

## **Senior Counsel's Office**

In its fifth year, fiscal year 2004, the Senior Counsel's Office is MIT's central in-house counsel's office, providing comprehensive legal services and counseling on MIT matters in all areas of concern to the academy and the administration (except intellectual property law). The office represents MIT's president, provost, executive vice president, and chancellor, as well as the deans, vice presidents, the departments, laboratories, and research centers, and administrative offices. We also arrange for and manage outside legal services when needed and oversee all litigation. Our office includes MIT's senior counsel Jamie Lewis Keith, contracts counsel Margaret Brill, and litigation and risk management counsel Mark DiVincenzo, as well as a law clerk, Kathryn Johnson. (In FY2004 our office also included a part-time environmental counsel. In FY2005 the office will include an associate counsel.) 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.

Our office's expertise includes structuring, negotiating, and documenting major research and other collaborations and transactions; export controls; privacy laws; information requests; government investigations; privacy issues; issues of compliance and conflicts of interest; contracts; litigation; mediation; internal investigations; employment and student issues; affirmative action; real estate and corporate law; capital design and construction law; environment, health and safety laws and permitting; and insurance and risk management issues.

### **Highlights**

#### **The Eli and Edythe L. Broad Institute**

Working closely with MIT's president, provost, vice president for research, and associate provost, as well as with the director of the Office of Sponsored Programs (OSP) and the executive vice president, the senior counsel represented MIT over the past year in the establishment of the Eli and Edythe L. Broad Institute. 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 that is dedicated to multidisciplinary research aimed at using genomic tools to treat disease at the molecular level and changing the foundations of medicine. This undertaking is a major focus of MIT's research mission. (The Broad Institute is the largest single campus research enterprise.) In FY2003, the senior counsel worked with MIT's president and provost to represent MIT in the negotiation and closing of a \$100 million gift agreement entered into by MIT with the Eli and Edythe L. Broad Foundation and the Broad Foundation to fund the establishment of the Broad Institute.

In FY2004, the senior counsel represented MIT in close collaboration with these senior officers and the director of OSP in the negotiation and October 2003 closing of a Transfer Agreement that transferred the \$100 million-plus per year genome research program, with its extensive physical and other assets, awards, 350 researchers and other personnel, and leases, from the Whitehead Institute to the Broad Institute at MIT. This effort involved substantial due diligence and identification and allocation of risks for the senior officers and the MIT Corporation. The senior counsel also worked with these senior officers and the director of OSP to negotiate and, in May 2004, to close a creative and historic collaboration agreement among MIT, the Whitehead Institute, and Harvard University that will enable these institutions and the Harvard-affiliated hospitals to collaborate in the research and operation of the Broad Institute. Litigation and risk management counsel, working with Human Resources, represented MIT in related employment issues. In these transactions, the senior counsel also worked with the controller, staff of the Provost's Office, and colleagues in other areas. The contracts counsel, working with the Real Estate Office, Treasurer's Office, Controller's Office, and Provost's Office, represented MIT in negotiating and closing a long-term lease of a building to be constructed to house the Broad Institute adjacent to MIT's campus.

### **Enabling International Leading-Edge Research and Education Initiatives**

The senior counsel continued to work with the director of OSP and MIT's provost, chancellor, other senior officers, and departments, labs, and centers (DLCs) on complex international and other research and educational endeavors. In the last year, these included the Media Lab Europe, Media Lab Asia, and the Singapore-MIT Alliance. The Controller's Office and other colleagues contributed to these efforts. Capturing MIT's experience over the past five 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 was presented at the 2004 Conference of the National Association of College and University Attorneys and is available at <http://web.mit.edu/srcounsel/resource/>.

### **Serving Education and the Nation through Diversity**

In FY2003, the senior counsel represented MIT on its amici curiae brief to the US Supreme Court in the University of Michigan law school and undergraduate admissions cases to demonstrate the importance of student body diversity for science and engineering higher education and for the nation. DuPont, IBM, Stanford University, the National Academy of Sciences, and the National Academy of Engineering joined MIT's brief, and the senior counsel worked with these institutions' counsel and Jones Day in preparing the brief. MIT's brief is at <http://web.mit.edu/srcounsel/resource/index.html>.

In FY2004, the senior counsel continued to work closely with MIT's president, provost, and chancellor, as well as several deans and faculty leaders, to affirm MIT's long-standing commitment to diversity in all aspects of our campus community and in the fields of science, engineering, and technology. The senior counsel, working with the litigation and risk management counsel and MIT's president, chancellor, and dean for

undergraduate education, represented MIT in the ongoing investigation by the Department of Education's Office of Civil Rights of two of MIT's renowned minority summer programs to ensure that MIT can preserve their long-standing goals and accomplishments while also complying with applicable law. The senior counsel continues 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 in service of the nation. During the Project Interphase 35th Anniversary Celebration, the senior counsel was on a panel with MIT's president and dean for undergraduate education and an attorney from the Harvard Civil Rights Project to discuss the effects of the Michigan cases on programs aimed at increasing the participation of underrepresented minorities in science and engineering. She also spoke on panels and at conferences on this important topic hosted by the College Board, a large national foundation, and a civil rights activist organization.

### **Service in the Post-9/11 Environment**

Serving MIT and the national higher education and research community in the post-9/11 environment has been a challenge. At the end of FY2004, the senior counsel was appointed to the Board of the Council on Governmental Relations (COGR), where she will represent the nation's academic research institutions in a wide range of issues affecting research and higher education. She continues to represent MIT in the Ivies Plus General Counsel's Group, which addresses the many issues affecting their institutions, such as conflicts of interest, export controls, visa issues, compliance, student life, enterprise risk management, initiatives in Massachusetts and other states to impose Sarbanes-Oxley Act-like standards on charitable institutions, and affirmative action. The senior counsel published the lead article, "The War on 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. 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 and litigation and risk management counsel continued to represent MIT on post-September 11 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 a COGR Task Force on Bioterrorism.

