

Senior Counsel's Office

In its sixth year in fiscal year 2005, the Senior Counsel's Office is MIT's central, primary in-house counsel's office, providing comprehensive legal services and counseling on MIT matters in all areas of concern to MIT's senior officers, the academy, and the administration other than intellectual property law and investments. We also arrange for and manage outside legal services when needed and actively oversee all litigation for the Institute (including litigation concerning intellectual property). The office is also responsible for enterprise risk management, working with the Institute auditor and leadership across MIT. Our office includes MIT's senior counsel Jamie Lewis Keith; contracts counsel Margaret Brill; litigation and risk management counsel Mark DiVincenzo; associate counsel Richelle Nessralla; and one FTE assistant counsel, Regina Dugan and Kathryn Johnson, who job-share. We are problem solvers and strategic thinking partners for our clients. We strive to be enablers, helping MIT's senior officers, faculty, and staff to accomplish their mission-critical objectives and to make informed decisions. Our office also brings the lessons learned from litigation, other disputes, and major transactions back to the MIT community through counseling and education. These lessons support management and faculty initiatives to minimize and avoid those reputational, financial, operational, and legal risks that can be appropriately managed, while still achieving MIT's core mission. The Senior Counsel's Office advises and works closely with the MIT Corporation's Auditing Committee. The senior counsel represents MIT in the Ivies Plus General Counsel's Group and is a board member of the Council on Government Relations. Our office's expertise includes structuring, negotiating, and documenting major research, education, and other collaborations and transactions; export controls; privacy laws; federal higher education legal issues; information requests; internal and government investigations; issues of compliance and conflicts of interest; contracts; litigation; mediation; immigration; employment, tenure, and student issues; affirmative action; real estate, corporate and tax law; capital design and construction law; environmental, health, and safety laws and permitting; public and administrative law; licensing; and insurance and risk management issues.



Margaret Brill, Jamie Lewis Keith, Mark DiVincenzo

Enabling Leading-Edge Research and Educational Initiatives

The senior counsel continued to work with the director of OSP and MIT's president, provost, chancellor, other senior officers, and departments, laboratories, and centers (DLCs) on complex international and domestic research and educational endeavors. In the last year, these included the Eli and Edythe L. Broad Institute, MIT's leadership of university research and education for the Idaho National Laboratory, Media Lab Europe, and the Singapore–MIT Alliance. The Broad Institute is an MIT center operated as a

collaboration with Harvard University, the Whitehead Institute for Biomedical Research, and the Harvard-affiliated hospitals and is dedicated to multidisciplinary research aimed at using genomic tools to treat disease at the molecular level and changing the foundations of medicine. The Broad Institute is MIT's largest single campus research enterprise. The Controller's Office and other colleagues contributed to these efforts. Capturing MIT's experience over the past six years on a variety of leading-edge research endeavors and approaches, the senior counsel was the primary author of a guide to options for structuring joint research and educational initiatives that she and her copanelists presented at the 2004 Conference of the National Association of College and University Attorneys, available at http://mit.edu/srcounsel/documents/NACUA_FinalCreativeStructuresJointResearch29Apr04.doc.

Serving Education and the Nation through Diversity

After leading MIT's *amici curiae* brief with DuPont, IBM, Stanford University, the National Academy of Sciences, the National Academy of Engineering, and the National Action Council for Minorities in Engineering, in FY05 the senior counsel continued to work closely with MIT's president, provost and chancellor, as well as several deans, faculty leaders, program directors, and the MIT community to affirm MIT's longstanding commitment to diversity in all aspects of our campus community and in the fields of science, engineering, and technology. The senior counsel and litigation and risk management counsel continued to advise the senior officers, deans, and DLC heads on a range of affirmative action issues that are critical to MIT's accomplishment of its educational mission for all of its students and the nation. The senior counsel has worked with a number of leading national organizations and as a member of the College Board's "brain trust" concerning the important issues posed for the nation by the legal and other challenges to diversity in higher education and in science and engineering fields.

Serving in the Post-9/11 Environment

The senior counsel worked closely with MIT's president, provost, vice president for research, associate provost, vice president for government relations, and director of OSP to address the challenges to academic research, higher education, and the nation posed by March and April 2004 recommendations to Congress of the inspectors general (IGs) of the Commerce, Defense, State, and Energy Departments with the inspectors general of the CIA, FBI, and Department of Homeland Security to change longstanding interpretations and to severely limit the reach, of the US university fundamental research and educational protections from export controls. (For example, the IGs would exclude controlled information on the use of controlled equipment on US campuses from the fundamental research protection.) These protections have for two decades excluded from export controls education, as well as basic and applied research, in science and engineering that is conducted on campus in the United States, provided that the results of the research are freely disseminated and shared broadly in the scientific community. These protections are critical to the open and international research and teaching environment that is the foundation of the US academic research and higher education enterprise. The senior counsel also participated on the Council for Government Relations (COGR) Task Force on Export Controls that is working with the Association of American Universities and assisting the higher education community to respond to the IGs' recommendations in a manner that will serve all of the nation's interests, including

national security, education, research and innovation, competitiveness, and economic strength.

