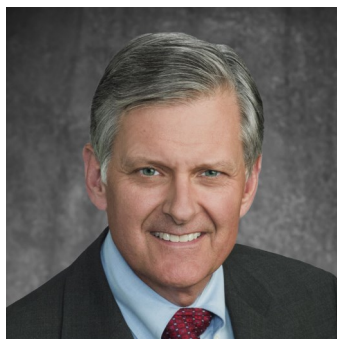
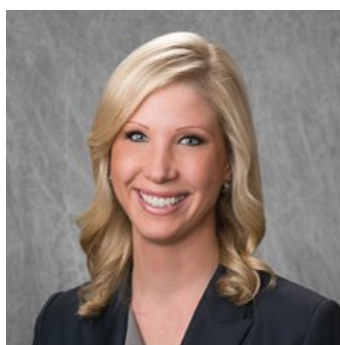


Special Appearance



Reagan W. Simpson
Partner
rsimpson@yettercoleman.com



Rebecca Phelps
Associate
rphelps@yettercoleman.com

A special appearance is the only means for contesting a Texas state court’s jurisdiction over the defendant’s person or property.¹ Do not confuse the special appearance with a motion to quash service (a general appearance that, if successful, results only in a new citation)² or a plea to the jurisdiction (which attacks subject matter jurisdiction).³

Special Appearance Procedure Under Rule 120a

The special appearance must follow Texas Rule of Civil Procedure 120a. Rule 120a requires a sworn motion. While the motion should have “special appearance” in its title, the substance of any pleading is controlling.⁴ A “special appearance” that asserts a forum selection clause is not a special appearance.⁵ But a wrong title is not fatal if in substance the pleading challenges personal jurisdiction.⁶

Regardless of title, the special appearance must be sworn, and the client is the best candidate for the verification. But an unsworn special appearance does not automatically waive a special appearance, because it can be cured. Rule 120a(1) allows amendments to cure any defects without imposing any deadline.⁷ In fact, a curative amendment can be filed even after denial of the special appearance, although the prudent practitioner will follow all procedures and promptly cure any defects.⁸

Not all defects may be curable. Presumably, there is no way to cure an untimely or unfiled special appearance,⁹ and there may be no post-hearing cure for a special appearance that did not give fair notice of the jurisdictional challenge.¹⁰

One way to cure the absence of a sworn special appearance is through a separate affidavit, filed at least seven days before the hearing as required by Rule 102a.¹¹ A separate affidavit ordinarily verifies facts asserted in the special appearance, but it may also verify jurisdictional facts presented in the hearing.¹²

The affidavit must contain facts, not legal conclusions.¹³ For example, it is insufficient for the affiant to state simply that the defendant committed no tort or conducted no business in Texas.¹⁴ But submission of a defective affidavit does not waive a special appearance if the defendant submitted sufficient other proof at the hearing.¹⁵ And any defect in the affidavit can be waived by the plaintiff’s failure to object.¹⁶

Due Order of Pleading and Waiver

To avoid waiver, a special appearance must be filed as, or in, the first responsive pleading. Any other pleading may be combined with the special appearance, or may be filed after the special appearance.¹⁷ While unnecessary, most lawyers expressly make any combined or later-filed motions or pleas “subject to” the special appearance.¹⁸

Also to avoid waiver, the defendant must request and obtain a hearing and a ruling on the special appearance before proceeding on any other issue. See Tex. R. Civ. P. 120a(2). Whether an implicit ruling suffices is questionable.¹⁹

If the court fails to rule on the special appearance, and the defendant does not object but proceeds on the merits, the special appearance is waived.²⁰ Once the special appearance is overruled, however, the objecting party may then appear generally without waiving the jurisdictional challenge.²¹

An extensive body of case law discusses what does and does not waive a special appearance. The governing principle is that waiver occurs if the defendant requests judicial action inconsistent with the special appearance.²² Variants of that principle are that waiver does not result from: (1) proceeding with matters appurtenant to the special appearance;²³ or (2) matters ancillary or prior to the main action.²⁴ A few examples from this body of case law appear below:

