



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Consumer Practice Extravaganza

The Intersection of Bankruptcy and Divorce

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COVID and IPV

Coerced and Fraudulent Debt: What it is and What You Need to Know

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This presentation is based on:

**THE FREQUENCY, NATURE, AND EFFECTS OF COERCED DEBT
AMONG A NATIONAL SAMPLE OF WOMEN SEEKING HELP FOR
INTIMATE PARTNER VIOLENCE**

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severe psychological
aggression



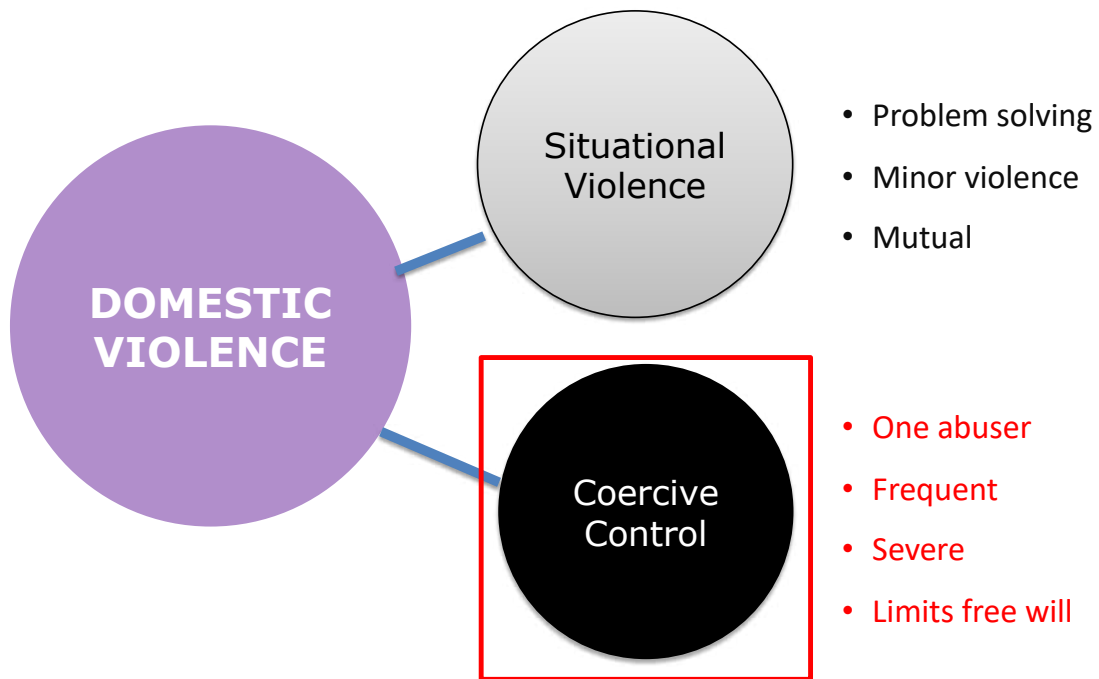
severe physical
violence





Types of Domestic Violence

- Control
- Physical Abuse
- Sexual Abuse
- Emotional Abuse and Intimidation
- Isolation
- Verbal Abuse: Coercion, Threats, Blame
- Economic Abuse



The Covid Effect

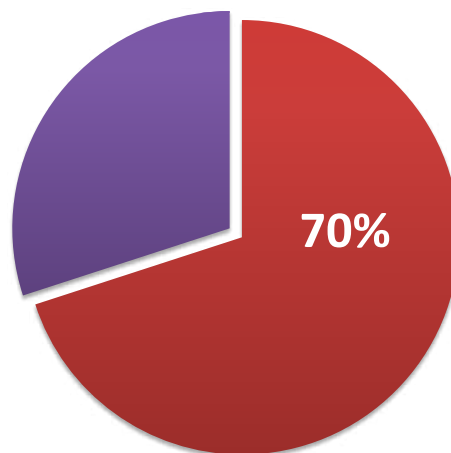
Voluntariness of Contracts



A Fundamental Premise of Debt

Hidden Financial Info

Has an intimate partner ever kept financial information from you?



