

Office of General Counsel

ANNUAL REPORT

2018

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



Introduction

2018 was an amazing year of accomplishments for the NFTA! The Buffalo Niagara International Airport received the prestigious J.D. Power award ranking the airport #1 in customer satisfaction among all medium hub airports in North America. We received industry recognition that “Metro Rail outperforms most of the light-rail lines in the United States”¹ which follows on the heels of our 90% transit rider satisfaction rating for bus and rail. The legal team and procurement group is honored to provide the necessary support for the NFTA to achieve these exemplary accomplishments.



The activities described in this report reflect the diligent work of the professionals in the Office of the General Counsel who serve the public by providing high quality legal services 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 (Paralegal and Assistant to the General Counsel).

*General Counsel
David J. State (December 31, 2018)*

¹ Trains, Buses, People: An Opinionated Atlas of U.S. Transit (Island Press), Christof Spieler.

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.

The Office also oversees the NFTA’s Procurement Department. This combination has strengthened the Procurement Department’s exceptional performance in procurement compliance and ethics and facilitates continued focus on those areas so that Procurement can continue to successfully perform their mission to “procure high-quality materials and services which provide safe and reliable transportation, transportation services and facilities for our customers.”

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 and integrity. Staff members are dedicated and hard-working professionals who provide selfless service to the public.

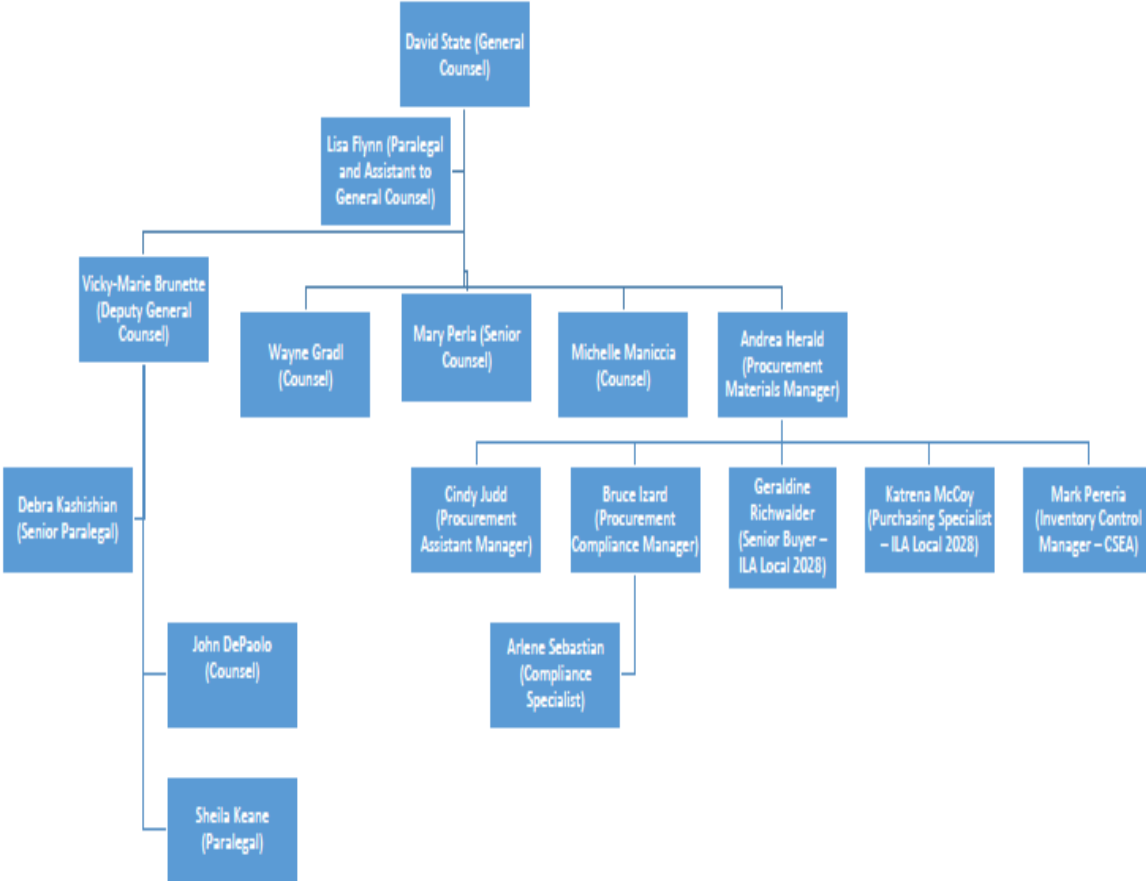
A. Personnel and Location

The Office of General Counsel consists of a General Counsel, a Deputy General Counsel, a Senior Counsel, three Counsels, one Senior Paralegal, one Paralegal and Assistant to the General Counsel, and one Paralegal. The majority of the Legal Staff is located on the 6th 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.

The Procurement Department is led by the Manager of Procurement/Materials and includes a Manager of Procurement Compliance, an Assistant Manager, a Compliance Specialist, Senior Buyer, Purchasing Specialist, Inventory Control Manager and other direct reports.

A graphical description of all current staff members is depicted below:

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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.

