

# Office of General Counsel

## ANNUAL REPORT

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### 2016

**The Niagara Frontier Transportation Authority  
and  
Niagara Frontier Transit Metro System, Inc.**



## *Introduction*

*The lyric “Taking care of business every day, taking care of business every way” (Bachman-Turner Overdrive 1973) accurately describes the work of the NFTA General Counsel’s Office in 2016. The transactional group continued the NFTA’s divestment of its waterfront properties, worked on significant land dispositions impacting our airports in Buffalo and Niagara Falls, finalized bus access directly on a commercial property in Cheektowaga, New York, worked on a historic naming rights initiative, negotiated bus terminal leases for the Metropolitan Transit Center, assisted in establishing a veteran’s lounge at the Buffalo Niagara International Airport, and finalized our departure from the Labor Management Healthcare Fund.*



*The litigation group had outstanding success in two police excessive use of force cases, and Brigette Whitmore tried her first jury trial and achieved a no-cause. The labor group instituted a job action/strike charge against the ATU, achieved key labor rulings reaffirming the companies to address business needs, and successfully assisted in the negotiation of collective bargaining agreements bringing the total to 18 for the NFTA’s 13 unions over the past several years.*

*The activities described in this report reflect the hard work, professionalism and dedication of the attorneys and other professionals in the Office of the General Counsel who serve the public by providing high quality legal services in order to support the NFTA’s mission of providing safe, efficient and professional transportation services that enhance the quality of life throughout the Buffalo Niagara region. I want to thank Kimberley Minkel, the NFTA’s Executive Director, and the NFTA Board of Commissioners for their support and for allowing our office to serve the public. Special appreciation for extra work on this report goes to Lisa Flynn (Secretary to the General Counsel). I hope you find this report informative and I welcome you to “Turn the Page” (Bob Seger 1973), to read about our exciting accomplishments in 2016!*

*General Counsel  
David J. State (December 31, 2016)*

## I. Overview of the Office

The Office of General Counsel provides and/or administers all legal services for the Niagara Frontier Transportation Authority (“NFTA”) and Niagara Frontier Transit Metro, Inc. (“NFTM”) on civil and administrative matters. The NFTA is a multi-modal entity (Aviation, Surface and Property) providing efficient and professional transportation services that enhance the quality of life in the Buffalo Niagara region. NFTM is a subsidiary of the NFTA and provides bus and rail transportation services within Erie and Niagara Counties.

These legal services include representation of the NFTA and NFTM in negligence claims, negotiations with state and federal agencies, arbitrations involving collective bargaining agreements or employee grievances, professional negligence, tort and contract claims, condemnation and relocation proceedings, negotiation of collective bargaining agreements, preparation of leases, releases, use and operating agreements, settlements and memoranda of understanding.

The Office of General Counsel provides advice, opinions and counsel to the Board of Commissioners, the Executive Director, business center managers and staff on matters concerning labor and employment relations, environmental compliance and litigation, landlord-tenant and real property transactions, procurement and contracting issues, suretyship, risk management and insurance, municipal bonds and finance, secured transactions, commercial relationships and corporate and legislative concerns.

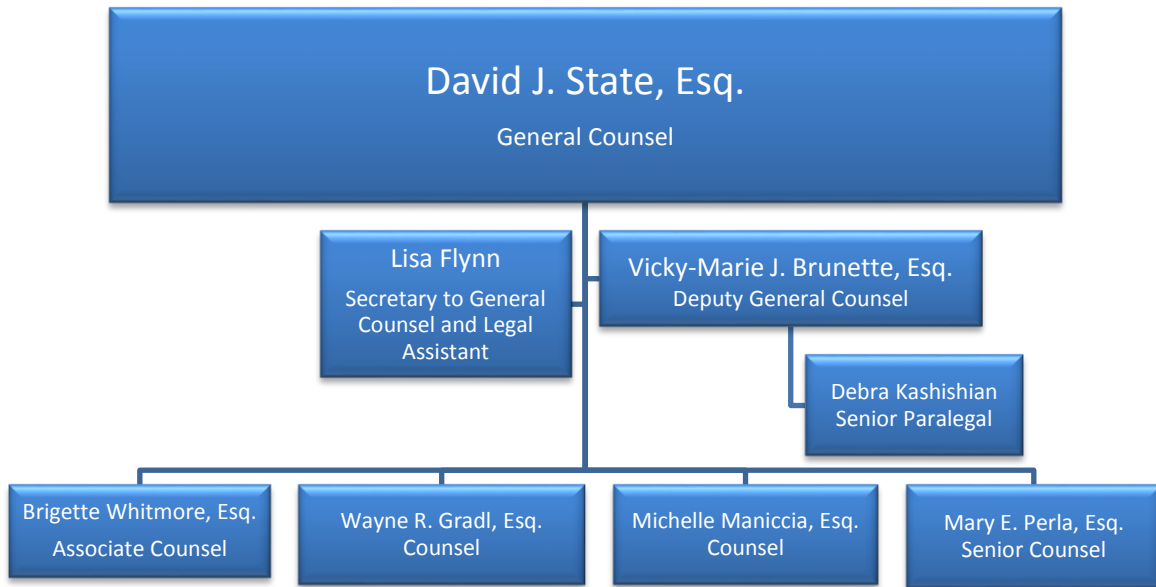
Under the direction of the General Counsel, staff attorneys appear in state and federal trial and appellate courts and before arbitration panels and administrative agencies such as the New York State Department of Labor, the U.S. Environmental Protection Agency, the New York State Department of Transportation, the Federal Aviation Administration and the Federal Transit Administration. General Counsel attorneys draft proposed agency rules and administrative procedures, and pursue enforcement and collection of judgments for fare evasions and parking violations. Staff personnel manage the board agenda, prepare resolutions for consideration by the Board of Commissioners and assist and provide guidance to user departments and business centers on procurement and various other matters impacting the day-to-day and long range operations of NFTA and NFTM.

