

INSIDE: Due Process & Non-Citizens • Special Relief for Unaccompanied Youth • Abuse Victims Scared Silent

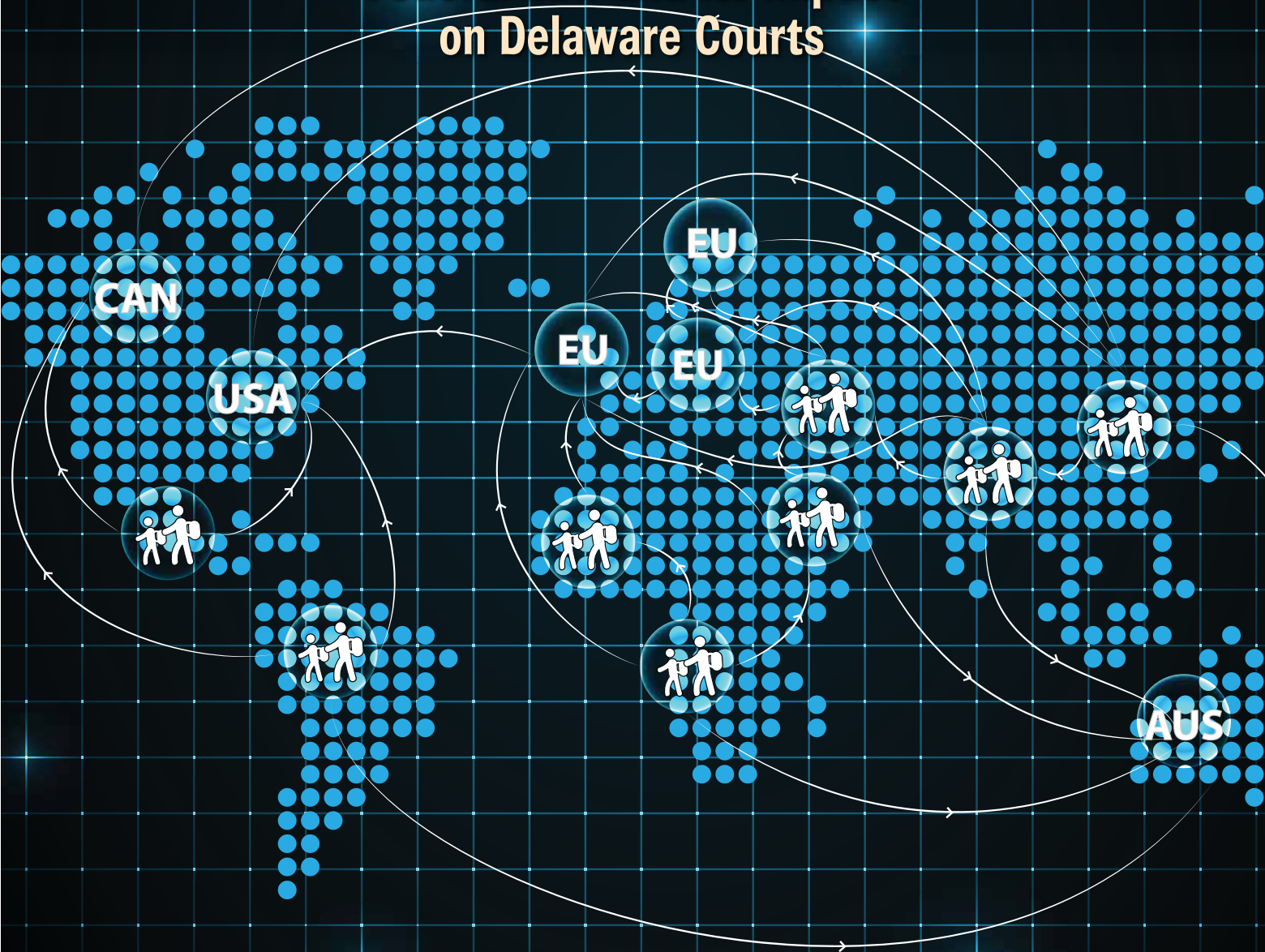
