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July 23, 2004

The Honorable Thomas R. Phillips Chief Justice, Supreme Court Supreme Court Building P.O. Box 12248 Capitol Station Austin, Texas 78711

Re: Proposed Changes to Rule 120a (1, 2, 3)

Dear Justice Phillips:

Enclosed are proposed changes to Rule 120a which have been approved for submission to the Supreme Court by the Court Rules Committee.

By copy of this letter, I am forwarding copies of this proposed rule change to Justice Hecht and to Charles Babcock, Chairman of the Supreme Court Advisory Committee.

Sincerely,

ATLAS & HALL, L.L.P.

By:

O. C. Hamilton, Jr.

OCH/ea

Enclosure

cc w/enclosures:

The Honorable Nathan Hecht Justice, Supreme Court of Texas Supreme Court Building P.O. Box 12248, Capitol Station Austin, Texas 78711

Charles Babcock 901 Main Street Dallas, Texas 75202-3748

#### STATE BAR OF TEXAS

#### COMMITTEE ON COURT RULES

# REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE TEXAS RULES OF CIVIL PROCEDURE

# I. Exact wording of existing Rule:

#### **RULE 120a. SPECIAL APPEARANCE**

- 1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amendable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.
  - 2. Any motion to challenge the jurisdiction provided for herein shall be heard and

determined before a motion to transfer venue or any other plea or pleading may be heard.

No determination of any issue in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance or permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violated of Rule 13, the court shall impose sanctions in accordance with that rule.

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or

subject matter is not amenable to process issued by the courts of this State.

Added by order of April 12, 1962, eff. Sept. 1, 1962. Amended by orders of July 22, 1975, eff. Jan. 1, 1976; June 15, 1983, eff. Sept. 1, 1983; April 24, 1990, eff. Sept. 1, 1990.

### II. Proposed New Rule:

- Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amendable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion supported by affidavit objecting to personal jurisdiction filed within thirty (30) days after the date that party's answer is due to be filed. The time to file a motion under this rule may be extended (1) by a written agreement that complies with Rule 11, or (2) by a motion filed and granted under Rule 5. No action taken by the moving party prior or subsequent to a timely filed special appearance motion shall be deemed a general appearance or a waiver of the objection to personal jurisdiction. A timely filed special appearance is waived only by the party filing an express written withdrawal of the motion.
  - 2. The court must hear and decide the motion by written order at an early

practicable time after it is filed and before the court determines a motion to transfer venue and any other plea, pleading or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

- 2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue, plea to abate, or any other plea or motion pleading may be heard that materially affects the party that filed the special appearance, except that the court may rule on discovery motions relating to the special appearance before deciding the special appearance. No determination of any issue in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.
- 3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. **Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out**

# by objection by the opposing party with opportunity, but refusal, to amend.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance or permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violated of Rule 13, the court shall impose sanctions in accordance with that rule.

# 4. [No change to subsection 4]

# Proposed Offical Comment:

The requirement in Section 2 for the court to hear and decide the motion "at an early practicable" time is not intended to permit undue delay or excessive discovery unrelated to the special appearance; it is designed to encourage good practices in making the decision on the special appearance only after receiving the information necessary to determine the motion. The trial court may resolve discovery disputes related to jurisdiction before deciding jurisdiction.

III. Brief statement of reasons for requested changes and advantages to be served by them:

The proposed changes are to change the procedure for objecting to personal jurisdiction and eliminate unintended waiver. Because obtaining the necessary evidence to

support the motion may be difficult to obtain in admissible form before the answer date, the

time to file the motion was changed and a means to extend the deadline was provided. To

prevent unintended waiver, nothing the objecting party does prior or subsequent to a timely

filed motion will result in waiver, except the filing of a written withdrawal of the motion.

The proposal is also to expedite hearings on special appearances but still provide opportunity

for necessary discovery. The proposal also eliminates defects in affidavits as a ground for

reversal unless the defect is objected to.

Respectfully submitted,

Chair, Court Rule Committee

Date: July 23, 2004

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