

# Office of General Counsel

## ANNUAL REPORT

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### 2013

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



## **Introduction**

*Starting in 2012, the Office of the General Counsel for the Niagara Frontier Transportation Authority began issuing an Annual Report to highlight some of its significant activities throughout the calendar year. This Annual Report covers the period from January 1, 2013 through December 31, 2013 and reflects the hard work, professionalism and dedication of the attorneys and other professionals in the Office of the General Counsel who serve the public by providing high quality legal services in order to support the NFTA's mission of providing safe, efficient and professional transportation services that enhance the quality of life throughout the Buffalo Niagara region. I want to thank Kimberley Minkel, the NFTA's Executive Director, and the NFTA Board of Commissioners for their support and for allowing our office to serve the public. Special appreciation for extra work on this report goes to Lisa Flynn (Secretary to the General Counsel). I hope you find this report informative and welcome any questions you may have.*



*David J. State (December 31, 2013)*

*General Counsel*

## 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.

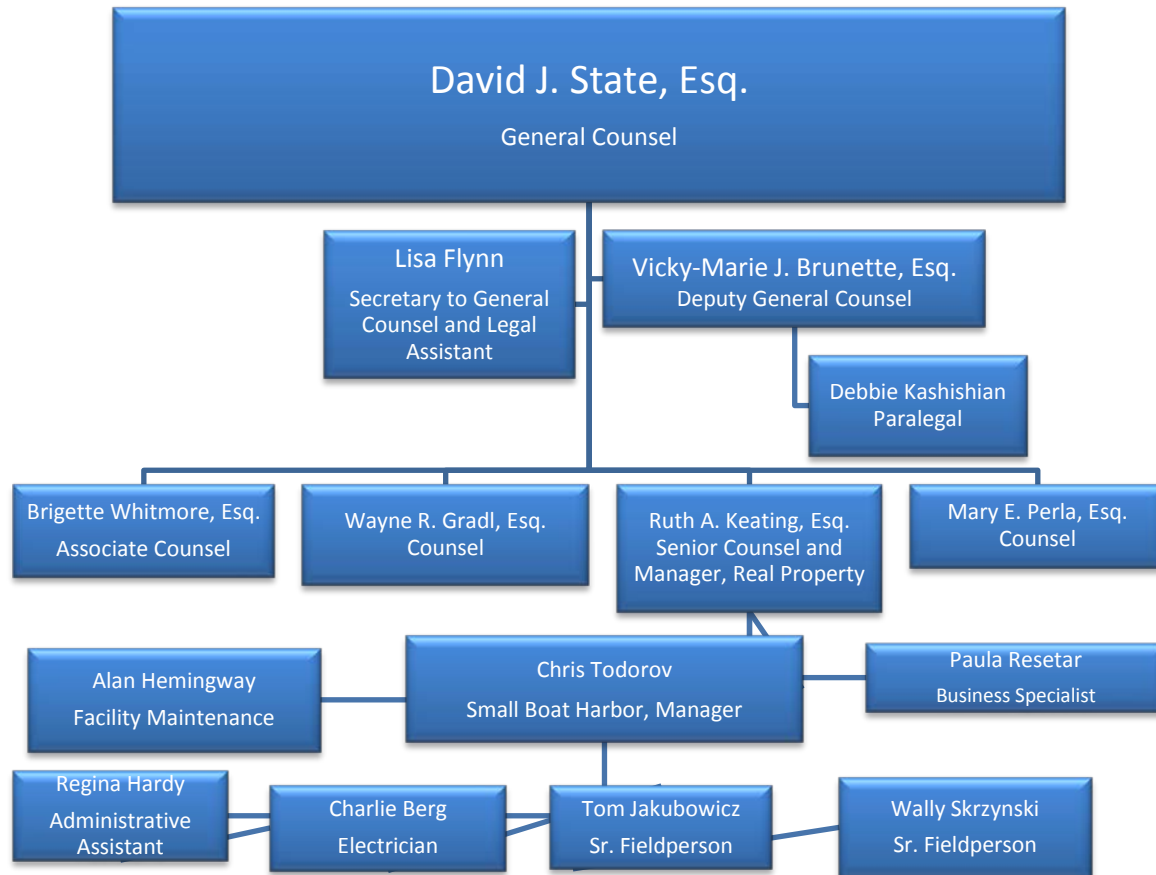
The Office of General Counsel also oversees the functions of the Property Group, one of the NFTA’s three business centers. Thus, in addition to providing legal services, the Office of General manages and develops the NFTA’s real property to optimize the generation of self-supporting discretionary revenue to support our core transportation mission while fostering economic growth. This includes management and oversight of the Boat Harbor and commercial properties.

