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**United States District Court**  
For the Northern District of California

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

JAMES RIVERA,

No. C 09-5863 WHA (PR)

Plaintiff,

**ORDER OF DISMISSAL**

v.

GARY M. DIAMOND,

Defendant.

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**INTRODUCTION**

Plaintiff, a California prisoner proceeding pro se, has filed a civil rights complaint under 42 U.S.C. 1983 against a former attorney who represented him in federal court.

**ANALYSIS**

**A. STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the

1 claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the  
2 statement need only "give the defendant fair notice of what the . . . claim is and the grounds  
3 upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted).  
4 Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a  
5 plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than  
6 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
7 do. . . . Factual allegations must be enough to raise a right to relief above the speculative  
8 level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A  
9 complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.*  
10 at 1986-87.

11 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
12 (1) that a right secured by the Constitution or laws of the United States was violated, and (2)  
13 that the alleged deprivation was committed by a person acting under the color of state law.  
14 *West v. Atkins*, 487 U.S. 42, 48 (1988).

15 **B. LEGAL CLAIMS**

16 Plaintiff claims that defendant, an attorney who represented him in a habeas action in  
17 federal court, committed legal malpractice.

18 Attorneys in private practice are not state actors. *Simmons v. Sacramento County*  
19 *Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003); *see also Kimes v. Stone*, 84 F.3d 1121,  
20 1126 (9th Cir. 1996) (attorneys are private actors). Services performed by a private attorney in  
21 connection with a lawsuit do not constitute action under color of state law. *Franklin v. Oregon*,  
22 662 F.2d 1337, 1345 (9th Cir. 1981); *Briley v. California*, 564 F.2d 849, 855-56 (9th Cir. 1977).  
23 Similarly, appointed counsel does not act under color of state law in representing a client in  
24 court. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981); *accord Vermont v. Brillon*, 129 S.  
25 Ct. 1283, 1291-92 (2009). In addition, claims for legal malpractice do not come within the  
26 jurisdiction of the federal courts. *Franklin*, 662 F.2d at 1344.

27 It is not clear from the pleadings, whether defendant was a privately retained attorney,  
28 or one appointed by the court. In either event, plaintiff's legal malpractice claim against him is

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not cognizable under 42 U.S.C. 1983.

**CONCLUSION**

For the foregoing reasons, the complaint is **DISMISSED**. The clerk shall close the file.

**IT IS SO ORDERED.**

Dated: December 28, 2009.



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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE