

Barb:

Welcome back to hashtag #SistersInLaw. Jill Wine-Banks, Joyce Vance, and me, Barb McQuade. Kim will be back next week, so we'll see her soon. Today we'll be discussing Rudy Giuliani's legal woes, the latest updates in the Trump criminal cases, and what's an arraignment anyway? As always, we look forward to answering your questions at the end of the show. And remember, go to politicon.com/merch to buy our shirts, totes, and other goodies for the perfect gift.

Well, before we dig in, sisters, I heard an amazing story recently that was such great career advice and I'll share it, but I wanted to ask each of you first if you've received any good career advice and what it was that we can share with our listeners. Joyce, how about you? You have any good advice, I guess, about life or careers that you can share with our listeners?

Joyce:

So, not that I'm ever smart enough to take advantage of good advice, but actually I do have something that I was told by an extremely wise person that really I think has helped me throughout my career. They told me that if you can't imagine yourself doing something, if you can't see yourself doing it, then you'll never get there, right? I mean if you can't imagine yourself being the astronaut who lands on the moon, then that job opportunity is not open to you.

And so I've done that at different points in time. I did that one time when I was asked to consider a job being the United States Attorney in Birmingham. I was a line prosecutor. I mean I tried cases. I was the appellate chief when I was formally approached about it, so I had done a little bit of management. I'd never even contemplated being the United States Attorney. For one thing, I loved my job and the only way that I could get there and it took me some time, was to actually imagine being in that role. And once I really gave myself the permission to think about it and what it would be like, it took that for me both to become enthusiastic, but also to seize the opportunity. So, that I think is my good advice I would pass on.

Barb:

That's great advice. It's also why representation matters so much. If you've never seen anyone who looks like you do a job, sometimes it's hard to imagine yourself in it, but picturing it is really good.

Joyce:

So true.

Barb:

How about you, Jill? You've got some good career advice for us?

Jill:

Yeah, I do. And there's sort of two parts to it. One part is I was told when I was thinking about what to do next, to really analyze what in my past jobs had I really enjoyed and what had I really hated. And so I made my pro and con list. Con included 12 minute segment billing that, was what I hated at law firms. And I thought about all the things I liked and it made me actually change careers from law to corporate business side, because I really enjoyed some of the management responsibilities I had had.

So, I thought that was really good advice, and it really drilled down on what is it that you're going to do on your job. When you get to the office in the morning and you sit down at your desk, what exactly are

you going to be doing? And I turned down a really great offer in the Carter administration because when I thought about what the actual job was, not the title, which sounded great, it was Secretary to the Cabinet. Wow, doesn't that sound great?

Barb:

Sounds amazing.

Jill:

Doesn't it? But then you think about what exactly will I be doing? And I went, "No, I think I'd rather take a chance on being general counsel of the Army." And so I took that one instead, because I read the materials that the transition team prepares and it sounded like I would really enjoy the issues that I would have to deal with. So, I think you have to really think about what is the actual work that you'll do? Not what's the title, but what's the work?

Barb:

That's a great one. Well, the story I have actually involves advice provided by one Jill Wine-Banks in Detroit in the early 1970s. So, I was having lunch with a friend who is herself a legend in the Detroit legal market, a woman named Barbara Rom. She's retired from the practice of law, but was a very prominent bankruptcy attorney. In fact, there's an award named after her now by the local chapter of the Federal Bar Association.

And she told me she remembered going to a talk, and she knew who Jill was from her Watergate fame. And my friend, Barbara, was a new lawyer. It was the seventies. She showed up in her navy blue suit with her little ribbon tie that people used to wear then. And she listened to the advice and Jill gave the advice of you have to be yourself even though you are practicing law in a very male dominated field.

And the story Jill told, according to my friend, was that the Watergate team had returned to the office after losing a very significant motion, and the guys on the team proceeded to punch a wall and kick a waste-basket and do all kinds of things in their rage. And Jill started crying. And one of the lawyers said, one of the men, "What are you doing? There's no crying in law." And you said, "Look, you're punching a wall and you're kicking a waste-basket. And I don't feel like doing any of those things, but we're all sad, right? We're all angry that this happened and I'm going to cry."

So, my advice to you, women lawyers, is be yourself. You don't have to be a man to be a successful lawyer. You can do the job your way and still be a successful lawyer. And Jill, I want you to know that your words really made an impact on my friend, Barbara Rom, who had an amazing career as a lawyer. So, that's some great career advice right there.

Jill:

Well, I hope I get to meet Barbara Rom someday when we're doing a show in Detroit.

Barb:

That would be great.

Jill:

I definitely want to meet her.

Barb:

Hey Joyce, my college aged daughter keeps stealing my OSEA body butter. What's your secret to keeping it under wraps?

