

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

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NORMAN H. MEYER, JR.
CLERK OF COURT
505-348-2450

07-BK-023

February 15, 2008

Mr Peter G McCabe, Secretary of the Committee
on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Washington, DC 20544-0002

Re Comments on Proposed Rules and Forms Amendments in response to August 2007
Preliminary Draft

Dear Mr McCabe:

I would appreciate your considering the following comments of our staff on the noted items

1 Rule 1017.1 We believe there is no need for this rule. Upon the passage of BAPCPA, we saw the need for a debtor's certification under section 109(h)(3) and devised the attached NM Form 504 (Eff. 10-17-05). When OF 1, the voluntary petition, was amended to add exhibit D, we changed the process to provide that the debtor file a motion for determination that the certification of circumstances was satisfactory – see NM Form 504 (Eff. 10/20/2006), attached. This process works; this is a situation we have already straightened out. (Here, we echo Judge Isgur's December 14, 2007, comment "I make these observations because of a concern that the injection of a new rule may create confusion in a situation that now appears well under control" [07-BK-006])

As proposed, we imagine a process in which every case where box 3 in exhibit D was checked would have to be reviewed by the judge. Unless some specific item was separately entered on the docket, there would be no way to automatically track such cases. In our current approach, the motion for determination is entered separately on the docket and thus is trackable and we can use CM-ECF's reporting capabilities to ensure appropriate action on the motion.

Were the proposed rule adopted, requiring the court to enter an order on the certification within 21 days after the filing of the certification based on a motion which could be filed as late as 14 days after the filing of the certification puts the court in the position of having to schedule, give

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notice of, conduct, and conclude a hearing within a week. This result strikes us as being highly impractical and burdensome to the court.

Also, were the rule adopted, OF 1, the voluntary petition, would need to be amended to change the wording of item # 3 in exhibit D and of the "If the court" paragraph following item #3. We do not see a proposal to so amend OF 1.

Finally, the committee note doesn't reveal what problems, issues, or concerns prompted the proposal to adopt this new rule — we would be most interested in that information because we haven't had any problems at all.

2. OF 8 — We agree with Judge Hunter's comments (07-BK-005). The explanation of/instructions for the fourth column, beyond the first sentence, is confusing and the example is not illustrative of the form. Since the form is a "statement," should the signature of the debtor include a verification per the requirements of Rule 1008? It is not necessary to include a declaration of a non-attorney bankruptcy petition preparer (BPP) since OF 19 is required to be filed with any document prepared by a BPP.

3. OF 27 — The form number at the top should be OF 27, not B27. We would propose that the first sentence read, "Complete this form and file it within the time set under Rule 4008." The listing of the debtor's name and address is not needed. We would propose that the third sentence read, "Attach the reaffirmation agreement to this cover sheet." Lines 8 and 11 delete the words, "set out." First check box: "Check this box if the amount on line 10 of this form is greater than the amount on line 7 of this form. If these expenses are greater than the income, a presumption of undue hardship arises." (Emphasis to show change.) The filer's certification would be unnecessary if the original agreement is attached.

(The listing of New Official Form 27 on the Federal Rulemaking site [<http://www.uscourts.gov/rules/newrules1.htm>] should describe it as "(Reaffirmation Agreement cover sheet)")

4. Only a few of the time-computation amendments cause us concern.

a. The first is Rule 2002(a), particularly in conjunction with giving notice of a section 341 meeting of creditors. The window of time within which a section 341 meeting can be scheduled is already small for an "in-town" case — just a week. If you increase the amount of notice required to be given, then the window goes down to six days. Although the net effect is only one day's difference, it increases the difficulty of scheduling in lower-volume districts like ours (where there are fewer trustees) and in districts like ours where there are multiple out-of-town locations for meetings which must, in chapter 13 matters, be covered by the same person. (I am glad to share my calculation of the window of time if that would be helpful.)

b The second concerns Rule 2002(b) Increasing that notice requirement from 25 days to 28 days makes it that much harder for the court to conduct a chapter 13 confirmation hearing within the time required by section 1324(b). Scheduling difficulties similar to those mentioned above also arise in this situation, since the chapter 13 trustee also needs to cover these hearings before both judges (Again, I am glad to share my time calculations in this situation if that would be helpful)

c Similar to the chapter 13 confirmation hearing situation, the proposed amendment to Rule 2002(b) makes it that much harder for the court to conduct a chapter 11 small business confirmation hearing within the time required by section 1129(e) As an illustration, say a chapter 11 small business plan is filed on February 15, 2008. Assume the best-case scenario, where the order conditionally approving the disclosure statement, and setting deadlines for acceptance or rejection of the plan and for objections to confirmation, and notice of the confirmation hearing is sent to all creditors and other parties in interest the same day. Also assume that the deadline for filing objections to confirmation is set as seven days before the confirmation hearing, to give the parties some small opportunity to resolve problems before a hearing With the 28-day notice period required by proposed rule 3017(d) and proposed rule 2002(b), the court is left with only ten days between the hearing date and the confirmation date required by section 1129(e) in which to make a decision Here is how I calculate the dates:

Plan filed	Friday, February 15, 2008
Days between objection due date and confirmation hearing	7
Days required for notice of objection due date	28
Results in earliest possible confirmation hearing date	Friday, March 21, 2008
Section 1129(e) 45 days after the plan is filed	Monday, March 31, 2008

This time calculation assumes that the debtor is sending out the order/notice and that the order/notice is obtained and mailed out the same day the case is filed Actual experience is different. Assume that the filer doesn't call the courtroom deputy to schedule a hearing before filing the plan, and that the plan is filed on a Friday Also assume that the following Monday is a holiday The courtroom deputy won't see the plan on a CM-ECF report until Tuesday. The above timeline has just been cut into by four days, leaving the court with the options of cutting down on either the time between the objection due date and the hearing date or the time between the confirmation hearing and the date by which the plan must be confirmed. These requirements and realities combine to create scheduling emergencies