Adams, Littwin, & Javorka (forthcoming)

Coerced Debt



Debt through fraud

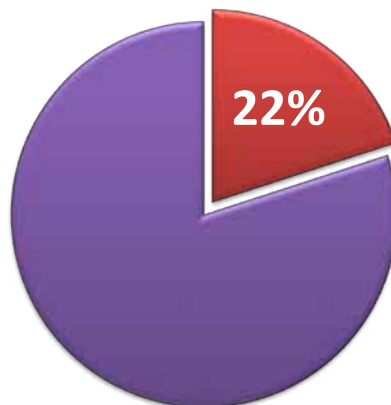


Debt through coercion



Fraud

Have you ever found out about debt or bills you owed that an intimate partner put in your name without you knowing?



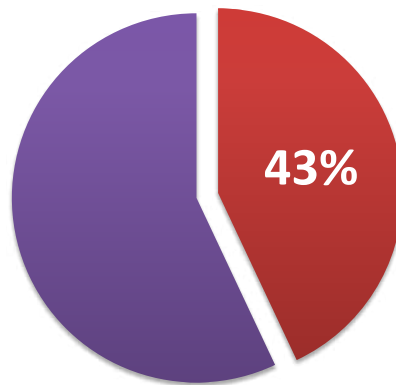


Coercion

Has an intimate partner ever convinced or pressured you to borrow money or buy something on credit when you didn't want to?

AND

Fear of consequence for saying "no?"



Effects of Coerced Debt



Credit Report Problems



Financial Dependence

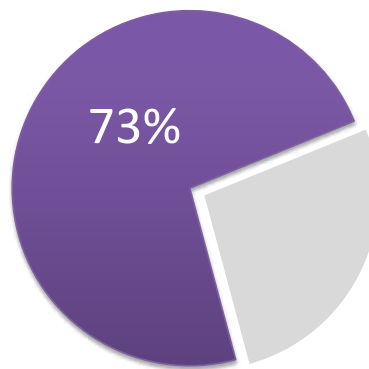


Financial Hardship

Credit Matters



Financial Dependence



Stay longer



Financial Hardship

“I think what this could have looked like had I not married him. And the possibilities of where I could be financially and where I am now. I’ve always done a lot of volunteer work in my life. I used to go down to the soup kitchen in downtown Detroit before I met him once a month and help make sandwiches and soup and serve the people and stuff, and never once did I ever think that may be my future.”

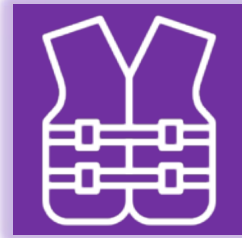
Bankruptcy Complications

- Eligibility – debt limits, means test, discharge
- Undue Hardship - coercion is not a defense
- Effects on non-filing (abused) spouse – spiteful surrender



