

What Attys Can Learn From Harvard Professor's Conviction

By **Jack Sharman and Tatum Jackson** (January 12, 2022)

Media attention around the arrest of Harvard University nanoscientist Charles Lieber has focused on Chinese espionage and the U.S. Department of Justice's allegedly misplaced focus on American academic researchers who receive Chinese grants.

The more urgent lessons from the Lieber episode for the white collar practitioner, however, arise from the professor's post-arrest interview, the statements he made to agents and their ultimately fatal use with the jurors who quickly convicted him.

Professor Lieber's conviction highlights the perils that even highly educated white collar targets face in an FBI interview without counsel present.

After being confronted early in the morning, he was sufficiently aware to speculate aloud that he should have a lawyer — but he did not clearly and firmly demand one. His videotaped statements were apparently important to the jury.

In a federal investigatory initiative that has come to focus more on false statements or obstruction than on its original mission, volunteering information can be fatal.

Why would somebody like Lieber — by all accounts, a genuinely brilliant and experienced professional — voluntarily make incriminating statements, even though, while he was making them, he was obviously aware that he should not?

Do the very characteristics of many white collar clients — intellectual firepower, personal confidence, and the potent potion of embarrassment and hubris — combine to lead the client into statements that he or she knows to be incriminating?

This article first sketches a brief background of the prosecution initiative regarding Chinese espionage; summarizes the key facts of Lieber's arrest and conviction; and concludes with practical notes for lawyers counseling their clients in stressful circumstances.

The DOJ's China Initiative

The Thousand Talents program is a Chinese government program to attract foreign-educated scientists to China.

There is nothing inherently illegal about the participation of an American academic in such a program, but the researcher must disclose the relationship.

The DOJ's China Initiative, led by the department's National Security Division, seeks to counter Chinese national security threats generally, and technological, intellectual property and scientific espionage particularly.

The department has had mixed results with prosecutions under the initiative, and the



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initiative has been criticized.[1]

Lieber's Arrest and Conviction

Lieber was chair of Harvard's chemistry and chemical biology department and a leader in his field. He published over 400 academic papers, served on editorial boards of several science journals and received numerous awards.

Government agents interviewed him in 2018 about his involvement with a Wuhan University of Technology project.

Agents arrested him in the early morning of Jan. 28, 2020, read him his Miranda rights and interviewed him on video for three hours.

Initially, Lieber said, "I guess I think probably I should have ah, an attorney," but he continued answering the agents' questions and ultimately admitted that he lied in his previous interview.[2]

Lieber mentioned "an attorney," but the mention did not trigger his Fifth Amendment right to counsel. The Fifth Amendment requires an unambiguous, unequivocal request. The lack of ambiguity supposedly allows a reasonable agent to know with confidence if the witness wants an attorney.

If the interviewee simply might want a lawyer, the government may continue interrogating the individual. A witness does not invoke his right to counsel by saying that "maybe [he] should talk to a lawyer," as the U.S. Supreme Court held in 1994 in *Davis v. U.S.*[3]

Lieber's hedging language was not decisive, the agents did not violate his Fifth Amendment rights and the jury could hear his videotaped statements.

After deliberating for just under three hours, the jury convicted Lieber of two counts of making false statements about his participation in the Thousand Talents Plan. He was also convicted of failing to declare income earned in China and failing to report a Chinese bank account.

Accomplished, smart, white collar targets do things all the time that they know they should not do, knowledge that comes from moral sense. That moral sense animates embarrassment and guilt, which then leads them to talk when confronted.

Hubris and ambition also play a role. Although Lieber's work has received worldwide recognition, he apparently had long dreamed of winning a Nobel Prize — but also suffers from late-stage lymphoma. He told the interviewing agents that his goal of winning a Nobel Prize motivated, at least in part, his arrangement with Wuhan.

Practical Notes

How do we help clients like Lieber?

Say nothing.

Without your presence, your client should say nothing to the agents, except: "Upon advice of my counsel, I invoke my rights under the Fifth Amendment of the U.S. Constitution. I respectfully decline to answer your question and request to speak with my lawyer."

Let's assume the inevitable — that the client respects your advice but does not follow it, answering first some and then many questions from agents outside your presence.

What are the points that you will go over with the client at the outset of the representation, assuming you will have a chance to do so?

Tell the truth.

Not only is it a good thing to tell the truth, the witness who lies to or misleads a federal agent faces a federal false statement or obstruction of justice charge.

Although it should be obvious, there are no exceptions to these federal criminal statutes for lying to protect children, friends, a spouse or colleagues.

Exercise discipline.

Because the client is in the room with agents and no lawyer, he or she must exercise unusual discipline.

In other words, the witness must listen, process, and behave with extra care. What do we mean by that?

Listen to the question.

The client should listen to the question with even greater clarity and focus than would be required in a deposition, hearing or trial. There is no counsel present to force the agents to ask a clear question, and agents can sometimes get lazy, obnoxious or incomprehensible.

In a witness interrogation room, there is a premium on listening to the question and answering that question directly — and then stopping.

Prepare for multiple examiners.

Unlike a deposition, the witness can be questioned by multiple agents in the room.

Stand your ground.

An interrogation room can be an odd combination of hostility and lethargy.

The accusatory tone in such examinations is foreign to the self-perception of white collar witnesses, most of whom have consumed a steady diet of entertainment where agents are the very good guys and the individuals they pursue are the very bad guys.

If the client has been arrested or has had a search warrant executed on his home or office, the government has already concluded that the client has committed a federal offense.

Even in a "voluntary" interview in the absence of a search warrant, law enforcement believes your client has knowledge of a crime, or at least knowledge of a potential crime.

Because agents have unfettered sway in the interrogation room, they often exhibit frustration, skepticism or sarcasm when confronted with testimony inconsistent with the government's theory.

This response is difficult for the witness: she may have no idea what the government's theory actually is. The witness needs to be civil but firm in her refusal to agree with a statement or assumption that the witness believes is simply not true, however much it irritates the agent.

This is not a business deal.

If your client is a businessperson, he should be reminded that many agents, although certainly not all, lack extensive experience in the business world.

They do not have customers, employees, vendors or patients. They do not have to undergo examination by stock analysts, or be called on the carpet before the CEO or the board because of a missed sales target or a clumsy merger.

For those reasons, almost any business activity in the wrong light can seem potentially criminal to the investigator's eye. The agents are not there to invest. The witness who postures and tries to negotiate the way one might in a business deal will only find herself exposed to more charges.

Conclusion

Lieber should not have spoken with the agents at all, at least outside the presence of his lawyer.

Having elected to speak, he may have been betrayed by some common characteristics of white collar targets — including intellectual firepower and a high degree of confidence, undergirded with a moral sense that can lead to embarrassment and a sense of guilt.

Having been so betrayed, he violated the practical rules of engagement and paid a significant price we would all wish to spare our clients.

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[1] Ellen Barry, In a Boston Court, a Superstar of Science Falls to Earth, N.Y. Times (Dec. 22, 2021), <https://www.nytimes.com/2021/12/21/science/charles-lieber.html>.

[2] Meera S. Nair & Andy Z. Wang, Embattled Professor Charles Lieber to Go on Trial in December, Harvard Crimson (Nov. 2, 2021), <https://www.thecrimson.com/article/2021/11/2/lieber-trial-december/>.

[3] Davis v. United States, 512 U.S. 452 (1994).