## II. People

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

### A. Personnel and Location

In 2013, we were fortunate to add an Associate Counsel position to support the NFTA's ongoing legal needs. Thus, the office currently consists of a General Counsel, a Deputy General Counsel, a Senior Counsel/Property Manager, two Counsels, one Associate Counsel, one Paralegal, one Secretary to the General Counsel/Legal Assistant and one Business Specialist. The majority of the Legal Staff is located on the 6<sup>th</sup> Floor of the Metropolitan Transportation Center ("MTC") at 181 Ellicott Street in downtown Buffalo, New York. One of the Counsels is located at the Buffalo Niagara International Airport to more efficiently serve the Aviation Group. The Property Group personnel are primarily located at the Boat Harbor and the Port Terminal Complex on Fuhrmann Boulevard in Buffalo, New York. A graphical description of all staff members is depicted below:



## **B. Communication, Development and Office Efficiencies**

### **1. Standing Staff Meetings**

The Office of General Counsel continued the practice of periodic standing staff meetings in order to promote collegiality and the sharing of knowledge to provide better service to our clients. Meetings were usually held monthly with the attorneys, support staff and/or a combination of individuals from both groups.

### **2. Professional Training and Development**

In an effort to stay sharp on current topics and recent trends in areas such as transportation, litigation, labor, property and aviation, staff attorneys attended professional conferences and training sessions relevant to their specific fields of practice. 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. This year we were fortunate enough to be able to send Ruth Keating to a National Conference hosted by the American Public Transportation Association ("APTA") in Austin Texas which covered such topics as Ethics, Civil Rights, Constitutional Law (First Amendment); Buy America Requirements and Intellectual Property. Wayne Gradl attended the Annual Training Conference hosted by the New York State Public Employer Labor Relations Association in Saratoga, New York. Vicky-Marie J. Brunette, the NFTA's Deputy General Counsel, was elected as the 2014 Vice President/President Elect for the Defense Trial Lawyers Association. This is a prominent position in the legal community which will facilitate and improve upon the professional image of the NFTA. The newest addition to our staff, Brigette Whitmore attended several CLEs including "Practical Skills - Basics of Civil Practice - The Trial" in August; "Applying Medical Knowledge of Injuries to Your Case" and "Winning Opening Statements and Closing Arguments in September. Finally, Mary Perla attend several CLEs focused on legal issues stemming from Social Media including "Still a Twitter Over Facebook" in November; and "Facebook Got You All A-Twitter" in January.

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

In 2012, for the first time in the history of the NFTA, the Office of General Counsel formally established an externship program with SUNY Buffalo Law School. Externships provide law students with unique legal and public service experience as they work in a variety of government and non-profit organizations, and get academic credit for doing so. The NFTA receives the benefit of having a law student available to accomplish research and writing tasks and other duties. In order to

qualify, the NFTA had to meet specific curricular, substantive and administrative requirements established by the Law School and the American Bar Association to ensure that the externship would be academically appropriate and in compliance with all other accreditation requirements. Deputy General Counsel, Vicky-Marie J. Brunette, spent significant time mentoring our 2013 extern and received Certification for Teaching an Accredited Law School Course (Externship) for those efforts. 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. Through the Spring of 2013, we were fortunate to have the continuing services of UB law student Anthony Orphe until he began preparation for the New York State Bar Examination. Anthony was selected through coordination and consultation with the Law School's Externship and Judicial Clerkship Program and the Minority Bar Association of Western New York and we wish to thank Linda Seay (the NFTA's Director of Equal Employment Opportunity/Diversity Development); Karen Novo (the NFTA's Director of Human Resources); Lisa Piecki; and members of the Minority Bar Association of Western New York (Family Court Support Magistrate Lenora B. Foote-Beavers and Joseph M. Hanna, Esq.) for their assistance in Anthony's selection. Our next extern (UB law student Aaron Rubin), is expected to start in February 2014.

