

# The Professional Liability Law Blog

BRINGING PROFESSIONAL LIABILITY INFORMATION TO CALIFORNIA ATTORNEYS,  
INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



## [Claim Against Attorney Time-Barred Under Statute of Limitations for Fraud](#)

Monday, January 31st, 2011

In a malpractice action against his attorney, the plaintiff appealed from an order by which the trial court sustained a demurrer to his claim on the ground that the legal malpractice statute of limitation had expired. *Altwiji v. Behjatnia*, California Court of Appeal, Second Appellate District, No. B209914 (filed Jan. 13, 2011; unpublished). The plaintiff alleged that shortly before trial in the underlying medical malpractice action, his attorney refused to perform according to their engagement agreement. Rather, plaintiff alleged the attorney demanded greater compensation and, when plaintiff refused, the attorney promised that if the plaintiff would sign a substitution of attorney form to act in pro per, the attorney would continue to advise and guide plaintiff. The plaintiff signed the form, the attorney allegedly failed to help him, and the plaintiff lost his medical malpractice action. He then filed suit against his attorney for legal malpractice.

The plaintiff alleged legal malpractice and the trial court sustained the demurrer based on the legal malpractice statute of limitation. The plaintiff claimed that the legal malpractice statute of limitation had been tolled while he was physically unable to file the action due to various accidents and medical problems. Plaintiff relied upon the portion of the malpractice statute which tolls actions while the plaintiff is “under a legal or physical disability which restricts the plaintiff’s ability to commence legal action.” (Cal. Code Civ. Proc. 340.6 (a)(4))

However, the Court of Appeal found that the action was one for promissory fraud. The court noted that the legal malpractice statute of limitation expressly excludes claims for actual fraud. The court further noted that the statute of limitations for fraud, found in Code of Civil Procedure Section 338(d), has no tolling provision for physical disability. Further, although the statute for fraud was tolled until the plaintiff knew or should have known of the attorney’s wrongdoing/fraud, that occurred at the very latest when the plaintiff lost the underlying action. Since the action was one for promissory fraud, and since the plaintiff did not file his complaint within three years of the latest date on which he was on notice of the fraud, the action was time-barred. Likewise, the court held that the plaintiff’s appeal in the underlying action did not serve to toll the time for him to file the fraud action.