FOCUS (FORUM & FOCUS) • Jan. 15, 2009

Sex, Lies and Remittiturs

FOCUS COLUMN

By Benjamin G. Shatz

Sometimes lawyers do bad things. Very bad things. Like lie to their clients. And sometimes the consequences to those deceived clients can be very bad - like spending years in prison. Typically a client's only remedy is a malpractice suit against the lawyer. But what about reviving an appeal that had been dismissed over a decade ago? Doesn't seem likely, does it? But consider the 6th District's recent opinion titled *In re Grunau*, __ Cal.App.4th __ No. H015871 (6th Dist. Dec. 30, 2008), a saga of sex, lies and recalled remittiturs.

Nearly 13 years ago, a jury convicted Mark Grunau of sexually abusing a minor. This being his "third strike," he was sentenced to 25 years to life in prison. His father retained a lawyer to appeal, and a notice of appeal was filed in 1996. When that lawyer failed to file an opening brief, however, the appellate court dismissed the appeal and terminated the case by issuing its remittitur in 1997. Ordinarily, that would be the end of the story. But there is much more to tell here. Before going further, though, we pause at this point to explore what a "remittitur" is.

Remittitur is a word with several meanings in the law, all related to the concept of re-mitting, which is to say sending something back. One meaning is simply to pay back money owed on an outstanding bill, as in "remitting" overdue funds. See also Code of Civil Procedure Section 666 (paying back money in excess of a court's jurisdiction). Another similar meaning is the process whereby a judge may conditionally grant a new trial unless the winning party agrees to "remit" the excessive portion of a jury verdict. Code of Civil Procedure Section 662.5(b). That use of the term remittitur (as the opposite of addittur) is trial practice parlance. Remittitur has yet another definition in appellate argot.

Litigation begins and ends in a trial court, ascending and descending the hierarchy of tribunals through specific jurisdictionally transitioning documents. A case begins with the filing of a complaint or petition in a trial court, and if an appeal is taken, the case works its way "up" the ladder of appellate courts. When an appellate court finishes its work, it sends the case back "down" to the court where it came from. Just as a notice of appeal is the jurisdictional document that moves a case "up" - that is, it divests the trial court of jurisdiction and vests the appellate court with jurisdiction - the remittitur is the document that returns a case to its court of origin. When the remittitur issues, the reviewing court loses jurisdiction and the lower court is revested with jurisdiction. See *Noel v. Smith*, 2 Cal.App. 158 (1905), which notes the history of the remittitur vis-Ã -vis appeals from the King's Bench to the House of Lords that were decided in judgments entered with the recital that the matter was to be sent back, "remittitur," to be carried into effect by the King's Bench.

Code of Civil Procedure Section 43 explains that an appellate court's judgment "shall be remitted to the court from which the appeal was taken." Thus, the remittitur notifies the originating court that the judgment of the higher court is final. The actual remittitur document is typically a simple, one-page piece of paper sent by an appellate court clerk to the clerk of the court below and also to the parties. See Code of Civil Procedure Section 912, which explains that when an appellate court's decision is final, "the clerk of the court shall remit to the trial court a certified copy of the judgment or order of the reviewing court and of its opinion, if any." See also California Rules of Court 8.272 and 8.540. In federal practice this document is called the "mandate." Federal Rule of Appellate Procedure 41.

Although the remittitur is supposed to be the end of a matter with an appellate court, the court retains "some vestige of jurisdiction" to "recall" the remittitur and thus take further action in a case under unusual circumstances. *In re Martin*, 58 Cal.2d 133 (1962); Rule 8.272(c)(2); Rule 8.540(c)(2). Although the rules provide for a recall on "good cause," recalling a remittitur is an extraordinary and rare remedy. *Haydel v. Morton*, 28 Cal.App.2d 383 (1938). A recall may arise to correct a clerk's failure to enter the proper judgment or correct other clerical errors. *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal.3d 158 (1982); *Sacramento & San Joaquin Drainage District v. Reed*, 217 Cal.App.2d 611 (1963), in which a clerk mistakenly awarded costs to the wrong party; see Rule 8.276(b)(2), which states that a remittitur may be recalled to correct a cost award no later than 30 days after its issuance.

