

Office of General Counsel

ANNUAL REPORT

2019

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



Introduction

It's been "Five hundred twenty five thousand six hundred minutes¹" since last year's General Counsel Report, and what a year 2019 has been! We had continued strong performances in the Aviation, Metro and Property divisions with the legal team providing support for these critical Business Centers.

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, 2019)*

¹ Rent – Seasons of Love.

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.

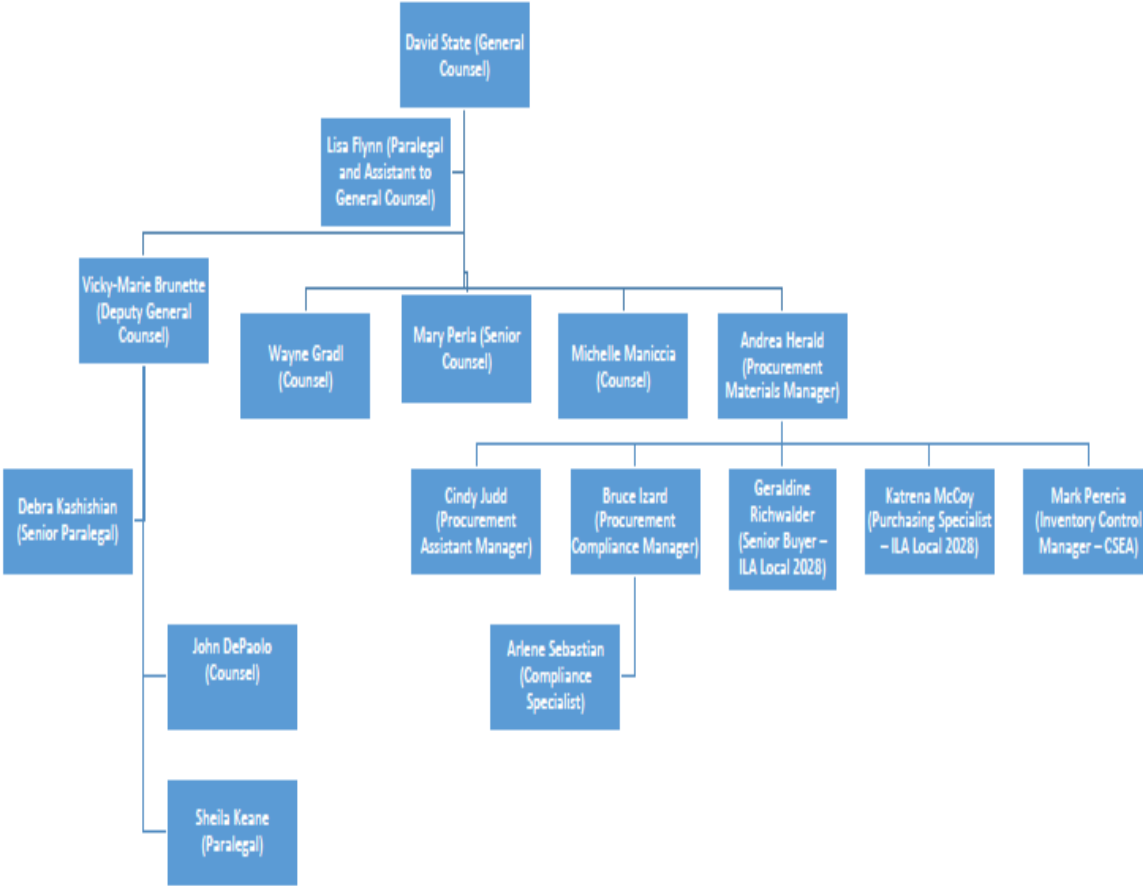
A. Personnel and Location

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. This year we brought on a part time attorney, Diane Noshay, Esq., to assist the Transit Authority Police Department with policy and procedure reviews.

The Procurement Department is led by Andrea Herald, 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:

OFFICE OF GENERAL COUNSEL



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 participated in the live stream Defense Research Institute Civil Rights and Governmental Tort Liability conference in San Antonio, Texas on January 31-February 1, 2019. The conference featured national speakers and educators and covered topics including the following: 1) school security/guns in schools; 2) a panel discussion on preventing school shootings; 3) limits on use of technology in small and large law enforcement departments; 4) qualified immunity; 5) Supreme Court review; 6) litigating emotionally charged police cases; 7) a panel discussion on race and police; and 8) ethical and effective use of motion practice in civil rights litigation. Additionally, Vicky earned CLE credit in professional practice by attending a CLE course entitled "Sexual Assault and the Child Victim Act: Implications for Liability and Coverage."

Wayne Gradl attended the Annual Training Conference hosted by the New York State Public Employer Labor Relations Association in Saratoga, New York. Mary and Michelle both participated in the annual Real Estate Conference.