#### **4. Paperless Initiative**

Part of the NFTA's Blue Print for the Future is to identify technological improvements and efficiencies to save money and improve our service to the public. Our electronic central filing system (developed and implemented by Lisa Flynn in 2012) continues to pay dividends. Every contract and item requiring legal review and subsequent approval by the Executive Director is scanned and electronically filed and maintained. Lisa Flynn has taken the lead on this important initiative. This tool permits the Office of General Counsel to quickly access documents and information and to quickly respond to client inquiries in addition to saving on purchase and copying costs. This initiative has proven to be so successful that our new Chief Information Officer (John Oborn) has selected the Office of General Counsel as one of the primary departments for a "Docushare" initiative that he hopes to implement at the NFTA in 2014.

### **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. We have continued our focus on a proactive outreach to our clients in the following ways.

**A. Ethics Training**

In February 2013, the General Counsel attended comprehensive ethics training provided by the New York State Office of the Inspector General. Following that training, our office developed and submitted to the Inspector General a Power Point presentation to highlight the ethics issues identified by the Inspector General and to reinforce ethics policies and procedures promulgated by the NFTA. The topics covered by this presentation include a description of the New York entities having jurisdiction over ethics; the NFTA Code of Conduct; the NFTA Code of Ethics; Gifts; Conflicts of Interest; Outside Employment and Activities; Nepotism; Phone and Computer Usage; State Vehicle Use Policy (recently issued on 11-12-13); and the Defense and Indemnification of NFTA employees. Beginning in January 2014, this training will be provided by members of the Office of General Counsel to senior staff and managers at the NFTA.

**B. Business Center Meetings**

The Office of General Counsel supports the NFTA's business centers which are organized into three strategic business units (Surface Transportation Group; Aviation Group; and the Property Group). All of the staff of the Office of General Counsel are obviously available to serve these groups as needed, however, to better support the needs of the business centers and the NFTA as a whole, standing meetings with our clients provide us with an opportunity to provide better service and to keep the legal staff "in the loop" as projects go forward and legal issues are identified. Thus, our office continued its practice of regular and systematic contact with our clients. For example, in addition to meeting with the Executive Director on a regular basis, the General Counsel meets with the Metro Surface Director and the Chief Financial Officer every month. Vicky-Marie J. Brunette, the Deputy General Counsel, conducts regularly scheduled round table meetings with the claims group to go over specific files and review them in depth. With the addition of a new Associate Counsel, Vicky also regularly meets with Brigette Whitmore to review litigation matters. Mary E. Perla, the Counsel assigned to the Aviation Group, meets weekly with the Aviation Group and Wayne R. Gradl, the Counsel who handles labor matters Authority wide, meets regularly with staff from Human Resources. Finally, Ruth A. Keating, Senior Counsel and Real Property Manager, meets with the facilities manager on a weekly basis and the Engineering branch on a monthly basis.

**C. Proposed and Pending Legislation** Ruth A. Keating regularly reviews proposed and pending legislation and advises all of the business centers on any developments that that may impact their operations. This proactive approach enables us to take a position on legislation that impacts the NFTA and notify our legislative, executive and lobbying advocates. In 2013, some of the legislation that was introduced involved continuing efforts to increase the size of the NFTA's Board



of Commissioners (currently at 13 members) and legislative efforts to discourage the siphoning away of dedicated transit funding.

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

The Office of General Counsel maintains an active 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, other contractual matters, and to ensure compliance with all applicable laws, rules and regulations. All of the attorneys deal with these matters in one way or another, but the large majority of this work is handled by Ruth A. Keating and Mary E. Perla and 2013 proved to be a very busy year. In 2013 alone, Ruth prepared hundreds of agreements and approved hundreds of purchase requisitions, in addition to her significant corporate compliance work and other duties. The following represents some of the unique and significant matters that staff worked on in 2013.

