

WHY YOU NEED A LAWYER

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WHO THIS LETTER IS FOR

This is a letter to persons who believe they might be contacted by their employer, a funder, or government officials regarding their relationship to the People's Republic of China. This includes, for example, university professors who have received grants to support their academic activities; researchers in STEM fields working in the private sector; civil servants; and even U.S. military personnel. It also includes individuals regardless of citizenship; holding a green card, having naturalized, or even being a native-born citizen will not protect you from potential problems. The most important message here is: if you have any concerns at all, you should consult with a lawyer as soon as possible, preferably one with specialized expertise.

You will benefit from talking to a lawyer, even if you do not intend to file a lawsuit. You also may damage yourself if you take actions that you sincerely believe are proper and well-meaning, but which, without your knowledge, weaken the legal arguments you may eventually be compelled to present. You have a right to talk to a lawyer. It is normal to do so. That does not mean anything negative. It does not mean you are guilty of anything at all.

WHO I AM

Allow me to introduce myself. I am a lawyer who practiced with a major firm, a law professor for more than twenty-five years, a former dean of Wayne State University Law School in my hometown of Detroit, and a former chancellor of University of California Hastings College of the Law in San Francisco. Although I cannot represent you, and I cannot offer legal advice, I have referred many people to lawyers who are able to assist in these situations. Because of the scope of these issues, and the danger to you, I have written this note to offer basic information. This letter is not legal advice; it recommends obtaining legal advice.

I have served the community pro bono (meaning for free) on various matters. I am contacted often about this type of case.

WHAT THE RISKS ARE

You likely already are aware of the risks. In the current era of increased hostilities between the United States and China, there are many cases – from investigations and threatened termination of employment to criminal prosecution with the possibility of significant imprisonment – involving persons whom the United States government has deemed to have interacted with China in an inappropriate manner.

These are serious matters. In some cases, people have been found guilty or agreed to a plea bargain in which they admit they are guilty. In other instances, people have been innocent but had to defend themselves against these charges. In still another set of circumstances, people have been subjected to changing norms or inconsistent norms compared to others who may have been engaged in similar conduct.

I have no idea about the details of your career. I can say, to err on the side of caution, that if you have or have had *any* relationship with *any* Chinese government entity, you need to be mindful of the possibility you will have to explain that relationship as well as the possibility that the relationship will be subjected to scrutiny. This is true even if the relationship was in the past. It also is true even if you believe the relationship was primarily honorary. It is even true if you have only applied for, but did not join, a Chinese talent recruitment program, whether it was formally designated as “the Thousand Talents” or had another name. But it certainly is true if you participated or are participating in Thousand Talents or in anything else that involves payment of moneys from a Chinese source to you. It becomes especially true if you have or have had federal funding, hold a U.S. government role of any type, require a security clearance for your work, or are requested to fill out reporting forms about conflicts of interest or interactions with foreign governments. In this context, “Chinese government” includes any Chinese university, think tank, or state-owned enterprise, and “U.S. government” includes any agency such as NIH that offers financial support. The Chinese government includes, as you know, many more components than the U.S. government.

You might assume that you are collaborating with Chinese scholars, but it also can be interpreted as collaborating with Chinese government officials.

You also should realize that if anybody contacts you to discuss these issues, that should be considered a warning sign. That includes the HR office at your university or company or even a colleague such as the department chair at your campus or the research compliance office. It includes any law enforcement personnel and it includes those entities that gave you grants. That is true even if you regard the people involved to be your colleagues and friends. They must comply with the law and follow orders from their supervisors.

Even without any definite indication, of course you may be under investigation. It is common for proceedings, if national security is asserted, to be underway without any knowledge of the target.

THE TYPES OF LEGAL ISSUES YOU MIGHT CONFRONT

There are many different legal cases. These include administrative inquiries, such as an internal investigation. They include “civil” cases, which could result in termination of employment or adverse actions affecting your current job and your future prospects. They also include criminal charges, both state and federal, and in some instances relating to the “civil” dispute – for example, you might have an argument with a former employer about whether ideas are yours or intellectual property of theirs, and that in turn could lead to litigation about trade secrets and then accusations about industrial espionage. These scenarios also vary depending on your job and the requirements associated with it. A person with an NIH grant is not the same as a person trying to renew a security clearance. A person who has used their official laptop while traveling abroad is not the same as a person who has been approached by a Chinese government official.