## **II. People**

The strength of any organization is reflected in its people. The Office of General Counsel has a full complement of high caliber professionals who serve the public with honor, integrity and respect. Staff members are dedicated and hard working professionals who provide selfless service.

### **A. Personnel and Location**

The General Counsel's office currently consists of a General Counsel, a Deputy General Counsel, a Senior Counsel, two Counsels, one Associate Counsel, one Senior Paralegal and one Secretary to the General Counsel/Legal Assistant. The majority of the Legal Staff is located on the 6<sup>th</sup> Floor of the Metropolitan Transportation Center ("MTC") at 181 Ellicott Street in downtown Buffalo, New York. Our Senior Counsel, Mary Perla, is located at the Buffalo Niagara International Airport to more efficiently serve the Aviation Group. A graphical description of all current staff members is depicted below:



## **B. Professional Training, Development and Outside Activities**

### **1. Professional Training and Development**

We attended and hosted several educational conferences to keep our skills sharp and to learn about recent trends in areas such as transportation, procurement, litigation, labor, property and aviation law. Staff attorneys who attended these professional conferences and training sessions then relayed this information to NFTA stakeholders to improve our overall knowledge base. Some of the training opportunities were in the form of webinars or traditional Continuing Legal Education ("CLE") programs while others involved some local or domestic travel as time and budgets permitted.

Wayne Gradl attended the Annual Training Conference hosted by the New York State Public Employer Labor Relations Association in Saratoga, New York and completed 5 hours of training on the Code of Professional Responsibility. Vicky-Marie Brunette attended several courses including the Use of Social Media in Personal Injury Actions; the Affordable Care Act: Understanding the Basics of the Law and Recent Developments; False Eyewitness Testimony: The Limits of Memory; the Gavel Gap: Why New York's Judiciary Doesn't Reflect the Population; and Contractual Indemnity Provisions and Additional Insureds Liability. Brigitte Whitmore attended an Advanced Auto Injury seminar and for a seminar on Eye Witness Testimony. Mary Perla attended a seminar titled Preserving Privilege in Business, and participated in a webinar for Airport Disability Compliance - Airport Provided Ground Transportation. Michelle Maniccia participated in several FTA webinars including The ADA and Paratransit, The ADA and Fixed Route Service Requirements, The ADA and Demand Responsive Service Requirements and The ADA and Transportation Facilities.

Finally, on November 18, 2016, our office hosted a viewing of a CLE program titled "Infrastructure Public-Private Partnerships (P3s): Utilizing P3s to Procure, Develop and Finance Infrastructure Projects" sponsored by the New York City Bar Center for Continuing Legal Education. Lisa Flynn was instrumental in setting this up and Mary and Dave attended along with senior management of the NFTA.

### **2. Externship – SUNY Buffalo Law School**

In 2012, for the first time in the history of the NFTA, the Office of General Counsel formally established an externship program with SUNY Buffalo Law School. Externships provide law students with unique legal and public service experience as they work in a variety of government and non-profit organizations, and get academic credit for doing so. The NFTA receives the benefit of having a law student available to accomplish research and writing tasks and other duties. In order to qualify, the NFTA had to meet specific curricular, substantive and administrative requirements established by the Law School and the American Bar Association to ensure that the externship would be academically appropriate and in compliance with all other accreditation requirements. The Law School's Externship and Judicial Clerkship Program is directed by Professor Lise Gelernter and administered by Dawn Skopinski

and we wish to express our sincere appreciation for their efforts in establishing this program. In addition, we wish to acknowledge Linda Seay (the NFTA's former Director of Equal Employment Opportunity/Diversity Development); Karen Novo (the NFTA's Director of Human Resources); Lisa Piecki (the NFTA's Communication and Advertising Specialist); and members of the Minority Bar Association of Western New York (Family Court Support Magistrate Lenora B. Foote-Beavers and Joseph M. Hanna, Esq. from Goldberg Segalla LLP) for their assistance and continued support of this program.

We are proud of all of the interns who participated in this program. Several have advanced to prominent legal positions following their NFTA internship. For example, Maisha Huggins-Blakeney (our first summer intern in 2015) joined the firm of Feldman Kieffer and is the President-elect of the Minority Bar Association of WNY. Colin Casey (summer of 2015) was promoted from associate project manager to associate director-legal with Ciminelli Real Estate Corporation and more recently obtained a position with Great Lakes Environmental & Safety Consultants.

We look forward to our next intern, Alexandria Smith, starting in the winter/spring of 2017 and look forward to future law students participating in this program.