Joyce:

Yeah, so I actually noticed after my daughter went back to school in Boston that I was a couple of OSEA items lighter. I hope she's not listening to the podcast, because my response was to get her one of those nice little kits for herself for her birthday. But after burning in the summer sun, OSEA Malibu has an amazing solution to rejuvenate overloaded skin and get your perfect glow.

It's OSEA's Undaria Exfoliate and Glow Duo, the perfect combo to refresh your skin so you look and feel your best going into the fall. We love how clean our skin is after using it. And it's nourishing seaweed based ingredients make you feel younger and fresher every time you use it. You get two of their bestselling products in the combo. So, if you've been looking for best in class body care, this is it.

Jill:

It is a great combination. And if you've been showering a lot more in the summer because of the heat, OSEA takes them to a next level with the essential Undaria cleansing body polish. You get easy one-step exfoliation, moisturizing and clean skin all in one, and you might never get out of the shower because its unique silky texture feels so great on your skin. I like to follow it up with the Undaria Algae Butter Oil to seal in the skin's hydrations after the shower.

And the rich texture even makes it feel like you're getting a massage with no greasy effect when you apply it. Another thing that's really important to us is that OSEA is a one-stop shop for clean, vegan, cruelty-free clinically proven and climate neutral certified products for both face and body. Even better, they've been making seaweed infused products in California that are safe for your skin and the planet for over 27 years. Never choose between your values and the best skincare you can trust will work.

Barb:

So, save and glow at the same time with OSEA. Right now you can save 16% on the Undaria Exfoliate and Glow Duo with an extra 10% off from our promo code. Plus you get free samples with every order, that's the stuff my daughter steals, and free shipping on orders over \$60. We can all use that when it comes to treating ourselves. Prep your skin for fall with clean vegan skincare from OSEA. And right now we have a special discount just for our listeners. You can get 10% off your first order site wide with the code sistersinlaw at oseamalibu.com. Head to O-S-E-A malibu.com and use code sistersinlaw for 10% off.

Joyce:

This past week, Rudy Giuliani got some more bad news when Federal Judge Beryl Howell in Washington DC entered a judgment against him in a case brought by Ruby Freeman and her daughter, Shaye Moss. They're of course, as everyone knows at this point, the mother and daughter in Fulton County, Georgia, who Rudy accused of voter fraud using racist dog whistles and just completely false sorts of claims during the vote count in Georgia in 2020. They sued him for defamation. That lawsuit has been rocking along until this week when the judgment was entered. And Jill, can you explain to us the legalese behind this situation? What happened? What kind of judgment did the judge enter and why at this point?

Jill:

It's such a great example of how the judicial system can work well. And in this case what happened was Rudy wasn't complying with discovery and he was ordered to do so. He has even been sanctioned for legal fees because he didn't comply. And he, in trying to avoid compliance, admitted basically that he had in fact said false things about them and injured them. So, basically admitting the crux of the crime of defamation or the civil lawsuit of defamation.

And he reserved the right to make some legal gobbledygook arguments, that's the official term, gobbledygook. And Judge Beryl Howell finally had had enough of him and she entered a default judgment for his non-compliance and sanctioned him and said, "Now the only thing left to try is how much you owe Ruby and Shaye." And I'm sure everyone remembers how dramatic their testimony was before the January 6th committee. They were terrific witnesses and they were so wrongly accused as two citizens trying to help in a civic way to count the votes being accused of passing USB and things that looked like cocaine.

I mean it was really a hideous, horrible accusation. And so now the case is basically over except for he has to give them financial information so that there can be a trial on how much he owes them in punitive damages. So, that's where we are now.

Joyce:

I mean it's really hard to overstate the impact on these women, right? Trump is just perpetrating the big lie in the worst way, and these two women become the focal point for a lot of abuse and a lot of hate. Barb, the judge in my opinion, reading her ruling, she seemed deeply annoyed with Giuliani. Was it about the facts or was it something else? What was he trying to do here that the judge just really reacted strongly to?

Barb:

Yeah, so he was trying to be very evasive in his discovery obligations. So, in a civil case, there is a moment when the parties have to exchange documents, answer interrogatories, sit for depositions, and he was being incredibly evasive. And she even wrote a line that said something like, "His discovery responses have more holes than Swiss cheese." And she said she gave him repeated opportunities to correct it again and again and he kept refusing to produce what the plaintiffs were entitled to under the discovery rules. So, finally she just had it with him and said, "That's it. You're not complying with the court's orders to produce the discovery you are legally required to produce. When I've asked you whether you know what it is you're supposed to produce, you assured me that you did because you've been practicing law for over 50 years and yet it appears that you are not taking this seriously."

So, I think she came down on him quite hard, but it's because he was trying to play very fast and loose with what they were entitled to. Now it may be that one thing that is motivating him is he's concerned that what he produces in this case could be used against him in the criminal cases, but you either get a stay in the civil case, that's an option, or you proceed and you comply with your legal obligations. And so his failure to do that again and again and again, it was essentially like saying, "Oh, I can't produce those documents because my dog ate it."