The laws can be complex and technical. The laws also are changing, by and large negatively for you. These rules do not necessarily match what you or I or other reasonable people might believe to be what is right and wrong. They apply to you whether you know them or not and whether you agree with them or not.

I should add a word about discrimination. I have no doubt that there is bias at work here, both the explicit type and the “implicit” version. I am an advocate against “racial profiling.” But I should say in many instances, there is neither a claim you can make for racial discrimination nor a defense on that basis. You might feel the treatment you are experiencing is unfair, and I might agree, but that does not mean you will be able to present a legal claim or defense that will be successful before a judge or jury. (Beyond your own case, you might wish to participate in advocacy for legal reform. We can have a separate talk about standing up and speaking out.)

There are many laws that have been “on the books” but not stringently applied in the past. They have become an enforcement priority more recently. Attorney General Jeff Sessions made an announcement to that effect in November 2018. He said there would be a new “China initiative.” Examples include disclosures of affiliations and compensation, even if you believe they do not present a serious conflict of interest. It includes provisions against “moonlighting,” which means having other employment, even if it is part-time during vacation periods from your regular occupation. It includes regulations for proper accounting for money and time, even as to aspects of a grant that have nothing to do with China. Some of these laws can be violated without any intent to violate them. Others appear administrative or relatively trivial. But please understand even if you have behaved honorably by your cultural standards or in accordance with the norms of your academic discipline, you can be found to have violated U.S. law – even without the Chinese government directing you and possibly even without significant personal gain. You are vulnerable if you receive NIH funding, you visited China to deliver lectures during the summer, and you received a modest honorarium, if you were required to list this activity in a report and failed to do so.

There are many possible outcomes. Laypeople may believe law is black and white. It is not. A person who has a legal problem may have multiple remedies available. The options may depend on the strategy that is developed by a good lawyer. People can end up with a mildly negative outcome or severely negative outcome. How the facts are framed, and many variables, too difficult to reduce to an algorithm, will determine the result along a range. It is impossible to assess your situation in the abstract, without details.

WHY YOU NEED TO TALK TO A LAWYER AND SHOULDN'T TALK TO OTHERS

You likely are highly educated and professionally successful. That deserves the utmost respect. It will not prevent problems. People who are award-winning, tenured, chaired professors at prestigious universities are in trouble.

You cannot solve these legal problems on your own. You should not try – anymore than I would treat an illness on my own, not being a medical doctor. Your education and success may make you vulnerable, as our own accomplishments do, to all of us confronting a new domain of activity. However smart and ethical you are, law is almost certainly not an area in which you commonly work. These are legal issues. Scientific training is not only not helpful; it can be harmful – because legal problems are different than scientific problems. In the movies, you know they always announce that anything you say can – and will – be used against you. They don't add, but they should, that that includes inconsistencies that can be explained. Some actions and statements that you, or indeed any of us, might believe are helpful legally are harmful, and vice versa.

The people who contact you might be in fact acquaintances. That might be awkward. They probably are working with lawyers, even if they do not identify those lawyers. A university department chair, for example, will be talking to the university “general counsel,” who represents the institution and not you. They may genuinely like you. But they cannot be your advocate, especially if they are facing legal demands from others such as the federal government. They have to comply with the law, even if they may be uncomfortable with the outcome. Any time the party you are interacting with has a lawyer, you should, too. You do not necessarily need to be hostile to people who contact you, but you also do not necessarily need to comply with every request. The people who are your peers, even those who have faced legal issues, are not expert, and they cannot protect the confidentiality of what you tell them. It is not safe for you to rely on their example, even if it turned out well for them, and it also is not safe for them to talk to you, because it may make them a target or a witness. Everyone, most of all you, will be in a worse position if you attempt to rely on non-lawyers or lawyers not representing you.

There is an aspect of the attorney-client relationship that ought to be highlighted. It is different from most other professional relationships. When you talk to a lawyer, even if you are only considering hiring them (but decide against it), they must maintain the confidentiality of what you share. The government also cannot force them to reveal it. Anybody else does not owe you that obligation.

They might want to keep secrets you tell them, but the government can force them to repeat what you have said to them. (For our purposes, I will treat you as a “prospective client.” That means our conversation will be covered by the attorney-client “privilege.”)

HOW TO WORK WITH A LAWYER

This section of the letter addresses practical aspects of the relationship you establish. Many lawyers will have an initial consultation without a fee. You likely have not consulted with a lawyer before. Below is an explanation of how it works. The word “retain” is sometimes used to refer to hiring a lawyer. The “retainer fee” is an amount paid to establish the relationship, as a deposit against which the lawyer will bill at an hourly rate. (The exception is contingency fee lawyers. They are not likely available here for reasons explained below.)

Most importantly, a lawyer cannot talk to you casually. A competent lawyer will say, immediately, that they cannot just give “off the cuff” advice, based on a brief conversation, because their opinion must be based on much more information about the situation (and legal research and what is called a “conflicts check.”) They need to review all the relevant documents, at a minimum. For a lawyer, giving advice means serving as a lawyer. There is no such thing as giving advice that can be used and not forming an attorney-client relationship, which is why the best lawyers are so careful. Unlike this letter, which is generic, legal advice must be specific. Even in this document, I have taken pains to be clear we are not initiating an attorney-client relationship.

You should develop a relationship with a lawyer you trust. That means you are willing to answer any question they ask, and, beyond that, you volunteer the facts, including those that might appear to reflect poorly on you; it also means you are willing to follow their advice. If you don’t want to talk freely with them, or if you doubt their suggestions, you should not choose a different lawyer. (If you are contacting me and you already have a lawyer, you should explain to that lawyer that you authorize us, that lawyer and me, to talk, and I should ensure that lawyer agrees it is acceptable for you and me to talk, to respect your attorney-client relationship. I am here to support your relationship with your lawyer.)

I am sorry to say you likely will have to pay an hourly fee. That could be from \$500 to \$1000 per hour, with a request for an amount up front (the “retainer fee”) that may range from \$5000 to \$25,000. It is highly unlikely, whatever the geographic region you live in, that there will be a lawyer who is qualified who will accept a “contingency fee” for this type of work. I mention that arrangement only because you may have heard of it, but it is not customary for this type of work. The reason is there likely is no recovery for you from which such a lawyer could receive a percentage as their earnings. (Even in employment discrimination cases, unless you are the CEO or compensated similarly, individuals usually do not have cases with enough financial significance to attract a “contingency fee plaintiff’s lawyer.”) Some people who contact me have been told by a contingency fee lawyer that they do not have a case or they do not have a case at this point in time. That may be quite good legal advice as a case you would bring as a plaintiff who wants to recover money (such as for discrimination), but it has no bearing on whether you face a situation as a defendant who must protect one’s self. It also is unlikely you will locate a pro bono lawyer. This is not the type of work they do for free. Furthermore, major firms that dedicate a portion of their professional services to pro bono usually reserve it for people who meet a poverty test, such as the homeless. (They may well be on the other side of these issues from you, representing a university or corporation.)

You should retain a specialist. That means somebody who either does employment law for employees (it need not be for academics, since that specialization is too rare except in the a handful of major metropolitan areas), or “white collar criminal defense,” or perhaps more than one lawyer or a single lawyer who has done some work in both employment and white collar criminal defense. A general practitioner is not ideal. Here is a personal example. I became a member of the bar in 1992. I have worked on a range of issues. I would not present myself as qualified to handle this type of matter beyond the initial referral.

Finally, please understand that contacting a lawyer does not mean you wish to be aggressive. In the circumstances we are discussing, it typically is defensive rather than offensive. Some lawyers never even reveal themselves publicly. They remain in the background. I understand in some cultures, it is not common to consult a lawyer, and lawyers themselves are not held in high regard. There is no stigma here. I cannot emphasize enough the need to talk to a lawyer.

CONCLUSION

For those to whom I have sent this letter personally, we are scheduled to talk. I will reiterate that I am not and cannot be your lawyer. I have no self interest here. Everything I have done on any case such as this has been pro bono, meaning without any fee – all of the referrals also are without any fee.

Your matter is urgent and important. If you call me after you have signed documents or given an interview, to ask if you need a lawyer, my answer will be yes, and you needed a lawyer in advance of signing the documents or giving the interview. I cannot emphasize that enough. The reason I have written this letter is my experience. Many people hesitate to contact a lawyer to their disadvantage. If reading this document has made you uncomfortable, then I have done you a service.