No Waiver

- Rescheduling a hearing pursuant to a Rule 11 agreement.²⁵
- Rule 11 agreement to extend the pleading deadline.²⁶
- A request for a single judge and a complex case assignment because such a request does not seek to invoke the judgement of the court, rather, it seeks to preserve judicial resources.²⁷
- A motion to strike plaintiff's amended pleading is not a waiver if limited to plaintiff's jurisdictional allegations.²⁸
- A motion to defer hearing, as long as the motion is not made for purposes furthering a decision on the merits.²⁹
- Including in the special appearance a challenge to method of service.³⁰
- Moving for sanctions subject to resolution of the special appearance and only if the special appearance is denied.³¹
- Alleged misrepresentations in defendant's affidavit in support of special appearance, which go only to the merits of the special appearance.³²

Waiver

- A motion to strike all allegations or causes of action.³³
- Moving for a continuance for the purpose of obtaining DNA testing to disprove paternity was general appearance because it "indicate[d] [the defendant's] intention to defend the case [on] the merits".³⁴
- A motion to set aside a default judgment and grant new trial, stating in the motion that the defendant was ready to start trial.³⁵

Default judgments can provide tricky situations. As explained by Justice Brett Busby in a detailed opinion, the defaulted defendant must not only file a timely special appearance, but must also obtain a ruling on the special appearance before seeking to set aside the judgment—a "due-order-of-hearing" requirement.³⁶

Likewise, an appellant that succeeds in setting aside a default judgment for defective service or no service can attack personal jurisdiction on remand but only by following Rule 120a's requirements.³⁷

Discovery

Rule 120a allows all discovery processes but does not say whether discovery must be limited to jurisdictional facts. In *Dawson-Austin*, the Texas Supreme Court hinted in dicta that discovery should be so limited,³⁸ but lower courts have not followed that dicta and held otherwise before *Dawson-Austin*.³⁹ Compelling merits discovery, however, is likely to waive a special appearance.⁴⁰ On the flip side of this issue, a defendant is entitled to resist merits discovery while its special appearance is pending.⁴¹

The case law, then, seems to distinguish between mere participation in merits discovery and compelling merits discovery. On the one hand, mere participation is always permissible and has no effect on a pending special appearance. On the other hand, compelling merits discovery waives a special appearance if sought by a defendant and is not available to the plaintiff pending the outcome of the special appearance.⁴² Overall, the defendant should limit discovery to jurisdictional facts and obtain a prompt hearing on the special appearance after adequate jurisdictional discovery. Doing so avoids waiver and can reduce litigation costs.

Plaintiff's Burden to Assert Basis of Jurisdiction

The plaintiff must plead sufficient allegations to confer jurisdiction under the Texas long-arm statute.⁴³ The Texas long-arm statute authorizes jurisdiction when a defendant conducts business in Texas; its non-exclusive list of conducting consists of: (1) contracting by mail or otherwise with a Texas resident when either party is to perform all or part of the contract in Texas, (2) committing a tort, as whole or in part, in Texas; and (3) recruiting Texas for employment in Texas or elsewhere.⁴⁴

The Texas long-arm statute extends personal jurisdiction as far as due process allows.⁴⁵ Under due-process analysis, personal jurisdiction exists when (1) the nonresident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice."⁴⁶

A defendant has minimum contacts when it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁴⁷ "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court."⁴⁸ Physical presence in the forum is not required "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of [the forum]."⁴⁹

A nonresident's contacts may give rise to either general or specific jurisdiction.⁵⁰ Because only a limited set of affiliations with a forum will render a defendant generally amenable to process, specific jurisdiction is the usual basis for asserting jurisdiction over a non-resident.⁵¹ Specific jurisdiction exists if the defendant's alleged liability arises from an activity within the forum.⁵² The still-undefined "stream of commerce" theory will not by itself suffice for general jurisdiction, but it may create specific jurisdiction depending on the extent of sales into the forum.⁵³

Defendant's Burden to Negate All Bases of Jurisdiction

The defendant must negate all bases of personal jurisdiction asserted by the plaintiff, on either a factual or a legal basis.⁵⁴ For example, if the plaintiff alleges the defendant has already generally appeared, the defendant must negate that allegation.⁵⁵ To negate jurisdiction on a factual basis, the nonresident defendant must present evidence.⁵⁶ To negate jurisdiction on a legal basis, the defendant must show that jurisdiction is absent under legal principles regardless of the truth of plaintiff's allegations.⁵⁷

Conclusion

The special appearance is the only means in Texas for challenging a state court's exercise of personal jurisdiction. Practitioners should closely follow Rule 120a's procedures and avoid any requests for judicial action inconsistent with the special appearance until after the court decides the challenge to personal jurisdiction.