Vicky-Marie Brunette earned 14 hours of CLE instruction and attended the Defense Research Institute Civil Rights and Governmental Tort Liability conference in New Orleans, Louisiana in January 2018. The conference featured national speakers and educators and covered topics including the following: 1) trying police cases in a post-Ferguson world; 2) the interaction of the First and Fourteenth Amendments in interactions between citizens and police officers; 3) the significance of *White v. Pauly* in Qualified Immunity; 4) emerging technologies for police and first responders; 5) protecting prisoners from each other; 6) appellate practice in §1983 cases; and 7) the Americans with Disabilities Act relating to law enforcement and prisoners. Additionally, Vicky earned CLE credit in New York's newly created Diversity, Inclusion and Elimination of Bias category by attending a CLE course entitled "Fostering Inclusion in the #MeToo Era." In October of 2018, Vicky also attended the statewide Agency General Counsel meeting in Albany, New York.

Wayne Gradl attended the Annual Training Conference hosted by the New York State Public Employer Labor Relations Association in Saratoga, New York and took CLE courses on the Taylor Law. Mary Perla took the following courses: The Best and Worst of Ethics Violations Creating Opportunities; and Improving Outcomes Commercial Real Estate: Overcoming Sticking Points. Michelle Maniccia took the Commercial Real Estate – Overcoming Sticking Points course.

In February 2018, John DePaolo earned 22 hours of CLE instruction and attended the APTA Legal Affairs Seminar in Palm Springs, CA. The APTA conference featured national speakers and educators and covered topics including the following: 1) public transportation legislative update; 2) Federal Transit Administration update; 3) physical and cyber security developments; 4) public private partnerships (P3s); and 5) opportunities and challenges of transportation network companies. John also took course work in Traumatic Brain Injuries; Defending Against Reptilian Plaintiff's; and Maximizing the Vantage Point of a Vocational and Economic Expert in Damages Analysis. John is expected to attend the 2019 APTA Legal Affairs Seminar in New Orleans, Louisiana.

2. Externship Program– 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); Christine Farrow, PhD, (the NFTA's Manager 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 (Lenora B. Foote-Beavers, Esq. and Joseph M. Hanna, Esq.) for their assistance and continued support of this program.

For the spring of 2018, Kodai Sinclair Okano from SUNY Buffalo Law School participated in the program. Kodai worked on several significant projects including research on litigation and evidentiary issues such as whether material in a claims file is “material prepared in anticipation of litigation” and is therefore privileged; research on liability matters such as whether a police officer, operating a police vehicle which collides with another vehicle that fails to yield to the police vehicle, is subject to liability when he is responding to a personal or family emergency; research on labor and employment matters such as subcontracting/outsourcing of work; research under the Pattern Jury Instructions; research on governance issues as to whether a member participating in an executive session can disclose a matter discussed in the session after the session has concluded. Kodai also drafted several Payment Card Industry (PCI) policies in order to support the NFTA's fare system upgrade project.

We are proud of all of the interns who have 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 has served as the President of the Minority Bar Association of WNY. Colin Casey (interned during the summer of 2015) was appointed Vice President of Great Lakes Environmental & Safety Consultants.

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 staff participated in outside activities that advanced this objective.

In 2018 Vicky-Marie Brunette commenced a two-year term on the Executive Board of the Delaware Women's Golf Club (DWGC) League, as Secretary. Each year the club sponsors a worthy cause and this year Vicky, the Executive Board and DWGC members were pleased to raise funds for Mona's House, a local organization that provides assistance and refuge for victims of human trafficking. Professionally, Vicky also continued her service as Co-Chair of the Corporate Counsel Committee of the Women's Bar Association of the State of New York, WNY Chapter, the Nominations Committee Chair of the Defense Trial Lawyers Association of Western New York, and, as a member of the Board of Trustees for St. Mary's School for the Deaf, where she also serves as Nominations Committee Chair.

Dave State continued his service as a policy committee member of the Erie County Industrial Development Agency, board member of Bishop Timon-St. Jude High School, adjunct faculty at Erie Community College, and board member of the Buffalo Municipal Housing Authority.

John DePaolo has continued his service as a Charter Member of the Rotary Club of Buffalo Niagara Medical Campus. The Rotary/Greenway Commission continues to be engaged in improvements and extensions to the nature trails between Buffalo and Lake Ontario. John has continued to be involved in the WNY Defense Trial Lawyers Association, serving as the Education Chair. In December 2018, John participated in the Santas of Swig - a Homebrewed Fundraiser for the Matt Urban Hope Center which organization responds to the needs of the community by hosting family-focused events, informative workshops, free tax preparation, benefits screening, housing and job assistance and assists individuals who are homeless and those at risk for becoming homeless. John's Belgium triple styled drink was awarded 1st Place Best of Show.

Wayne Gradl was elected Secretary of the Western New York Amateur Chess Association and holds the title of National Master. Wayne continues his climbing activities and is a member of the Adirondack Mountain Club, the Appalachian Mountain Club and the Adirondack 46ers.

Lisa Flynn continued to serve as Secretary of the Board of the Wilson Youth Football League. This continues Lisa service with the league where she previously served as the Board's elected Trustee last year before she was nominated by the community to serve as Secretary of the Board.