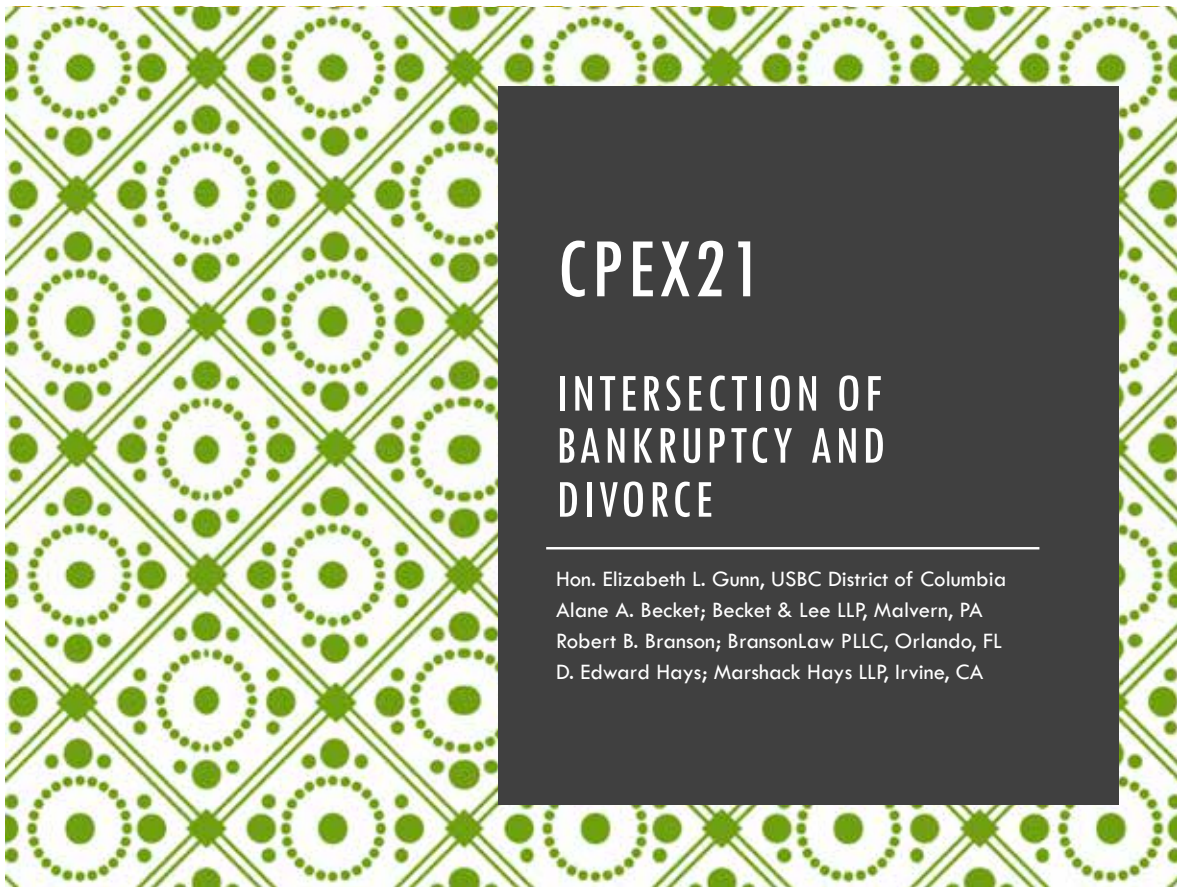
Most Importantly

Safety First



**If you or someone you know
is in crisis**

800-799-SAFE
www.theHotline.org



DEBTS THAT ARISE IN FAMILY LAW CONTEXT

- Relationship between financial and marital problems.
- Types of debts that arise during marriage and out of divorce that must be addressed in Bankruptcy:
 - Attorney's Fees
 - Alimony
 - Child Support
 - Property Settlement Agreements
 - Credit Card Debt
 - Mortgages

JOINT VS. INDIVIDUAL SPOUSAL CASES

Joint Cases

- Only spouses can file
- Cases may be substantively consolidated
- Cases may be severed upon divorce or conflicts
- Be aware of actual conflicts and get waivers of potential conflicts
- Advantages: (a) Single meeting of creditors; (b) combined court hearings; (c) many courts automatically deem substantively consolidated
- Disadvantages: (a) Both spouses must elect same set of exemptions; (b) risks excess assets of one spouse being used to pay debts of other spouse; (c) means test and disposable income test do not use spousal income unless typically used for household expenses

Individual cases

- Separate cases against spouses may be jointly administered
- Joint administration is not substantive consolidation

Non-Debtor Spouses

- No right to assert exemptions in debtor's case
- Their property rights may be affected especially if in a community property state
- Advisable to retain separate counsel

PROPERTY OF THE ESTATE

Included in Estate

- Community Property of Non-Debtor Spouse
- Form of Title Issues
 - Property rights determined by state law
 - Liability of property similarly dependent on non-bankruptcy law
- Joint Tenancy is Community Property
- Domestic Support Payments

Excluded from Estate

Separate Property of Non-Debtor Spouse

Debts v. Property Rights

Separate property right of reimbursement is a debt

Debts cannot be used to obtain greater share of property ahead of other creditors

AUTOMATIC STAY- IN EFFECT

▪ Where Automatic Stay is in Effect

- Pursuant to §362(c) stay continues until property is no longer property of the estate or until case is closed or dismissed, or debtor is discharged.
- Stay regarding property may be lifted for cause, including allowing state court to adjudicate rights of the spouses in property, even though distribution of property of the estate is under the jurisdiction of the Bankruptcy Court.
- The Chapter 13 co-debtor stay provided by §1301 protects non-filing co-debtors