In the chapter 11 small business situation, because the requirements of section 1121(e) for extension of the section 1129(e) time are so stringent (to the point of being nearly impossible to meet, time-wise), the likelihood of an extension of the section 1129(e) date is very small

d The proposed amendment to Rule 2003 doesn't seem to be parallel to the other time-computation amendments, particularly in that the notice requirements for section 341 meetings of creditors are addressed in Rule 2002(a). Practically speaking, for courts which use the BNC to give

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this notice, an "in-town" chapter 7 section 341 meeting can be set only within a six-day window Changing Rule 2003 has no effect on this. (Please advise if my calculation of this window of time would be helpful)

The state in which we now find ourselves – living with BAPCPA, using interim rules, and having had to create new procedures and forms on the fly – has been somewhat of a "perfect storm " In this kind of a time, it might be helpful for the committee to make some special "call-outs" to clerk's offices when the committee first begins to consider these matters. This would give the committee a good sense of the kinds of things we have developed in our best efforts to comply with the provisions of the new law Perhaps we will never have this kind of convergence again, but we are certain that the AO's Bankruptcy Court Administration Division and your clerk's offices are ready, willing, and able to be of assistance to the committee

Very truly yours,



MARGARET GRAMMER GAY
Chief Deputy Clerk
Direct dial number 505-348-2438

/mGG

cc Chief Judge Mark B. McFeeley
Judge James S Starzynski
Glen K. Palman, Chief, Bankruptcy Court Administration Division, AO

enclosures 2005 and 2006 versions of NM Form 504

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re

Debtor.

No. _____

**CERTIFICATION BY INDIVIDUAL DEBTOR OF EXIGENT
CIRCUMSTANCES WHICH WARRANT A WAIVER OF REQUIREMENT
FOR BUDGET AND CREDIT COUNSELING PRIOR TO FILING PETITION**

I certify that I am entitled to an exemption from receiving the budget and credit counseling services required by 11 U.S.C. § 109(h)(1).

I merit a waiver of this requirement because of the following exigent circumstances:

_____.

Further, I requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain them during the five-day period from _____ (date I made the request).

I understand that this certification will be accepted by the Clerk's Office so that I may file the petition in this case but if the Court does not find this certification satisfactory, the Court may enter an order to show cause why this case should not be dismissed.

I also understand that even if the Court finds this certification satisfactory, the requirement to obtain budget and credit counseling services is waived only for 30 days after the petition is filed, unless I ask for and receive a 15-day extension of the waiver period.

Debtor Signature

Address: _____

Telephone: _____

Docket: *crtexgcr*

Notes:

NM Form 504 (Rev 11-30-05)

Exigent circumstances A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside BLACK'S LAW DICTIONARY 236 (7th ed 1999).

Counseling required by 11 U.S.C. § 109(h)(1). Submission of certification for temporary waiver of requirement authorized by 11 U.S.C. § 109(h)(3) and NM IBR 1007(b)(3) Certification is required to be filed with petition in accordance with NM IBR 1007(c).

A list of credit counseling agencies which have been approved by the United States trustee for provision of services in this district can be found on the Internet at www.usdoj.gov/ust/ This list is also available by telephone request to the Clerk of Court (505-348-2500, toll free 866-291-6805), from visiting the Clerk's Office (500 Gold Avenue SW, 10th floor, Albuquerque), or from the Court's website at www.nmcourt.fed.us/web/BCDOCS/bcindex.html, where there is a link to the United States trustee's website.

Submit one form for each debtor

USE OF THIS FORM IS REQUIRED BY COURT ORDER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re

Debtor.

No.

**MOTION FOR DETERMINATION THAT
DEBTOR'S CERTIFICATION OF EXIGENT CIRCUMSTANCES
WHICH WARRANT A WAIVER OF REQUIREMENT FOR BUDGET AND
CREDIT COUNSELING PRIOR TO FILING PETITION IS SATISFACTORY**

Pursuant to 11 U.S.C. § 109 (h)(3)(A), the debtor (*state name of debtor if a joint case*)¹ asks the Court to determine that the certification in Exhibit D to the petition filed on (*date petition filed*) is satisfactory and warrants a temporary waiver of the credit counseling requirements of 11 U.S.C. § 109(h)(1) and that debtor be given 30 days from the date of filing of the petition to complete budget and credit counseling and file a certificate of completion with the court.

The exigent circumstances that prevented the debtor from complying with the credit counseling requirements before filing the petition are as follows:

[state description of exigent circumstances here]

s/submitted electronically _____

Typed name of attorney for debtor

Attorney address and telephone number

Notes:

Exigent circumstances: A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside BLACK'S LAW DICTIONARY 236 (7th ed. 1999).

Counseling is required by 11 U.S.C. § 109(h)(1). Submission of certification for temporary waiver of requirement is authorized by 11 U.S.C. § 109(h)(3)(A) and NM IBR 1007(b)(3). Certification is required to be filed with petition in accordance with NM IBR 1007(c). The petition, Official Form 1, was amended October 1, 2006, by the inclusion of Exhibit D which provides for debtor's certification. The motion regarding certification is required by Exhibit D.

USE OF THIS FORM IS REQUIRED BY OCTOBER 14, 2005, COURT ORDER

¹ In a joint case, include the debtor's name in the body of the motion. If the circumstances apply to each debtor, submit a separate motion for each debtor. Each debtor must complete credit counseling and submit a certificate of completion within 30 days of the date of filing of the petition unless a motion for extension of an additional 15 days for a total of 45 days from the date of filing of the petition is filed and granted.