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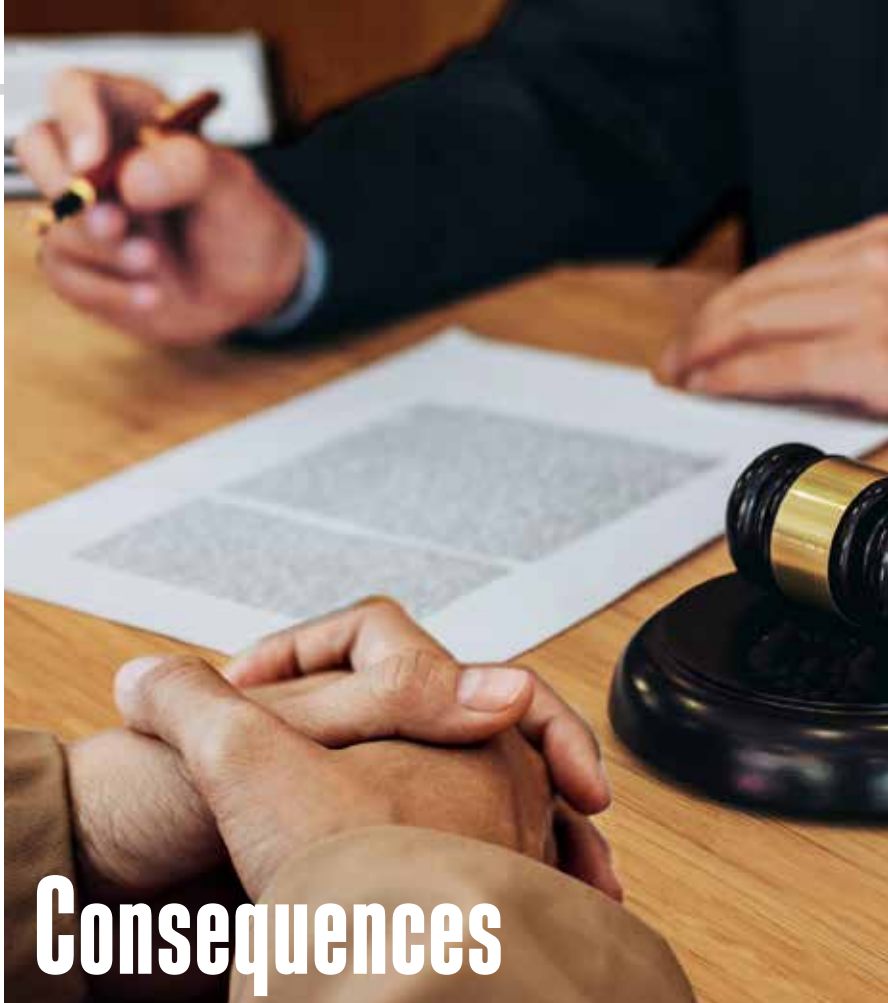
IMMIGRATION Federal Law and Its Impact on Delaware Courts



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Unintended Consequences

How
civil protection
orders affect
immigrants.

Increases in immigration enforcement and changes in enforcement priorities¹ cause fear in immigrant communities that negatively impacts the willingness of immigrant victims of domestic violence, child abuse, sexual assault and human trafficking to seek help from the civil and criminal justice systems.² “Commonly, the worldview and understanding of the legal system for an immigrant spouse are shaped by the person with status who has more familiarity with the United States.”³ In this way, abusers are able to more effectively use threats of deportation to silence victims, lock them in abusive relationships and prevent them from seeking help from police and the court system.⁴

In a growing number of cases across the country, judges reported that the immigration status of a victim or a party is being raised by the opposing party in 32 percent of civil protection orders, 31 percent of custody and 23 percent of divorce proceedings.⁵ Victim advocates and attorneys saw significant declines in the numbers of immigrant victims of domestic violence and child abuse willing to seek immigration protections afforded victims under U.S. immigration laws. They reported a 391 percent drop in filings of VAWA self-petitions by abused spouses and children of U.S. citizens and

a 31 percent drop in filings of U visa cases by immigrant victims of domestic and sexual violence.⁶

Comparing 2014 with 2017, law enforcement reported a 22 percent decline in immigrant victims’ willingness to make police reports.⁷ Prosecutors reported substantial reductions in prosecution of certain categories of immigrant victim cases: 82 percent domestic violence, 48 percent child abuse, 55 percent human trafficking and 70 percent sexual assault cases.⁸ Judges reported that 54 percent of court cases were being interrupted due to immigrant victims’ fears of deportation.⁹

Changes in immigration enforcement priorities implemented in 2017 have impacted both immigrant victims and perpetrators of domestic violence. In 2017, Executive Order, Enhancing Public Safety in the Interior of the United States¹⁰ was issued and followed on February 20, 2017 by an implementing memorandum from the Department of Homeland Security (DHS) entitled *Enforcement of the Immigration Laws to Serve the National Interest*.¹¹ These set out DHS categories of people who are priorities for removal. This list includes immigrants who:

- have been convicted of any criminal offense;
- have been charged with any criminal offense that has not been resolved;
- have committed acts that constitute a chargeable criminal offense;
- have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency;
- have abused any program related to receipt of public benefits;
- are subject to a final order of removal, but have not departed; or
- otherwise pose a risk to public safety or national security.

As former Immigration and Customs Enforcement Acting Director Thomas Homan stated “[u]nder these new directives, ICE will no longer exempt entire classes or categories of removable aliens from potential enforcement. Those in violation of immigration law are subject to arrest, detention, and, if issued a final order by an immigration judge, removal from the United States.”¹² Unfortunately, “[w]hen everyone is a potential priority, there effectively are no priorities.”¹³

These policies have a particularly harmful effect on immigrant and limited English proficient (LEP) victims of domestic violence. When immigrant and LEP domestic violence victims call police for help, police responding to crime scenes fail to use qualified interpreters¹⁴ needed to make predominant perpetrator determinations, thus increasing the likelihood that the victim will be arrested either with or instead of the perpetrator.¹⁵

DHS’s increased presence in courthouses has caused grave concern among

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immigrant communities.¹⁶ In an older articulation of its enforcement priorities, DHS issued a memorandum on October 24, 2011, outlining particular places or “sensitive locations” such as schools and churches where immigration enforcement would not regularly occur.¹⁷ Courthouses, significantly, are not classified as “sensitive locations.”¹⁸ A January 2018 ICE directive addressing the circumstances under which they would conduct immigration enforcement at federal, state or local courthouses¹⁹ purports to target individuals with criminal convictions, gang members and people with prior orders of deportation, among others.²⁰ These policies affect both victims and perpetrators.

Protection Order Benefits

All 50 states, D.C. and Puerto Rico have domestic violence protection order statutes that grant civil protection orders,²¹ personal protection orders²² or protection from abuse orders (PFA)²³ to victims of domestic violence and child abuse. The duration of the order varies by jurisdiction and ranges from months, to a year, to indefinitely.²⁴ For immigrant victims of abuse, protection orders are helpful and effective tools that limit that abuser’s ability to leverage their knowledge of the United States and, often, more secure immigration status to exert coercive control over their immigrant victims.²⁵

In addition to granting a victim use of the family home, custody of children, child and/or spousal support and keeping the abuser away, a protection order can help an immigrant victim with an order that the abuser not contact DHS and order the return of the victim’s and the children’s passports and other important immigration documents.²⁶ Protection orders can also provide victims critical evidence of abuse to support the victim’s VAWA self-petition or U visa case²⁷ and can include orders that protect against international child kidnapping.²⁸ For immigrant victims of abuse, applying for an order of protection may be their first interaction with the legal system in the United States.