### **3. Outside Activities**

Our participation in outside activities is important in order to facilitate and improve upon the NFTA's image in the community. Several of our attorney's participated in outside activities that advanced this objective.

Vicky was named to the Board of Trustees for St. Mary's School for the Deaf and served as an arbitrator on a three person arbitration panel, which presided over a personal injury damages case (in lieu of trial). Vicky also served on the Defense Trial Lawyers Association (DTLA's) Bylaws Committee and helped update/re-draft the organization's Bylaws; Chaired the DTLA's Nominations Committee; and was admitted to the United States Court of Appeals for the Second Circuit.

Dave continued his service with the policy committee of the Erie County Industrial Development Agency, served as a board member of Bishop Timon-St. Jude High School, and served as co-chair of the Erie County Bar Association's Committee on Veterans' & Service-Members' Legal Issues. In October 2016, Dave spoke at the NY State Building Officials conference (Capital Chapter in Albany, NY) on the topic of ethics for public employees and enforcing the NY State Building Code.

Wayne continued his climbing excellence and scholarship activities. In August 30, 2016, he climbed Mt. Abraham in Maine descended the other side and found the Appalachian Trail. Wayne followed the Appalachian trail to the summits of Mt. Spaulding and then Sugarloaf, where he completed both the New England 67 (he has climbed all 67 4,000 foot or higher peaks in New England (i.e., Vermont, New Hampshire and Maine) and the Northeast 111 (i.e., The Northeast 111 requires

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climbing the ADK 46, the New Hampshire 48, the 4,000 footers in Vermont and Maine, and the two Catskill Peaks over 4,000 feet, Mts. Slide and Hunter). In April 2017 Wayne will be attending the Appalachian Mountain Club 4000 Footer meeting in Exeter, New Hampshire to receive his certificates for completing the NE 67 and NE 111. Through the fall of 2016, Wayne wrote a column called Gradls Geshichten consisting of stories for a local German newspaper known as the German Citizen which explores various aspects of German language and the culture.



Finally, in December 2016, Mary and Dave were invited to assist in writing an Airport Cooperative Research Program (ACRP) digest article reviewing federal laws, FAA Orders, policies, guidance, and case law on the permitted extent of airport involvement in economic development efforts with respect to off-airport, general community economic development and/or air service development.

### III. Outreach and Preventive Law

The Office of General Counsel has a commitment to reducing the risk of legal problems by proactively providing legal advice before problems occur. The staff is strongly encouraged to be problem solvers and to identify appropriate courses of action to our clients, rather than identifying legal roadblocks without any solutions. In 2016 we continued our ethics training initiative, and also developed proactive training programs designed to meet the needs of particular client groups.

#### A. Ethics Training

In April 2014, our office was certified by the NY Joint Commission on Public Ethics (JCOPE) to present JCOPE's Comprehensive Ethics Training Course. Following certification, our office presented a 2 hour live training session to Financial Disclosure Statement filers at the NFTA who are required to take this training, and others who wanted to participate. The topics covered by this presentation include a description of the New York entities having jurisdiction over ethics; the NFTA's Code of Conduct; the NFTA's Code of Ethics; financial disclosure; negotiation of future employment; gifts; conflicts of interest; outside employment and activities; nepotism restrictions; honorarium; official activity expense payments; public service announcements; post-employment restrictions, and restrictions on political activities.



In October of 2016, we conducted ethics training to ensure that all of our Financial Disclosure Statement filers completed the training as required by law. In total, we have provided this training to approximately 70 individuals consisting of both NFTA Commissioners and NFTA employees, and other individuals at the Greater Buffalo-Niagara Regional Transportation Council and the Niagara International Transportation Technology Coalition who have benefitted from this ethics training. We are proud to say that we are in 100% compliance with this training requirement.

## **B. Proactive Training Initiatives**

Kim's goal of facilitating professional development by having staff make presentations to senior NFTA management continued in 2016 and we were proud to have several members of our staff participate. In April of 2016, Brigitte presented information on debt collection law and practices and her work in those areas. In February of 2016, Michelle presented information on complying with our Americans with Disabilities Act (ADA) requirements.

One of the more exciting training initiatives we worked on in 2016 was procurement training. Our office, in consultation with John Cox, Andrea Herald and Cindy Judd (from the CFO's office) and Stephanie Calhoun (the NFTA's Manager of EEO/Diversity Development), developed a procurement training block which will covers topics such as Conflicts of Interest, Gift Rules, Sharing Confidential Information, Post government employment (2 year rule/lifetime bar), "Reverse revolving door," Receiving/Soliciting employment offers, Prohibited Contacts during procurement restricted period, MWBE/DBE/Service-Disabled Veteran-Owned Businesses, Project Sunlight, Purchase Requisition Instructions, and Guidelines for preparing better Board Resolutions. Mary Perla and Michelle Maniccia took the lead on this important initiative and we will be rolling it out in 2017.

## **IV. Contracts/Negotiations/Opinions/Regulatory Compliance**

The Office of General Counsel maintains an active transactional practice in the negotiation and drafting of contracts to procure goods, services and to acquire and dispose of real property for the NFTA. We are also frequently called upon to assist in negotiation of outstanding debts, contractual matters, provide opinions and to ensure compliance with laws, rules and regulations. The large majority of this work is handled by Mary Peral and Michelle Maniccia. 2016 was a huge year for transactional work. The following items represent some of the unique and significant matters that staff worked on in 2016.



