Lacey v.*
10 *Maricopa County*, 693 F.3d. 896, 907 n.1 (9th Cir. 2012) (*en banc*), and must be complete in
11 itself without reference to the prior or superseded pleading. Local Rule 220. Therefore, in an
12 amended complaint, as in an original complaint, each claim must be sufficiently plead. Plaintiff
13 should also set forth sufficient facts to establish that the Court has subject matter jurisdiction over
14 his claims in accordance with 28 U.S.C. § 1332 or any other law. The amended complaint should
15 be clearly and boldly titled “First Amended Complaint,” refer to the appropriate case number, and
16 be an original signed under penalty of perjury.

17 Plaintiff may also choose to stand on his original complaint, in which case the Court will
18 issue findings and recommendations to the assigned district court judge recommending that the
19 case be dismissed for failure to state a claim.

20 Based on the foregoing, it is **HEREBY ORDERED** that:

- 21 1. Plaintiff may file a First Amended Complaint curing the deficiencies identified by
22 the Court in this order if he believes additional true factual allegations would state
23 a claim, within **thirty (30) days** from the date of service of this order;
- 24 2. If Plaintiff chooses to file an amended complaint, Plaintiff shall caption the
25 amended complaint “First Amended Complaint” and refer to the case number
26 1:17-cv-01447-LJO-EPG;
- 27 3. Alternatively, within **thirty (30) days** from the date of service of this order,
28 Plaintiff may notify the Court that he wishes to stand on his original complaint,

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subject to this Court issuing findings and recommendations to the assigned district court judge recommending that the case be dismissed for failure to state a claim; and

4. If Plaintiff fails to file an amended complaint or notify the Court that he wishes to stand on this complaint within thirty (30) days from the date of service of this order, the Court will issue findings and recommendations to the assigned district court judge recommending that Plaintiff's case be dismissed for failure to state a claim and failure to comply with a Court order.

IT IS SO ORDERED.

Dated: January 30, 2018

/s/ Eric P. Shroy
UNITED STATES MAGISTRATE JUDGE