**A. DiPizio Construction Company, Inc., v. NFTA:** This case involves DiPizio's request for multi-million monetary damages following their construction work at the Buffalo Niagara International Airport (BNIA) which was completed on or about August 1, 2006. On June 4, 2012, the NFTA, through Mary's hard work and assistance provided to outside counsel, filed a motion for partial summary judgment asking the Court to rule in the NFTA's favor that DiPizio, as a matter of law, is not entitled to certain relief demanded in DiPizio's Complaint. On July 26, 2012, the Judge issued a ruling from the bench granting the NFTA's motion, which effectively eliminated 13 out of 15 counts in DiPizio's Complaint. DiPizio appealed the trial court's ruling and the Appellate Division heard oral arguments from both parties on May 13, 2013.

On June 14, 2013, the Appellate Division unanimously affirmed the trial court's ruling which reduced the dollar value of the remaining causes of action down to approximately \$350,000. That amount is still contested but since DiPizio was seeking over \$4M in the litigation, the Appellate Division's ruling significantly reduced the NFTA's exposure. On September 27, 2013, the Appellate Division denied DiPizio's motion for re-argument and for leave to appeal to the Court of Appeals, and the matter is set for trial in 2014.

**B. Taxi Concession Agreement at the Buffalo Niagara International Airport:** Mary successfully negotiated a five year concession agreement between the NFTA and Independent Taxi Association of Western New York, Inc. (ITA) for the provision of taxi service at the Buffalo Niagara International Airport. The agreement will result in the payment of a minimum concession fee to the NFTA of \$2,750,000 over the five year term. ITA further committed to pay an additional fee based upon the number of passengers arriving at BNIA which fee is projected to total \$437,500

over the five year term based upon 2012 passenger data.

**C. Fixed Base Operator Agreement at Niagara Falls International Airport:** An agreement between the NFTA and Calspan Air Services, LLC for the operation of a fixed base operation at the Niagara Falls International Airport (NFIA) was successfully negotiated. Calspan will perform fueling services and other support services to the air carriers serving NFIA and the general aviation community that utilizes NFIA. Calspan will provide upgraded and enhanced equipment in conjunction with its FBO operations and will establish an FAA certified repair station. This repair station will provide a new offering to the aviation community.

**D. Executive AirShare:** The Aviation and Property Groups collaborated on negotiating the expansion of the space leased by Executive AirShare Corporation, a fractional airplane ownership company. This is the only company of its kind in the Western New York area and the expansion permits it to provide even more local companies and individuals with additional options for air service.

**E. Integration of Allen Hospital Station with UB Medical School:** Representing the NFTA's first significant foray into Transit Orientated Development at one of its rail stations, the Office of General Counsel negotiated a ground lease with the University of Buffalo for its construction of a new \$350 million medical school that will be integrated with the NFTA's existing Allen Hospital Station. This project will provide the entire Buffalo Niagara Medical Campus with coatless access to the NFTA's Light Rail Rapid Transit system. The complicated lease negotiations had to take into consideration construction of a building over an active rail station, air rights, as well as compliance with the Federal Transit Administration's requirements for continuing control, residual value and fair market value.

**F. Minority and Women Owned Businesses:** The NFTA is proud to promote and assist Disadvantaged Business Enterprises ("DBEs") and Minority and Women Owned Businesses ("MWBEs") and facilitates a fair share of the awarding of contracts to those entities. Ruth assisted Linda Seay, the NFTA's Director of Equal Employment Opportunity/Diversity Development, on revising standard engineering and procurement practices to comply with New York's increased focus on increasing MWBE and DBE participation.

**G. Rules and Regulations (Advertising of Vapor Cigarettes):** Advertising proceeds provide a significant source of revenue for the NFTA. The Office of General Counsel provides legal advice to NFTA staff who make day to day decisions assessing various advertising proposals to ensure consistency with the NFTA's Guidelines governing public advertising. Among other interesting research topics

handled in 2013, Brigette Whitmore, our new staff attorney, researched public transit advertising restrictions on vapor cigarettes.

**H. Tim Hortons (Metropolitan Transportation Center):** Ruth was successful in negotiating a lease with Tim Horton's for placement of a coffee shop in the Metropolitan Transportation Center at 181 Ellicott Street, Buffalo, New York.