**A. Rainbow Center:** In 1984, the NFTA and the Niagara County Industrial Development Agency (NCIDA) entered into a general partnership agreement in the form of a joint venture known as Niagara Industrial Incubator Company (NIIC). The stated purpose of the joint venture was the development of an incubator building for the purpose of creating employment and attracting industry to the County of Niagara on land owned by the NFTA. The land is adjacent to the Niagara Falls International Airport (NFIA). In furtherance of the joint venture, NIIC formed a limited partnership with NWI. This limited partnership is known as NIIA. Thereafter, NIIA leased vacant land to Rainbow Industrial Center, Inc., for the development of the land and construction of the incubator building (Rainbow Building) to be subleased to various businesses. The Rainbow Building is situated to the immediate right of the entrance road to the new terminal at the Niagara Falls International Airport (NFIA). The NFTA desired to take back control of the property to enable the NFTA to make room for additional parking and possible redesign of the entrance and roadways to the new terminal. To accomplish this objective, the NFTA and the NCIDA, as the general partner in NIIA, entered negotiations with NWI to buy-out NWI's interest in the partnership as a first step to regain control of the land. The buy-out of NWI is an important step in the NFTA's efforts to regain control of the property. It allows for the NFTA to remove the private developer's interest from the NIIA. Mary Perla successfully led the negotiations and performed the transactional work on this important initiative.

**B. Bus stop at Walmart:** Issues of bus access and safety are high priority items at the NFTA. Walden Avenue, in Cheektowaga NY, has been and especially sensitive topic for the NFTA following the 1995 death of Cynthia Wiggins who was killed by a truck while trying to cross several lanes of traffic from a bus stop on Walden. Her death prompted accusations that the mall's owners had prohibited bus access. In April of 2016, Walmart was scheduled to open a new store on Walden but concerns were raised that bus passengers would have to cross Walden to shop. After weeks of negotiations involving Walmart, the NFTA and the Town of Cheektowaga, Walmart announced that there would be an NFTA bus stop directly on the property of the new Walmart store. NFTA Executive Director Kimberley Minkel made the exciting announcement by stating "we are very

pleased that Walmart, the Town of Cheektowaga and the NFTA came together to provide a safe and effective solution for the many workers and customers who use public transportation.” Michelle Maniccia participated in the negotiations and completed the transactional work for the important and high profile project.

**C. Air Cargo Lease Negotiations:** The NFTA originally ground leased approximately 33 acres to Air Cargo Buffalo in 1985, as part of a competitive selection process, for the construction and development of air cargo facilities immediately adjacent to the Buffalo Niagara International Airport and the construction and development of office buildings fronting Cayuga Road. Due to complex financing arrangements, several of the Ground Leases were finalized as separate transactions and have varying termination dates. The NFTA negotiated with Air Cargo to provide for coterminous expiration dates, and to terminate the ground lease for Parcel 3. This transaction will provide the NFTA with flexibility for the leasing and operation of these office buildings when they revert to the NFTA at the end of the Ground Leases, and provide future development opportunities for Parcel 3. Mary Perla led the negotiations and performed the transactional work on this important initiative.

**D. Naming Rights to Metro assets:** For the first time in its history, the NFTA has engaged a consultant to explore selling the naming rights of the Metro Rail system and obtaining corporate sponsorships of the individual Metro Rail stations in an effort to generate revenue for asset and capital improvements within the Metro system. This historic initiative involved preparing a competitive RFP, and negotiating and preparing an agreement with the successful vendor (The Superlative Group headquartered in Cleveland, Ohio). Michelle Maniccia took the lead on this, participate in the negotiations with the vendor and drafted the agreement.

**E. Hutchins Property Acquisition NFIA:** The NFTA acquired approximately 70 acres of land from Hutch Enterprises in the Town of Niagara adjacent to the NFIA. The portions of the property are in the Runway Protection Zone of the NFIA. The land is heavily treed and the height of the trees creates FAA Part 77 obstructions. Acquisition of the land enables the NFTA to appropriate action to protect instrument and visual operations and take appropriate action to clear and remove airport hazards and prevent the future development of the property that could have created further airport hazards and nonconforming uses. Mary Perla led the way in these negotiations which finalized this voluntary acquisition in an expedited manner and avoided litigation.

**F. Departure from Labor Management Healthcare Coalition/Fund:** In September 2015, the Board authorized the NFTA/NFTM’s departure from the Labor Management Healthcare Coalition/Fund (LMHF). However, the negotiations with the LMHF and subsequent transactional work finalizing the deal went well into 2016. The transition out of our relationship with the LMHF demanded a diverse set of legal skills and abilities since it involved labor, contract, health care, HIPAA and other legal issues. Thus, we asked and received invaluable

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assistance from Wayne Gradl and Michelle Maniccia. They provided a tremendous amount of support, advice and assistance to our Human Resources department who was heavily involved in this important initiative.