Reagan Simpson is a partner at Yetter Coleman LLP in Houston. A graduate of the University of Texas School of Law, Reagan is a Fellow of the American College of Trial Lawyers and the American Academy of Appellate Lawyers.

Rebecca Phelps is an associate at Yetter Coleman LLP. Rebecca earned her J.D. from Stanford University.

This article first appeared in *The Advocate*, State Bar of Texas Litigation Report, Volume 72, Fall 2015.

¹ Tex. R. Civ. P. 120a; see, e.g., *N.H. Helicopters, Inc. v. Brown*, 841 S.W.2d 424, 425 (Tex. App.—Dallas 1992, orig. proceeding).

² See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985) (per curiam); Tex. R. Civ. P. 122 (defendant deemed to have appeared if service is quashed).

³ *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004).

⁴ *Houston Lighting & Power Co. v. Klein Indep. Sch. Dist.*, 739 S.W.2d 508, 514 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

⁵ *Goad v. Hancock Bank*, 2015 WL 1640530, at *2 (Tex. App.—Houston [14th Dist.] Apr. 9, 2015).

⁶ *Huynh v. Nguyen*, 180 S.W.3d 608, 616-17 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

⁷ *Moore v. Pulmosan Safety Equip. Corp.*, 278 S.W.3d 27, 33 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

⁸ *Dawson-Austin v. Austin*, 968 S.W.2d 319, 321-22 (Tex. 1998).

⁹ See *Boyd v. Kobierowski*, 283 S.W.3d 19, 24 (Tex. App.—San Antonio 2009, no pet.).

¹⁰ See *Moore v. Pulmosan Safety Equip. Corp.*, 278 S.W.3d at 33.

¹¹ See *Fin. Strategy Group, PLC v. Lowry*, No. 01-14-00273-CV, 2015 WL 452265, at *9 (Tex. App.—Houston [1st Dist.] Jan. 27, 2015, no pet.) (mem. op.).

¹² *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 730-31 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

¹³ See *Fin. Strategy Group, PLC v. Lowry*, 2015 WL 452265, at *9.

¹⁴ *Id.*; *Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 250 n.8 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

¹⁵ *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 307 (Tex. 2004).

¹⁶ *Int'l Turbine Serv., Inc. v. Lovitt*, 881 S.W.2d 805, 808 (Tex. App.—Fort Worth 1994, writ denied).

¹⁷ Tex. R. Civ. P. 120a(1); *Int'l Turbine Serv., Inc.*, 881 S.W.2d at 808 (motion for protection from merits discovery could accompany special appearance).

¹⁸ *Dawson-Austin*, 968 S.W.2d at 322-23.

¹⁹ *Goad*, 2015 WL 1640530, at *2.

²⁰ Tex. R. Civ. P. 120a; *Milacron Inc. v. Performance Rail Tie, L.P.*, 262 S.W.3d 872, 876 (Tex. App.—Texarkana 2008, no pet.).