## **V. Property Management**

The Property Management business center is responsible for planning and management of the non-transportation property assets of the NFTA. Its mission is to maximize the financial return to the NFTA on its non-public transportation assets while improving and preserving the physical integrity of those buildings and grounds. The Office of General Counsel oversees the functions of the Property Management business center. This involves direct management by Ruth A. Keating over the Property Group consisting of Chris Todorov (Boat Harbor, Manager); Alan Hemmingway; Regina Hardy; Charlie Berg; Tom Jakubowicz and Wally Skrzynski. In addition, Paula Resetar performs voluminous and important work in preparing property budgets and revenue/expense calculations and projections. 2013 was an exciting, demanding and challenging year for our Property Group especially in light of the Governor's announcement in September 2013 that would facilitate the NFTA's exit from its waterfront property holdings. Ruth and Paula had another outstanding year and the following represents some of the highlights of 2013.

**A. Boat Harbor:** The NFTA owns and operates the largest -boat marina in New York State and 2013 was another outstanding year. Our revenues exceeded \$1 million due in large part to the hard work and dedication of Chris Todorov (the manager of the Boat Harbor) and his crew, combined with management and oversight by the Office of General Counsel. 2013 was the first time in many years that the NFTA was able to sell out all of the slips in the marina.



*OFFICE OF GENERAL COUNSEL*

**B. NFTA Rental Property:** Revenue from our rental properties is important to support our other business centers. The NFTA’s leased space is up over 4 percent compared to the previous year and represents the highest percentage in recent history. Property Management is currently administering approximately 78 leases. The buildings at 485 and 247 Cayuga are approximately two-thirds full and we continue our efforts to fully maximize the revenue from our properties. In addition to filling unleased space this year, new improvements are being implemented such as the rehabilitation of the roof at 485 Cayuga.

**C. Waterfront Properties:** The NFTA’s desire to explore the sale of the NFTA’s waterfront properties has resulted in a large amount of work for the Office of General Counsel. Staff has been working on the sale of the entire holdings. The Port Terminals are to be sold to Gracious Living Corporation and the rest of the waterfront to the Erie Canal Harbor Development Corporation. These deals have involved extensive negotiations over the acquisition agreements, SEQRA compliance and responses to due diligence investigations and interactions with numerous government entities including the Department of Environmental Conservation, New York State Parks Recreation & Historic Preservation, and Empire State Development Corporation.



Port Terminal A



Port Terminal B

**D. Outer Harbor Concert Series:** The concert series blossomed in 2013. The number of concerts doubled to six and featured nationally known acts such as Guns ‘N Roses and the Tragically Hip.



**E. OSC Real Property Audit:** In 2012, the Property Management Department underwent an audit by the New York Office of the State Comptroller (“OSC”). Ruth A. Keating and Paula Resetar did an admirable job working with the auditors on behalf of the NFTA and compiling comprehensive lists of all properties owned by the NFTA in addition to tracking down all the information the auditor’s requested. On December 19, 2013, General Counsel Staff prepared a response issued by the NFTA’s Chairman to a draft audit report issued by OSC and we await their final report. Many of the “non-findings” by OSC which did not appear in their draft report confirmed our view that our operating policies and practices are sound. We look forward to the final report and a continued and productive working relationship with OSC to identify best practices to better serve the public.

## VI. Litigation

With approximately 1,500 employees and diverse operations from bus to light rail to aviation to the boat harbor, 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 attorneys are in court, arguing motions, picking juries, trying cases and getting verdicts. Vicky-Marie J. Brunette and Debbie Kashishian make an excellent team by combining Vicky’s extensive public sector experience with Debbie’s extensive private sector experience prior to joining the NFTA. Our litigation team was further strengthened with the addition of Brigette Whitmore this year. Brigette was able to second chair a trial in October 2013 which resulted in a favorable settlement for the NFTA. The cases listed below represent some of the more significant matters that we worked on in 2013.

As of December 2013, the Office of General Counsel retained a litigated caseload of 167 personal injury, wrongful death and police professional liability files, with a total self-insured reserve of approximately \$2,180,990. The breakdown was 141 active litigated personal injury cases against NFTM, with a self-insured reserve retention of approximately \$1,683,750, and 26 active litigated personal injury cases against the NFTA, with a self-insured reserve retention of approximately \$497,240. All 167 files are handled in-house, the large majority by the Deputy General Counsel, Vicky-Marie J. Brunette. Associate Counsel, Brigette Whitmore, has recently taken over the Health Care Provider litigation (described below) and is providing much needed assistance with the burgeoning personal injury caseload. 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 2013 alone it is estimated that Vicky appeared at approximately 175 pre-trial conferences; drafted and argued approximately 15 pre-trial motions; conducted approximately 110 depositions; conducted two arbitrations, 13 mediations; conducted two jury trials; and favorably negotiated resolutions in 32 cases short of trial. Vicky is assisted by Debbie Kashishian who

prepares trial notebooks and pleadings in addition to obtaining medical records and other documents required for litigation.

In 2013 alone, there were 46 new cases filed. Vicky and Debbie had an outstanding year as demonstrated by the following highlights in 2013.

**A. Slip and Fall at the Allen Medical Campus Station:** This matter proceeded to jury selection on May 6, 2013 and a five (5) day jury trial in New York Supreme Court on the issues of both liability and damages. Our Deputy General Counsel, Vicky-Marie J. Brunette, tried the case.

This action stemmed from a slip and fall that occurred on August 23, 2008 at the Allen Medical Campus Rail Station. The Plaintiff, a 47 year old male, alleged that NFTM was negligent with respect to the inspection and maintenance of the premises and further alleged that he missed approximately eight months of work as a result of the shoulder, neck and back injuries he sustained as a result of the fall.

Plaintiff called an orthopedic surgeon and a radiologist to testify that he sustained cervical disc herniations, thoracic compression fractures and a massive retracted rotator cuff tear of the right shoulder that required surgical repair. Vicky called a sports medicine physician who specializes in orthopedic injuries. He opined and testified that the Plaintiff sustained cervical and thoracic sprains and a right shoulder rotator cuff strain as a result of the fall and that the massive rotator cuff tear and resultant surgery were not causally related to the August 23, 2008 accident.

At close of proof, Plaintiff's counsel requested \$350,000 for past and future pain and suffering and past lost wages. After deliberation, the jury returned a verdict in favor of NFTM and awarded the Plaintiff nothing.

**B. Sideswipe Bus Accident:** This matter proceeded to binding high/low arbitration on July 8, 2013 before a sole arbitrator, in lieu of a Supreme Court trial. Our Deputy General Counsel, Vicky-Marie J. Brunette, arbitrated the case. This matter involved a motor vehicle accident that occurred on March 16, 2009 between a Metro bus traveling north on Michigan Avenue and a van also traveling north on Michigan Avenue in the City of Buffalo. The Plaintiff, an 84 year old male, was a passenger on the bus at the time of the accident and alleged serious spinal injuries and resultant surgery as a result of the accident.

The bus video revealed that the co-defendant initially stopped behind and to the left of the bus for a period of twenty (20) seconds and when the light changed from red to green he made an independent decision to speed up alongside the bus in an effort to overtake it on the left. In doing so, Vicky argued that he created a

dangerous situation, wherein he then attempted to squeeze between the bus and oncoming traffic, and was therefore the proximate cause of the accident.

With respect to damages, Vicky argued that the Plaintiff was not able to sustain his burden of proof and the record was devoid of any evidence that the Plaintiff sustained a serious injury, as defined by the Insurance Law, which was causally related to the motor vehicle accident of March 16, 2009. She further submitted an expert opinion from a neurosurgeon that contradicted the Plaintiff's expert's opinion. The arbitrator ruled in NFTM's favor and found that the bus operator was not negligent and that the Plaintiff did not sustain a causally related serious injury under the Insurance Law. Plaintiff's counsel demanded \$600,000 and was awarded the low amount, \$3,500, to which we had previously agreed.

**C. Pedestrian/Motor Vehicle Accident:** This matter proceeded to jury selection on October 4, 2013 and a two (2) day liability only jury trial in New York Supreme Court. Our Deputy General Counsel, Vicky-Marie J. Brunette, tried the case. Associate Counsel, Brigitte Whitmore, was second chair.

This action stemmed from a pedestrian/motor vehicle accident that occurred on November 4, 2011. The 41 year old Plaintiff was struck by a vehicle operated by our Co-defendant, while attempting to cross Bailey Avenue, after alighting from a Metro bus in the City of Buffalo. The Plaintiff alleged that the defendants were negligent with respect to the operation of their respective vehicles. As to NFTM, the Plaintiff argued that the bus operator stopped at an unsafe place for her to cross Bailey Avenue and that the operator affirmatively encouraged her to cross at that location.

After over three hours of deliberation, and prior to the jury returning a verdict, Vicky was able to favorably resolve the case, with NFTM's contribution to the settlement being appreciably lower than our Co-defendant's share.

**D. Rear End Bus Accident:** A Metro bus rear ended a Ford Explorer on November 5, 2010. The 54 year old male Plaintiff was the driver, who alleged lumbar spine injuries as a result of the accident. He underwent an anterior/posterior lumbar surgery on November 16, 2011 and has not returned to work as a factory laborer since the surgery. A jury trial was scheduled for November 8-15, 2013 in New York Supreme Court. Prior to commencement of the trial, Plaintiff's counsel made a \$2,225,000 settlement demand and moved for Summary Judgment. He argued that NFTM was negligent as a matter of law for striking the Plaintiff's vehicle in the rear. Vicky-Marie J. Brunette opposed the motion and argued that there was an issue of fact regarding sudden and unanticipated brake failure that should be addressed by the jury. The Supreme Court judge presiding over this matter ruled in our favor. The matter then proceeded to a mediator for further discussion and Vicky was able to negotiate a favorable resolution prior to trial.

**E. Defense and Indemnity Claim:** In a strange turn of events, NFTM was sued by one of its own bus operators on a defense and indemnity claim. The underlying action stemmed from a physical altercation that occurred on September 10, 2009 between the Plaintiff, a Metro bus operator, and a former passenger and her mother, on the premises of the Cold Springs Bus Garage. The bus operator, who was named as a defendant in a separate action related to the physical altercation, sought defense and indemnity from NFTM under the Public Authorities Law and Public Officers Law. Vicky-Marie J. Brunette argued that the bus operator could not demonstrate that she was entitled to a defense pursuant to the Public Authorities Law in the underlying action, as the pleadings and admissions and denials in the Complaint demonstrated that the activities and course of conduct engaged in by the bus operator fell outside of the scope of her employment duties and did not rise to the level of negligent operation of a vehicle. The denial of defense, therefore, was appropriate. Vicky further argued that the bus operator was obligated to cover her own defense costs, fees and disbursements relative to the underlying assault claim and that NFTM was entitled to Summary Judgment in its favor. The Supreme Court granted Summary Judgment in NFTM's favor and the case was dismissed.

**F. Health Care Provider Suits against NFT Metro:** Depicting a fairly recent trend, health care providers (whether a hospital, imaging center, or a chiropractor) have begun suing the NFT Metro to recover the payment of no-fault benefits on behalf of their patients. These patients have been denied No-Fault benefits, for various reasons ranging from, a lack of video evidence confirming a slip and fall on a bus as they have alleged, or a simple failure to show up to Independent Medical Examinations as required under the No-Fault regulations. Previously these matters have been adjudicated primarily in arbitration proceedings, however, the current trend is to litigate these issues in Buffalo City Court and there are approximately 20 provider suits pending against the NFT Metro in Buffalo City Court at this time. Brigitte has taken the lead in defending these actions

## VII. Labor and Employment

Providing legal support to NFTA managers who work with the NFTA's 13 unions presents a significant challenge. Wayne Gradl, the Counsel who is assigned to labor and employment matters, handles grievances, arbitrations and assists in contract negotiations with these unions. In addition, Wayne provides the NFTA and NFTM with advice regarding employee dismissals and discipline and discrimination and other Equal Employment Opportunity matters, including claims by passengers as well as representation in Federal and New York State courts and before administrative agencies such as the EEOC and New York State Division of Human Rights. Some of the significant cases Wayne handled in 2013 are as follows:



