

NITA'S STATEMENT ON THE IMPORTANCE OF IN-PERSON ADVOCACY IN COURTS

The National Institute for Trial Advocacy (NITA), is a group of trial lawyers from every corner of the country. We are committed to training our colleagues in high-quality advocacy in support of our pursuit of litigants' right to fairness and equal access to justice. For 50 years, NITA has served as the model for advocacy training, including trial techniques and other skills that are universal across venues and among factfinders in any court of law.

Recent articles in the public and legal press have started a discussion about the need for virtual trials. During the COVID-19 pandemic, our judicial system has struggled to balance the competing right of health and safety with the right to due process in criminal and civil actions. The Fourteenth Amendment provides that no one shall be "deprived of life, liberty or property without due process of law." These words are meant to assure that all levels of American government provide fair procedures that secure an impartial judge or jury, an opportunity for confrontation and cross examination of witnesses, and discovery. For these reasons, NITA urges and promotes in-person jury trials and other adversarial proceedings with approved medical safeguards.

While there understandably have been temporary interruptions to open courtrooms and court proceedings, it is critical that our democracy preserve traditional judicial processes. The fundamental role of the judge or jury in any case is twofold: (1) to decide the facts based on the credibility of the testimony and evidence presented, giving appropriate weight to evidence that may be conflicting; (2) to apply the law to the facts determined to be reliable. In order to judge the credibility of witnesses, a trial must have procedures in place that are *effective for determining the truth*.

The compelling need for in-person proceedings where credibility can be assessed is so profound that the law prefers in-person trial testimony over recorded or transcribed deposition testimony, because "live testimony" permits the judge or jury to use their senses to judge the credibility of witnesses and to observe their responsiveness, demeanor, and how they react to unscripted questions to which they must answer in real time. Live testimony allows a litigant to confront witnesses in the manner intended by the founders of our Constitution. The dynamic interchange that occurs in trial between witnesses, the attorneys, judge and jurors is critical to ensuring that the factfinders' search for truth is undertaken on the most informed basis possible. Denying a factfinder these crucial tools deprives a litigant of a fair process in either a criminal or a civil case. It is therefore critical that our judicial system not default to remote or virtual proceedings, where such essential tools are severely compromised or eliminated altogether.

The efficacy of jury selection would likewise be compromised if *jurors* were not present in "open court." All prospective jurors take an oath to answer truthfully the questions posed during the jury selection process. As with the examination of witnesses, answering questions in open court exerts a powerful force for truth-telling. And the ability to evaluate the prospective juror's demeanor face-to-face has immeasurable value.

Both bench and jury trials, as well as certain dispositive hearings, are designed to seek and reveal the truth in a public forum. In all types of contested matters – whether a criminal trial before a judge or jury, a civil trial before a judge or jury, a child custody dispute between caretakers in a family court, an asylum hearing before an administrative officer, a

bail/bond/detention/release hearing before a juvenile or criminal justice judge, a domestic violence proceeding for a victim seeking the court's order of protection – remote, virtual, or other substitutes for in-person advocacy are a poor substitute for in-person proceedings. Virtual or remote proceedings deprive the factfinder from using all of their senses to weigh the evidence, and thereby diminish the parties' ability to have a fair and impartial outcome.

NITA is proud to continue to train lawyers for all adversarial proceedings, but NITA urges our local, state, and federal governments to maintain full and fair in-person trials and hearings in open, public courtrooms. Also, restricting public attendance at our court proceedings impedes the open administration of justice. Our system of justice must not relinquish constitutional protections in favor of virtual convenience. Nor should it succumb to the enticement of economic expediency. NITA recognizes that during the pandemic certain proceedings might have to occur remotely; however, in the long run in-court advocacy must take place. The “cauldron of truth” that a courtroom represents demands a live setting.