In February 2019, John earned 24 credit hours of CLE instruction and attended the APTA Legal Affairs Seminar in New Orleans, LA. National speakers and educators were featured at this APTA conference covering numerous topics including (1) FTA's Acting Chief Counsel Dana Nifosi provided a retrospective summary of significant FTA actions in 2018 and a preview of what's on the horizon in 2019; (2) The Basics: Procurement, Grants, Buy America; (3) The labor panel featured the Supreme Court's Janus decision on public employees' union dues, perspectives of a transit services contractor on bargaining, and a primer and updates on section 13(c) labor protection; (4) Alternate Modes of Transportation Clean Transportation: Electric Buses; (5) Rail Session: Modernizing the Passenger Rail System Requires Playing the Long Game; (6) Transit in Uncertain Times and the Role of Legal Counsel; (7) Guns on Transit; (8) Joint Development Projects and public-private partnerships (P3s); (9) Crisis Management 101 for the Transit Lawyer; and a joint session with Legal Affairs and Risk Management attendees covering Sexual Harassment: Leadership in the #MeToo Era; Insurance and Risk Management: Litigation, Investigation & Public Disclosures; and Cyber Security Risk, Mitigation and Insurance. John also took courses involving Mock Trials, Jury Consultants and Focus groups.

2. Paralegal Internship Program

At the direction and leadership of Deb Kashishian, we implemented a paralegal internship program for the first time in the history of the NFTA. Jennifer Gaynor from Daemen College was our first intern and completed her service during the spring of 2019. Jennifer worked on reviewing Summons and Complaints; 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; research on LexisNexis, Facebook and other social media regarding claimant activity; E-filing of pleadings with the court; preparation of subpoenas; and organization of files in preparation for trial. We look forward to continuing this program with additional interns.

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 and warrant recognition.

In November of 2019 The Defense Trial Lawyers Association of Western New York (DTLA-WNY) announced that NFTA's Deputy General Counsel, Vicky-Marie J. Brunette, was awarded the highest honor bestowed by that organization: the Robert M. Kiebala Memorial Award as the 2019 Defense Trial Lawyer of the Year. The award is presented to the attorney who best exemplifies the Association's mission of "promoting the highest standard of trial conduct through member education and advocating the defense position in civil cases with the judiciary and where appropriate in the New York State legislature." In selecting Vicky, her defense colleagues noted that she is known for her measured and thorough approach to trial practice. The award ceremony was held on December 11, 2019 at the Mansion on Delaware with her NFTA colleagues in attendance.



OFFICE OF GENERAL COUNSEL

In 2019, Vicky completed a two-year term on the Executive Board of the Delaware Women's Golf Club (DWGC) League, as Secretary. She was elected to and agreed to serve an additional one (1) year term as the Club's Marketing and Publicity Chair for 2020. Professionally, Vicky also continued her service as a member of the Board of Trustees for St. Mary's School for the Deaf, where she also serves as Nominations Committee Chair and By-Laws Committee Chair. She will also continue on as Social Co-Chair of the DTLA-WNY in 2020.

Dave State continued his service as a policy committee member of the Erie County Industrial Development Agency, adjunct Business Law faculty at Erie Community College, and board member of the Buffalo Municipal Housing Authority.

John DePaolo is active with the Rotary Club of the Buffalo Niagara Medical Campus, is a Charter Member and served as a Board member for four years. John is also active with the Rotary District (7090) involving service clubs in the Niagara Frontier and Southern Ontario. One of the District 7090 initiatives is the Rotary/Greenway Commission. This effort joins multiple clubs all along the Niagara Greenway making improvements and extensions to the nature trails between Buffalo and Lake Ontario. Funds from the Ralph C. Wilson, Jr. Foundation will greatly bolster these efforts especially in the area of the present LaSalle Park in Buffalo. John is still serving as the Education Chair of the WNY Defense Trial Lawyers Association which provided multiple legal seminars in 2019. John has continued to support 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.

Wayne Gradl, the NFTA's version of Anatoly Karpov, had two articles published in the New in Chess Yearbook Volume 133 on the Sicilian Dragon and the Krause variation of the Slav defense. He was elected Vice-President 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.

Sheila Keane volunteered as part of the NFTA Community Outreach team and worked at the Taste of Buffalo. She also continued her volunteer docent work with Explore Buffalo. This year Explore Buffalo hosted the first ever "Doors Open Buffalo" and Sheila collaborated with the NFTA Planning and Rail departments to get the DL&W open to tour for the day. This tour was an amazing success and the DL&W was one of the most visited locations of the day, with over 1000 visitors. The inclusion of DL&W as part of the tour resulted from Sheila's initiative and the NFTA's own Rachel Maloney who helped get the green-light for involvement and organized our volunteers. The tour helped generate more buzz about the rail expansion project and provided a great opportunity to build additional excitement for second level development potential. Finally, Sheila wrote and created a bike tour of South Buffalo and also sits on the Explore Buffalo Marketing Advisory Committee.