Effects on Immigration Status

Applying for an order of protection will have no impact on the immigrant victim’s immigration status. Having an order of protection entered against someone who is not a U.S. citizen, however, may have immigration consequences. For example, obtaining certain immigration benefits requires applicants to prove that they are of good moral character. Such proof is required for immigrants seeking naturalization, cancellation of removal, voluntary departure or lawful permanent residence as a VAWA self-petitioner.²⁹ Having an order of protection issued against a non-citizen could prevent that person from establishing the requisite good moral character. This is one key reason why it is important to contest the issuance of an order of protection against an immigrant victim and oppose the issuance of mutual order of protections.³⁰

Violating Protection Orders

Violation of a protection order is a deportable offense that can lead to a non-citizen’s removal from the U.S., including for long-term lawful permanent residents.³¹ Immigration law provides for the removal of any non-citizen:

who at any time after admission is enjoined under a protection order issued by a court and whom *the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or*

persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) . . .³²

Note that the statute only requires that a court “determines”³³ that the immigrant has engaged in conduct violating the protection order; a finding is sufficient and conviction is not required.³⁴ To be a deportable offense a court must find that the immigrant violated “the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.”³⁵ So for example, if a judge holds an individual in contempt of court for failure to pay child support or repeatedly returning children late from visitation, these contempt findings would not trigger removal.³⁶

The immigration consequences of violating an order of protection affect both undocumented immigrants and immigrants who are lawful permanent residents. In *Matter of Obshatko*, the Board of Immigration Appeals held that a lawful permanent resident was removable without requiring a conviction, stating that “the plain language of section 237(a)(2)(E)(ii) makes clear that a ‘conviction’ is not required to establish an alien’s removability,”³⁷ and “unlike other provisions of the Act, the text of [that section] does not depend on a criminal conviction but on what a court determines.”³⁸

Despite the potential severe consequences for violation of an order of protections, existing case law has not yet recognized a duty of attorneys to provide the parties with warnings regarding the impact that family court findings regarding protection order violations could have on the perpetrator’s immigration status. In *Padilla v. Kentucky*, the Supreme Court held that criminal defense attorneys are required under the Sixth and Fourteenth Amendments to advise non-U.S. citizen

Existing case law has not yet recognized a duty of attorneys to provide the parties with warnings that protection order violations could impact the perpetrator’s immigration status.

defendants of the immigration consequences of a plea deal.³⁹

Further, the Supreme Court held that “[a]lthough removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”⁴⁰

In light of this decision, several states have enacted statutes requiring that courts issue advisals to defendants prior to accepting pleas of guilty or *nolo contendere*.⁴¹ While *Padilla* advisals are becoming standard practice in criminal court, family courts issuing protection orders and hearing cases involving protection order violations should issue advisals similar to those required by *Padilla*, particularly because many parties in protection order cases appear without an attorney. Providing warnings that violations of protection orders can lead to offenders’ deportation can be beneficial for the parties, as it may help prevent violations if the respondent is aware of the immigration consequences for violating the order.

The immigration consequences are not always immediately apparent and can

impact immigrants years after the case is concluded. It is crucial for victim safety that courts and attorneys representing immigrants avoid issuance of protection orders against immigrant victims and ensure that perpetrators are made fully aware of the potentially devastating consequences of violating an order of protection. ♦

NOTES

1. For a detailed report on the impact of this administration’s immigration policies, see Pierce, Sarah, Jessica Bolter, and Andrew Selee, 2018. *U.S. Immigration Policy under Trump: Deep Changes and Lasting Impacts*. Washington, DC: Migration Policy Institute.
2. See generally, American Civil Liberties Union, *Freezing Out Justice: How Immigration Arrests at Courthouses Are Undermining the Justice System*, 2018, <https://www.aclu.org/report/freezing-out-justice>.
3. Veronica T. Thronson, *Domestic Violence and Immigrants in Family Courts*, 63 JUV. & FAM. CT. J. 63, 66 (2012).
4. The National Immigrant Women Advocacy Project conducted a national survey among judges, prosecutors, law enforcement, advocates and attorneys documenting the impact on increased enforcement on immigrant victims. See <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf>.
5. *Id.* at 15.
6. *Id.* at 102.
7. *Id.* at 42.
8. *Id.* at 76.
9. *Id.* at 103.
10. <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.
11. https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.
12. <https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland>
13. Veronica T. Thronson, *Executive Orders and Immigrant Victims of Domestic Violence*, 47 MICH. FAM. L. J. 7 (2017).
14. National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access (2013) <http://niwaplibrary.wcl.american.edu/pubs/rsch-police-response-immigrant-victims/> p. 26 (discussing the use of perpetrators to interpret in domestic violence (8.3%) and sexual assault (10.7%) cases.
15. The Central Role of Victim Advocacy for Victim Safety While Victims’ Immigration Cases Are Pending (2014) <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/> p. 2.