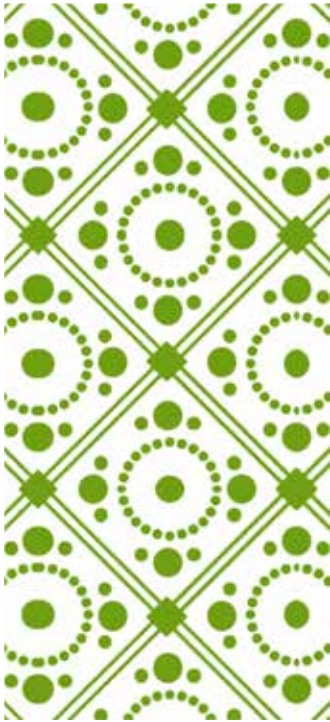
AUTOMATIC STAY-NOT IN EFFECT

▪ Automatic Stay Not in Effect

- Family Court parties will sometimes hesitate to proceed when a party is in bankruptcy believing the automatic stay prevents their involvement in the proceedings. They want an official release from stay from the Court to avoid potential sanctions..
- The automatic stay is not in effect under 362(2)(b)(A)(i), (ii), and (iii), which are essentially proceedings related to domestic support obligations:
 - These actions include actions to establish paternity; to establish or modify support; to collect domestic support obligations from property that is not property of the estate; concerning child custody and visitation; concerning domestic violence; and the reporting of overdue support for certain purposes.

▪ Contempt in State Court.

- If incarceration is used to compel debtor to pay support from property of the estate, action violates stay. *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008).



DOMESTIC SUPPORT OBLIGATIONS

What is a DSO

Section 502(b)(5) disallows post-petition support
Failure to pay post-petition support is cause for dismissal

Chapter 11 and 13 plans may not be confirmed unless debtor is post-petition current on DSO

Must be in the nature of support
DSOs are priority claims

DISCHARGE: CHILD SUPPORT AND ALIMONY- TYPICALLY NOT DISCHARGEABLE

- To be nondischargeable under §523(a)(5), a debt must have been established or be subject to establishment before, on or after the commencement of the case through the provision of a separation agreement, property settlement agreement, divorce decree other order of a court of record or a determination made in accordance with State or territorial law by a governmental unit.
- When the characterization of a debt as alimony, maintenance or support is in dispute, the court should hold an evidentiary hearing to determine whether the debt is actually in the nature of alimony, maintenance or support within the meaning of §523(a)(5).

The critical issue is whether the parties intended the obligation to provide support to the debtor's spouse, former spouse or child. Whether the payment obligation derived from a duty to provide for the well-being of the spouse, former spouse or child.

Discharge of Support or Non-Support Obligations

- 11 USC § 523 (a) (15)
- Distinction of §523(a)(5) and §523(a)(15) in Chapters 7, 11, and 12 and Chapter 13
- §523(a)(15) provides unqualifiedly that a debt encompassed in §523(a)(15) is nondischargeable. Thus, with respect to dischargeability in cases under chapters 7, 11, and 12, all of which base dischargeability on §523(a), the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence. **However, in a chapter 13, debtors encompassed by a §523(a)(5) are not dischargeable, while debts encompassed by §523(a)(15) are dischargeable.**

ATTORNEY FEES

▪ Attorney's Fees

- Complicating the discharge issue is attorney's fees related to these proceedings. Generally, a judgment including attorney's fees is considered part of the domestic support obligation and is therefore not dischargeable.
- **Case Law:**
 - *In re Strickland*, 90 F.3d 444 (11th Cir. 1996): holding that an attorney fees award arising from a post-dissolution custody action constitutes "support" for the former spouse under [11 U.S.C. § 523\(a\)\(5\)](#) where, as here, the award is based on ability to pay. In the absence of special circumstances showing otherwise from the record in the underlying proceedings, the district court properly determined that the debt in this case is not dischargeable
 - *In re Mellor*, 340 B.R. 419 (Bankr. M.D. Fla. 2006): Holding the general scope of services provided by the attorney for Chapter 7 debtor's ex-wife related primarily to child support issues and, thus, the fees for these services constituted nondischargeable child support.
 - *But see In re Gentilini*, 365 B.R. 251 (Bankr. S.D. Fla. 2007) holding debt was dischargeable since former spouse was no longer obligated to pay the attorney's fees.

