



1 Review of defendants' original motion and exhibits thereto demonstrate that plaintiff  
2 expressly refused to participate in his April 19, 2018 deposition without legal representation. See  
3 ECF No. 48-1 at 12-8 (transcript of attempted deposition). Although plaintiff appeared at the  
4 time and place scheduled for his deposition, he refused to be sworn in by the court reporter or  
5 answer any substantive questions solely because he was not represented by counsel. Id. at 17.

6 Plaintiff was appointed counsel in this action for the limited purpose of drafting the  
7 operative Third Amended Complaint. See ECF Nos. 25-7. Appointment of counsel was  
8 terminated August 22, 2017, at the request of counsel, ECF No. 27, and plaintiff did not request  
9 further appointment. As the court then explained, district courts do not have authority to *require*  
10 attorneys to represent indigent prisoners in Section 1983 cases. Mallard v. United States District  
11 Court, 490 U.S. 296, 298 (1989). A district court may only request the *voluntary* assistance of  
12 counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.  
13 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). Only a limited number of  
14 attorneys is available to voluntarily represent indigent prisoners. Therefore, appointment of  
15 counsel is appropriate only under "exceptional circumstances" that include a plaintiff's likelihood  
16 of success on the merits of his claims together with an inability to articulate his claims pro se.  
17 Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009). Circumstances common to most prisoners,  
18 such as lack of legal education and limited law library access, do not establish exceptional  
19 circumstances. Id. When plaintiff's previously appointed counsel was terminated, the court  
20 found that plaintiff had not met his burden of demonstrating exceptional circumstances  
21 warranting the appointment of new counsel. See ECF No. 27. The same conclusion continues to  
22 apply and the court will not, under the present circumstances, consider a new motion for  
23 appointment.

24 Defendants' motion is made pursuant to Rule 37, Federal Rules of Civil Procedure.  
25 Under Rule 37(a)(3)(C), a party may move to compel another party to answer questions at his  
26 deposition; if the motion is granted, the movant may be entitled to reimbursement of his  
27 reasonable expenses, see Rule 37(a)(5)(A). Similarly, under Rule 37(d), a party who fails to  
28 attend his deposition may be required to pay the movant's reasonable expenses. A broader range

1 of sanctions, including dismissal of an action, is authorized under Rule 37(b) if a party fails to  
2 comply with a court order. See Fed. R. Civ. P. 37(b)(1) (failure to abide by court order directing  
3 cooperation with deposition may be treated as contempt of court); Fed. R. Civ. P. 37(b)(2)(A)  
4 (range of sanctions include dismissal of action in whole or part).

5 Having commenced this action, plaintiff is required to fully participate in all stages of the  
6 proceedings. Defendants aver that the only outstanding discovery is plaintiff's deposition. The  
7 extended discovery deadline is February 1, 2019. See ECF No. 56. It would be fundamentally  
8 unfair and prejudicial to defendants to permit plaintiff to continue to pursue this action without  
9 requiring his attendance and cooperation at his deposition.

10 For these reasons, defendants' motion to compel plaintiff's deposition will be granted,  
11 subject to proper notice at least fourteen days in advance.<sup>1</sup> Plaintiff is directed to appear at his  
12 rescheduled deposition and to fully cooperate in answering all questions to the best of his ability.  
13 Should plaintiff fail to so cooperate, the undersigned will, upon proper motion, recommend to the  
14 district judge this action be dismissed due to plaintiff's failure to prosecute and failure to abide to  
15 the rules and orders of this court. See Fed. R. Civ. P. 11, 41(b); see also Local Rule 110.

16 Defendants' motion for monetary sanctions (\$587.50), reflecting reimbursement of  
17 defendants' expenses in convening plaintiff's first attempted deposition, will be denied without  
18 prejudice. Although defendants invested substantial time and expense in scheduling plaintiff's  
19 initial deposition, obtaining a court reporter, and pursuing a motion to compel in this court,  
20 awarding monetary sanctions at this time would not further the interests of justice due to  
21 plaintiff's in forma pauperis status. However, if plaintiff fails to participate in his newly  
22 scheduled deposition, the court may reconsider this matter.

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26 <sup>1</sup> This court's discovery and scheduling orders provide: "Pursuant to Federal Rule of Civil  
27 Procedure 30(a), defendants may depose, either in person or by videoconference, plaintiff and any  
28 other witness confined in a prison upon condition that, at least fourteen days before such a  
deposition, defendants serve all parties with the notice required by Fed. R. Civ. P. 30(b)(1)." See  
ECF No. 38 at 5; ECF No. 56 at 5.

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Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' request, ECF No. 57, is construed as a renewed motion to compel plaintiff's deposition and for sanctions; the Clerk of Court shall so designate on the docket.
2. Defendants' motion to compel plaintiff's deposition is GRANTED; defendants shall inform plaintiff of his rescheduled deposition at least fourteen (14) days in advance.
3. Defendants' motion for monetary sanctions is DENIED without prejudice.
4. Failure of plaintiff to appear at his deposition and fully cooperate in answering defendants' questions will, upon proper motion, result in a recommendation this action be dismissed due to plaintiff's failure to prosecute and failure to abide by the rules and orders of this court. See Fed. R. Civ. P. 11, 41(b); Local Rule 110.

SO ORDERED.

DATED: October 12, 2018

  
ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE