

Joyce Vance:

Welcome back to #SistersInLaw. I'm Joyce Vance. There's a lot of legal news this week. We've learned more details about the investigation into Florida Congressman Matt Gates. So we'll do a deeper dive into those allegations and discuss what it means to be a cooperating witness since there's news that Gates's buddy Joel Greenberg may plead guilty. We'll also take a look into vaccine passports and talk about possible jury outcomes as the Chauvin trial heads into its third week. As always, we'll be answering some of your questions at the end of the show.

Joyce Vance:

So y'all vaccine passports, it actually makes me think about the possibility that at some point in the future, we'll be taking vacations again.

Kimberly Atkins:

Yes.

Joyce Vance:

I have not been out of Birmingham in over a year, which is such a strange thing to think about. Not all bad. But I'm really looking forward to our first family hiking trip, maybe going back to Iceland, or going to Montana or someplace up in Canada, where we can just get out and hike and see a lot of plants and animals. Barb, what about you? What's your first vacation plan?

Barb McQuade:

Well, like you Joyce, I really like national parks. In the before times, we made it our family vacation destination every year to go to visit a different national park. We've been to a lot of them. But I have a personal quest to visit all 50 states. I've been to 48 of the 50 states.

Joyce Vance:

Real close.

Barb McQuade:

Remaining are Alaska, which is one of those like retirement bucket list trips. But the other one is oh so tantalizingly close, North Dakota. So I am secretly plotting a trip to Roosevelt National Park so we can get to North Dakota, and I can check it off my list. So we'll see if I'm able to prevail. How about you, Jill? Where's your next vacation?

Jill Wine-Banks:

Well, I also love hiking. I love adventure travel, my husband and I go to places that my friends cannot believe I actually go. We have been to Borneo and New Guinea and stayed with native huts. There's no hotels. I would love to do my next trip to see the gorillas, the mountain gorillas. That is something I'd really like to do. But traveling abroad is still pretty tricky.

Jill Wine-Banks:

So I am actually planning to visit my goddaughter and her family in Milwaukee. I have a trip planned to Memphis for the Civil Rights Museum and Graceland. That's a trip that was supposed to happen last

July, and obviously didn't happen. So it's going to happen hopefully this July, I will be there. I'm looking forward to that as maybe my first trip. I forgot how to even use the airline to make a reservation. When I went to reserve this one, it was like, "I haven't done this in over a year." I used to travel almost every week. So I'm really looking forward to it. What about you, Kim?

Kimberly Atkins:

Yeah, this is all giving me such wanderlust. These are all really really great destinations. Like you guys, I think the first trip will probably be domestic. I just would love to see the ocean again, whether it's going up to Maine and seeing the Atlantic or visiting my good friends in LA and getting a peek at the Pacific. That would be really wonderful to do sometime this year. Then in the long term, been thinking a little bit about potential honeymoon destinations, and perhaps Japan. Neither my fiance nor I have been to Japan. So that's sort of on a bucket list. There are some again, hiking related trips that look really good out there. So that might be it.

Joyce Vance:

Those also really information on that.

Jill Wine-Banks:

I can give you lots of information on that. I've been working there for a long time.

Kimberly Atkins:

Oh good.

Jill Wine-Banks:

It's my husband's business is oriental art. So let's help you plan it.

Kimberly Atkins:

All right, we're going to talk.

Joyce Vance:

I'm glad to know that all the sisters so enjoy hiking, I did not know about that about us. We have something in common. So when we finally can all get together somewhere, perhaps a hiking destination.

Kimberly Atkins:

Yes. That'd be great.

Jill Wine-Banks:

Getting together is great.

Joyce Vance:

That's what I was. Maybe there's a #SistersInLawPodcast from a national park. Maybe we'll all go to glacier or something like that.

Kimberly Atkins:

Oh, that would be so fun.

Joyce Vance:

That sounds like a great thing to get to look forward to. But on a serious note, our first topic today involves the Matt Gaetz investigation. Barb?

Barb McQuade:

Yeah, let me jump right into it. There's news today that Matt Gaetz perhaps taking these allegations very seriously. He has hired some lawyers to represent him, some very fancy New York lawyers, Marc Mukasey and Isabelle Kirshner, who have represented people connected with the Mueller investigation and former governor of New York. So some high powered people here.

Barb McQuade:

Just to give you a little background and remember where we were on this case. Matt Gaetz has told the world himself that he is under investigation by the Department of Justice for sex trafficking of a minor, which he denies. He is a congressman from Florida, has been in office since 2016. Yesterday we also got some new developments that there is potential cooperation from an associate named Joel Greenberg, he is a former tax collector in Florida.

Barb McQuade:

His lawyer indicated to the judge in his case that he may be cooperating with authorities. His lawyer told the judge that they were negotiating a plea deal. Greenberg was charged last summer with sex trafficking a minor, stealing from his office and fraud. It appears at least reports are piecing together that it may have been in that Greenberg investigation that investigators discovered the role of Matt Gaetz. Of course, these are all still just allegations. But Matt Gaetz has said that he is under investigation for sex trafficking by the Department of Justice.

Barb McQuade:

So let's talk about some of these wrinkles. Again, we don't know everything about his investigation, really just what he himself has revealed. We don't even know whether he is a target or subject of an investigation. So why don't we start there? Joyce, can you talk with us a little bit about the meanings of those terms "subject and target of an investigation" and the significance of them?

Joyce Vance:

Sure. Those are all terms of art for federal prosecutors. So when Barb and I were at DOJ, and we were trying to decide whether or not to indict a case, one of the first resources that we had was to use what we used to call the US Attorney's Manual. It's been recently renamed and now it's called the Justice Manual. It sets out the federal principles of prosecution. One of the most important parts of that, just really a baseline level, is figuring out who you're dealing with and what sort of classifications people fall into.

Joyce Vance:

Some people are mere witnesses, they observed events that you're interested in. Some people are subjects, they've engaged in conduct that falls within the scope of a grand jury investigation. I would call them maybes, maybe they get indicted, maybe they don't. Then there are targets. Those are people who

you've developed significant evidence on, it's very likely that rather they'll be indicted, maybe they'll become cooperating witnesses, maybe not. But targets are the people that you're primarily focused on, who looked like really good candidates for prosecution. So that's a good starting point.

Barb McQuade:

Yeah. Of course, if you hire a lawyer, and the lawyer reaches out to the prosecutor and asks whether the client is a target or not a target, frequently, they'll tell you. That can be helpful in deciding how to represent your client, whether you want to cooperate, work out a plea deal, invoke your fifth amendment rights, all of those kinds of things. So we got this news that Joel Greenberg may be cooperating. Jill, what does it mean to say that a person is cooperating and an investigation? What are the implications of that?

Jill Wine-Banks:

In this case, particularly, the implication is that he may be flipping on Matt Gaetz, that he has significant evidence that could be used to indict and eventually to try and convict Matt Gaetz. He has to have something that he's offering. If he's going to cooperate, it means he's going to give some help to the prosecution. It means that he's hoping to reduce the charges against him, to get a plea deal, a sentencing deal, something that will benefit him in exchange.

Jill Wine-Banks:

Cooperation can be anything from ... I mean, Michael Cohen became a cooperating witness. He still went to jail. He didn't get out of his guilt. He didn't evade liability. But he has cooperated now in a number of cases and is currently cooperating again. In the Watergate case, of course, we had two very significant cooperating witnesses, John Dean and Jeff McGruder, who were two keys to the convictions. Without them, we would not have had the explanations. Butterfield, Alexander Butterfield who was an aide to the president was the one who revealed the tapes. He became a cooperating witness in terms of just that narrow area. So it means that they're helping the prosecution develop a case probably against someone else. So that's what it means in this case here.

Barb McQuade:

Yeah. I know when I was working in the US Attorney's Office, we certainly didn't just take their word for things, they had an incentive to save their own neck. So we would always try to corroborate things. I often thought of a cooperator as a narrator, somebody who could explain, point you to nuggets of information like documents, dates, times, text messages, and other things. Then when you showed all of these things, they could be a narrator to explain the significance of them and help the jury put that all together. But that corroboration was always essential. You didn't want a witness just making up some story out of whole cloth and so, yeah, it's something of an objective.

Jill Wine-Banks:

Right. A corroborator is always a member of the criminal activity. So they are not the most credible witness. Without corroboration the jury, it's one criminal's word against another criminal's word. So you always, always need that corroboration. But even for example, in Michael Cohen's case, he's probably helping to explain to the DA what all the financial records mean. In some of my organized crime cases, it's a question of revealing what the code is because they don't talk in normal English. They're hiding things. So if you have a cooperator, they can say, "Well, when he says that this is what it means." They're the translator as well as the narrator.

Barb McQuade:

Yeah. Good. Kim, you've been paying attention to this story as it's been evolving? What is the potential significance of the case if Greenberg is cooperating? What consequences could flow from that?

Kimberly Atkins:

Yeah. So legally, and I think it's also important to point out that even if Greenberg is cooperating, and even if he is flipping, it doesn't necessarily mean that it's on Gaetz. We don't know all of the targets of this investigation. It could very well be, he's cooperating for his own reasons to minimize the repercussions for himself or to cooperate in association with somebody else who might be involved. There's still a lot about this case that we don't know.

Kimberly Atkins:

But if Gaetz is implicated in the fact that he is lawyering up the way that he is, the fact that also we learned today that the house is opening, the House Ethics Committee is opening an investigation into this, which happens when they have reason to believe something serious is going on. This seems like a big deal for Matt Gaetz. I believe that if he is charged, if he is charged, that is bad news for him not just legally, but also politically. We have seen and we've discussed in the past how, particularly Republicans right now when they are accused of even the worst crimes, the new approach is to just dig in, deny and just try to ride it out, politically hold on to their office. He has said again and again that he will not step down. He has denied these allegations and said he's going to move forward.

Kimberly Atkins:

But certainly if he is charged, that changes things. It does not necessarily mean that that's the end of his political career though. I should point out, it's not just Republicans that do this, right? I mean, Senator Robert Menendez, who was a Democrat from New Jersey went on trial for corruption. He was acquitted, and then he was reelected. So Democrats can dig into when they are facing really serious charges.

Kimberly Atkins:

But I don't expect him to back down until he absolutely has to. But this is really politically serious. We have already seen Republicans, even if they aren't calling for him to resign. We've seen them back away from him. His kryptonite, we're learning that he didn't have a whole lot of friends here in Washington, even among his fellow Republicans because this is the time when you have friends that you call on them. They're not really coming out for him, including President Trump.

Kimberly Atkins:

He knows he's in big trouble too, because as Barb pointed out, the lawyers that he chose, he chose not just because of their legal chops, but because they have experience in these high profile investigations, whether it comes to the Mueller investigation or the investigation into Eric Schneiderman from New York. These were big high profile cases. These are the folks who he has on this side. So I think he recognizes that this is serious and certainly this could have a big drawback. But it's still too early to know exactly what that might be.

Barb McQuade:

Yeah. Do you guys think that this playbook that we've seen from President Trump, where the best defense is a good offense, you get in, you deflect, you accuse other people. He was talking about the

fact or allegation that he was being extorted. Do you think that that is the new way that politicians will seek to defend themselves when they're accused of crimes? Do you think there's a likelihood that it will be successful?

Joyce Vance:

I think that's a great question, right? Because as long as it's successful, people will keep doing it. But one of the realities that Gaetz is facing is that if it's true that he's being investigated for sex trafficking a minor, he's looking at a federal case that carries a mandatory minimum sentence of 10 years. He does not look to me, and I don't mean this pejoratively, he just doesn't look to me like somebody who can do 10 years in federal prison.

Joyce Vance:

He will be highly motivated to cut a deal with prosecutors to give up anything that he knows about anyone else in order to avoid doing time in prison. He runs the risk, if he goes too far down the road in fighting back, for instance, if he's indicted, and when they sit down and they're shown the evidence by prosecutors, if it's clear that prosecutors have the evidence, by continuing the bluster, he could be foreclosing working out a good cooperation deal for himself that would give prosecutors the ability to prosecute others who are engaged in wrongdoing. So it's a very dicey call for folks in this position to make.

Barb McQuade:

Yeah, I think that when you represent a client who is someone in the public eye like a congressman, you have to think about the court of law and the court of public opinion. But at the end of the day, there's only one that can take away your liberty, the court of law. So I think that when there's a conflict between those two interests, you have to be very respectful of the court of law. I think this deflect, deny accuse strategy can only go so far. That is the playbook of politicians.

Barb McQuade:

But I think once you get into court, where facts matter, and judges aren't going to put up with that sort of defense, I think is a very different ballgame. So I think having good counsel, like the ones that he has hired, may be helpful to him. It might be the splash of cold water he may need. But of course, at this point, all we have are allegations. So we'll see how that shakes out.

Jill Wine-Banks:

Barb, I want to just take a little issue with what you said. Because when you say it's the path of politicians, it's the path of Republican politicians. Democrats seem to resign and get out. It's happened with a number of people with sexual, Representative Porter or Hill. Was her name Hill? I think maybe Hill.

Joyce Vance:

Katie Hill.

Barb McQuade:

Hill, yeah.

Jill Wine-Banks:

Katie Hill, Al Franken. They all left. But there is a model being created that started with Donald Trump of deflect and deny, disinformation that seems to have worked for him. I don't think it's working so well for Matt Gaetz. The evidence seems to be coming out. The crime is one that is so repulsive that it may not work in this situation.

Kimberly Atkins:

I mean, to be fair, I mean, I pointed out Senator Menendez that did not involve a sexual allegation. That was a corruption allegation. But there's also New York Governor Andrew Cuomo, who is taking the dig en route. So I think that we do see it in a bipartisan way. But certainly more Republicans, and certainly Republicans are more apt to give cover to fellow Republicans who take this. The difference with Al Franken is he resigned because there was a groundswell of calls from within the Democratic Party calling on him to resign. Then he finally did, that is something you certainly do not see happen among Republicans.

Barb McQuade:

Yeah. I think it's probably also too soon to say that with regard to Matt Gaetz, right? He hasn't been charged with anything yet. Really we only know about this investigation, because he has made statements about it, trying to get ahead of it. So we'll have to see what the evidence shows. But his lawyer, the cooperator, Greenberg said something yesterday, like Matt Gaetz is not going to be sleeping very well from now on or something like that, which was kind of ominous.

Barb McQuade:

But suggested to me as being a hint that the cooperation that is part of this plea deal does relate to Matt Gaetz. There's some reporting that they've exchanged text messages and other things. So we'll have to stay tuned and see how those facts shake out. But really interesting. I saw one thing written that cooperation usually tries to work its way up the food chain, that you want to use lower level cooperators to go against a higher level cooperators.

Barb McQuade:

The way it was framed was and so prosecutors will want to go after him because he's a sitting congressman. I think that's wrong. Absolutely it is the case that you want to go use lower level people to go against higher level people, but it doesn't reflect their stature in society. It is the egregious nature of their conduct. You want to use someone whose conduct was less serious to cooperate against someone whose conduct was more serious, absolutely true. But not simply because of a position that they hold. So I want to want to clarify that.

Joyce Vance:

I think you're exactly right about that, Barb. The most I think reprehensible part of Greenberg's conduct is the fact that he's an elected official. He's not a congressman. He's a state local elected official. He's actually using his official power to perpetrate the frauds and to access information he's not entitled to. Jill, how have you been sleeping lately?

Jill Wine-Banks:

Much better. It's quite a surprise. I took the helix quiz. As a result, I got this little package. I couldn't believe it was actually a mattress. It was something that my husband and I could pick up and take upstairs. Then it just opens up and inflates itself. It's unbelievable. What about you?

Joyce Vance:

Same thing here. Our old bed was a little bit too soft for my taste. So we have a helix and it's the firm mattress. Easy to unpack, easy to put into operation and a lot more comfortable.

Jill Wine-Banks:

Yeah. It's a surprise because my husband and I have different sleep styles and different sizes. It accommodates both of us. We're so happy with the Helix. It's really been wonderful. We really are enjoying, I'm not waking up with back pain in the morning, which I used to do on my older firmer mattress.

Joyce Vance:

It's really great when you can find something like this that you love and that really improves your life. So you can go to HelixSleep.com/Sisters to take their two minutes sleep quiz. Just like Jill and me, you'll be matched with a customized mattress that will give you the best sleep of your life. They have a 10-year warranty and you get to try it out for 100 nights risk free. They'll even pick it up for you if you don't love it.

Jill Wine-Banks:

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Joyce Vance:

Let's go on to our next topic and talk for a moment about vaccine passports, something that's increasingly being mentioned in the news. Jill, did you want to kick off on that one?

Jill Wine-Banks:

Yeah, I do. It we're talking about these COVID-19 vaccine passports, which are now one of the most divisive issues across the US. Several states, including New York, are embracing the idea. My own state of Illinois sort of has embraced the concept with some limitations. But others like Texas and Florida have banned them. It's now become the new mass cultural issue. It is something that has become so politicized that I think we need to look at it so that our listeners can understand what they are, who's objecting, why they're objecting, who wants them and why, and whether such a document is even legal.

Jill Wine-Banks:

So let's start with what are they. Is passport a misnomer because it's not used for international travel? I wish we were on a YouTube thing because I brought with me somewhere here, I have my passport, which you guys can see. Inside my passport, and I don't know how many of you have this is, my yellow health card. This is something I've been using, I found mine today, 1995 is my cholera vaccine and typhoid in '96. It goes all the way to 2013 to something I can't possibly read. So we have been carrying in

a way, a COVID type medical document. So who wants to start with what are they and is there a precedent for them, which I've just showed you there is.

Joyce Vance:

Well, I'm fascinated by the different forms they can take. I think the first issue is, is it a piece of paper that you carry or is it something that lives on your phone? Not everyone has access to being part of the Digital Commons. So it can be very difficult for some folks and at least at some level, there will have to be access to physical pieces of paper that some folks can carry around.

Kimberly Atkins:

Yeah. So I think that's a very good point to make, Joyce. The answer to your question right now, Jill is we don't know, we don't know because there is no universal uniform standard to what these vaccine passports or vaccine certifications will take. Right now, the Biden administration has said that they will come up with guidance, but that they want any sort of vaccine passport program to be spearheaded by the private sector or by nonprofit organizations. That gets to one of the problems is people have a really big problem with the idea of a government mandate, a government issued document that allows people, some people to go places, it denies the right of other people to go other places. That can lead to a very show me your papers type of feeling.

Kimberly Atkins:

That really leads to a lot of concerns here. So in full disclosure, I'm a member of the Boston Globe's Editorial Board. We issued an editorial this week saying that they can be a good idea with protections. To that point about paper documents and what's different from the cards that people who have gotten their vaccines, right, they got a card that the person who gave you the vaccine filled out, and it's from the CDC.

Kimberly Atkins:

The problem with just using those is those can so easily be forged. Anybody can get ahold of one of those things, write a name and a birthdate on it, and hand it to someone. So you want something a little more secure. We talked to Jeff Singer from the Cato Institute. The Cato Institute, which is a conservative leaning libertarian organization that has voiced some concerns about the use of this. But he said, "You know what, it could work, if it looks something like the paper boarding passes that you use to board a plane." Not the things on your phone, because that's electronic data that can be stored who knows where and that can lead to privacy concerns.

Kimberly Atkins:

But if you have a piece of paper with a barcode that when it's scanned, wherever you're going, to a concert, to a ballgame to school can be scanned, and it says, "Okay, the holder of this document got vaccinated on this date, got this kind of vaccine in this place." Then that takes away this idea of central control, it takes the government out of it, it makes it more secure because the person has the information with them. That's an idea of what these things can look like. But we don't have that guidance yet. We'll wait to see what the Biden Administration says in what private enterprises really, the private sector chooses to do.

Barb McQuade:

So interesting, isn't it? That there's more trust in the private sector than there is in our own government, which is really the government is us, right. Of, by, and for the people. Yet I think that the skepticism is not without merit when you think about other systems. I know, Joyce, in preparing for this, we talked a little bit about in Nazi Germany or pre Nazi Germany, there were censuses taken and census data that indicated people's religion, which data was given very innocently for well-intentioned purposes. Then when the Nazis came into power, it was used against people to round up the Jews. So even if collected with good intentions can be abused down the road.

Barb McQuade:

But with regard to government involvement in this, it's certainly permissible under the law for the government to mandate that everyone be vaccinated, schools do it, universities do it. There's the leading case on this, I know this got a lot of play in the early days of COVID. Case called Jacobson versus Massachusetts, when there was a smallpox outbreak. The Supreme Court said that individual liberty is not absolute. When there is a strong state interest in protecting public safety as when there is some sort of pandemic, then that justifies government ordering things like vaccinations. So I think they could do it. I think they could even require passports. But the question is just because the government can do something, does that mean it should do something?

Jill Wine-Banks:

Can we look at the arguments against doing it and the arguments for doing it? Because a lot of this doesn't sound so scary to me in the forms, as defined and limited as we've been talking about it. What's the best argument against it?

Kimberly Atkins:

Well, I just I want to start by saying I think there are two different groups of arguments. There are genuine concerns that have been raised by a number of folks across the ideological spectrum of about these. Then there's the politicized nonsensical arguments that are being raised to make this a part of the culture war, like masks that we saw, during the pandemic. There are folks, particularly from the right, saying, "Oh, look at Democrats being so hypocritical. They don't want people to use an ID to vote, but they want people to use an ID to be able to go into a restaurant." That's politicized nonsense. Okay?

Kimberly Atkins:

There's a big difference between imposing restrictions that have been proven and shown to reduce access to the polls in some people and trying to further a government interest in keeping everyone safe as you reopen an economy, particularly before we reach herd immunity in the middle of a pandemic. So I'm going to just dismiss that outright. But the real arguments against this, one, is privacy, which is a big argument. If there were some sort of electronic phone app, for example, that would require a lot of people's personal medical information to be stored in a central location. That can make it really rife for hacking.

Kimberly Atkins:

There is the arguments of government overreach. Barb is absolutely right. The courts have said that the government can mandate things like vaccinations for certain purposes. That still makes people feel like this is Big Brother, this is overreach. That's government waiting too far telling people what they can and cannot do. Then there's certainly the concern about equity and equal access. We know just from things like voter ID laws, that certain documents are easier for some people to get than others. It tends to be

the most vulnerable folks, the folks who would need this the most that may have the hardest time accessing it. So these are the valid concerns against it that I've seen.

Joyce Vance:

One other concern, and I'm not sure if this is an argument for or against the vaccines, but in the absence of some sort of a national stance on getting these passports, right? Biden, they seem to have come out and pretty clearly said, at least for now, there's not going to be a federal plan. So we'll have different rules in the 50 different states, sort of like 50 quarterbacks all throwing footballs at once. I think it may become very confusing. I'm sure if I'm home in Alabama, I'll never have to show a vaccine passport. But if I want to see a show on Broadway when it reopens, I may need one. So the confusion is really going to be an additional feature of this landscape.

Barb McQuade:

Joyce, you raise the confusion domestically, which is absolutely right. But I also think then put the international issue in play as well. It's even more so if you want to travel to a foreign country, do you need one? If visitors want to come to the United States, do they need one? What if they have been vaccinated by a vaccine approved in China or Russia or England that is not approved in the United States? Do we want to accept that? So it gets complicated. I think if we're going to have these, we need to work out some unified rules about what is going to be accepted or not. So it has a lot of potential wrinkles.

Jill Wine-Banks:

It does. But it also has some very strong supporters who argue that it would speed things up at the airport, if it was digitized, that goes to the should it be in paper or just digital, that it could provide an incentive to get vaccinated. That it is something that is necessary for certain countries. Right now, you can't go to certain countries. But maybe if you could prove that you were vaccinated, that they would allow you to travel.

Jill Wine-Banks:

It's an existing form that has been required for many years for certain diseases before you travel to some countries. So there are some arguments that are in favor of it. New York argues that it would help allow society to return to normal activities by letting people who are vaccinated do more robust activities pre pandemic style than they can right now. What do you think? Are those valid arguments in favor of it?

Barb McQuade:

I wouldn't say that I have made a decision about this as a good or a bad thing. Because I think there are valid arguments on both sides. One of the reasons we've had to lock down and closed down so much of society is because we had to treat everybody as if they had COVID. Right? As if they were going to infect the rest of us. That's why we can't go about our business.

Barb McQuade:

If you allow people to move about who can show a card, then you can relax a lot of those restrictions. It could have benefits for businesses, for example. In Michigan, they're talking about closing down restaurants again. But if you said only those who have proof of vaccine can come into your restaurant,

now your restaurant can still operate. When I go get my hair done, when I walk in the door, they take my temperature, I fill out a form, I answer a series of questions, I sign a document. That would really be no different from what I would do if I were to present some sort of proof of vaccine or vaccine passport.

Barb McQuade:

So I think it is a way to get us back in the system. I think that it's something that doesn't need to be forever. The COVID pandemic is here for a short period of time. So with some of the precautions we've talked about to protect privacy and equity, it seems like it is a way to get us back in business without having to wait for full herd immunity, which might be some time in 2022.

Joyce Vance:

Barb, do you worry at all that it's a slippery slope, know, if we do it for COVID, you might be right. It just might be one singular crisis and limited to that. But what if it makes it easier ultimately? I mean, this is a fascinating trend, right? Businesses asking for your information before you can walk in and use their services. But maybe this becomes something that leads to us being a society where we have to give up more and more of our personal information over time.

Kimberly Atkins:

Yeah, I don't know. I mean, I'm sorry. You directed that to Barb and I jumped into it.

Barb McQuade:

No, go ahead.

Kimberly Atkins:

I see that concern. But I think so long as it is a really important public interest, in this case, it's undoubtedly a strong public interest, especially since it's becoming clearer and clearer that even when the vaccine is available to everyone, it isn't quite yet, but it soon will be, that we still will not reach the point that experts say constitutes herd immunity for a number of reasons, because there will still be access problems for some, because there is still vaccine hesitancy.

Kimberly Atkins:

I think you're also seeing a growing number of people that are saying, "Well, if enough people are vaccinated now, I don't have to worry about it." So that it can serve as that incentive. I think that strong public interest is different than a store just taking your personal information, requiring your personal information for other reasons. It's a valid point, I've been to China where the amount of information that places, like stores try to get from you and use facial recognition and stuff is really shocking. I want to know parts of it. But I think that it's a big space between that and what this is trying to do. I agree with a lot of steps that some universities, for example, are requiring proof of vaccination before students can return in the fall in person. It's important to get things going again while keeping people safe.

Joyce Vance:

That makes a lot of sense. I know I'll sleep a lot more easily, our youngest kid goes off to college in the fall, I'll be a lot happier knowing that he's around people who've been vaccinated.

Barb McQuade:

This week's episode is sponsored by Audible. The number one source of spoken word entertainment. Kim, I know you're a fan of Audible, how are you using audible these days?

Kimberly Atkins:

Well, I've really loved how audible helped me through the pandemic, frankly. Because with all of the news that was coming in and the worry about COVID-19, I kind of escaped by using audible to listen to some biographies of some of my favorite folks. I really loved Mariah Carey's autobiography, also Andre Leon Talley, just how these people talk about their lives and sort of provide a little escapism for me when I was trying to get through the darkest times of the last year. How about you, Barb? How do you use Audible?

Barb McQuade:

Escapism is probably similar for me too. Like you, I do a lot of reading all day. I listened to a lot of podcasts for information. When I'm out running or walking or doing chores, I like to listen to things that are a little bit lighter and more entertaining. So I listened to two really great things very recently, I listened to Tina Fey's book, Bossy Pants. Very funny.

Kimberly Atkins:

That's a good one.

Barb McQuade:

Yeah. What's great about the Audible version is it's Tina Fey reading it. So it's funny, she has a funny tone. She reads it in a voice that's far funnier than it would be on the written page. The other great thing I listened to recently is a 10-part podcast series with Keegan Michael Key called the History of Sketch Comedy it's fantastic. He talked about Saturday Night Live and Second City and all of these things. Aga, he kind of acted out some of the skits, and I found that entertaining. I would literally laugh out loud on runs and sometimes had to stop because I was still a little ... I'm sure I looked very foolish to the dog walkers and others who were out attending to things.

Kimberly Atkins:

Oh, I love it. Keegan Michael Key is also a Michigander. like you and I, Barb. A little factoid, we went to high school together. So I will look out for that one too. So you too can try Audible for 30 days on us. To download titles and listen offline anytime, anywhere, just visit Audible.com/SistersInLaw. That's all one word or text "sisters in law" S-I-S-T-E-R-S-I-N-L-A-W to 500500.

Barb McQuade:

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Joyce Vance:

Kim, we're closing out the second week in the trial of ex Minnesota cop Derek Chauvin on trial for the homicide of George Floyd. I can tell that there's a lot of interest among our listeners in this trial from the questions we're getting. A lot of people seem to be watching along, like I know all of us are. So as we

slowly get to the point where if everything goes right, the judge will deliver the case to the jury and the jury will deliberate and reach a verdict. Were you going to lead us in the conversation about what we can expect when we get to that point?

Kimberly Atkins:

Yeah. Joyce, we have received questions to our podcast. I know I've gotten questions on Twitter and elsewhere about how the trial may end. Folks particularly want to know, if for example, a jury verdict has to be unanimous whether it's not just for conviction, but also for acquittal or what a hung jury means and what happens if there is a hung jury. So sisters, with your vast trial expertise, can you give us a little primer about how this trial might end and what listeners should be looking out for?

Jill Wine-Banks:

Yeah. There's nine options, I think, because there's three charges and there's three outcomes for each of those three. They can acquit, which requires all 12 jurors to vote for acquittal. They can convict which requires all 12 jurors to vote for conviction or one juror or more could say, "No, I don't agree with the other 11 of you." That results in a hung jury. So each of the three charges are judged separately. So you can have conviction on one, acquittal on another and a hung jury on a third. But ultimately, there are nine different possible outcomes, two require unanimous juries and one requires only one objecting juror.

Kimberly Atkins:

So what comes next after that? What comes next in the event of a conviction? What comes next in the event of an acquittal, and what comes next in the event of a hung jury?

Barb McQuade:

So if there's a conviction, the next phase would be sentencing. Typically, there's a probation department that will do an extensive review of the case and make some recommendations to the judge. But there would be a sentencing hearing, depending on what crime or crimes Derek Chauvin is ultimately convicted of. This is the kind of case where because there's sort of three different theories for the same homicide, the sentences would likely merge into whatever is the most serious count of convictions.

Barb McQuade:

So if it's one of the murder counts, he would be sentenced on that one, he wouldn't be sort of triple sentenced for the same conduct. But the jury does have the ability to look at each of those in case one of them say, for example, gets reversed on appeal. If second degree murder gets reversed and appealed, there'd still be third degree murder as a backstop. So I think the jury will deliver a verdict on all three, as Jill said. Then the court at sentencing will merge. I think the sentence for the highest penalty there is 40 years for the second degree murder, although sentencing guidelines are typically less than that. I've heard that there's something like 10 to 12 years.

Barb McQuade:

If there's an acquittal, then Mr. Chauvin is free to go. He is no longer under any charge by the state. Now there may be civil, civil lawsuits that follow from this. We know that there was a civil payout that was made by the City of Minneapolis, I think \$27 million to George Floyd's family. But there could be other consequences for him in addition to this. But he would be free to go from any criminal consequence.

Then the most interesting one is what happens after a hung jury. That means he was neither acquitted nor convicted.

Barb McQuade:

Because the jury verdict did not come to fruition, that means that double jeopardy does not bar the state from trying him again. So prosecutors would get together and regroup and decide, "Should we go forward? Do we think this was simply one holdout juror who just simply saw the world in a very different way than we would expect most any, you know, most typical groups of 12 people to see it or was this a case where it was a six-six type of deadlock and it was so difficult for anyone to decide we can't imagine that a new trial would have a different outcome? So it would be up to the prosecutors to decide whether they want to go forward and try the case over again.

Kimberly Atkins:

Joyce, so what should listeners be looking out for in the remaining days of this trial to get a clue as to what jurors might do? Although as a lawyer, I know you never really know what jurors might do until they do it.

Joyce Vance:

I'm realizing as we're watching this trial how much I've always depended from my assessments of juries on the visual cues that you get from jurors, because of course we can't see this jury, we can only see the lawyers. One of the things we used to say in my old office was that a happy jury doesn't convict. When jurors walked back into the courtroom ready to deliver their verdict and they were laughing and joking with each other, that was when you knew that there was a problem.

Joyce Vance:

Because for juries to convict defendants, even in cases that they think are righteous, it's a very somber moment. We don't know except for these brief bursts that we get from pool reporters what the juries are doing. We hear that they're taking notes or not taking notes, which I don't really give any accreditation to in terms of where they are.

Joyce Vance:

I do want to say that evidence that we have heard is painful, it's really hard to listen to. But I think it's very serious evidence. I tend to really be the one who holds back on thinking that the prosecution can get a conviction in cases like this. That may be because I live in Alabama, and I've tried too many cases where we've had juries hang or even refuse to convict. But the evidence in this case really is incredible.

Joyce Vance:

Yesterday we heard testimony that there was a period of two minutes and 44 seconds after the EMT said that they had not found a pulse and during which period of time Chauvin remained on George Floyd's neck and on his back. That seems to me to be evidence that this jury will take very seriously. But it's interesting that prosecutors have given them options murder two, which is felony murder, murder three depraved heart, and then the manslaughter charge, which although it sounds less serious, it would still be a very serious conviction against this police officer, a felony charge that would send him to prison for a period of years. So as we head towards this closing period in the trial, I think we'll all be listening

for the arguments that both sides are mustering. Then we'll just have to wait and see what the jury does.

Kimberly Atkins:

Yeah, I just want to I just want to close by saying there was much made about the fact that there was a juror nodding off at one point during the testimony. I would think that all y'all would agree with me, jurors nod off sometimes. I think way too much was being made about it. It's really hard to sit in one spot, especially when you're hearing a lot of technical testimony, and not expect somebody to close their eyes for a minute, to maybe not be paying super close attention at every minute. It's happened to all of us in jury trials. Usually somebody taps that juror or a note is passed or the judge asks the juror if they're okay. Usually that little bit of embarrassment is enough to wake them up. I think a little much was made out of that little fact. I think that's one thing our listeners might have heard.

Joyce Vance:

That's absolutely right. We've all had that experience. Every once in a great while there's a juror who sleeps through most of the trial. At some points, one of the lawyers says to the judge, "Listen, juror number six has been asleep for the last six hours of trial. He hadn't read anything."

Kimberly Atkins:

Yes, well, if they're asleep for that long, yes.

Joyce Vance:

The judge will shake his head or her head and replace that juror with one of the alternates.

Kimberly Atkins:

Yes.

Joyce Vance:

One of the problems here is they're only working with two alternates. So I think the judge will hold out till the last possible minute.

Barb McQuade:

Sometimes I not offering these podcast recordings just when Joyce is talking. Kidding. She has such a lovely voice.

Joyce Vance:

I'll come read your bedtime stories tonight, Barb.

Barb McQuade:

Very perfect.

Jill Wine-Banks:

I think it's also fair to note-

Barb McQuade:

You have this very lulling voice.

Jill Wine-Banks:

The time that the juror fell asleep here was in between what were very emotional segments. The case started with the emotional testimony of witnesses who had been traumatized by seeing this. It's now back to some pretty intense medical testimony. It's hard to imagine how intense the testimony yesterday and today is, but I think the jury is completely engaged again, based on pool reporting.

Jill Wine-Banks:

As Joyce pointed out, we're not seeing the jury, which makes it very hard to predict how they're reacting. I don't like taking someone else's opinion of it. I would love to see them. But of course if they're wearing masks, you are denied that as well. You really can't tell, just if you cover your face, and you only see eyes, you can tell something, but it's not the same as being able to see and change your tactics in trial. If you see the jury nodding off or stopping, taking notes, you have to change your rhythm, your tone, or the witness. So I think there are some disadvantages here. But mostly, I think it was a small thing that happened, and we shouldn't make a big deal of it.

Barb McQuade:

I think one of the things you're pointing to is that sitting through trials is exhausting under the best of circumstances. It's intense. It's emotional. It's not like sitting there watching a television show or a movie. It is riveting. You're seeing real human suffering. In this case, those bystander witnesses who talked about their feeling of helplessness and guilt by watching George Floyd die before their eyes. It's exhausting to listen to that, emotionally exhausting. The idea, Kim, that a juror nodded off when they moved on to something else is not surprising. It's a very emotional experience. It leaves you feeling you just spent, especially when it's lasting several weeks. They've got to come back and rally everyday and be on. So it's hard work to be a , and I appreciate their service very much.

Barb McQuade:

And the biggest difference from a television show, as you compared it to, is that in television, all of the wait time is eliminated. Only sharply worded questions are asked and concise answers are given. It's not, "Let me find that document," and it takes you five minutes of shuffling through papers or looking through a screen. So it's easy to wander off if you're a juror watching sidebars that go on for a long time that you can't hear you're, "What are they talking about?" So your mind wanders, and that's how jurors lose their interest.

Joyce Vance:

The one last thing about trial outcomes we haven't said and we should flag for down the road is that if there is a conviction, Chauvin will likely file an appeal. So this case won't end with the jury's verdict, if there is a verdict of conviction. There is a lot more ahead of us.

Joyce Vance:

Let's go to some listener questions. If you have a question for us, please email us at SistersInLaw@Politicon.com or tweet using #SistersInLaw. If we don't get to your questions during the show, keep an eye on our Twitter feeds during the week. We'll answer as many questions as we can

there. Our first question comes from @GalSpaceNorCal. She asks, "Can you expand on your point that the filibuster can be amended so laws can be passed by senators who represent 60% of the population? How feasible is that?" Jill, I think that one's for you.

Jill Wine-Banks:

Okay, the concept of it is that right now, we require 60 senators to vote to close debate, to allow a vote on any legislation where the filibuster is being used. The concept is to replace 60 senators, with representative, senators who represent 60% of the population. Right now democrats are 50 and Republicans are 50. But the 50 democratic senators represent 70% of the population. So this would bring back the idea that majority rules by having the majority of the American population be able to control what gets a vote in the Senate.

Jill Wine-Banks:

I think it's an interesting and very possible amendment without eliminating filibuster, allowing the minority to make their arguments. I think we could also add to that, that they have to make arguments that are relevant to the legislation that's being debated and not just reading the Constitution. So that's the explanation for the 60% filibuster cloture.

Joyce Vance:

But good luck getting Joe Manchin to vote for that. Right, Jill?

Jill Wine-Banks:

Well, he has said he won't do anything on any of this. But I think as we see gridlock take over once again and that voting rights are taken away, and serious things need to be attended to that maybe even Joe Manchin will feel the pressure to take some action to allow a vote. Doesn't guarantee the vote outcome, but to at least let there be a vote.

Joyce Vance:

So our second question comes from Jack on Squarespace. How do all of you feel about lifetime judge appointments? Who wants to start?

Kimberly Atkins:

Yeah, I can start on that ,I've had an evolution. I used to think that it was really important that judges be appointed for life so that they are answerable to no one but themselves and their job's to interpret the law and the Constitution in the way that they see is right. I have always been in remained opposed to elected judges of any sort. I think putting judges in a political context is really devastating for justice.

Kimberly Atkins:

But especially seeing what has happened to Supreme Court confirmations in recent years, I think I now am more in line with the proposals that, at least for the Supreme Court, that judges been nominated for specific terms, for a specific period of time to take the politics out of this waiting game, like that's happening right now involving Justice Breyer. Everyone wondering when he might retire so that Joe Biden can have a chance to have a court pick that diversifies the court, it takes that out of it. The judges and the public can just worry about the fairness of these opinions as opposed to the politics behind selecting judges. So I've changed my mind.

Barb McQuade:

It's interesting. We used to say, welcome to federal court, where the judges are appointed for life, and it seems longer. But I've always kind of appreciated the lifetime appointment because I perceive that it took some politics out of it. If a judge, and maybe this is more true at the trial court level, if a judge knows, "I am here for life, and whatever the consequence of my decision, I don't have to worry about how it's going to be perceived for my next job. I'm not looking to go to be a partner in a big law firm or get a job in a corporation or with some in a big foundation. I am here and this is what I'm going to do."

Barb McQuade:

So I worry that without a lifetime appointment, they might feel more political pressure to justify their decisions. They might want to do something that's popular in their local community, even if they think it is legally the wrong answer. But I hear what you're saying. I suppose if we were to impose terms on supreme court justices or other judges, you would want those terms to be of sufficient length that they weren't looking over their shoulder and trying to campaign for their next job.

Jill Wine-Banks:

So I would take it from a slightly different perspective, which is my absolute distaste and horror at election of judges. People voting do not know who they're voting for or why. It's really, really terrible. In Illinois, the process for getting on the ballot is totally political. So I am very much against electing judges for a term. I agree with Kim on the idea of a term limit for the Supreme Court. That will keep a balance in the court that we don't currently have, where you have predictable appointments by different administrations. I think that that is a good thing for the Supreme Court. I don't see it so much as necessary at the Court of Appeals. Now I'm talking federal court.

Jill Wine-Banks:

In Illinois, I was talking about state elected judges, but for the Court of Appeals or for the district court federally, I don't think lifetime is such a terrible thing. You do get judges, I just did a commentary on the Chicago seven trial, you can get a bad federal judge who's really, really, really horrible, Judge Julius Hoffman. But removal is the proper way of dealing with a judge who's so beyond the norm, rather than saying you shouldn't have lifetime appointments there.

Joyce Vance:

It's a tough problem. The courts have become so much more important over the last four years, when we've had an out of control executive branch and the legislature doesn't seem to have been a very effective check. I think as a country, we've all come to rely a lot more and think a lot more about what makes for an effective judiciary. Something that I thought was very interesting was that when the founding fathers were creating some of this scheme, and of course, the courts have expanded over the years, but people had much shorter life expectancies. So this problem that Barb identifies where they were thinking about their next staff really didn't exist.

Joyce Vance:

So although I loved the notion that we have judges who aren't thinking about who's going to butter, their next slice of bread, I do you think we could do something like have a mandatory age for retirement or something along those lines that would help with some of these problems that we've seen. It's a really interesting issue. I note that just today, the President has appointed a commission that will be

looking at the Supreme Court in particular, a commission that includes both one of Barb's law school colleagues and one of mine. So that'll be something to keep an eye on for the future.

Joyce Vance:

Our last question comes from Elizabeth in Chicago, Illinois. She asks, "As a paralegal, I understand that attorneys are the the headliners in the work context. But I was curious to hear if any of you had been a paralegal prior to becoming an attorney and what you think makes a great paralegal or legal assistant?"

Barb McQuade:

Well, I have been blessed to have some great paralegals and legal assistants. They are your partner and you can't do the job without them, I'm thinking of my great legal assistant, Stacy Harris, who I have to name. I mean, I sat beside her every day. We work together so closely. I mean, it's almost like you have a mental mind meld because you're working together so closely. Then with paralegals in the courtroom, I find them to be incredibly helpful. One of the things you want in a paralegal is someone who is organized and has a meticulous attention to detail.

Barb McQuade:

When we would try cases, we always had a paralegal in the courtroom who was managing all of the exhibits. Much of the evidence is displayed in a courtroom electronically on a big screen. There may be hundreds of exhibits. You want to show, you say to your paralegal, "Hey, can you show that one record, the form, you know the one that the doctor sign that looks really bad for the defendant. It's red ink. Remember that one? I want you to blow up the paragraph where his signature is." Boom, up it goes, because they have memorized the list, they know exactly where it is, they know what that document is.

Barb McQuade:

So as you're giving your closing argument or as you're questioning a witness, they can call up the relevant document that is necessary there. So I found paralegals to be of incredible value for that and many other tasks, but that in particular, they were really the unsung heroes of trial work.

Jill Wine-Banks:

So let me take it from a different point of view, which is, I was the partner in charge of the paralegals at my law firm, Jenner and Blach. So in civil, they are absolutely essential, not just in court, but in the preparation, in the depositions, in the preparation for trial. We couldn't have done the work without them. But I also want to point out that when I started practicing, there were no paralegals. There were no computers. The first paralegals that I ever had was in the Watergate trial. That was also the first computers.

Jill Wine-Banks:

We've come a long way with the training. I mentored someone who I actually thought was going to become a lawyer since he was in high school. He decided he really didn't want to be a lawyer, that he wanted to be a paralegal and got his master's in paralegal studies and is having a fabulous career. So I want to take it from that standpoint, it's a great career. It has opened so many doors to him. I know how much he enjoys it. So they are valuable to us as both trial lawyers and both criminal and civil. But it's a great career path. So it's something everybody should consider.

Joyce Vance:

I always thought having a good paralegal or legal assistant at my side was what let me be a good lawyer, focus on what I could do. Something that I was always grateful for, I started out at a big law firm in Washington DC at Aaron Fox, Kindler, Plotkin, and Kahn. I was blessed with the most wonderful paralegal and legal assistant. As a brand new lawyer, I learned a lot from them. You go straight out of law school to work and you think that you know everything. They were so incredibly gracious about never making me feel stupid, but helping me learn everything I needed to know that I didn't know. I'm still really grateful for that all these years later.

Joyce Vance:

Thank you for listening to #SistersInLaw with Barb McQuade, Jill Wine-Banks, Kim Atkins, and me, Joyce Vance. Don't forget to send in your questions for next week by email to SistersInLaw@politicon.com or tweet using #SistersInLaw. Please support this week's sponsors, Helix and Audible. You can find their length in the show notes.

Joyce Vance:

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Joyce Vance:

Well, y'all, my husband turned 60 tomorrow.

Jill Wine-Banks:

Happy birthday.

Joyce Vance:

My evil best friend, who is also his best friend, we all went to law school together, she decided to throw him a party just for our six closest friends. She's just a little bit different. So she has picked a theme. It's a scary clown party. So I will be-

Barb McQuade:

No.

Joyce Vance:

Up at the crack of dawn working on my clown costume because-

Barb McQuade:

Nope.

Joyce Vance:

Your first reaction is, "Eva, I am not doing this." But now I feel the competition because everybody else is working on their stuff. So I need a clown name and a costume by, I think-

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Barb McQuade:

I will never-

Jill Wine-Banks:

I think Rudy Giuliani or Donald Trump would do. They're both loser clowns.

Kimberly Atkins:

I never absolutely go to that party. Clowns are not funny. They are scary on their own. They don't need to be made scarier. That is a form of torture. I would have nightmares for weeks.

Barb McQuade:

Awe.

Kimberly Atkins:

No.