Credit Card Debt

- Where the obligation to pay credit card debts “in lieu of “ alimony, the Bankruptcy Court is likely to find the obligation in the nature of support and not property settlement. Credit card debt that a debtor, filing individually or jointly, is solely responsible for outside of a Divorce Agreement is generally dischargeable as credit card debt is general unsecured debt.

MORTGAGES

In Chapter 13 you can strip off secondary liens

Loan Modification pitfalls:

- If former spouse on note, typically required to sign any approval agreements
 - This can be a problem if divorce is not clear that other party must cooperate, or former spouse is hostile
- Assumption of loan in some circumstances allowed to remove former spouse

MARITAL OR PROPERTY SETTLEMENT AGREEMENTS

MSAs are subject to avoidance as fraudulent transfers

- Actual Fraudulent Transfer
- Constructive Fraudulent Transfer

Court judgments dividing property are not subject to avoidance

Transfers of title in an MSA or Judgment still need to be perfected to avoid Trustee powers under Section 544(a)(3)

EXEMPTION ISSUES

Section 522(c) – Exemptions are ineffective against DSO and tax liens

- Trustees may seek to distribute exempt property to pay a DSO pursuant to a carve-out or subordination agreement

Only one set of exemptions

Non-Debtor spouse may not claim exemptions in debtor's case

DSO ISSUES: STATE/LOCALITY SUPPORT AGENCIES — ALLIES NOT OPPONENTS

Under federal law, each state must designate a state or locality based “IV-D” agency to handle child support.

Statewide examples: Texas, Florida, Virginia, Washington

Locality examples: Michigan, Pennsylvania, California

Each agency is required to help establish, collect, and enforce child support obligations. However, if there both spousal and child support, the agency can collect and enforce both together.

Important to serve the correct IV-D agency for POC to be filed and for a plan to be binding on the agency.

Issues on which they can be helpful: arrears, process for modifications, correcting accounting errors.

THINGS BANKRUPTCY CANNOT FIX

-Driver’s/other professional license suspension (reinstatement depends upon state law). But generally, no new suspensions post-petition

-Passport suspension (for this, no matter what state, arrears must be paid in FULL before the hold is lifted except for VERY limited exceptions)

-Cannot stop the establishment or modification of support, the establishment of paternity, reporting of support arrears to credit reporting agencies, registration of one state’s order in another state, the collection of ongoing current support by the agency*

-In some states, the interception of tax refunds (IV-D agency policy)

PAY ARREARS IN FULL IN CHAPTER 13

In many localities, especially those without active DSO agencies, chapter 13 plans simply “use the existing support order” terms to pay DSO arrears. However, those debts are non-dischargeable. WHY pay ANYTHING to unsecured, dischargeable debts in these situations?? It takes a bit more work on the front end, and may require the debtor to file a claim for the DSO recipient, but (in my opinion) it is falling on the edge of malpractice to have a 13 plan pay dividends to an unsecured creditor and leave the debtor with years of DSO payments.

PLUS, DSO claims continue to accrue post-petition interest UNLIKE taxes or other priority payments (in the definition of DSO under section 101(14A)). Thus, by NOT aggressively paying on the claims in chapter 13, the debtor may be even worse off than before.

REVIEW YOUR CLIENT’S DSO OBLIGATION

Child support is set (in most states) on a formulaic basis considering income. If your debtor has had a massive change in circumstances, know the procedures/forms necessary to have your debtor file a motion to amend their obligation ASAP. Most states have easily fillable forms by pro se parties or the courts have intake desks to assist.

Helping fix a financial future cannot be limited just to the “regular” bankruptcy debts, help your debtor use all paths to future financial stability.