**G. Buell Road acquisition at BNIA and acquisition of property adjacent to NFIA:** Working in conjunction with the Federal Aviation Administration, we are always looking to acquire properties adjacent to our airports that will allow us to better serve the aviation community and the public. Mary Perla was instrumental in negotiating the acquisition of land adjacent to the NFIA that will increase our runway protection zone and successfully negotiated a no cost public benefit conveyance of the Buell Road property adjacent to BNIA to the NFTA. These acquisitions are critical to the success of the Aviation Group and could not have happened without Mary's hard work and dedication. These transactions were negotiated in 2015 and finalized in 2016.

**H. Sale of Port Terminal A & B to ECHDC:** Over the past several years, the NFTA's goal has been to responsibly transfer ownership of its waterfront properties to best serve the interests of the



public and further facilitate waterfront development, to allow the NFTA to more fully concentrate on its core mission of public transportation. Thus, on May 12, 2014, the NFTA transferred title of the Boat Harbor, Gallagher Beach and the Outer Harbor (approximately 354 acres) to Erie Canal Harbor Development Corporation (ECHDC). Since that time, NFTA has been in negotiations with ECHDC to transfer an additional 50 acres of waterfront property commonly known as the Port Terminal Complex to ECHDC. On August 30, 2016, this transaction closed and the Port Terminal Complex was formerly transferred to ECHDC. Michelle Maniccia worked on this historic transaction with outside counsel. The underlying agreements provide compensation to the NFTA for this land (\$3.5 million) in addition to providing critical releases and indemnifications to the NFTA for any and all environmental claims.

**I. MTC Bus Terminal Lease to Megabus/Coach:** For a significant length of time, the NFTA has been in negotiations with the bus terminal carriers who use the Metropolitan Transit Center (MTC). Those negotiations got kick started in July of 2015

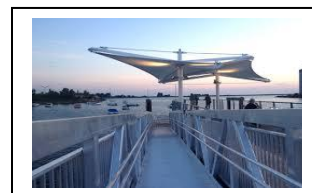


when Michelle Maniccia joined the team. Michelle brings a unique blend of business and transactional experience in commercial leasing. Largely through Michelle's efforts we were able to finalize a 10 year deal with Megabus in September of 2016. The lease agreement provides sufficient compensation to the NFTA in addition to resolving past due holdover rent. We continue to work hard toward resolving terms with the other carriers who operate out of the MTC but Michelle's work on this was outstanding and she deserves recognition.

**J. Veteran's Lounge at BNIA:** For the first time in the history of the NFTA, a Veteran's Lounge was established at the Buffalo Niagara International Airport. As stated by WNY Freedom Lounge, Inc., the operators of the facility, the lounge creates "a welcoming environment for traveling Military personnel & Veterans at the Buffalo-Niagara International Airport. This Courtesy Center is a private area, away from the normal stresses of travel, to enjoy light refreshments, and rest between flights, in an atmosphere that enhances the morale of those who are away from home." Mary Perla negotiated the lease terms and consulted with the Federal Aviation Administration to ensure full compliance with FAA requirements.



**K. DOT Underwater Land, Tiftt Street Pier and Boardwalk:** The State of New York appropriated approximately 1 acre of NFTA's underwater land on Fuhrmann Boulevard for use as a public pier commonly known as the Tiftt Street Pier and Boardwalk. The State offered the NFTA \$23,400 as compensation for the taking. The NFTA disputed the amount of the State's determination of fair market value. Through Mary Perla's hard work and advocacy the parties ultimately reached a settlement of \$43,400 as just compensation plus statutory interest.



## V. Litigation

With approximately 1,500 employees and diverse operations from bus to light rail to aviation to property management, the Office of General Counsel handles a large volume and wide variety of litigated matters ranging from personal injury to commercial cases. Unlike many large corporations who routinely refer litigation to outside counsel, the NFTA's litigators are in court, arguing motions, picking juries, trying cases and getting verdicts. Vicky-Marie J. Brunette, Brigitte Whitmore, Debra Kashishian and Lisa Flynn continue to make an excellent team resulting in aggressive representation of the NFTA's interests in court. The success of this team was proven again in 2016 with an outstanding no-cause verdict in an excessive force action, a no-cause verdict in a slip and fall action, handling an appeal in house from a lengthy jury trial, and successful motion practice on a number of matters.

As of December 2016, the Office of General Counsel retained a litigated caseload of 217 personal injury, wrongful death and police professional liability files, with a total self-insured reserve of approximately \$3,479,515. The breakdown was 186 active litigated personal injury cases against NFTM, with a self-insured reserve retention of approximately \$3,040,535, and 31 active litigated personal injury cases against the NFTA, with a self-insured reserve retention of approximately \$438,980. Of the 217 files, 214 are handled in-house, the large majority by the Deputy General Counsel,

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Vicky-Marie J. Brunette. Three litigated cases are being handled by outside counsel, pursuant to indemnity agreements. Associate Counsel, Brigitte Whitmore, continues to handle the Health Care Provider litigation, as well as general premises and automobile negligence matters, and is now handling approximately 60 of her own active cases. The proper handling of a caseload this large requires significant work. The NFTA and NFTM are self-insured up to \$5,000,000 for each litigated matter; therefore, the potential exposure on any given case is enormous. In 2016 it is estimated that Vicky appeared at approximately 168 pre-trial conferences; drafted and argued approximately 16 pre-trial motions; conducted approximately 90 depositions; 4 mediations; 2 jury trials; drafted a respondent brief in an appeal from a lengthy full jury trial involving a fatality; and argued an appeal before the Fourth Department. In addition to the foregoing, Brigitte Whitmore also appeared at 58 pre-trials conferences, 3 mediations; 4 arbitrations and 2 bench trials in Buffalo City Court; argued 9 motions; completed a number of depositions; and successfully tried her first jury trial as lead counsel in State Supreme Court. Vicky and Brigitte favorably negotiated resolutions in 27 cases short of trial. Of those matters favorably resolved, 12 involved no monetary contribution from NFTA or NFT Metro. Vicky is assisted by Debra Kashishian who prepares trial notebooks and pleadings in addition to obtaining medical records and other documents required for litigation. In light of her many years of experience, Debra supervised and mentored a temporary, junior paralegal this past year. Debra also expanded her litigation support expertise to the federal arena this year. Brigitte is assisted by Lisa Flynn, whose technical savvy has proven to be invaluable. Lisa similarly prepares documents and records required for litigation and continues to take on increased responsibility in the litigation support area.

In 2016, there were 40 new cases filed against NFT Metro and NFTA. Vicky, Brigitte, Debra and Lisa had an outstanding year as demonstrated by the following highlights in 2016.



**A. Yin v. Alvarado:** The underlying incident involved a fare dispute on a Metro bus on September 22, 2008 after the plaintiff, a 54 year old disabled Chinese immigrant, boarded a Niagara Falls bus at the Metropolitan Transportation Center. After not receiving change from the fare box, the bus driver testified that the plaintiff became loud and irate, such that he ultimately had to request assistance from the defendant, Officer Victor Alvarado, to remove her from the bus. Officer Alvarado testified at trial that he responded to the call, escorted the plaintiff from the bus to the inside of the terminal where he repeatedly tried to explain the process for receiving a refund. Officer Alvarado further testified that the plaintiff continued to be loud and argumentative so much so that he had safety concerns which necessitated a brief detention of the plaintiff through the use of handcuffs. The plaintiff quickly slipped out of the handcuffs and

left the terminal. Officer Alvarado did not follow the plaintiff and did not charge her with any crime.

The plaintiff described a very different factual scenario. She testified that Officer Alvarado threw her walker out of the bus onto the ground, forced her down the stairs of the bus by twisting her arm behind her back and pulling her out of the bus, threatened her with arrest, forced her through the bus station and into a small room with her arm still twisted behind her and forced her onto a bench, at which time he repeatedly struck her back and her hand while placing her in handcuffs.

The case proceeded to a jury trial in Federal District Court for the Western District of New York. During closing arguments plaintiff's counsel asked the jury to award Ms. Yin compensatory and punitive damages against defendant Alvarado, alleging that he seized her in violation of the Fourth Amendment to the Constitution of the United States, and further that he subjected Ms. Yin to excessive force, also in violation of the Fourth Amendment. The plaintiff alleged both physical (bruising and right shoulder injury) and emotional (depression, anxiety, PTSD, etc.) damages.

After three hours of deliberation, the jury returned a verdict of no cause of action and determined that defendant Alvarado had not subjected Ms. Yin to excessive force and had not unreasonably seized her.

**B. Bailey-Lynch v. NFTA, et al.:** This action was brought under a negligence theory wherein Plaintiff, 57 year old Yvonne Bailey-Lynch, alleged she sustained an undisplaced fracture of the left distal fibula, as a result of a slip and fall outside the LaSalle Station on March 26, 2011. Plaintiff contends she was caused to fall due to ice on the roadway at the LaSalle Station. The matter proceeded to a bifurcated jury trial on the issue of liability only in New York Supreme Court on December 12, 2016. After one hour of deliberation, the jury returned a defense verdict of no cause of action. Contributing to the success of the trial was Associate Counsel, Brigitte R. Whitmore, as lead counsel, advisement by Deputy General Counsel, Vicky-Marie J. Brunette, and litigation support provided by Legal Assistant, Lisa Flynn.

**C. Buckley v. NFTA, et al.:** In August of 2014, the NFTA was served with a Summons and Complaint on behalf of Nathaniel J. Buckley, relative to an arrest made by the Transit Authority Police on April 8, 2011. The Complaint named NFTA, M&T Bank Corporation, Allied Barton Security Services, LLC, Richard Russo, Adam Brodsky, George Gast, Adam Rees, Jacqueline M. Jackson and David Mondry as defendants in the action. The Complaint alleged causes of action for Malicious Prosecution, False Arrest, Failure to Prevent Unconstitutional Acts, Assault, Battery and Excessive Use of Force. The case was venued in Federal District Court for the Western District of New York and was re-assigned to Magistrate Judge Michael Roehmer.

The parties participated in Federal Court's mandatory confidential mediation program on a number of occasions, without success. All named defendants filed Motions for Summary Judgment, requesting that Justice Roehmer dismiss the Complaint in its entirety. The motions were argued on July 12, 2016. On July 21, 2016 the Court issued

its Report and Recommendation to the presiding Federal District Court Judge. In a lengthy written decision, Magistrate Judge Roehmer recommended that the Complaint be dismissed against all named defendants.

On December 21, 2016, Federal District Court Judge, Michael Telesca, adopted the Report and Recommendation in its entirety and granted defendants' summary judgment motions, thereby dismissing the Complaint against NFTA and its officers.

## **VI. Commercial/Regulatory Litigation:**

We had one major commercial/ regulatory cases that we resolved in 2016. Mary Perla was assigned to work on this matter with the NFTA's outside commercial litigation counsel.

**A. Westover Car Rental LLC v. NFTA:** Westover is the operator of an off-airport parking service and off-airport car rental operation at 4301 Genesee Street across from the Buffalo Niagara International Airport. On September 20, 2013, Westover sued the NFTA alleging that the NFTA limits access to their customers, requires excessive and unfair access fees which are not consistent with other agencies, and is interfering with Westover's operations in an attempt to put them out of business.

On November 15, 2013, the NFTA filed a motion to dismiss the entire action, rather than undergoing expensive and time consuming discovery. On June 6, 2014, the Trial Court granted, in part, the NFTA's motion and dismissed five of the six causes of action. Both parties appealed to the Fourth Department. On November 20, 2015, the Fourth Department ruled that the NFTA's motion should have been granted in its entirety and dismissed the complaint. Among other things, the Court concluded that the fees charged for access to the airport are "a reasonable levy and do not constitute an objectionable burden on interstate commerce."

On January 8, 2016, Westover filed a Motion For Leave To Appeal, the Fourth Department's Decision, to the Court of Appeals of the State of New York. On March 29, 2016, the Court of Appeals of the State of New York denied Westover's Motion For Leave To Appeal. Thereafter, the parties negotiated a final settlement of the case whereby Westover paid in full the total arrears of \$124,399.66 plus interest of \$7,500.00. Mary Perla deserves full credit for the outstanding resolution of this case which resulted in a rejection of the constitutional claims against the NFTA and monies payable to the NFTA.

## **VII. Labor and Employment**

Providing legal support to NFTA managers who work with the NFTA's 13 unions presents a significant challenge. Wayne Gradl, the NFTA's "labor lawyer", handles grievances, arbitrations and assists in contract negotiations with these unions. In addition, Wayne provides the NFTA and NFTM with advice regarding employee



dismissals and discipline and discrimination and other Equal Employment Opportunity matters, including claims by passengers as well as representation in Federal and New York State courts and before administrative agencies such as the EEOC and New York State Division of Human Rights. Some of the significant cases and matters Wayne handled in 2016 are listed below.

**A. Clerical Subcontracting:** During the second half of 2013, three senior ATU clerical personnel opted to leave the Metro Payroll Department. The Company experienced great difficulty in recruiting qualified replacement personnel. Consequently, from late 2013 throughout 2014 Payroll Department management had to “catch as catch can” to keep the Metro payroll processed and issued on time via employing temporary agency personnel, hands on work by management, and assistance from personnel who process the NFTA payroll. The ATU filed a grievance and demanded arbitration, claiming that Metro Payroll Department data processing and record keeping was “their work” and, accordingly, the Company owed the ATU damages for every hour a non-ATU member assisted with the Metro payroll because such assistance was improper “subcontracting out” of ATU bargaining unit work.

After hearing the matter, Arbitrator Foster completely rejected that ATU’s grievance and arguments, finding instead that management’s use of non-ATU personnel was done in good faith to address legitimate business needs and was contractually permissible. In his ruling, Arbitrator Foster noted the, “serious human failures ... [by ATU personnel around this time which resulted in] significantly exacerbating the challenges created by the lack of staffing” and found that the Company’s response was appropriate and lawful.

**B. Bus Accident Review Program:** A former big bus operator had a major accident that the Bus Accident Review Committee, comprised of 3 ATU drivers and 2 management representatives, determined to be his fault thereby making the operator subject to dismissal for too many accident points in a 12 month period. The Union attempted to save Mr. Hall’s employment by arguing at arbitration that a previous Safe Driver course taken by the operator before the accident should operate to reduce his accident point total below the termination threshold. All accident points drop off an operator’s record after 12 months and the Union wanted the points reduction for the safe driver course to reduce the most recent points charge as opposed to the oldest points so that the intervening drop off of the oldest points would save the operator from dismissal. If accepted, this argument would essentially allow the points reduction for a safe driver course to operate as a chit that could save a driver from dismissal for a major accident that had yet to happen as of the time the course was taken.

Through Wayne Gradl’s hard work and advocacy we successfully convinced Arbitrator Siegel that the intent of the safe driver course was to allow avoidance of non-dismissal discipline pending at the time the course was taken and not to save the operator from the prospect of being discharged for major accidents that had yet to happen. Arbitrator Siegel ruled that the effect of taking the safe driver course was to reduce the oldest points at the time the course was taken and thereby mitigate whatever non-dismissal discipline was pending at that time. Not allowing a safe driver course to operate as essentially insurance against major accidents yet to happen was a significant

management win for the company which will pay dividends into the future. A very successful outcome for Wayne and the labor group.

