

Memorandum



Subject

Debtors' Failure to Appear at §341 Meeting

Date

July 8, 1999

To

All Chapter 7 Trustees
Western District of Texas

From

Richard W. Simmons
United States Trustee, Region 7
Southern and Western Districts of Texas

This memorandum sets forth the United States Trustees's **minimum** requirements for trustees in handling the non-appearance of a debtor at a §341 meeting or requests for telephonic appearances or the waiver of appearances at §341 meetings. A trustee may require more from a debtor, including, but not limited to, court orders for telephonic §341 meetings.

Pursuant to §341(d), prior to the conclusion of the §341 meeting, "the trustee shall orally examine the debtor...." Further, §343 provides a debtor **shall** appear and submit to an examination under oath at the §341 meeting. The Bankruptcy Code has no provisions for the waiver of a debtor's appearance at the §341 meeting. However, a debtor may request to be excused from attending, especially one debtor spouse of jointly filing debtors. The *1998 Chapter 7 Trustee Handbook at 7-5 and 7-6 (the Handbook)* suggests that a trustee consult with the United States Trustee regarding general procedures to be followed when one spouse does not appear.

Joint Debtors Must Both Appear

The United States Trustee's position is that in the case of spouses filing jointly, both spouses must appear and testify under oath. The Bankruptcy Code does not authorize either the chapter 7 trustee or the United States Trustee to waive the appearance of a debtor. Further, there are always critical and pertinent questions that should be asked of both debtors, such as

1. Are you the debtor whose name appears on the Petition?
2. Is that your signature on the Petition, Schedules and Statement of Financial Affairs?
3. Are all of your assets and liabilities listed on the schedules?
4. Is everything on the Schedules and Statement of Financial Affairs true and correct?

If the debtor simply cannot attend the first creditors' meeting due to a scheduling conflict, the

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trustee may continue the creditors meeting to another date for which the debtor has indicated that he will appear. If the debtor fails to appear at the second meeting scheduled, the trustee should file a motion to dismiss for failure to appear. Filing a motion to dismiss prior to the date for objecting to the discharge of the debtor will flag the Clerk's office not to automatically issue a discharge for the debtor.

Exceptional Circumstances One Spouse Appears

In the event of exigent circumstances which prevent one or both debtors from appearing in person, there are only two (2) options available to debtors: (1) the Debtors ask the trustee to conduct a telephonic §341 meeting in which creditors are given an opportunity to participate; or (2) the Debtors file a motion to waive the appearance of one debtor.

Telephonic §341 Meetings

In the event it is impossible for a debtor to appear at one of the locations where the trustee regularly holds §341 meetings, the debtor may ask the trustee to conduct the §341 meeting telephonically. The policy of the United States Trustee is that the trustee may only hold the meeting telephonically under the following conditions:

1. The debtor appear at one of the ninety-three (93) offices of the United States Trustees across the country. A list of those offices can be obtained from the United States Trustee. It is also available on the USTP web page at www.usdoj.gov/ust. The meeting must be scheduled in advance with the Office of the United States Trustee. The United States Trustee's offices in the Southern and Western Districts can facilitate the scheduling and conducting of the meeting. The debtor must provide an employee of the United States Trustee with a picture I.D. The employee of the United States Trustee will verify the debtor's identification and administer the oath to the debtor. The meeting is tape recorded by the trustee.
2. The debtor appears at the office of a notary. The debtor must present the notary with a picture I.D. The notary will verify the debtor's identification, administer the oath and ensure that the debtor is the person answering the questions throughout the meeting. The notary must then send an affidavit to the trustee verifying that the debtor appeared.
3. Additionally, the private trustee may deem it necessary to require the Debtor acquire a court order authorizing a telephonic §341 meeting.

Waiver of Appearance

Neither the trustee, nor the United States Trustee have the authority to waive the appearance of a

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debtor at the §341 meeting. In what should be a rare event in which the debtor cannot appear in person and a telephonic §341 meeting is also not possible, the debtor must obtain court authority to be excused from appearing at the §341 meeting.

The motion to waive the appearance of a debtor should be signed by the debtor requesting the waiver and a notarized signature would be preferable. The motion should clearly state the reasons why a debtor is unable to appear in person or telephonically. The debtor should consult with the trustee prior to filing the motion to determine if the trustee has any objection to the motion to waive under the circumstances. The trustee should object to a motion to waive filed prior to the first meeting of creditors so that the trustee has an opportunity to determine if any creditors appear at the first meeting of creditors and want to question the debtor under oath. If any creditors want to examine the debtor under oath, the trustee should object to the motion to waive. If the trustee does not object to the waiver of the debtor's appearance, the debtor should include that statement in the motion or provide a signature line for the trustee. This will notify the court that the trustee has had an opportunity to review the situation and determine that the trustee does not object.

If, in these limited circumstances, the debtor asks that someone appear and testify at the creditor meeting on his behalf the debtor should attach to the motion an adequate durable power of attorney or court order appointing the non-debtor showing sufficient capacity on the part of that person to act and testify. The non-debtor must be capable of responding to the trustee's and creditor questions in a knowledgeable manner at the meeting.

The United States Trustee will make this policy statement available to the debtor bar.