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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLA C. BUCCI,

Plaintiff,

No. CIV S-08-2351 EFB P

vs.

PATRICK CLANCY,

Defendant.

ORDER

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He seeks leave to proceed *in forma pauperis*. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1) and is before the undersigned pursuant to plaintiff’s consent. *See* 28 U.S.C. § 636; *see also* E.D. Cal. Local Rules, Appx. A, at (k)(1)-(2).

Plaintiff’s declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2).

Pursuant to 28 U.S.C. § 1915(b)(1), plaintiff must pay the \$350 filing fee. *See* 28 U.S.C. § 1914(a). Plaintiff must make monthly payments of 20 percent of the preceding month’s income credited to his trust account. 28 U.S.C. § 1915(b)(2). The agency having custody of plaintiff shall forward payments from plaintiff’s account to the Clerk of the Court each time the

1 amount in the account exceeds \$10 until the filing fee is paid.

2 The court has reviewed plaintiff's complaint pursuant to 28 U.S.C. § 1915A and finds it
3 does not state a cognizable claim against any defendant.

4 To state a claim under 42 U.S.C. § 1983, plaintiff must allege an identified defendant
5 deprived plaintiff of a right secured to him by the Constitution or laws of the United States while
6 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48-49 (1988).

7 In his complaint, plaintiff alleges that on January 7, 2007, he hired a private defense
8 attorney, who failed to adequately represent him over a ten month period. Plaintiff alleges that
9 this violated his due process rights.

10 Plaintiff's allegations do not state a cognizable claim under § 1983. They simply fail to
11 meet the "state action" requirement of the statute. He may or may not have state court remedies
12 available in an action for professional negligence, though the court expresses no opinion on the
13 viability or merits of such an action.

14 Attorneys in private practice are not state actors, and therefore do not act under color of
15 state law, an essential element of a § 1983 claim. *See Simmons v. Sacramento County Superior*
16 *Court*, 318 F.3d 1156, 1161 (9th Cir. 2003); *see also Polk County v. Dodson*, 454 U.S. 312,
17 318-19 (1981) (public defenders do not act under color of state law for purposes of § 1983 when
18 performing a lawyer's traditional functions). Additionally, plaintiff's claims for legal
19 malpractice do not come within the jurisdiction of the federal courts. *Franklin v. Oregon*, 662
20 F.2d 1337, 1344 (9th Cir. 1981). Therefore, plaintiff's complaint must be dismissed.

21 Accordingly, the court hereby ORDERS that:

- 22 1. Plaintiff's request to proceed *in forma pauperis* is granted;
23 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in
24 accordance with the notice to the Director of the California Department of Corrections and
25 Rehabilitation filed concurrently herewith; and
26

1 3. This action be dismissed with prejudice for plaintiff's failure to state a claim. *See* 28
2 U.S.C. § 1915A; *see also Lopez v. Smith*, 203 F.3d 1122, 1128 (9th Cir. 2000) (indigent prisoner
3 proceeding without counsel must be given leave to file amended complaint unless the court can
4 rule out any possibility that the plaintiff could state a claim).

5 DATED: April 14, 2009.

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7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
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