16. See generally, American Civil Liberties Union, *Freezing Out Justice: How Immigration Arrests at Courthouses Are Undermining the Justice System*, 2018, <https://www.aclu.org/report/freezing-out-justice>.

17. See generally DHS Enforcement Actions at or Focused on Sensitive Locations at <https://www.ice.gov/ero/enforcement/sensitive-loc>.

18. In cases where ICE conducts enforcement against a victim in a courthouse, the officer must include a statement that he has complied with the provisions of 8 U.S.C. § 1367 (VAWA confidentiality requirements). See Immigration and Nationality Act, 8 U.S.C. § 1229(e). See also <http://niwaplibrary.wcl.american.edu/courthouse-protections-and-crime-victims/>.

19. Thomas D. Homan, "Directive Number 11072.1: Civil Immigration Enforcement Actions Inside Courthouses," U.S. Immigration and Customs Enforcement, January 10, 2018, <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>.

20. *Id.*

21. See, e.g. Illinois 750 ILCS 60/222.5; New York FCA § 154.

22. Michigan: MI MCL § 600.2950.

23. Delaware: 10 Del. C., § 1041 *et seq.* ("Protective order means an order issued by the court to a respondent restraining said



respondent from committing domestic violence against the petitioner.").

24. See generally, <https://www.womenslaw.org/laws/general/restraining-orders>.

25. Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research (2012) <http://niwaplibrary.wcl.american.edu/pubs/battered-women-protection-order-research/>.

26. Immigrants and Protection Orders Bench Card (2013) <http://niwaplibrary.wcl.american.edu/pubs/bench-card-imm-protection-orders/>.

27. See Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii). See also Veronica T. Thronson, *Domestic Violence and Immigrants in Family Courts*, 63 JUV. & FAM. CT. J. 63 (2012).

28. The Implications of the Hague International Child Abduction Convention: Cases and Practice (2013) <http://niwaplibrary.wcl.american.edu/pubs/ch6-3-hagueintlchildabduction/>.

29. 8 U.S.C. § 1101(f); INA § 101(f). Barriers to a finding of good moral character include a determination or admission of being a habitual drunkard; certain convictions; or having been found to have failed to pay court-ordered child support or spousal support. For an overview of immigration relief for immigrant victims see generally, Veronica T. Thronson, *Domestic Violence and Immigrants in Family Courts*, 63 JUV. & FAM. CT. J. 63 (2012).

30. 42 U.S.C. 3796hh(a)(3) requires state government agencies to "certify that their laws, policies, or practices prohibit issuance of mutual restraining orders of protection except in cases where both spouses file a claim and the court makes detailed findings of fact indicating that both spouses acted primarily as aggressors and that neither spouse acted primarily in self-defense."

See **Unintended Consequences** continued on page 27

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31. A lawful permanent resident (LPR) is someone who has been given authorization to live and work in the U.S. permanently. As proof of LPR status, a person receives a “green card.” LPRs can still be subject to removal from the U.S. for certain types of criminal-related grounds.

32. See 8 U.S.C. § 1227(a)(2), INA § 237(a)(2)(E)(ii) (emphasis added).

33. See *Garcia-Hernandez v. Boente*, 847 F. 3d at 872 (2017) (“The key language, ‘the court determines,’ does not require a conviction of a particular kind.”)