The director of OSP and the senior counsel worked closely with MIT's senior officers to address the challenges to academic research and the nation posed by March and April 2004 recommendations to Congress of the inspectors general of the Commerce, Defense, State, and Energy departments with the inspectors general of the CIA, FBI, and Department of Homeland Security to change long-standing interpretations and to severely limit the reach of the US university fundamental research and educational protections from export controls. These protections have for two decades excluded education as well as basic and applied research in science and engineering that is

conducted on campus in the United States from export controls, 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 endeavors. The director of OSP, senior counsel, and the vice president for government relations also participated on a 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 inspector generals' recommendations in a manner that will serve all of the nation's interests, including national security, education, research and innovation, competitiveness, and economic strength.

### **Supporting Human Resources Management**

In supporting human resources management in a time of budgetary constraints and high standards of conduct, the litigation and risk management counsel worked extensively with the vice president for human resources, the executive vice president, ombudspersons, and DLC heads to represent MIT on the many issues arising during layoffs necessitated by the Institute's budget constraints in FY2004 and FY2005. He also collaborated with the Human Resources Department and ombudspersons to develop and deliver a voluntary educational program on harassment and discrimination for academic and administrative leaders and administrators in DLCs across the Institute.

### **Supporting Research and Other Compliance Initiatives**

The senior counsel continued to represent MIT in implementing its 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 campus. This work included close collaboration with the faculty and research community to design and implement an Environmental Health and Safety Management System that represents MIT's values and is a model for and is sustainable in an academic research setting.

The contracts counsel, the litigation and risk management counsel, and the senior counsel worked 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, and the Health Insurance Portability and Accountability Act, governing the privacy of certain personal medical information. 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 litigation and risk management counsel worked closely with the vice president and secretary of the Corporation, the vice president for information services and technology, and the vice president for human resources to represent MIT in its efforts to proactively

respond to the accidental disclosure of certain personal information about employees. These efforts included advice on how to assist individuals and address their concerns.

The senior counsel and litigation and risk management counsel supported OSP and the vice president for research in a number of legal issues in research compliance. The senior counsel spoke about the laws and management approaches on a panel on research compliance moderated by the National Science Foundation's deputy general at the National Council University Research Administrator's conference in San Diego.

### **Risk Management and Litigation**

The Litigation and Risk Management counsel managed outside counsel, worked closely with MIT's senior officers on several major litigation matters, and counseled clients across the Institute to prepare them for the litigation process. The litigation and risk management counsel worked with the senior counsel and conferred with the president, provost, chancellor, executive vice president, and other leaders across the Institute to review 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 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.

The senior counsel and litigation and risk management counsel worked closely with the provost, chancellor, deans, and executive vice president on their development and implementation of a new MIT Travel Risk Policy to address heightened safety and health risks when members of the MIT community travel abroad.

### **Major Institute Contracts**

Contracts counsel worked with Student Financial Services, the Controller's Office, and the Treasurer's Office to support MIT's participation in a national consortium of colleges and universities that offer an Independent 529 Plan, a prepaid tuition plan. Contracts counsel worked with the Athletics Department, the executive vice president, Human Resources, and the Controller's Office to develop a model for structuring MIT's relationships with affiliated organizations in order to support these important relationships while addressing financial and operational risks.

### **Controlling Legal Costs**

The Senior Counsel's Office manages MIT's outside legal services funding. In FY2004, the office continued its five-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 programs. FY2000 was the first year of implementation of this cost tracking, and FY2002 was the first year of full staffing in the office, creating greater capacity to provide in-house services.

The litigation, contract, and environmental 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, MCAD and other agency discrimination claims, prelitigation disputes and litigation, government investigations, and major contracts. In-house counsel total compensation is converted into hourly rates and compared with prevailing rates for the same work of outside firms to determine savings.

Inside rates were reduced from FY2002 to FY2003 to reflect greater hours worked, while outside rates increased during the same period by 30.67%. Inside rates were retained at FY2003 levels in FY2004, while outside rates increased again from FY2003 to FY2004 by 7.4%. The hourly cost differential between inside and outside counsel—and the resulting savings realized by inside counsel—was on average \$256 per hour in FY2003 and in FY2004 was on average \$285 per hour. Without considering the savings gained by the senior counsel from her substantive legal work for MIT, the Senior Counsel's Office saved MIT \$1,054,000 in avoided outside legal costs in FY2004. However, after three years of declining billings from the Institute's primary firms as the Senior Counsel's Office performed more work in-house, outside billings increased by \$1.7 million in FY2004, as more work significantly exceeded the inside counsel's workload capacity and had to be performed by outside counsel. This was caused by a number of extraordinary and unavoidable initiatives and litigation. Most of this increase is attributable to several large litigation matters: the transfer of the genome project and its assets and personnel to MIT to create the Broad Institute, certain unusually large and complex transactions in the Treasurer's Office, a Superfund Site settlement (not the associated legal fees), and extraordinary export controls and other federal research policy issues. Although outside billings are up, the work of the lawyers in the Senior Counsel's Office (including the senior counsel's work on the genome project transfer and service as the sole lawyer on the Broad collaboration agreement and the other work outlined in the highlights above) avoided an even greater increase.

**Jamie Lewis Keith**

**Managing Director for Environmental Programs and Risk Management/Senior Counsel**