THE PRACTICE AND PERILS OF MAKING SPECIAL APPEARANCES
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In *Streit v. Covington & Crowe* (July 2000) 82 Cal.App.4th 441, 98 Cal.Rptr.2d 193, the Court was asked to decide whether an attorney who makes a "special appearance" for a colleague owes a duty of due care to the litigant. The Covington & Crowe law firm specially appeared at a summary judgment hearing as a professional courtesy to Streit's attorneys of record. When Streit sued both her attorneys of record and the Covington & Crowe firm for legal malpractice, Covington & Crowe moved for summary judgment asserting that the firm had no attorney-client relationship with her. The trial court agreed, dismissing the case, and Streit appealed. In a very strongly worded opinion, with an even stronger concurring opinion, the Fourth District Court of Appeal rebuffed Covington & Crowe's argument and expressly held that: **An attorney who makes a "special appearance" for a single proceeding has an attorney-client relationship with the litigant and owes a duty of care to the litigant**. In reaching its conclusion, the Court stated:

(1) Although the attorney-client relationship usually arises from an express contract, it may also arise by implication, and without any direct dealings between attorney and client.

(2) An attorney making a "special appearance" is associated with the client's attorney of record because, absent an association, the specially appearing lawyer would have no authority to make the appearance.

(3) In any association, the lead attorney and the associated attorney must divide their duties. **"But whatever the allocation between them, both attorneys have an attorney-client relationship with the litigant they represent until that association is terminated."**

(4) **An attorney owes a duty of due care and a duty of loyalty to every person with whom he/she has an attorney-client relationship.**

"To summarize, we hold that, by agreeing to 'specially appear' in the place of Streit's attorneys of record, Covington & Crowe undertook a limited association with that firm for the purpose of representing Streit at the hearing on the motion for summary judgment. Covington & Crowe thereby entered into an attorney-client relationship with Streit pursuant to which Covington & Crowe owed Streit a duty of care."

In closing, the Court noted that the precise scope of Covington & Crowe's duty had not been decided, and that do so the trial court needed to look to the "details of the engagement of Covington & Crowe by . . . [the firm of record] and the nature of the instructions they gave to Covington & Crowe."

The concurring justice in *Streit v. Covington & Crowe* stated: "I believe that our system of legal representation is better served by a bright-line rule: when an attorney stands before the court and announces ready for Jones, the world can count on it – that attorney represents Jones, and that attorney will be held responsible if he or she commits malpractice or violates rules of professional conduct."

Does the *Streit v. Covington & Crowe* decision mean that lawyers should no longer make special appearances for each other? Does it mean that sole practitioner litigators can never go on vacation or get sick? Not at all.

Does the *Streit v. Covington & Crowe* decision mean that lawyers who make special appearances and lawyers who contract with others to make appearances for their clients need to re-evaluate their practices in that regard? Does it mean that lawyers involved in special appearances should now take more precautions than they have previously? The answers to these questions are clearly: Yes!

At two recent Lawyers' Mutual seminars, the issues raised by the *Streit* decision were discussed with the participants. The two groups developed a number of sensible and constructive ideas about how to minimize the risk of malpractice exposure while keeping "special appearances" a part of the practice of law. The groups' conclusions derived primarily from commonly used risk management tools and common sense, with underlying themes of communication, disclosure, and using due care in every undertaking. Actually, two sets of ideas were developed, depending upon whether we were considering the role of the attorney asking a colleague to make a special appearance, or the role of the attorney making the special appearance. Please consider these ideas for guidance whenever you are involved on either side of a "special appearance" and, of course, do not hesitate to include your own risk management ideas as well.

IDEAS FOR THE ATTORNEY OF RECORD ENGAGING ANOTHER LAWYER TO MAKE A SPECIAL APPEARANCE

1. At the time of engagement, explain to the client both the prospect and meaning of using another attorney to make "special appearances."

2. At the time of engagement, identify the person(s) you are likely to ask to make a special appearance should the need arise.

3. Before engaging an attorney to make a special appearance for a client, have the specially appearing lawyer conduct a conflict of interest check.

4. Make sure the scope of the special appearance engagement and the instructions to the specially appearing lawyer are in writing, with a copy to the client. This letter should also include the compensation arrangement.

5. Provide the attorney making the special appearance with all of the documents and information needed to make the appearance and to respond to any reasonably foreseeable issues a court might raise. Include in the engagement letter a list of the documents being provided, the work required to prepare, and issues you anticipate may arise.

6. Make certain the attorney being engaged to make the special appearance is competent and has the time to prepare fully for the hearing and any reasonably foreseeable follow-up that may be required in your absence.

7. Unless you are backpacking in the rain forest, make certain that the attorney engaged to make the special appearance knows how to reach you.

8. Make certain the attorney being engaged to make the special appearance has professional liability insurance.

IDEAS FOR THE ATTORNEY BEING ENGAGED BY AN ATTORNEYOF RECORD TO MAKE A SPECIAL APPEARANCE

1. Before agreeing to make the special appearance obtain all of the names and information necessary to conduct a conflict of interest check and confirm you have no conflict.

2. Make sure the scope of the special appearance engagement and the instructions you have received are in writing, with a copy to the client. If that is not the case, send your own confirming letter to the counsel of record, with a copy to the client.

3. Make certain you have all of the documents and information needed to make the appearance and to respond to any reasonably foreseeable issues a court might raise.

4. Make certain the attorney engaging you to make the special appearance is competent and will take the time to fully prepare you for the hearing as well as any reasonably foreseeable follow-up that may be required in his/her absence. Remember you have a duty of due care in preparing for and appearing at the hearing.

5. If either the lawyer engaging you or the client is paying you, that arrangement should be confirmed in writing with the client.

6. Make certain you know how to reach the counsel of record and the client.

7. Make certain the attorney engaging you to make the special appearance has professional liability insurance. If they don't you are likely to be a target in any malpractice case should the client be dissatisifed.

8. Make sure that you send a brief letter to the engaging attorney, copied to the client, indicating that your special appearance engagement is terminated.

There is no reason why attorneys should not continue to engage in the practice of making "special appearances." However, like everything else we do, special appearances should be made: (1) consistently with our fiduciary obligations; (2) with due care; and (3) with an eye toward making sure we do not become litigants ourselves in a case where someone making a special appearance announces "ready for plaintiff in her legal malpractice complaint against . . .." As the concurring opinion pointed out, we best serve our clients and ourselves if we remember the maxim: "[I]f a job is worth doing, it is worth doing well."