34. For immigration purposes, a conviction includes (1) a formal judgment of guilt entered by a court; and (2) in a case where an adjudication of guilty has been withheld (e.g., in a “diversion” court), a conviction exists when (a) a judge or jury has found the immigrant guilty or he has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and (b) the judge has ordered some form of punishment, penalty, or restraint on his liberty to be imposed (e.g., a mandatory treatment program). 8 U.S.C § 1101(a)(48)(A); INA § 101(a)(48)(A).

35. 8 U.S.C. § 1227(a)(2). See also *Matter of Medina-Jimenez*, 27 I&N Dec. 399, 402 (BIA 2018).

36. However, failure to pay child support could impact the person’s immigration application based on lack of good moral character.

37. *Matter of Obshatko*, 27 I&N Dec. 173, 175 (BIA 2017).

38. *Id.* (quoting *Garcia-Hernandez v. Boente*, 847 F.3d 869, 872 (7th Cir. 2017)) (internal quotation marks omitted).

39. See *Padilla v. Kentucky*, 559 U.S. 356 (2010).

40. *Id.* at 357.

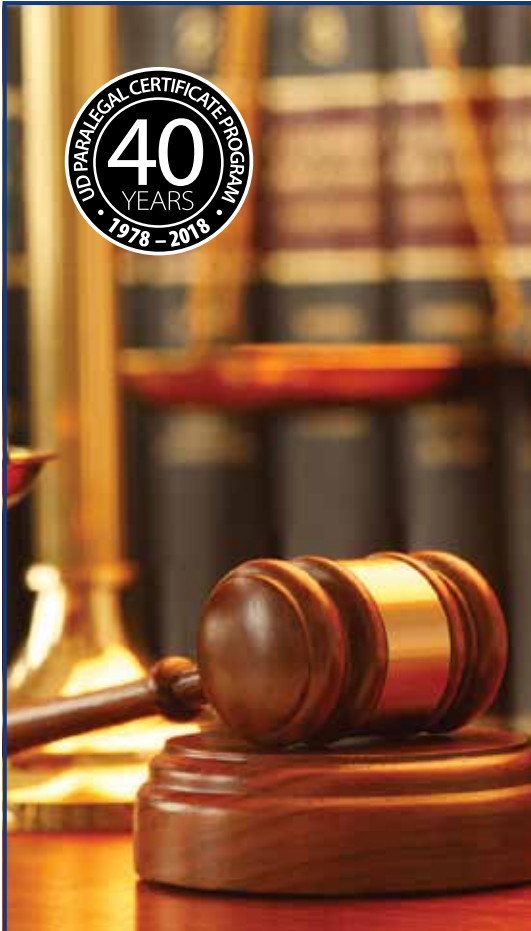
41. More than one half of the states and the District of Columbia have statutes requiring advisals, i.e., Alaska R. Crim. Proc. 11(c)(3)(C), Ariz. R. Crim. P. 17.2(f), Cal Pen Code § 1016.5, Fla. R. Crim. P. 3.172(c)(8). Delaware has not enacted a similar statute.

has been the consummate champion on behalf of his clients, as reflected most recently in *Sherman, et al. v. State of Delaware Department of Public Safety*, 2018 WL 3118856, Del. Supr., Strine, C.J., June 26, 2018.

Dan’s fortitude and perseverance over several years of litigation and appeals, finally brought triumph for his deceased female client, who following an arrest in 2009, was coerced into having sexual relations with the state trooper who arrested her. Reversing itself, the Supreme Court ruled that the jury should never have been asked to decide whether the sexual encounter was consensual as a matter of law, “because she is prohibited from seeking to escape her arresting officer, even by peaceable means, at risk of criminal penalty.”

Recognized for years as one of Delaware’s top lawyers, Dan’s opinion was often solicited by *The News Journal*. In 2002, Dan was asked for comment as the New Castle County Courthouse moved from Rodney Square to its current location. In reflecting upon the former courthouse, Dan remarked, “A lot of drama played out here, far better than what is on TV. There is a lot of soul in this building because of that. I like things with soul and this building has soul.”

As do you, Dan. ♦



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