Faculty

Alane A. Becket is an AV-rated attorney and managing partner of Becket & Lee LLP, a Malvern, Pa., law firm providing comprehensive nationwide representation of financial institutions in bankruptcy matters, with a focus on consumer lenders and debt-purchasers. In addition to client and industry relations, she focuses on litigation strategy, and Becket & Lee has been lead or co-counsel in some of the most influential decisions in consumer bankruptcy over the last 20 years. In addition to her duties at the firm, Ms. Becket is Chairman of ABI, co-chair of the Bankruptcy Section and of the Professional Standards and Grievance Committees of the National Creditors Bar Association (NCBA), and a member of the National Association of Chapter Thirteen Trustees (NACTT) and the National Association of Bankruptcy Trustees. She also co-chaired ABI's Consumer Bankruptcy Committee. Ms. Becket has written and lectured extensively on consumer bankruptcy issues for a variety of professional organizations, including ABI, the Federal Judicial Conference, NACTT, NABT, *Norton Bankruptcy Law Advisor*, NCBA, the National Conference of Bankruptcy Judges, and a host of local and regional organizations. She also served as a commissioner on ABI's Commission on Consumer Bankruptcy, and she has authored articles for many of the same organizations, as well as the Norton Institute on Bankruptcy Law. She served as editor of the fourth edition of ABI's *Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code*. She also served as editor for the 2011, 2012 and 2013 editions of *The Best of ABI: The Year in Consumer Bankruptcy*. In 2016, *Collection Advisor* magazine named her as one of the "25 Most Influential Women in Collections" in its September/October cover story. In 2018, *Collection Advisor* once again recognized her among her peers, this time in its September/October cover story on the "20 Most Powerful Women in Collections." Ms. Becket received her undergraduate degree from Pennsylvania State University and her J.D. from Widener University School of Law.

Robert B. Branson is an attorney with BransonLaw, PLLC in Orlando, Fla., who has focused on consumer and small business bankruptcy rights for more than 30 years. He is a member of the Central Florida Bankruptcy Law Association and former chair of the Orange County Bankruptcy Committee. Mr. Branson is a mediator with the U.S. Bankruptcy Court and has performed more than 600 mortgage mediations. As debtor's counsel, he has completed more than 500 mortgage modifications since the program's inception. Mr. Branson spoke at the National Bankruptcy Judge Conference in 2016 and 2018, at ABI's Annual Spring Meeting in 2015 and at ABI's Southeast Bankruptcy Workshop in 2016 and Paskay Memorial Conference in 2019, and at the National Association of Chapter Thirteen Trustees Annual Conference in 2014. His firm also assisted with the formation of the Middle District of Florida, Orlando Division *Pro Se* Clinic. Mr. Branson served in the U.S. Army from 1978-83. He received his B.A. from the University of Central Florida in 1985 and his J.D. from the University of Florida College of Law in 1988.

Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the sole the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40

Under 40.” She is a former board member of the International Women’s Insolvency & Restructuring Confederation, is a former committee chair of ABI’s Consumer and Litigation Committees, and is an Associate Editor of the *ABI Journal*. Judge Gunn is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

D. Edward Hays is a founding member of Marshack Hays LLP in Irvine, Calif. He was admitted to practice in 1992. Mr. Hays has been a Certified Bankruptcy Law Specialist with the State Bar of California from 2016 to the present. He also has been selected on numerous occasions to present to national, state, county and local bar associations on various legal topics, including bankruptcy law, family law in bankruptcy cases, labor law in bankruptcy, exemptions, enforceability of spendthrift trusts, evidence, pretrial and trial practice, and recent developments in bankruptcy law. In 2011 and 2014, Mr. Hays presented at the Southern California Trust and Estate Planning annual conference on the treatment of trusts in bankruptcy. In 2018, he presented an all-day seminar on evidence to the National Association of Consumer Bankruptcy Attorneys. In 2019, he was asked to speak at the annual conference of the National Association of Bankruptcy Trustees on the administration of trusts in bankruptcy, and he was selected to present a seminar on evidence at the National Conference of Bankruptcy Judges in Washington, D.C. During that trip, he also was admitted to appear before the U.S. Supreme Court. Mr. Hays received his B.A. in business with honors from California State University at Fullerton in 1989 and his J.D. from the University of Southern California Law Center in 1992, where he was a member of the Hale Moot Court Honors program.