The senior counsel published the lead article, “The War of Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-terrorism Statutes, Regulations and Policies that Apply to Colleges and Universities,” in a symposium issue of the *Journal of College and University Law*, volume 30, 2004, and an Export Controls Update. See http://web.mit.edu/srcounsel/resource/Final25_Apr04_JLKversion_Same_As_PDF_Journal_version.pdf and http://web.mit.edu/srcounsel/resource/Revised_Export_Control_Jan_2005.pdf. The article addresses changes in federal laws and policies that must be understood and wisely administered by academic research institutions and the government to avoid unduly burdening and undermining our institutions’ open and creative teaching and research environments that support the nation’s leadership role in higher education, innovation, and the global economy, as well as the nation’s security. The senior counsel also authored two chapters, one on export controls and another on antibioteerrorism laws, of an Association of University Technology Managers’ manual on technology transfer. Publication is pending. The senior counsel spoke at a number of conferences on structuring and conducting complex and international research and education initiatives, on export controls and tax issues, and on antiterrorism laws. These included a webcast hosted by the National Council of University Research Administrators (NCURA), a two-day seminar hosted by NCURA and PriceWaterhouseCoopers on Export Controls, a Massachusetts Continuing Legal Education seminar on export controls, and a COGR panel.

In FY2005, the senior counsel and litigation and risk management counsel continued to represent MIT on post-September 11, 2001, matters. They supported the International Scholars and Students Offices and the Admissions Office in their legal issues under immigration laws that broadly affect MIT. The senior counsel continued to participate on the COGR Task Force on Bioterrorism begun in 2002 and to work with the vice president for research, faculty leaders, the Environment, Health, and Safety (EHS) Office, and the Office of Sponsored Programs to design and implement a compliance program under new federal laws and regulations governing biological research and particularly select agents and toxins, in a manner that is as supportive and sustainable as possible for the researchers.

Bates Linear Accelerator Laboratory

Working with the provost, director of Bates, dean of science, Office of Sponsored Programs, and the EHS Office, the senior counsel provided legal advice and participated in negotiations with the Department of Energy to end three decades of operations at Bates as a national user facility for nuclear physics, to appropriately address responsibility for radioactive materials, and to position Bates for the future. MIT will continue research and educational activities at Bates under a new program.

Holding Charitable Institutions More Financially Accountable

The senior counsel, working with the provost, executive vice president, Institute auditor, and controller, advised MIT’s senior officers and worked with the Ivies Plus and Massachusetts General Counsels groups to address Congressional and Massachusetts

attorney general proposals to hold public charities more accountable. Efforts were made to improve the likelihood that any statutory or regulatory changes will be practical, add value, and address legitimate concerns without unnecessarily burdening the core public mission of universities.

PILOT Agreement with the City of Cambridge

The senior counsel participated with the executive vice president, managing director for real estate and his staff, and codirector of the President's Office of Government and Community Relations to negotiate, and the senior counsel drafted, an agreement with the city that provides tax-base protection for the city, while also allowing MIT appropriate tax-free opportunities to provide adequate facilities for its academic mission. The agreement represents an important commitment by MIT to the city and reflects MIT's positive relationship with the city and fellow citizens of Cambridge.

Supporting Research and Other Compliance Initiatives

The senior counsel continued to represent MIT in implementing its 2001 consent decree with the US Environmental Protection Agency and the Justice Department settling a major enforcement action arising from a May 1998 inspection of MIT's research laboratories and facilities. This work included close collaboration with the faculty and research community to design and implement an environment health and safety management system that provides policies, procedures, and tools to support EHS performance, represents MIT's values, and is a model for and sustainable in an academic research setting. For more information, see the annual report of the Environmental Programs Office and its EHS Office.

Contracts counsel, litigation and risk management counsel, and the senior counsel continued to work with academic and administrative colleagues across the Institute to support the development and implementation of sustainable compliance programs under the federal Gramm-Leach-Bliley Act, which governs how MIT gathers and protects certain types of personal financial information; the Family Educational Rights and Privacy Act, which governs privacy of student education records; the Health Insurance Portability and Accountability Act, which governs the privacy of certain personal medical information; and various other regulations and statutes. These and other efforts addressing privacy laws and policies involved a review of programs and activities of a wide range of departments at MIT, both academic and administrative, identification of activities covered by these laws, and support of departments in their efforts to develop sustainable compliance approaches that add value to and do not unduly burden core work.

The senior counsel and contracts counsel advised senior officers, the Office of Government Relations, the Office of the Dean for Student Life, the Controller's Office, the Department of Facilities, and Lincoln Laboratory on certain state and local regulations affecting campus activities, including student and employee health and safety, dining services, residential life, child care, and campus and public construction.

Supporting Human Resources Management and Student Life

Litigation and risk management counsel worked extensively with the vice president for human resources, director of employee relations, the Disability Services Office, and various human resource officers and administrative officers on regular employee relations issues to manage risks appropriately. Litigation and risk management counsel also served as the primary legal resource for offices and committees conducting or addressing a review of the student discipline system; enhanced communication among MIT Medical, counseling services, housing, and housemasters; new Fair Labor Standards Act regulations; new student life policies such as those on voluntary and mandatory medical withdrawals; policies and procedures on certain background checks; managing internal complaints of all types, including harassment investigations; and record-keeping processes. Litigation and risk management counsel also provided guidance to the president, provost, dean of student life, and the Committee on Discipline regarding disciplinary matters.