**A. NFTA v. Amalgamated Transit Union (ATU) -- 13(c) Litigation with ATU over right to Binding Interest Arbitration:** A dispute with the ATU dating back to 1973 regarding whether the Union was entitled, as a condition to the NFTA's receipt of Federal assistance, to binding interest arbitration for setting the terms of new collective bargaining agreements was litigated to a conclusion on the merits in favor of the NFTA in 2013. On February 1, 2013, the Appellate Division, Fourth Department ruled that the 13(c) Agreement between the Authority and the ATU that was entered into as a condition for the receipt of Federal assistance does not entitle the ATU to unilaterally demand binding interest arbitration for a new collective bargaining agreements as a substitute for the procedures prescribed in the Taylor Law. In May of 2013, the ATU's motion for permission to appeal to the New York Court of Appeals, the highest court in New York State, was denied, marking a final end to this litigation. Wayne Gradl worked diligently to make sure that the strongest possible case against the ATU's claim for interest arbitration was presented and this collaboration succeeded in avoiding the pro-interest arbitration rulings that the ATU has obtained in other parts of the United States. The importance of this victory cannot be overstated in that a loss would have forced the NFTA into binding interest arbitration which has traditionally not been a favorable forum for many public employers. Although it is difficult to reduce the successful resolution of this litigation to a fixed dollar amount because of its ongoing significance, it is evident that the holding of this case will result in immeasurable savings to the NFTA over the years. In addition to the monetary significance, the decision properly puts the authority to approve or impose new collective bargaining agreements in the hands of the NFTA's Board of Commissioners as a matter of public policy after appropriate negotiations are conducted in accordance with the Taylor Law.

**B. Dismissal of Sexual Harassment Claim after Trial:** After the Division of Human Rights issued a preliminary probable cause determination in favor of a former bus operator who claimed that she was improperly fired after having been the victim of a sexually hostile work environment, Wayne Gradl conducted a two day trial before an administrative law judge who issued a decision dismissing the sexual harassment claims on the merits. The former employee's pre-trial settlement demand was reinstatement plus \$50,000.00. Wayne established at the hearing that the actual reason for the employee's dismissal as a bus operator was excessive misses to appear for scheduled runs.

**C. Federal Court Dismissal of Civil Rights Claim:** The claim of a former Airport maintenance employee that his termination for excessive absenteeism was done in a manner that violated his Federal due process rights was rejected by the local Federal District Court in July of 2013. Wayne Gradl filed a motion to dismiss this complaint as a matter of law in lieu of filing a formal answer to the complaint's allegations.

**D. Division of Human Rights Dismissal of Age and Sex Discrimination**

**Complaint:** A 14 page complaint alleging purported age and/or sex discrimination against an employee spanning several years was dismissed by the New York State Division of Human Rights as lacking in probable cause. Wayne Gradl dissected the complaint with a carefully drafted and thorough NFTA Position Statement which resulted in the dismissal of a matter that otherwise would have required a cumbersome and resource consuming trial to resolve.

**VIII. Audits/Investigations:**

Operating in a highly regulated environment, the NFTA is regularly confronted with agency audits and investigations. In 2013, the NFTA was subject to continuing audits from the NY Office of the State Comptroller, NY Authorities Budget Office and the Federal Transit Administration which consumed substantial time and effort for staff of the Office of General Counsel. The topics of those audits ranged from a review of the NFTA's real estate portfolio, discretionary expenses by the NY Office of the State Comptroller and an operational review by the NY Authorities Budget Office (issued in February 2013).

In addition, Kimberley A. Minkel, the NFTA's Executive Director, established the NFTA's Systems Integrity Committee to review complaints about lack of compliance with the NFTA's policies and practices which were not being investigated by other standing NFTA committees. The General Counsel and Deputy General Counsel serve on the Systems Integrity Committee and investigated several significant matters in 2013, including a complaint about alleged improprieties during the processing of an arrest at TAPD headquarters.

**IX. Board Resolutions and Legislation**

During the past year, Office of General Counsel staff prepared numerous resolutions for consideration by the NFTA's Board of Commissioners.

**X. Use of Outside Counsel**

In order 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. For example, the NFTA's exit from our waterfront property holdings necessitated outside expertise in State Environmental Quality Review Act (SEQRA) compliance. In addition, transactional assistance was required for the negotiations with the University of Buffalo over the integration of Allen Hospital Station with the UB Medical School. We continue to minimize our use of outside counsel to the fullest extent possible.

## **XI. Future Goals**

The Office of General Counsel's goals for 2014 include; continuing focus on ethics and identifying opportunities for conducting ethics training to our employees; continuing to support diversity in our employment practices and other activities; finalizing the transfer of the NFTA's waterfront holdings; continuing focus on cost controls such as implementation of billing guidelines for outside counsel; identifying new training and professional development opportunities; and developing a more focused legal outreach program.

End of Report