- ²¹ *N.H. Helicopters, Inc.*, 841 S.W.2d at 425.
- ²² See *Trenz v. Peter Paul Petroleum Co.*, 388 S.W.3d 796, 803 (Tex. App.—Houston [1st Dist.] 2012, no pet.).
- ²³ *Id.* at 802.
- ²⁴ *Grynberg v. M-I L.L.C.*, 398 S.W.3d 864 (Tex. App.—Corpus Christi 2013, pet. denied) (listing many examples of ancillary matters).
- ²⁵ *Wakefield v. British Med. Journal Publ'g Group, Ltd.*, 449 S.W.3d 172, 181 (Tex. App.—Austin 2014, no pet.).
- ²⁶ *Exito Elecs. Co.*, 142 S.W.3d at 306.
- ²⁷ *Wakefield*, 449 S.W.3d at 180-81.
- ²⁸ *First Oil PLC v. ATP Oil & Gas Corp.*, 264 S.W.3d 767, 778-79 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).
- ²⁹ *Wakefield*, 449 S.W.3d at 181.
- ³⁰ *GFTA Trendanalysen B.G.A. Herrdum GMBH & Co., K.G. v. Varne*, 991 S.W.2d 785, 786 (Tex. 1999) (per curiam).
- ³¹ *Xenos Yuen v. Fisher*, 227 S.W.3d 193 (Tex. App.—Houston [1st Dist.] 2007, no pet.).
- ³² *Jackson v. Hoffman*, 312 S.W.3d 146, 151 (Tex. App.—Houston [14th Dist.] 2010, no pet.).
- ³³ *SBG Dev. Servs., L.P. v. Nurock Group, Inc.*, 02-11-00008-CV, 2011 WL 5247873, at *3 (Tex. App.—Fort Worth Nov. 3, 2011, no pet.).
- ³⁴ *Branckaert v. Otou*, No. 01-08-00637-CV, 2011 WL 3556949, at *3 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet.) (mem. op.).
- ³⁵ *Liberty Entesr., Inc. v. Moore Transp. Co.*, 690 S.W.2d 570, 571 (Tex. 1985).
- ³⁶ *Global Paragon Dallas L.L.C. v. SBM Realty, L.L.C.*, 448 S.W.3d 607, 614 (Tex. App.—Houston [14th Dist.] 2014, no pet.); accord *Trenz*, 388 S.W.3d at 802-03.
- ³⁷ *Boyd*, 283 S.W.3d at 24.
- ³⁸ See *Dawson–Austin v. Austin*, 968 S.W.2d at 323.
- ³⁹ See, e.g., *Horowitz v. Berger*, 377 S.W.3d 115, 123 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (noting that a motion to compel did not waive special appearance when made subject to special appearance and when no ruling on motion was sought until after hearing on special appearance); *Silbaugh v. Ramirez*, 126 S.W.3d 88, 93 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Case v. Grammar*, 31 S.W.3d 304, 311 (Tex. App.—San Antonio 2000), *abrogated on other grounds by BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789 (Tex.2002); *Hotel Partners v. Craig*, 993 S.W.2d 116, 112-13 (Tex. App.—Dallas 1994, pet. denied).
- ⁴⁰ See *Case*, 31 S.W.3d at 311 (distinguishing *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 535 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *overruled on other grounds by Dawson–Austin v. Austin*, 968 S.W.2d 319 (Tex.1998).
- ⁴¹ *In re Stern*, 321 S.W.3d 828, 839-40 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
- ⁴² See *id.*
- ⁴³ *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010).
- ⁴⁴ Tex. Civ. Prac. & Rem. Code Ann. § 17.042.
- ⁴⁵ *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005).
- ⁴⁶ *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 567, 575 (2007) (quoting *Int'l Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945)).

⁴⁷ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁴⁸ *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002).

⁴⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

⁵⁰ *Am. Type Culture Collection, Inc.*, 83 S.W.3d at 806.

⁵¹ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 757-60 (2014).

⁵² *Spir Star AG v. Kimich*, 310 S.W.3d 868, 873 (Tex. 2010).

⁵³ See *Daimler AG v. Bauman*, 134 S. Ct. at 757; *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174 (5th Cir. 2013).

⁵⁴ *Kelly*, 301 S.W.3d at 658.

⁵⁵ See *In re Estate of Deuel-Nash*, No. 05-14-00128-CV, 2014 WL 5581044, at *3 (Tex. App.—Dallas Nov. 4, 2014) (mem. op.), *supplemented*, 2014 WL 6736919 (Tex. App.—Dallas Dec. 1, 2014) (mem. op.) (sanctions for frivolous appeal determined in supplemental opinion given that, *inter alia*, defendant never addressed plaintiff's allegation that a general appearance had already been made).

⁵⁶ *Id.* at 658-59.

⁵⁷ See *id.*; *Fjell Tech. Group v. Unitech Int'l, Inc.*, No. 14-14-00255-CV, 2015 WL 457805, at *3 (Tex. App.—Houston [14th Dist.] Feb. 3, 2015, pet. filed (mem. op.)).