A recall also may occur if a judgment is based on fraud that results in an unjust decision. The *Martin* case, for example, determined that despite the "general rule" that "an appellate court loses all control and jurisdiction over a cause after remittitur has been issued, a mistake or improvident act which results in prejudicial error or miscarriage of justice may nevertheless be corrected upon a recall of remittitur". The theory behind such a recall is that the appellate court never really lost jurisdiction when it issued its remittitur, because a judgment secured by fraud is a nullity. *Isenberg v. Sherman*, 214 Cal. 722 (1932). In criminal cases, when an error is so significant that a defendant would deserve habeas corpus relief, then a recall of the remittitur is "adjunct to the writ." *People v. Mutch*, 4 Cal.3d 389 (1971), found that generally, a legal error does not authorize recalling the remittitur; but if the error "is of such dimensions as to entitle the defendant to a writ of habeas corpus ... the remedy of recall of the remittitur may then be deemed an adjunct to the writ".

To return to our story, Grunau was serving time for sexual assault of a minor, and his appeal had been dismissed and the remittitur issued in 1997. Grunau, however, did not know that his appeal had been dismissed. His lawyer had been telling him - and telling Grunau's father, who was interested in following his son's case - that the appeal was still pending. This went on for over a decade, with the lawyer repeatedly giving "soothing assurances" that the appeal was proceeding, as part of a campaign of "plausible deceptions." When he could be found, that is. In truth, the lawyer had been suspended from the bar in 2000 and resigned in 2001 with charges pending, and Grunau had to track him down by finding someone who knew the lawyer's mother.

In 2004, Grunau contacted the court of appeal and discovered that his appeal had been dismissed seven years earlier. Further inquiry lead him to the 6th District Appellate Program, through which he obtained new counsel. Thus, in 2005, Grunau moved to recall the 1997 remittitur premised on the neglect and misconduct of his appellate attorney. The Court of Appeal denied the motion based on the inordinate lapse of time. A petition to the California Supreme Court, however, resulted in an order to show cause before the Court of Appeal. The Court of Appeal assigned a special master to make findings of fact, which confirmed the chronicle recounted above.

In a published opinion, the Court of Appeal narrates Grunau's tale and provides an overview of the black letter law on remittiturs and their recall. In particular, the opinion explains how in criminal cases, ineffective assistance of counsel may provide grounds for recalling a remittitur. In contrast to civil cases - where attorney negligence is remediable by a malpractice suit - "in a criminal case, a botched appeal may result in punishment for a crime of which the defendant was convicted in error." And the opposing party, i.e., the state, is effectively estopped from objecting to a court providing relief because "it has in a sense warranted the attorney's competence by issuing him a license." Thus, in January 2009, the Court of Appeal canceled the remittitur issued in April 1997. Grunau's opening brief in the appeal he should have had over a decade ago is now due in February 2009.

Grunau establishes that where an attorney breaches the fundamental duty of trust to a client by engaging in a long-term deception to cover attorney misconduct, and where the victim cannot be faulted for the loss of his appellate rights, and acts with reasonable diligence, relief may be granted. [PULLQUOTE] Somewhat similar situations have happened before. *In Martin*, the defendant sought assistance within months after the remittitur and moved for a recall of the remittitur within a year of the dismissal. In *In re Serrano*, 10 Cal.4th 447 (1995), the defendant moved to recall the remittitur less than 11 months after dismissal of the appeal. Grunau's case, however, presented the court with a yarn of significantly greater delay.

In the words of the court, "[f]ew laypersons understand in more than a nebulous way the relationship

between trial and appellate courts," and attempting "to penetrate the esoteric world of appellate procedure," can be a daunting task. The same can be true of many lawyers who lack familiarity with appellate practice. For those unfamiliar with appellate remittiturs, *Grunau* provides a vivid introduction to jurisdictional concepts and a document so pedestrian and anti-climactic that many lawyers hardly know it exists. For those aware of remittiturs but who thought them the ultimate termination of an appeal, *Grunau* provides a fascinating counter-example. Finally, for those concerned with professional ethics - a group that should cover everyone - *Grunau* stands as a shocking reminder of how abysmally wicked the misuse of power over a client may be, and how diligence and good faith may yet grasp a glimmer of hope.

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This article appears on Page 7

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