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 2019 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 2019, 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. Vendor Integrity Requirements in State Contracts (Executive Order No. 192)

On January 15, 2019, Governor Cuomo issued Executive Order No. 192 which imposed continuing vendor integrity requirements to ensure that government entities conduct business only with responsible entities to ensure that taxpayer dollars are not paid to entities or individuals that lack integrity, are incapable of providing satisfactory performance, or fail to comply with existing laws. The NFTA formed a team consisting of Andrea Herald, Mary Perla, Michelle Maniccia and Lisa Flynn to develop appropriate forms and checklists to ensure that the NFTA meets the requirements of this Executive Order. EO 192. This work included drafting (i) a new NFTA policy, consistent with Executive Order 192, governing vendor responsibility, (ii) a user-friendly form of Vendor Questionnaire to be completed by all vendors doing business with the NFTA or Metro and (iii) drafted language for

inclusion in all procurement documents issued, and contracts executed, by the NFTA and Metro. Michelle took on the additional steps of advising the Engineering department on Executive Order 192, including locating online resources to be added to its Contractor Checklist for the purpose of assessing vendor responsibility.

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. 2019 was a busy year for the transactional group. Here are some of the highlights.

A. New Use and Lease Agreements for Airlines operating out of BNIA:

Mary Perla negotiated a new Use and Lease Agreement with the scheduled airlines operating at Buffalo Niagara International Airport (BNIA). NFTA and the scheduled airlines entered into a five-year agreement. The scheduled airlines that signed the agreement are American Airlines, Delta Air Lines, Frontier Airlines, JetBlue Airways, Southwest Airlines and United Airlines. The new standard Use and Lease Agreement provides certainty for the NFTA at BNIA for the next five years.

B. Lounge at BNIA: BNIA had been without an airline club since October 2015 when American Airlines closed its private use club and the space was vacant. Mary Perla was instrumental in filling this void by providing assistance in bringing in a new operator to provide this valuable customer service amenity.



The NFTA issued a Request for Proposal for the development and operation of a common-use passenger lounge located in the vacant space to determine whether there was interest in the development of a common use lounge to fill the void in this customer service amenity. NFTA selected ALD U.S. Holdings, Inc. (ALD), of Plano, Texas to operate a common use airport lounge in the Buffalo Niagara International Airport (BNIA) for a term of five years and Mary negotiated the terms of the deal. ALD invested approximately \$1.6 million to remodel the existing facilities. ALD pays the greater of a minimum guarantee of \$855,000.00 or 12% of gross revenue for the five-year term. ALD operates ten lounges at other U.S. airports that have non-stop flight service from BNIA. ALD has a guaranteed contractual relationship with Priority Pass, the world's largest independent airport lounge access program with over 1,200 lounges worldwide. Since its opening, the lounge has been a great success.

- C. Automatic Data Processing (ADP):** The NFTA continued its initiative to go to a more efficient payroll processing system. Michelle Maniccia provided invaluable assistance to the Human Resources Department in implementing this initiative. This assistance included advising the Human Resources, Information Technology and Finance departments on (i) the NFTA’s contract rights under a Master Services Agreement (MSA) with ADP, LLC, and (ii) two amendments to the MSA, which were necessary to address extension of the “Go-Live Date,” and (iii) the necessary issuance of a reservation of rights notice detailing open issues, the updated critical path to new “Go-Live Date” and reimbursable costs associated with the new critical path.
- D. Blue Cross Blue Shield Agreement:** Michelle advised the Human Resources department on the terms of an Administrative Services Agreement with BlueCross BlueShield of Western New York (BCBS), which will govern the processing of approximately \$30 million in healthcare claims, in particular matters relating to indemnification and termination provisions as well as performance guarantees relating to claims processing and administrative services.
- E. Chase:** Michelle advised the Finance department on the terms of a Merchant Services Agreement with JP Morgan Chase Bank, N.A. and Paymentech, LLC, which will govern all Metro bus and rail transactions processed through Metro’s new fare collection system contract, in particular matters relating to the use of data, data breach matters, indemnification and liability caps.
- F. Token Transit:** Michelle advised Metro and Information Technology on the terms of a contract with Token Transit pursuant to which Metro licensed a downloadable mobile application that allows for the sale and purchase of transit pass media by interested Metro riders.
- G. WCB cash deposit:** Michelle advised the Risk Management department on the return of a \$25,000 workers’ compensation deposit made more than seven decades ago by International Railway Company (a predecessor-in-interest to the NFTA) by way of a negotiated Petition Affidavit that was acceptable, in form and substance, to the NYS Workers’ Compensation Board.
- H. Development of the DL&W Terminal:** Michelle advised the Metro and Grants departments on the terms of a (i) request for proposals seeking a private-sector development partner for the redevelopment of the DL&W Terminal and (ii) term sheet setting forth the material terms of a pre-development agreement.

- I. **Real Property Actions and Proceedings Law:** Michelle advised the Property and Finance departments on changes to New York Real Property Actions and Proceedings Law changes that impact commercial leases and drafted contract language for inclusion in all NFTA leases.
- J. **Durham:** Michelle negotiated a favorable settlement of a prevailing wage claim made by a local temporary staffing company.



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 2019 with an appellate affirmance in the Fourth Department of an expansive discovery motion, successful summary judgment motion practice in a four level fusion case, successful bifurcation and *in limine* motion practice at the trial court level in a significant personal injury trial, as well as skillful, favorable resolution of numerous cases that resulted in little or no monetary contribution from the Authority.

As of December 1, 2019, the Office of General Counsel retained a litigated caseload of 208 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 \$4,247,980. The breakdown was 186 active litigated personal injury cases against NFTM, with a self-insured reserve retention of approximately \$4,095,450 and 22 active litigated personal injury cases against the NFTA, with a self-insured reserve retention of approximately \$152,530.

Of the 208 files, 203 are handled in-house by the Deputy General Counsel, Vicky-Marie J. Brunette, and Counsel, John P. DePaolo. Two (2) litigated cases are being handled by outside counsel, pursuant to indemnity agreements. Five (5) litigated matters are 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.

In 2019, Vicky continued to manage the litigation caseload, as well as actively participate on the NFTA's Management Team, and assist the General Counsel with the overall operation of the Legal Department. In addition to her Deputy duties, on the litigation side of the house, it is estimated that Vicky appeared at approximately 94 pre-trial conferences; drafted and argued approximately 18 pre-trial motions; conducted approximately 44 depositions; conducted 8 mediations; selected two juries and conducted one jury trial in New York Supreme Court. She favorably negotiated resolution of approximately 15 Supreme Court cases short of trial.

John has expanded his caseload in his third 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 2019, it is estimated that John DePaolo appeared at approximately 120 pre-trial conferences, conducted approximately 80 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 11 mediations and has conducted one jury trial. Between medical provider suits and litigated matters, John has favorably negotiated resolution of approximately 35 cases short of trial.

Of the 50 matters Vicky and John resolved, 21 involved no monetary contribution at all from NFTA or NFT Metro. The department saw three juries picked and two jury trials in 2019, two handled by Vicky and one handled by John, which is in line with the general trend of Plaintiffs to gravitate toward alternate means of resolution, rather than risk a jury verdict.

Vicky is primarily assisted by Senior Paralegal, Debra Kashishian, who prepares trial notebooks and pleadings in addition to obtaining medical records and other discovery documents required for litigation. She brings with her more than 40 years of expertise and experience. In 2019, Debra was also instrumental in recruiting and mentoring a student paralegal intern. We expect Debra will continue to spearhead that initiative in 2020.

John is assisted primarily by Sheila Keane. Sheila has extensive experience as a litigation paralegal and has expanded her role by assisting John with the preparation of various discovery motions and motions to compel. Vicky and John are also assisted by Lisa Flynn. Lisa's attention to detail in delving into complex medical records, social media and financial documents continues to provide valuable assistance to the litigation group. Both Sheila and Lisa prepare litigation documents and records required for our ever-growing defense practice. In 2019, there were 59 new cases filed against the Authority. Vicky, John, Debra, Lisa and Sheila had an outstanding year as demonstrated by the following highlights in 2019.

A. Glenn v. NFT Metro, et al.

On September 23, 2013, an inbound #19 Metro bus on Bailey Avenue, near the intersection of Collingwood, made an emergency stop to avoid impact with a woman who ran across the street, mid-block, carrying a baby in her arms. The Plaintiff was a passenger in the bus at the time of the incident who stood up to look at bus schedules just before the bus had to brake. The Plaintiff grabbed a vertical pole to avoid falling and alleged injury to her neck and right shoulder as a result.

After completion of discovery, NFT Metro moved for summary judgment on the issue of liability on two grounds: 1) that the braking of the bus was not "unusual and violent" under applicable case law and; 2) that the bus operator was confronted with an emergency situation, not of her own making, and acted as a reasonably prudent bus operator would act in the same situation, thereby absolving Defendants of any liability.

After oral argument, the Court determined that Defendants met their initial burden to prove that the movement of the bus was not unusual or violent and, further, that the video showed that the bus operator was confronted with an emergency. Plaintiff failed to rebut the presumption and raise a triable issue of fact. An Order was entered in favor of NFT Metro on March 11, 2019, dismissing the Complaint in its entirety. Vicky-Marie Brunette handled this matter.

B. Almalahi v. NFT Metro

On August 23, 2019, in a unanimous decision, the Fourth Department, Appellate Division, affirmed the Trial Court's Decision and Order granting our motion to compel the production of expansive, unrestricted medical authorizations and held that that the Supreme Court did not abuse its discretion in granting the motion.

Plaintiff was a passenger on a #1 William bus on April 19, 2016 and fell when the bus moved slowly away from a service stop. The Plaintiff was utilizing a walker at the time, had recently undergone carpal tunnel surgery and suffered from a host of prior, unrelated medical conditions. The Fourth Department determined that Plaintiff's medical records covering disputed health conditions, which involved her ability to stand, steady herself and ambulate, may contain relevant information that is material and necessary to the defense of the action with respect to the element of causation or to the related affirmative defense of comparative fault. Vicky-Marie Brunette is handling the matter and drafted and argued the motion before the Trial Court. Goldberg Segalla handled the appeal.

C. Squires v. Spence, et al.

The Plaintiff alleged personal injuries sustained when the vehicle she was driving was struck in the rear by NFT Metro bus #2409 on East Huron Street, at the intersection of Oak Street, in the City of Buffalo, on February 1, 2016. The parties engaged in substantive motion practice in December of 2017 relative to the liability arguments, with the Court granting Summary Judgment in favor of the Plaintiff on the issue of negligence and comparative fault. As a result, the Plaintiff alleged a small left disc herniation at L4-5 and disc space narrowing at L5-S1. Her surgeon recommended and performed an L4-5 laminotomy and discectomy on October 31, 2016. He causally related the surgery to the accident in question.

At the time of the accident, the Plaintiff was employed as a Certified Nurse Assistant and alleged she was unable to work due to the accident until April 2019. In the interim, the Plaintiff returned to school to be trained as a Pharmacy Technician and subsequently was hired by Roswell Park as a full-time employee.

On June 29, 2017, Plaintiff underwent an independent orthopedic examination at the request of the Defendants. The orthopedic surgeon concluded that the Plaintiff sustained a temporary cervico-thoracic sprain/strain as a result of the accident in question. He also concluded that the Plaintiff did not sustain any injury to the lumbar spine or low back as a result of the accident. In his opinion, the MRIs revealed a pre-existing congenital variation of a sacralized lumbar 5 vertebrae with a pseudo articulation between L5 and the sacrum with a narrow L5-S1 disc.

Plaintiff's initial settlement demand was \$950,000. As the trial date drew near, the Plaintiff disclosed experts to be called at trial including: an orthopedic surgeon; a physical therapist; a nurse practitioner; a life care planner; and an economist. The demand increased to close to \$5,000,000 so we placed our excess carrier on notice. We filed a *Motion in Limine* and successfully eliminated much of the future wage claim. Nonetheless, numerous pre-trial settlement conferences were unavailing and the parties proceeded to jury selection on September 11, 2019. After opening arguments, we requested a mistrial based upon prejudicial comments/conduct of opposing counsel, which was granted. As a result, we were able to negotiate a favorable settlement prior to the second scheduled trial.

D. Abdelall v. NFT Metro

This matter proceeded to a jury trial in New York Supreme Court on the issue of liability only on September 23–October 2, due to a successful motion to bifurcate the trial. This matter involved the right rear side access panel door that houses various exhaust components on a Metro bus unexpectedly opening while in service and striking a 19-year-old female pedestrian in the face on January 10, 2015. On the date in question, the bus was proceeding northbound on Niagara Falls Boulevard in the Town of Amherst in the right curb lane during a lake effect snowstorm that produced near white out conditions and wind gusts up to 37 mph.

Several witnesses/motorists testified regarding the inclement weather and the impassable stretch of sidewalk between McDonald’s and Delta Sonic. The witnesses placed the Plaintiff near the edge of the roadway. The Plaintiff had previously provided a sworn statement shortly after the accident indicating that she remembered walking in the road facing traffic. The Town of Amherst, McDonald’s Corporation and Delta Sonic were originally co-defendants in the action, but the Court granted summary judgment in their favor prior to trial under a storm in progress theory.

Although damages were not addressed in this bifurcated trial, the Plaintiff alleges she sustained zygomatic arch and orbital fractures, significant facial scarring that has required multiple surgeries, a chipped tooth, visual blurring, a concussion/traumatic brain injury, headaches and cervical injuries as a result of the accident. A plastic surgeon who examined the plaintiff at our request opined that revisionary surgery would reduce the appearance of the scars. Plaintiff’s treating plastic surgeon disagrees that revisionary surgery is a possibility. She also alleges a diminution in future earning capacity as she maintains she was forced to change her career path from a more rigorous architecture degree to a fine arts degree.

After six days of testimony, the matter was submitted to the jury on October 2, 2019. The jury initially found NFT Metro 85% responsible for the accident while apportioning 15% of fault to the Plaintiff. However, this apportionment of responsibility was inconsistent with other questions posed on the verdict sheet. Subsequently, the Court directed the jury to complete a new verdict sheet and they found NFT Metro to be 100% responsible on the second verdict sheet. We have identified several potential errors and the matter is currently on appeal to the Fourth Department, Appellate Division. Vicky-Marie Brunette and Florina Altshiler (Russo & Toner) tried the case and are handling this matter.

E. Conklin v. NFT Metro

On October 3, 2017, the Plaintiff was a passenger on a #55 bus that was caused to brake abruptly after leaving a service stop to avoid an impact with another vehicle that unexpectedly made an illegal, un signaled right turn across the path of the bus from the left lane of travel. The Plaintiff, who was proceeding to a seat, fell when the bus made the emergency stop. As a result of the fall, the Plaintiff alleged that she sustained injury to her cervical spine, which necessitated a discectomy and fusion at C4-5 and C5-6. The Plaintiff made an initial settlement demand of \$3,000,000, which was reduced to \$800,000 after a pre-trial conference.

Prior to engaging in further settlement discussions, we moved for summary judgment on the issue of liability on two grounds: 1) that the braking of the bus was not “unusual and violent” under applicable case law and; 2) that the bus operator was confronted with an emergency situation, not of his own making, and acted as a reasonably prudent bus operator would act in the same situation, thereby absolving NFT Metro of any liability.

After oral argument, the Court determined that we met our initial burden to prove that the movement of the bus was not unusual or violent and, further, that the bus video showed that the operator was confronted with an emergency when the other vehicle unexpectedly cut the bus off. Plaintiff failed to rebut the presumption and raise a triable issue of fact. As a result, the Trial Court dismissed the Complaint in its entirety. Vicky-Marie Brunette handled this matter.

F. Watson v. NFTA

The Trial Court issued an Order of Dismissal on February 22, 2019 which became final when the Plaintiff failed to seek appellate review. The details as were reported last year involved the Plaintiff’s allegation that she fell and sustained personal injuries on February 3, 2015 at the Buffalo Niagara International Airport. Plaintiff alleged a significant wage component as well as two hand surgeries and a neck surgery post-loss, which were 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. John DePaolo handed this matter.

G. Rubrecht v. Prime Flight & NFTA

On June 10, 2012 at approximately 12:45 a.m., the Plaintiff slipped and fell on the concourse near Gate 18 at Buffalo Niagara International Airport. She had just exited a Southwest Flight from Las Vegas to Buffalo and was walking to the rest room across the concourse. She was wearing flip flops on her feet. She walked between two courtesy carts parked in the concourse when she stepped in water on the floor which caused her right foot to slide and she went down on her left knee. The Plaintiff commenced litigation against the NFTA in July of 2013. Initially Southwest Airlines was named as a defendant, but they were stipulated out and Prime Flight as the fixed base operator was added as a defendant. The Plaintiff claimed multiple injuries including her low back, left knee and left hip. The IME physician concluded that she sustained a temporary left knee contusion and left lumbar radiculopathy which had resolved by the time of the examination in 2017. The Plaintiff's initial demand for settlement was \$225,000.

After a lengthy discovery process and no realistic settlement discussions, the trial was scheduled to commence on December 9, 2019. As the trial date neared, the Plaintiff demanded additional depositions of first responders and motion practice ensued on various issues including spoliation and bifurcation. The NFTA prevailed on all motions. After seven years of litigation and successful motion practice Prime Flight and the NFTA made a joint de minimis settlement offer, which was eventually accepted. John DePaolo handled this matter.

H. May v. NFTA Metro v. Buffalo Public Schools

The Plaintiff was exiting a #14 bus near the corner of Bailey and South Park on December 27, 2012 when she fell over a snowbank located between the curb and the sidewalk. She commenced litigation against us as well as the City of Buffalo in August of 2013 seeking recovery for injuries to her neck, back and left shoulder. The Complaint asserted that the Plaintiff was forced to alight into the snow pile. which should have been removed from the sidewalk near the bus stop. The City of Buffalo took the position that the adjacent property owner is responsible for sidewalk snow removal in the City. Therefore, it was necessary for us to serve a third-party Summons & Complaint naming the Buffalo Board of Education, Buffalo Public School system and City of Buffalo School #28 because the property owner was identified as such. The school was no longer open and occupied at the time of this accident, so the argument arose that the obligation for snow removal on the sidewalk would revert to the City.

After a multitude of pre-trial conferences, and an IME favorable to the defense, the Plaintiff's attorney the parties were able to reach a favorable settlement, with a de minimis contribution from NFTA Metro. John DePaolo handled this matter.

I. Gause, Harpahn and Jesse, v. Joy, Robinson, NFT Metro and NFTA

On September 19, 2014 at approximately 8:48 a.m., NFT Metro Bus #2119 was stopped at a green traffic signal in the east bound left lane on Niagara Falls Boulevard preparing to make a left turn onto Ward Road. As the traffic signal turned yellow, the bus operator proceeded to make a left turn, but an auto traveling westbound on Niagara Falls Boulevard entered the intersection and struck the right rear section of the bus. As a result of the collision, five (5) passengers claimed various injuries. Emergency medical services arrived and transported all customers to a local hospital where they were treated and released. Both the bus and the auto sustained extensive damage. Bus video exists but then cuts out prior to the moment of impact because the collision was directly on the battery box. Accordingly, we can see the Plaintiffs and the other passengers on the bus but only until approximately one or two seconds before the impact. Our Co-Defendant's vehicle was insured through Nationwide with a policy affording coverage in the amount of \$25,000/50,000.

All three Plaintiffs had extensive treatment and claimed serious injuries. One Plaintiff claimed a right L5-S1 microdiscectomy spine surgery and a left ulnar nerve decompression at the elbow and another plaintiff alleged a complex anterior, lateral and posterior approach lumbar spine surgery. Given the limited Co-defendant policy and lack of personal assets, the attorneys were focusing their efforts on proving at least 1% fault against NFT Metro/NFTA. Plaintiffs' initial settlement demands in the aggregate were beyond \$1,000,000. The assigned judge engaged in numerous settlement conferences and ultimately obtained agreement to resolve all three Plaintiffs cases with the entirety of the Co-defendant's policy, together with what we viewed as a favorable contribution in the aggregate from NFT Metro for all three Plaintiffs. In addition, the Co-defendant insurer issued \$25,000 payment directly to the NFT Metro to reimburse our property damage. A jury trial on the issue of liability only was scheduled for January 13-17, 2020. All three cases are now resolved. John DePaolo handled these cases.

J. Ahmed v. NFT Metro v. OLV and Catholic Health

The Plaintiff was a bus passenger on April 11, 2014 who, while alighting, stepped and twisted her right ankle and fell to the ground. Plaintiff's counsel alleged that our operator failed to kneel the bus. The video and audio prove that the bus was kneeled. One of Plaintiff's allegations is a crack in the sidewalk. Lackawanna has a statute making the adjacent owner/occupant liable for disrepair of sidewalk issues and injuries. Accordingly, we brought a third-party suit against, OLV and Catholic Health Systems - the landowner adjacent to the area where the Plaintiff fell. Our third-party suit was after the Plaintiff's statute of limitations expired and therefore Plaintiff has no direct cause of action against OLV and Catholic Health.

The Plaintiff was taken by ambulance from the scene and treated initially at Mercy Hospital. Thereafter, she underwent a right ankle arthroscopy with extensive debridement, right ankle ligament reconstruction with arthrex suture anchors. After moving to Ohio, her problems continued. And she underwent a second surgery, an arthroscopy of the right ankle, debridement and a modified brostron procedure of the right ankle.

We arranged for an IME with a board-certified orthopedic surgeon. After substantive motion practice, we were able to favorably resolve the matter. John DePaolo handled this matter.

K. Tenders of Defense:

1. **Ibrahim v. NFTA:** John DePaolo successfully tendered NFTA Metro and NFTA's defense and indemnification to the insurer for Delaware North Companies. Ms. Ibrahim was in the employ of Delaware North Companies and was at the Buffalo Niagara International Airport on January 15, 2016, solely as a result of her being so employed. As a result of an examination before trial and other investigations, The NFTA determined that Ibrahim was solely responsible for a fall that is alleged to have occurred in a bathroom while on a break. The defense was handed over to counsel paid for by the DNC insurer and the matter was resolved without any contribution made on behalf of NFTA Metro/NFTA.

2. **Barnett v. NFTA & DCB Elevator, Co., Inc.:** Vicky-Marie Brunette successfully tendered NFTA Metro and NFTA's defense and indemnification to the insurer for DCB Elevator Co., Inc. In 2012, the 4-year-old Plaintiff sustained injury to his hand while he was playing on the escalators with his older brother at the University Rail Station. NFTA Metro was under contract with DCB Elevator Co, Inc., for the maintenance and repair of the escalators. NFTA Metro requested defense and indemnity under the terms of the contract. The defense was handed over to counsel retained by DCB's insurance carrier.



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 2019 are listed below.

- A. **Stay granted in traffic checker W2 issue:** In January 2019, Justice Paul Wojtasek granted a stay of arbitration against the ATU's demand to let an arbitrator settle how remuneration for employment paid to traffic checkers should be reported to Federal and State taxing authorities. The NFTA discovered that traffic checkers were being reimbursed for commuting miles and that these payments were not being reported to taxing authorities as remuneration from employment and the ATU requested that the reporting continue as a "past practice." Justice Wojtasek agreed that how remuneration from employment is reported to taxing authorities is a legal issue that has nothing to do with the interpretation of the ATU's Collective Bargaining Agreement and granted a stay.
- B. **Borrowing Provisions:** In March 2019, an arbitrator ruled that the 3 years' borrowing provisions in the ATU CBA that allows ATU employees to borrow extra "days worked" from the prior three years to qualify for benefits in years where the employee falls short of the 220 work day minimum did not allow ATU employees to apply the same extra work days three (3) times.
- C. **Absentee Control Policy:** In March 2019, an arbitrator upheld the absentee control policy in place for ILA 1949 employees working at the airport as a reasonable rule making exercise consistent with management's rule-making rights under the CBA.