Sheila Keane continues to serve as a volunteer chaperone with Explore Buffalo. In February and March of 2018, she took a history of Buffalo course through Explore Buffalo and in May she took a comprehensive docent training course. The docent

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training consisted of 6 days of training over a two week period of time with emphasis on the “Turn of the Century Treasures” tour, featuring eleven of the most significant buildings in downtown Buffalo including the Electric Tower, Buffalo Savings Bank, Market Arcade, Shea’s Buffalo Theater, Calumet Building, Root Building, The Curtiss Hotel, The Livery, The YMCA, Ancient Masons Lodge and the Genesee Building (Hyatt Hotel). Following the training Sheila gave the tour on Saturday mornings June – September 2018. Sheila expects to be giving this tour, along with the “Silo City Ground” tour and a “South Buffalo by Bike” tour in 2019.

Finally, Mary Perla and Dave State continue their efforts 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.

4. Internship Program – Daemen College

Deb Kashishian continues her work toward establishing a paralegal internship program with Daemen College. This would be the first paralegal internship in the history of the NFTA. Once established, the intern is expected to perform substantive work including review of Summons and Complaint and drafting of answers, discovery demands and other discovery documents; preparation of Bills of Particulars and omnibus discovery responses; requesting medical records; reviewing, organizing and summarizing medical records; review of deposition transcripts in order to determine if missing records/documents need to be obtained; LexisNexis, Facebook and other social media searches of claimants; E-filing of pleadings with the court; preparation of subpoenas; and organization of files in preparation for trial.

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 2018 we continued our ethics training initiative, and 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 2018, we maintained 100% compliance with JCOPE's Comprehensive Ethics Training Course (2-hour live course) for all Financial Disclosure Statement filers who are required by law to take this training. In addition, we provided newly developed training from JCOPE designated as a live "Ethics Seminar" which is designed as a refresher course with a focus on key concepts and changes in the law.

B. Procurement Training

On June 7, 2018, we conducted procurement training for approximately 100 senior staff and other individuals involved in procuring goods and services. The training was presented by Andrea Herald, Dave State, Cindy Judd, Bruce Izard and Christine Farrow, Manager EEO/Diversity Development and covered such topics as the responsibilities and identification of the individuals who work for the Procurement Department; the Procurement Guidelines and procedures of the procurement process; award and approval levels; purchase order requisitions and instructions; the purchasing Visa Card program; top procurement pitfalls; information on MWBE, DBE, and Service-Disabled Veteran-Owned Businesses; guidelines for preparing better Board Resolutions; coverage of the NFTA Procurement Guideline Code of Ethics, Procurement lobbying rules and Project Sunlight.

C. Ensuring Diversity and Inclusion and Combatting Harassment and Discrimination in the Workplace

On August 23, 2018, Governor Cuomo announced actions to address workplace discrimination and harassment, and further equal opportunity in both the private sector and the state workforce. Those actions included signing Executive Order 187. At NFTA's September 2018 Board meeting, Vicky briefed the Board of Commissioners on this new initiative. Vicky also provided legal guidance to NFTA's EEO/Diversity Development and Human Resources Departments in developing and finalizing a written Diversity and Inclusion plan and ensuring that the policies we currently have in place are compliant with Executive Order 187. Michelle was also involved in reviewing and advising the EEO/Diversity Development Department on Executive Order 187 and employee training materials and she drafted standard Executive Order 187 language for inclusion in NFTA and Metro contracts as well as a standard form of Affirmation of Compliance to be signed by counterparties doing business with the NFTA and/or Metro.

IV. Contracts/Negotiations/Opinions/Regulatory Compliance

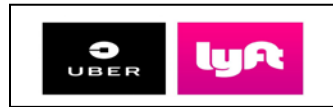
The Office of General Counsel maintains an active transactional practice in the negotiation and drafting of contracts to procure goods, services and to acquire and

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. Most of this work is handled by Mary Perla and Michelle Maniccia. 2018 was a tremendous year for the transactional group. Here are some of the highlights.

A. Advertising at the Airports:

BNIA and NFIA are hosts to 5.1 million passengers annually including a significant presence of Canadian travelers. Both airports provide an attractive opportunity for advertisers to market their products and services. On June 28, 2018, the NFTA Board approved an agreement with Lamar Airport Advertising Company for the sale and use of advertising space at BNIA and NFIA for a five year period providing a minimum guaranteed revenue equal to the greater of \$3,250,000.00 or 55% of gross revenue as well as \$150,000.00 in Mississauga Transit advertising trade value and a capital expenditure investment of \$400,000.00 to improve advertising displays. Mary Perla was instrumental in evaluating this proposal and negotiating the terms of this agreement.

B. TNC Regulations at the Airports:



Transportation Network Companies such as Uber and Lyft were first authorized to operate in upstate New York on June 29, 2017. We proactively reached out to Uber and Lyft to finalize pilot agreements so that they could offer their services at BNIA and NFIA by June 29, 2017. With these agreements finalized, BNIA and NFIA became the only upstate airports with both Uber and Lyft available as a customer amenity. Following these agreements, work began on changing the NFTA's Ground Transportation Rules and Regulations to incorporate a regulatory framework for TNCs as well as an established fee for drop off and pick up. On November 19, 2018, the NFTA Board formally adopted the new Ground Transportation Rules and Regulations and fees for TNCs operating at our airports. This accomplishment was largely due to the hard work and dedication of Mary Perla and her work with the Aviation group.

C. Metro – Buffalo School Board Agreement: Although NFTA Metro has historically provided transportation to the Buffalo Board of Education (BOE) students, the previous contract with the BOE was outdated. It was ratified in January 1991 and many of the previous contract parameters did not reflect current operations and current cost parameters. To address these needs, an approach that centered around student access, transit pass products and the associated cost structure was developed. On September 27, 2018, the NFTA Board approved a two year agreement with the BOE, for the upcoming 2018 19 academic school year, to provide Buffalo Public School Students access to NFTA - Metro Bus and Rail service, supplemental service and additional pass product. Michelle Maniccia was instrumental in negotiating and drafting the

terms of this agreement.

- D. Advertising at Metro Bus/Rail:** Michelle advised Metro and the Public Affairs Department on a five-year, \$4,000,00.00 (minimum guaranteed revenue) advertising agreement with Lamar Transit Advertising LLC with respect to Metro buses, bus shelters, rail stations and rail cars, exclusive of naming rights.
- E. Naming Rights of Metro Stations:** We have been working with a consultant to develop and implement a naming rights strategy for Metro rail assets and the Metro Light Rail Rapid Transit system. The consultant identified an opportunity to generate needed revenue that could be invested in Metro's rail assets and the LRRT system to modernize and upgrade the rail stations. On September 27, 2018, the NFTA Board approved the first of these initiatives authorizing an agreement with Seneca Gaming Corp. for the exclusive naming rights to the Erie Canal Harbor rail station. Michelle was instrumental in negotiating the terms of this agreement, and advising Metro and the Public Affairs Department on the material legal and business terms of naming rights transactions and arranging for the Federal Transit Administration's approval of these incidental uses.
- F. Office of General Services – NYS Building Code:** As a compliance function, our Engineering and Property Department took the lead in making sure that our processes were more interactive with the NY Office of General Services to ensure compliance with the NYS Building Code. Vicky, Michelle and Mary worked on this important initiative which involved advising the Engineering and Property Departments on the legal requirements of developing and implementing an in-house construction permitting and code inspection program. Michelle drafted a new policy, "Construction Permitting and Enforcement of Code Inspection Requirements," for the Property Department, which will be used by all business units before undertaking capital projects that require compliance with the Uniform Code.
- G. Sexual Harassment Prevention Program:** The NFTA's EEO/Diversity Development Department continues to focus on training and other initiatives to combat sexual harassment in the workplace. Vicky and Michelle have been instrumental in providing critical support and assistance to the EEO/Diversity Development Department to ensure compliance with all legal requirements.
- H. 5K run at NFIA:** On August 19, 2018, the NFTA and Eclipse Multi-Sport held an inaugural Run the Runway 5K at NFIA. A segment of the race took place on the main runway. Mary Perla was instrumental in dealing with the FAA and TSA and negotiating the terms of the license agreement permitting the event.
- I. ATMs at the Airports:** ATMs provide convenience and service to travelers requiring cash for various needs including concessions, parking, and other services. In 2018, the NFTA reached an agreement with M&T Bank, Buffalo, New York, to provide full service automated teller machines (ATM) at BNIA and

NFIA. The net revenue to the NFTA over the total term of the contract is projected at \$210,000. Mary Perla served on the evaluation team and negotiated the terms and conditions of this importation agreement.

- J. New food and beverage concession at NFIA:** The food and beverage concessions available at airports can be a critical part of customer service and satisfaction. In 2018, the NFTA reached an agreement with Metz Culinary Management, Inc., a new food and beverage concession at NFIA which included upgrades to the facilities and additional food and beverage options. Mary Perla negotiated the terms and conditions of this agreement that will provide additional amenities to our customers at NFIA.
- K. 2018 Disadvantaged Business Enterprise (DBE) Program:** Michelle advised the EEO/Diversity Development Department on alternative dispute language for inclusion in the NFTA's DBE Plan and federally-funded contracts, including drafting a standard form of Prompt Payment Affidavit for inclusion in all federally-funded contracts to ensure compliance with the NFTA's DBE Plan.
- L. Financing:** Michelle advised the Finance Department on transaction documents relating to a \$2.1 million transit bus lease purchase financing for the purchase of four new Metro buses.
- M. NYS Prevailing Wage Requirements:** Michelle advised the Human Resources Department on NYS prevailing wage requirements and coordinated with the Procurement Department to secure a new temporary staffing source familiar with those requirements. Wayne was also involved in researching this issue.
- N. ADP Payroll Services:** Michelle advised the Human Resources Department on the legal and business terms of a five-year Master Services Agreement with ADP providing for payroll and benefits management services, with substantial negotiation of indemnification terms, phased implementation, and payment arrangement dependent on "go live" effective date.
- O. Public Arts Display near LaSalle Station:** Michelle advised the Property Department on the material legal and business terms of a public arts display proposed to be painted on an old rail abutment owned by the NFTA and located near LaSalle Station, including drafting a Public Arts Agreement with the University District Community Development Association that provided for the development, installation and maintenance of the "Hearts in Hands" mosaic, including an evergreen escrow arrangement to ensure adequate maintenance of the art.
- P. Procurement Protest.** Michelle advised the NFTA Grants Department and Niagara International Transportation Technology Coalition (NITTEC) in connection with a procurement protest relating to its proposed Advanced Transportation and Congestion Management Technologies Deployment Project.



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, John P. DePaolo, Debra Kashishian, Lisa Flynn and Sheila Keane 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 2018 with an appellate dismissal from the Second Circuit Court of Appeals of a no-cause verdict in a §1983 case, an appellate dismissal in the Fourth Department of a number of causes of action in a slip and fall case, successful summary judgment motion practice in a wrongful death action and on a number of matters and skillful, favorable resolution of numerous cases.

As of December 19, 2018, the Office of General Counsel retained a litigated caseload of 206 personal injury files, including automobile negligence, premises liability, wrongful death, civil rights litigation and police professional liability files, with a total self-insured reserve of approximately \$2,411,015. The breakdown was 179 active litigated personal injury cases against NFTM, with a self-insured reserve retention of approximately \$2,125,985 and 27 active litigated personal injury cases against the NFTA, with a self-insured reserve retention of approximately \$285,030.

Of the 206 files, 203 are handled in-house by the Deputy General Counsel, Vicky-Marie J. Brunette, and Counsel, John P. DePaolo. Three litigated cases are being handled by outside counsel, pursuant to indemnity agreements. One litigated matter is being handled by outside counsel due to a conflict. 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.

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In 2018, Vicky continued to manage the litigation caseload. Notwithstanding taking on a greater role assisting with the overall management of the department on the “General Counsel” side of the house, it is estimated that Vicky appeared at approximately 91 pre-trial conferences; drafted and argued approximately 9 pre-trial motions; conducted approximately 27 depositions; conducted 13 mediations; and argued one appeal before the Fourth Department, Appellate Division. She favorably negotiated resolution of approximately 24 cases short of trial.

John has taken on many more cases in his second year with the Authority including motor vehicle negligence, premises liability, and police professional liability. John has continued with some no-fault provider suit defense matters. In 2018 it is estimated that John DePaolo appeared at approximately 90 pre-trial conferences, conducted approximately 50 depositions, drafted and argued numerous motions to dismiss/compel, some of which resulted in cases or certain causes of action being dismissed, while others resulted in the Plaintiffs complying with long overdue discovery. John has continued to defend the NFTA and Metro by filing notices to admit, notices to preclude and numerous motions to strike notices for physical examination and notes of issue. John has appeared for 8 mediations and has conducted one jury trial. Between medical provider suits and litigated matters, John has favorably negotiated resolution of approximately 30 cases short of trial.

Of the 54 matters Vicky and John resolved, 9 involved no monetary contribution at all from NFTA or NFTA Metro. The department saw only one jury trial in 2018, handled by John, which is indicative of the general trend of Plaintiffs to gravitate toward alternate means of resolution, rather than risk a jury verdict. Vicky is assisted by Senior Paralegal, Debra Kashishian, who prepares trial notebooks and pleadings in addition to obtaining medical records and other documents required for litigation. She brings with her more than 40 years of expertise and experience. John is assisted primarily by Sheila Keane. Sheila has extensive experience as a litigation paralegal and has proven to be a valuable asset to the team. She continues to do an excellent job handling FOIL work as requested by the NFTA’s Records Access Officer on an overflow basis. Vicky and John are also assisted by Lisa Flynn. Lisa’s attention to detail in delving into social media and financial documents led to unearthing what was tantamount to tax and insurance fraud in *Watson v. NFTA*. As a result, Plaintiff’s counsel decided to move to withdraw. Both Sheila and Lisa prepare litigation documents and records required for our ever growing defense practice.

In 2018, there were 52 new cases filed against NFTA Metro and NFTA. Vicky, John, Debra, Lisa and Sheila had an outstanding year as demonstrated by the following highlights in 2018.

A. Bernita Walker, as Administrator of the Estate of Tommy L. Herring v. NFTA, et al.

On March 19, 2014, a Notice of Claim was received by Defendants’ Legal Department. The notice alleged that Plaintiff, Bernita Walker, as Administrator of the Estate of Tommy L. Herring, intended to bring an action for the personal injuries,

conscious pain and suffering and the wrongful death of Tommy L. Herring. It further alleged that on or about December 19, 2013 at approximately 10:45 p.m. Tommy Herring was at a bus stop in the westbound lane of Genesee Street, near the intersection of Rowland, and that the bus stop was inaccessible due to the presence of snow and that Mr. Herring was “trapped in and forced to remain in the street, roadway, which was dark and unlighted” and as a result was struck by a 2004 Suburban operated by an oncoming motorist. Plaintiff alleged that the bus stop was “dangerous, unsafe and defective” and that the failure of the bus stop to be free of snow, ice and other obstacles prevented passengers from safely waiting for the #24 Route bus. Plaintiff further alleged that the snow that existed prevented passengers from safely exiting the street to the area where the bus stop was located.

Ms. Walker did ultimately place the matter into litigation. After discovery was complete, Defendants moved for summary judgment and requested that the Court dismiss the Complaint, as a matter of law, as there was no issue of fact to be presented to a jury.

Defendants argued that Plaintiff’s entire theory of liability in the instant matter was based upon speculation that the decedent was waiting to board an NFTA Metro bus at the time of the accident and further speculation that the decedent was somehow forced to stand in the roadway as a result of there being an accumulation of snow at the bus stop.

The only witness to the accident testified that the decedent was, at all times, walking westbound in the roadway, carrying what sounded like a bag of bottles and cans at the time he was struck by a vehicle driven by another motorist. She did not see him board or alight from a bus, nor did she see him wait at the bus stop.

Plaintiff, Bernita Walker, testified that her belief the decedent was waiting for a bus at the time of the accident was based upon a conversation she had with her daughter-in-law; however, her daughter-in-law testified under oath that the last time she had spoken to the decedent was sometime before she left for work at 2:00-2:30 p.m. She had no first-hand knowledge where he was when the accident occurred. Contrary to her mother-in-law’s testimony, she did not have a cell phone conversation with him immediately prior to the accident.

Defendants argued that the Plaintiff relied on “facts” or conclusions, which were all based on unsupported, improper speculation, in an attempt to create a duty and liability on the part of the Defendants. The issue of duty aside, Defendants also argued that they established by proof in admissible form that there was no bus service at or around the time of the accident, that there were no prior complaints about the condition of the bus stop or its location, that there were no prior accidents or injuries sustained by transit users at that location, that placement of the bus stop was properly vetted and the responsibility for removal of snow at the bus stop did not rest with the Defendants but, rather, with the municipality. With respect to the latter, the Town of Cheektowaga shifted the responsibility for snow and ice removal to the adjoining property owner or occupant via Cheektowaga Town Code §210-14.

After oral argument, the Court determined that Defendants met their initial burden and Plaintiff failed to show, by other than speculation, that the decedent was waiting for a bus at the time of the accident, such that a duty was created by the Defendants. An Order was entered in favor of NFT Metro, dismissing the Complaint in its entirety. Vicky-Marie Brunette handled this matter.

B. Thomas L. Mills v. NFTA, et al.

On September 11, 2014, shortly after 11:00 p.m., Plaintiff, then 52 year old Thomas Mills, boarded Metro bus #2011 at the Metropolitan Transportation Center (“MTC”), located at the intersection of North Division and Ellicott Streets in the City of Buffalo. The bus was equipped with interior lights, which were on, as well as a bus interior and exterior video/audio surveillance system. Video from the time Mr. Mills boarded the bus to the time he exited the bus was downloaded and preserved for litigation. The video evidence confirmed that, after boarding Bus #2011, Plaintiff initially walked to the center of the front deck and began to lower himself into a seat on the curbside of the bus facing the aisle, hesitated, stood again and then walked down the bus aisle toward the rear deck of the bus. He mounted the two stairs to the rear deck, took an additional one to three steps and then slipped and fell forward, striking the rear bench seat hard. After falling, Plaintiff noticed a “puddle-like” substance on the rear deck floor that appeared to emanate from the rear wheel well. The substance was confined to the rear deck. Plaintiff testified at deposition that he had not noticed that substance during his initial travel from the front of the bus to the middle of the front deck or during his subsequent walk to the back of the bus.

The bus operator testified at deposition that after leaving the MTC, he heard a noise and looked in the bus rear view mirror. He could see through the rear view mirror that the Plaintiff “was down”, but he could not see any substance on the bus floor. He pulled the bus to the curb and walked back to the rear deck to investigate the fall. When he reached the rear deck, he noticed an oily substance on the rear deck floor for the first time. In addition, no one had reported the existence of any slippery substance on the bus floor to him prior to the accident, nor had he observed the substance on the floor when he performed his inspection of the bus at his layover at the Amtrak Station less than 15 minutes prior to the fall.

It was later determined that the substance was hydraulic fluid that had leaked into the interior rear deck compartment as a result of a sudden and unexpected failure of an O-ring inside a fitting in the hydraulic system in the engine compartment. The mechanic who performed the subsequent repair testified that it is not a common repair and in his 20+ years with NFT Metro, had never before found the failure of an O-ring to result in a leak of hydraulic fluid into the interior of a bus. Maintenance records for the bus revealed that the bus had been properly and regularly maintained. Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell. While it is undisputed that Plaintiff fell after he slipped in a puddle of hydraulic fluid that had been caused by a malfunctioning piece of equipment, Plaintiff alleged that defendants had actual and/or constructive notice of the allegedly

dangerous condition, created the condition, failed to warn plaintiff of the condition, and negligently maintained or inspected the bus. Defendants denied those allegations.

After discovery was complete, Defendants moved for summary judgment dismissing the amended complaint, and Plaintiff opposed the motion, contending only that there were triable issues of fact with respect to the theories of actual and constructive notice. The lower trial court denied our motion in its entirety and we appealed that decision to the Fourth Department, Appellate Division. On appeal, the Fourth Department reversed the lower court's decision in part and affirmed it in part. The Court agreed Defendants had established as a matter of law that NFT Metro did not create the allegedly dangerous condition, that the bus was properly maintained and inspected and that the condition was open and obvious, thereby negating any duty to warn. However, the Court concluded that the trial court properly denied the motion insofar as it sought to dismiss the negligence claims predicated on the theories of actual and constructive notice, and determined that credibility of the testimony of the parties was an issue of fact for a jury to determine.

Following receipt of the Fourth Department's decision, which substantially narrowed the issues for trial, the parties agreed to participate in settlement discussions before a private mediator. With the assistance of the mediator, we were able to negotiate a favorable settlement. Vicky-Marie Brunette handled this matter.

C. Watson v. NFTA

In this matter, Plaintiff alleged that she fell and sustained personal injuries on February 3, 2015 at the Buffalo Niagara International Airport. Plaintiff alleged in her Bill of Particulars that she is a hair stylist and owner of a hair salon and that due to her injuries she was no longer able to work. Plaintiff included a wage component in her suit, alleging lost wages of approximately \$6,000-\$7,000 a month, ongoing into the future. Through discovery and after significant review of Plaintiff's financial history and business practices, it was found that Plaintiff was extremely dishonest in the allegations in the lawsuit. Numerous financial records were withheld initially. Through diligent discovery efforts we were able to get nearly all of the financial records which included several personal and several business bank accounts. The financial records showed that her pre-loss income was not what she claimed. It was also clearly established that she continued to work and earn post-loss at approximately the same rate as before. She has never made the pre-loss wages she alleged she did in her Bill of Particulars. Importantly, these accounts show money being moved and hidden at times that coincided with the NFTA discovery efforts. Numerous pre-loss money judgments against the Plaintiff were also located. Plaintiff had 2 hand surgeries and a neck surgery post-loss which are claimed to be causally related to the incident on NFTA property. We located pre-loss medical records showing prior injuries and treatment to her neck, back and hand including a prior surgical recommendation.

During the deposition, Plaintiff was questioned about her alleged pre-loss income, plus the fact that the same income seemed to continue even post-loss despite the

claim that she was unable to work and earn. She was questioned about judgments against her during the times she claimed she had significant earnings, the manipulated financial records, and her use of aliases to open new businesses. Plaintiff could not adequately explain any of the inconsistencies. She also disputed much of the pre-loss medical.

After the videotaped deposition, Plaintiff's counsel filed an Order for the Plaintiff to Show Cause why the lawyer should not be permitted to withdraw as counsel. It is unlikely that the California Plaintiff will appear herself, but she may acquire new counsel. Our opposing papers seek a dismissal with prejudice if the Plaintiff fails to proceed in some fashion within 30 days, and we are seeking an award of cost, in addition to reasonable attorney's fees. John DePaolo is handling this matter.

D. Tenders of Defense:

1. **Banas v. NFTA v. Standard Parking, et al:** After John DePaolo's successful tender of the defense and indemnification, which was reported last year, the entire lawsuit was ultimately resolved without any contribution from the NFTA.
2. **Stokes v. NFTA, et al:** After John DePaolo's successful tender of defense and indemnification, which was reported last year, this matter was completely resolved without any payment from the NFTA.
3. **Bailey v. NFTA Metro, et al:** As was reported last year, John DePaolo successfully tendered NFTA's defense and indemnification to the insurance carrier for Prior Aviation. That carrier has assigned White & Williams of New York City to stand in the shoes of the NFTA. To date, Plaintiff's counsel has been dilatory in providing discovery and recently counsel for White & Williams filed a Request for Judicial Intervention and a pre-trial conference will be held with the assigned Judge soon.



VI. Labor and Employment

Providing legal support to NFTA managers who work with the NFTA's 13 unions is no easy task and 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/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 2018 are listed below.

- A. **Manufacturer’s warranty work was NOT “subcontracting:** The ATU challenged the company’s invocation of a manufacturer’s warranty to get covered parts or equipment repaired, and argued that letting a manufacturer make the repair constitutes impermissible subcontracting. After hearing the matter, Arbitrator Selchick ruled that manufacturer’s warranty work was the work of the manufacturer, and not the Company, and so the ATU had no claim on that work. Wayne Gradl handled this important case which affirms management’s rights in this area by affirming the company’s ability to utilize warranties to repair equipment.

- B. **Texting while Driving:** On November 5, 2018 Arbitrator Foster issued an award which allowed the Performance Improvement Guidelines (PIGS) to be changed to make texting while driving a two-step discipline (i.e., termination occurs when an operator is caught a second time) as opposed to a four-Step discipline infraction. Wayne not only handled the advocacy required at the arbitration but also developed and implemented a strategy that ensured a successful outcome in the case. The PIGS have long been a source of frustration for operations management, especially in regard to operator cell phone use while driving, because they really did not act as a meaningful deterrent and attempts to negotiate tougher work rules had historically been unsuccessful. Using existing CBA language which requires the ATU not to unreasonably withhold approval of proposed rule changes, Wayne first presented the new rule against texting to the ATU and subsequently argued that the ATU’s refusal to approve such a rule was unreasonable and thus a union violation of the CBA. The arbitrator agreed. This technique for tightening up operator work rules had never been attempted before and will serve as a useful template for obtaining future rule changes to improve operations and safety.

VII. Procurement Initiatives:

A. Accomplishments

The combination of the Office of General Counsel with the Procurement Department has strengthened and provided added focus to this important function and 2018 was a very busy year for the Procurement Department. For example, in 2018 Andrea Herald and Cindy Judd managed the procurement process for over 91 BIDS/RFPs including procurements for Jet Bridge Ground Power Units, Sanitary and Storm Sewer Infrastructure Cleaning and Maintenance, Consultant for Safety Plan Development; Wildlife Hazard Management Consultant, Financial Advisor, Flight Information Display System, Payroll System, Bond Counsel, Fare Collection Marketing Consultant, Airport Lounge Concession, Portable Snowmelter for Airport, Environmental Testing, Financing for Buses, Aviation Consultant, Jet Bridge and Baggage Handling Maintenance and Operation, Taxicab Concession at BNIA, Underwriting Services, and various vehicle procurements.

Significant accomplishments in 2018 for the Procurement Department include the following:

- Two sessions of Procurement Training were provided to Managers and Requisitioners on June 7, 2018 with Cindy Judd and Bruce Izard as key speakers.
- The FTA found no defects in the Procurement section of FTA Triennial Review.
- Receipt of an “A” grade on the MWBE Program Performance Report Card due to the diligence of Bruce Izard and Arlene Sebastian.
- Empire State Development has begun to send other agencies to the Procurement Department to learn best practices for MWBE Program Management. Local Agencies such as the Erie County Water Authority and the Niagara Falls Water Board have also begun this practice.
- 91 projects were assessed for MWBE and SDVOB Participation Goals. Goals have been set and tracked for 23 new projects.
- The Department achieved 111.7% of our MWBE goal plan of 25.71%. MWBE Participation was 28.72%.
- The Department assisted the Grants department in securing \$1 Million Dollars for the Special Trackwork at the DL&W station.
- The Department provided the EEO Office with the Supplier Diversity section of the Strategic Diversity Plan.
- The Department worked on the Ellipse Upgrade Project. Mark Pereira is the

team leader for the Materials business stream for the upgrade. The tools provided with the upgrade will drastically improve the procurement process by providing electronic routing of requisitions, approvals of requisitions, and deployment of purchase orders. All procurement staff are involved in the system design, testing, and training.

- Bruce Izard, working with engineering and our electric and telecom consultants, is managing the upgrade of our natural gas accounts to Daily Metered Accounts. This involves the installation of new meters and telemetering cellular data plans for seven meters. This change will save approximately \$15,000 annually in natural gas transportation charges.
- The Procurement Boilerplates for formal bids and RFPs were updated with new statutory requirements as required, including new vendors' rules on sexual harassment prevention programs.
- The Procurement Compliance Team represented the NFTA at the following MWBE and SDVOB outreach events: BNMC Works Small Business Matchmaker, Roswell Park, Buffalo, NY - March 22, 2018; MWBE Compliance Training Review, Albany, NY - April 30, 2018; Small Business Matchmaker, Depew, NY - May 9, 2018; New York State Regional MWBE Opportunities EXPO, Buffalo, NY - June 1, 2018; SDVOB Matchmaker, Rochester, NY - August 28, 2018; Big Opportunities for Small Business. Buffalo, NY (participate in panel discussion with 3 other compliance officers discussing how to get certified as MWBE/SDVOB) - September 28, 2018; 2018 NYS MWBE Forum, Albany, NY - October 3 - October 4 2018; MWBE Classroom Training, ECMC, Buffalo, NY - October 18, 2018; Veterans Expo and Matchmaker, Rochester, NY - October 24, 2018.
- Over the last 18 months, the Inventory Control Team lead by Mark Pereira, has reduced on-hand inventory by over \$300,000 by systematically aligning supply and demand. Concurrently, the materials team is working with suppliers to reduce lead times, develop robust supply strategies, and identify ways to reduce both cost and inventory investment.
- In April 2018, the materials team reached out to Metro Bus's Top 5 Suppliers and began Quarterly Supplier Council Meetings. The intention of these meetings was to open the lines of communication between the NFTA materials team and key suppliers. Topics discussed include on-time delivery, lead times, service levels, and quality. Most importantly, the Supplier Council Meetings have created synergies resulting in reduced costs, faster response times, and knowledge sharing.
- To ensure the continued safety of the inventory clerks and promote safety awareness, the materials team documented Packaging Specifications and distributed it to our suppliers. The purpose was to align incoming receipts (i.e. box weight, shipment size, etc.) with already established safety policies,

lifting procedures and ergonomics.

- In coordination with Bus Maintenance, the Inventory Control Team assisted with the launch of the Metro Bus “K” Program. The “K” Program is a Predictive Preventative Maintenance Program. We assigned a replacement schedule to every part on the bus based on mileage, hours, and time. Replacement parts are ‘kitted’ by the supplier for each maintenance operation planned. The Inventory Control Team began their process by reviewing lead times and initial program costs. As a result, the team was able to achieve an additional cost savings of 12% to 15% by ordering in economic order quantities. Also, we were able to improve lead time without incurring any additional costs.
- At the beginning 2018, the Inventory Control Management Team identified Cycle Counting and throughput processing times as key processes to evaluate and implement best practices. The team began to map the processes and identify gaps in current processes. As a result, the development of a KPI (key performance indicators) dashboard will be established to monitor progress and communicate performance/desired results to team members.
- The Audit, Financial, and Inventory Control Departments worked together to finalize the “Perpetual vs. G/L Inventory Reporting” Audit. Through collaboration, the team identified a reporting error and submitted a change request with IT. Within the next three months, a new accurate report will exist, and the audit can be finalized shortly thereafter.

VIII. Audits/Investigations:

Operating in a highly regulated environment, the NFTA is regularly confronted with agency audits and investigations in addition to statutory reporting responsibilities. The Office of General Counsel is frequently called upon to assist in these matters.

In 2018, Vicky-Marie Brunette, the NFTA's Deputy General Counsel, reported to and conferred with the New York State Office of the Inspector General and the New York State Office of the Attorney General on several significant matters. In addition, she continues to serve on the NFTA's Systems Integrity Committee, which conducts its own internal investigations at the behest of the Executive Director.

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. The philosophy of the office continues to be full maximum use of in-house staff, and 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 2019 include; supporting initiatives of the Executive Director and the Board; continuing to support diversity in our employment practices and other activities; preparing and conducting training in areas such as procurement and ethics; facilitating Transit Orientated Development Projects such as development at the DL&W terminal and other Metro light rail stops; identification of revenue enhancement opportunities; continuing focus on cost controls for outside legal counsel; identifying new training and professional development opportunities; continuation of a strong litigation posture to defend any claims asserted against the NFTA, and identifying metrics to measure, manage improve the performance of the Office of General Counsel.





End of Report