**C. ATU Strike Charge:** On April 1, 2016 the ATU demanded that management stop the long-standing practice of offering open runs to new big bus drivers who were certified as capable of handling the assignments by big bus instructors who were also ATU members. After management refused this demand, ATU officials directed ATU instructors to tell two new big bus drivers who had accepted open run assignments to call off from performing those runs and make sure that the call offs were in fact made. The result was two cut runs on April 1 that should have had service, and the denial of work offered to ATU members who were ready, willing and able to perform their duties. The Taylor Law defines strike broadly to include any refusal to perform work in whole or in part. Consequently, the NFTA drafted a charge of an unlawful strike/job action and filed the charge with PERB. The charge was supported by bus camera and telephone recordings that showed conclusively that two new big bus drivers were pressured by ATU personnel into calling off from runs they otherwise had committed to perform. The Office of PERB's Counsel considered the compelled call offs of the two operators as serious enough to commence a formal PERB proceeding on that job action. The company's charge resulted in a settlement that was posted on all bulletin boards for 30 days and included the declaration that "No official of ATU Local 1342 shall direct, encourage or pressure any member of the ATU Local 1342 bargaining unit to refuse or call off from overtime or any other work assignments." Wayne Gradl provided invaluable advice and assistance on this matter.

**D. Collective Bargaining Negotiations:** In addition to handling numerous arbitrations and grievances, Wayne assists the Human Resources Department in collecting bargaining negotiations and reaching agreements that are fair to both labor and management. This year we were able to successfully settle two labor contracts due to Wayne's hard work. Among other successful negotiations, agreements were reached with the CSEA and the Teamsters 264(S) Transportation Supervisors. It should be noted that the NFTA has successfully resolved 18 collective bargaining negotiations for our 13 unions over the past several years.

**E. Dashboard lunch IP and improper use of bylaw charge:** In December of 2013, management decided to treat drivers to a free lunch. Drivers had been treated to free lunches known as "dashboard lunches" from time to time in the past as a morale building exercise. ATU executive staff apparently did not want management to provide the dashboard lunch in December of 2013, because of their dissatisfaction with what was being offered in regard to a new collective bargaining agreement and urged his members not to eat the free lunch offered. Management decided to offer the dashboard lunch anyway despite these concerns. A large number of ATU Executive Board were called off for "union business" with the apparent intent of entering the Cold Springs facility to essentially demonstrate against and disrupt the free lunch being offered. Because of this stated purpose, the Executive Board members were denied access inside the Cold Spring facility by the NFTA Police but were allowed to demonstrate against the lunch on the public sidewalk and adjoining areas.

In March of 2014, the ATU filed an improper practice charge with PERB alleging that the Executive Board members had been improperly denied the ability to conduct their “union business” on Metro property. Management defended against this charge, asserting that the Union’s right to conduct Union business on Metro property was not absolute, especially where there were legitimate concerns that their presence on property would foment work disruptions or perhaps violence, and that picketing against management actions is not the type of “union business” that unions have a right to conduct on an employer’s property. Through Wayne Gradl’s diligence and advocacy at PERB, this charge was ultimately withdrawn and the PERB case closed in February of 2016 without any finding of an improper practice on management’s part.

### **VIII. Audits/Investigations:**

Operating in a highly regulated environment, the NFTA is regularly confronted with agency audits and investigations. In addition, the NFTA takes its statutory reporting responsibilities very seriously. One of our statutory reporting responsibilities is to report “information concerning corruption, fraud, criminal activity, conflicts of interest or abuse by another state officer or employee relating to his or her office or employment, or by a person having business dealings with a covered agency relating to those dealings” to the New York State Office of the Inspector General. NY Executive Law §55. In 2016, Vicky-Marie Brunette, the NFTA’s Deputy General Counsel, reported to and conferred with the New York State Office of the Inspector General on several significant matters which are currently pending with that office.

### **IX. Use of Outside Counsel**

To assist the Office of General Counsel in providing legal services to the NFTA, it is sometimes necessary to retain the service of outside counsel to assist with specialized areas or work overload. Most of our outside litigation assistance was required for labor matters involving the ATU, commercial litigation and transactional assistance involving environmental issues. The labor matters involved assistance in collective bargaining negotiations (where we still hope to reach a fair deal with the core and hardworking members of the ATU), PERB fact-finding, and complicated grievances and requests for arbitration. The commercial litigation involved a constitutional challenge to our airport access fees. Finally, we used an outside firm to assist in the transfer of the Port Terminal Complex to ECHDC due to its environmental complexity. We continue to strive to use outside counsel only when necessary and in the best interests of the NFTA.

## X. Future Goals

The Office of General Counsel's goals for 2017 include; supporting initiatives of the Executive Director and the Board, facilitating Transit Orientated Development Projects such as development at the DL&W terminal and public-private partnerships for developing other Metro light rail stops; assisting in the alternatives access study in the Amherst Buffalo Corridor; finalizing further leasehold arrangements at the Metropolitan Transportation Center (MTC), promoting and regulating access to our airports for transportation network companies such as Uber and Lyft, identifying litigation trial opportunities for our Associate Counsel, development of additional proactive training initiatives, increased staffing to support increased demand for legal services, continuing focus on ethics and identifying opportunities for conducting additional ethics training to our employees; continuing to support diversity in our employment practices and other activities; continuing focus on cost controls for outside legal counsel; identifying new training and professional development opportunities; and developing a more focused legal outreach program.