VII. Procurement:

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 2019 was a very busy year for the Procurement Department. The Procurement team is led by Andrea Herald and consists of Cindy Judd, Bruce Izard, Arlene Sebastian, Geraldine Richwalder, Katrena McCoy and Mark Pereira. This talented group had an outstanding year and the NFTA greatly benefits from their wisdom and expertise. Significant accomplishments in 2019 for the Procurement Department include the following:

MWBE Program Performance. The NFTA scored a grade of A+ on the MWBE Program Performance Report Card from NY State. This was an outstanding accomplishment achieved by Andrea Herald and her team members including Bruce Izard and Arlene Sebastian. In addition, the NFTA's vendor selection MWBE participation rate of 29.2% was 104.3% of our goal participation rate of 28.00%. Finally, the NFTA had the best quarter ever in Q2 for MWBE participation wherein we reached over \$3,000,000 in purchases to MWBEs.

MWBE and SDVOB opportunities. The NFTA procurement compliance team was busy participating in numerous events and activities in 2019 to get the word out about MWBE and SDVOB (Service Disabled Veteran Owned Business) opportunities at the NFTA. For example, we participated in the following events: January 26, 2019 Straight Talk—US Small Business Administration; March 13, 2019 SBA and SCORE Small Business Matchmaker: Roswell Park, Buffalo, NY; April 30-May 1st NY Gov Buy; May 8, 2019 SBA Small Business Matchmaker: Depew, NY; June 11, Jointly Ran the NFTA/RTS SDVOB Training in Rochester, NY; July 25, 2019 Big Opportunities for Small Business; September 18, 2019 GLOW Region Small Business Matchmaker-Batavia, NY; October 1-October 2, 2019 NYS MWBE Forum: Albany, NY; October 19, 2019 MWBE Classroom Training: ECMC, Buffalo, NY; and October 30, 2019 PTAC SDVOB Veteran's Expo and Business Matchmaker: Rochester, NY.

NYS Vendor Integrity and Responsibility Initiative. On January 15, 2019, Governor Cuomo issued Executive Order No. 192 which imposed continuing vendor integrity requirements to ensure that government entities conduct business only with responsible entities to ensure that taxpayer dollars are not paid to entities or individuals that lack integrity, are incapable of providing satisfactory performance, or fail to comply with existing laws. Andrea Herald led a team to develop appropriate forms and checklists to ensure that the NFTA meets the requirements of this Executive Order.

Safety Initiatives. To promote safety awareness and encourage safe work practices, the Inventory Control Team participated in the following safety events and launched the following initiatives.

Ergonomics Seminar: In coordination with the HSEQ department, the entire Inventory Control Team participated in an Ergonomics Seminar. Topics covered included proper lifting and preventing injuries.

Introduction of 5S + 1 Methodology: The Inventory Control Management Team introduced the 5S + 1 Methodology [5S + 1- Sort, Set, Shine, Standardize, Sustain plus Safety] to the inventory clerks. 5S +1 is a workplace organization method used to organize a workplace for better layout, efficiency, and cleanliness. Our initial launch occurred in the Central Storeroom as we focused on cleanliness, proper labeling, and storage of parts. At the beginning of 2020, the major focus 5S + 1 will be phased out to the garage storerooms.

SDS Initiative: In December 2019, the Inventory Control Team launched a Safety Data Sheet (SDS) project to ensure all chemicals stocked at each storeroom location are properly identified and have a corresponding HSEQ#.

Improved Technology and Space Utilization. To support Bus Operations, ensure safety of all employees, increase speed and accuracy of our daily tasks, the Procurement group led the way by introducing several initiatives into the workplace.

Vertical Carousel Frontier Garage: In the summer of 2019, a vertical carousel was installed in the PAL VAN area at Frontier Garage. The vertical carousel allowed us to utilize space more effectively while introducing new levels of control in managing inventory and provides the added benefit of making the physical inventory more secure. In early 2020, the plan is to install software that makes the stocking and picking of parts timelier and more accurate.

Tablets: The Central Storeroom began to experiment with mobile technology by introducing a tablet in our daily work functions. The tablet allows for quicker transaction processing and makes data available in real time.

Push Back Racking System: In November 2019, a purchase order was sent to LCI Industrial for the purchase of a 72-pallet racking system. The procurement of this racking system will create 20% more storage capacity within the current layout. Additionally, the installation of the push back racking system helps reduce the risk of safety incidents (trips, injuries, congestion, etc.).

Ellipse Upgrade (Enterprise Asset Management Software). Mark Pereira was appointed leader for the Materials work stream and worked with AddOns consultants to define work design and process flow to integrate an upgrade of the Ellipse system. This included such activities as testing, report consolidation and design, and setting up training for the core teams. In the spring of 2019 we successfully implemented the materials work stream module of the Ellipse system which has resulted in numerous benefits including better process flow and communication, more accessible reporting, the introduction of check and balance control systems, more defined user roles and profiles, and more tailored training as to the new version of Ellipse. In addition, in October 2019, Mark participated in the 2019 Ellipse User Conference. The conference focused on data analytics, material process flows and developing a super use community and network.

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 2019, Vicky-Marie Brunette, the NFTA's Deputy General Counsel, reported to and conferred with the New York State Office of the Attorney General on one significant matter that resulted in a criminal conviction and restitution to the NFTA. 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 2020 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