Risk Management and Litigation

Litigation and risk management counsel continued to manage outside counsel and worked closely with the senior counsel and MIT's senior officers on several major litigation matters, including litigation in the areas of employee relations, faculty issues, student life issues, campus police, procurement, facilities, and intellectual property and counseled clients across the Institute to prepare them for the litigation process. He prepared deponents, both witnesses and parties, for depositions and guided outside counsel in strategy during litigation to ensure protection of the Institute's primary mission and goals. Litigation and risk management counsel, working with MIT's insurance manager, controller, and senior counsel, also led the review of insurance policies and development of strategies for ensuring coverage of significant outside counsel fees in certain high profile litigation. He also counseled the provost and deans in resolving employee, promotion, and tenure disputes. Litigation and risk management counsel and the senior counsel worked with the News Office to provide appropriate statements and communications regarding various matters involving the Institute. The senior counsel and litigation and risk management counsel conferred with Institute leadership on litigation trends and related management initiatives of the past several years. The senior counsel and litigation counsel continued to collaborate with academic colleagues, the Institute auditor, director of OSP, and the controller to identify and devise workable approaches to reasonably manage MIT's principal reputational, financial, operational, and legal risks while supporting MIT's core objectives.

Litigation and risk management counsel continued to work with the community to assist in managing risk of traveling abroad and to monitor the changing world conditions reflected in weekly updates of the MIT Travel Risk Policy.

Major Institute Contracts

Contracts counsel worked with various research laboratories on contracting for appropriate disposal of regulated materials. Contracts counsel continued to work with the Controller's Office on structuring MIT's relationships with affiliated organizations in order to support these important relationships while addressing financial and

operational risks. In addition, contracts counsel, working with the Central Utility Plant, Department of Facilities, and the Controller's Office, negotiated several agreements providing for expansion of MIT's natural gas service to support the existing cogeneration plant and steam boilers to meet the needs of the campus buildings and expansion of research and other programs. She also represented MIT's executive vice president and Department of Facilities on other major contractual and permitting matters in connection with current and future construction projects, including the Urban Ring, a major public transportation project affecting MIT's campus. She represented the executive vice president and the Real Estate Office on several real estate acquisitions. Contracts counsel also worked with the Real Estate Office, the Broad Institute, and the Controller's Office on leases for space for the Broad Institute and its collaborators. In addition, she worked with the List Gallery and the Facilities Department on contracts for the design and installation of newly commissioned artwork on the campus and the Human Resources Department and the Controller's Office on contractual arrangements to replace the voucher system with temporary staffing.

Controlling Legal Costs

The Senior Counsel's Office manages MIT's outside legal services funding. In FY2005 the office continued its six-year initiative to account for and report on legal expenditures across the Institute. Legal costs can fluctuate from year to year for a number of reasons, including major litigation, extraordinary new initiatives, special events, more or less efficient use of inside and outside counsel, rising outside fees, and significant increases or decreases in regulation and programs.

The lawyers in the Senior Counsel's Office track their time on work that would have been sent to outside firms if the office did not exist, such as work on capital projects, legal work on major policies, the Massachusetts Commission against Discrimination and other agency discrimination claims, prelitigation disputes and litigation, government investigations, and major contracts. In-house counsels' total compensation is converted into hourly rates and compared with going rates for the same work of outside firms to determine savings through avoided outside costs. Inside rates were reduced from FY2002 to 2003, retained at FY2003 levels in FY2004, and reduced again in FY2005 to reflect greater hours worked by inside counsel than were originally projected. At the same time, outside rates for MIT's core law firms increased substantially from FY2000 to 2005, even after required discounts. There is a major differential between the hourly cost of inside and outside partner level counsel, resulting in significant savings when inside counsel performs work. After accounting for lawyers' compensation, the Senior Counsel's Office saved MIT \$2 million in avoided outside legal costs in FY2005.

In addition to cost savings from avoided outside legal fees, in some years (e.g., FY2001–2003) the Senior Counsel's Office has contributed to declining billings from the Institute's primary firms, as the Senior Counsel's Office performed more work in house. However, outside billings increased in FY2004 and remained at the same levels in FY2005 as unavoidable demands for legal work significantly exceeded inside counsels' workload capacity, necessitating more work to be performed by outside counsel due to a number of extraordinary and unavoidable initiatives and litigation. Also contributing to increased costs was the increase over the last 5–10 years in the scope and complexity

of federal regulation of university activities. The work of the lawyers in the Senior Counsel's Office avoided greater increases by providing the Institute with expert in-house legal services for a fraction of the cost of the average outside firm rate and allowed MIT to hold level the cost of outside firms' work on core MIT matters (excluding extraordinary litigation and transactions).

Jamie Lewis Keith

Managing Director for Environmental Programs and Risk Management/Senior Counsel