She just said, "That's enough. Done. You lose the case. The sanctions for your failure to comply is judgment for the plaintiffs. And now the only question is how much?"

Joyce:

And it occurs to me that what he might've been trying to do also was to keep evidence out of the record so that he could make arguments on appeal, sort of slicing the baby really finely and saying, "I never

conceded that I did any of this stuff and the judge's decision was wrong." It just seems to me that Rudy is trying to play a long game here, hoping that that long game involves Trump back in the White House and that maybe the courts react a little bit differently to this stuff. I really appreciated the tenor of her opinion. So, Jill, you've said a little bit about what happens next, that there has to be some sort of decision-making process about damages. That happens and then what?

Jill:

And then it's collecting will be the next hard part. So, there will be a evidentiary presentation about damages and he will have to provide some financial information. If he doesn't, Judge Howell has said, "We will instruct the jury that they can make any conclusion they want about the fact that you're not providing this information." So, not doing it is going to hurt him as well. And then there'll be a judgment issued and the plaintiffs are going to have to try to collect. Now he is selling a 6.9 million apartment, or at least that's what it's listed for. And I am sure once there's a judgment, there will be a lien put on that so that the proceeds have to be given to Ruby and Shaye before they go anywhere else. So, I think in the future he's going to have to pay big money, also their legal fees as well as damages.

Joyce:

Well, Barb, let's pick up there, right? These women have really been through a lot of suffering. Their January 6th committee testimony was very compelling. Will this judgment give them a real chance at compensation? Jill makes the point that Rudy is selling some of his real property, that there will be a judgment against him that they're entitled to collect on. How quickly would they expect to see some real compensation and do you think it'll really happen?

Barb:

I don't know. Rudy Giuliani says he's broke, right? He went to Donald Trump to ask him for more money with all of the legal fees he's expending in his criminal cases. But one of the things that a lawyer can do is to garnish wages, to go after assets. And so to the extent he owns real property, as Jill said, this \$6 million apartment building and other kinds of things, they can put liens and garnishment orders in place for any of his assets. So, even if he doesn't write the check willingly, as long as he has assets they can get them. But I don't know how much he has. He's a really curious person.

I don't know if you guys read that profile about him in New York Magazine maybe a year or two ago, but it really talked about how he lives a very lavish lifestyle, but these days without any apparent source of income. He lives at The Pierre Hotel in New York City or something. He wines and dines in the lobby, he drives around in limousines. At least he was then. And if you're going to live that sort of lifestyle, you need some source of income to maintain it. And so it may be that the bottom has fallen out of all of that.

Jill:

He flew in a private plane to the turn himself in Georgia. That's not a poor person. Sorry.

Barb:

You can't fly coach to go to jail, Jill.

Joyce:

Does he know Harlan Crow? I mean, maybe this is my day to wear my appellate lawyer hat for the entire podcast, but I worry about what this looks like, because after the judgment, I think it's likely that Giuliani will appeal. He'll have to put down some sort of an appeal bond, but none of that will go to Freeman or to Moss. And so they'll have to continue to wait for however long that takes, and only then do they get to try and collect against Rudy, and who knows what his financial condition will look like at that point. I do think though, that there's some sort of a victory to be won here by being really two Davids who go up against Goliath.

Who would've thought that two women working an election in Fulton County, Georgia, could have taken down America's mayor? And I think that there's a certain amount of resonance to that that says even powerful people aren't above the law. So, I hope that they do get their money. I think that what they've done here is really, really important nonetheless. And I wonder if y'all agree, I mean do you think civil suits like this provide a meaningful remedy for folks, or are the criminal cases more important? Rudy Giuliani still faces charges in Georgia that are related to this same incident. How do people, real people living out in America, find a remedy when they're done wrong?

Jill:

I think it does make a difference to have this civil judgment saying, "He lied, we didn't do anything wrong. There was no fraud." And in the end, once the judgment is entered, interest starts accruing. And I can tell you that I sued a horrible landlord for the year that I lived in Florida and he didn't return my deposit and I got a judgment against him and he didn't pay it, and it wasn't worth suing or hiring someone to collect it. So, I let it ride. And several years later, he tried to sell the property and he couldn't because I had a lien on the property. And statutory interest in Florida at the time was 10%. So, I ended up making a great deal of money on the interest, and I hope they will too.

Joyce:

Of course, Jill. I mean that's like the most Jill story ever. I love that.

Barb:

Yeah, it really is. Joyce, just to answer your question, I do think that there's a role for civil litigation here. Rudy Giuliani has been charged criminally. He's presumed innocent. He'll get a fair trial. The penalty there would be prison term for him. It doesn't really make whole Shaye Moss or Ruby Freeman. So, I think civil litigation does provide that, the vindication for them individually, clearing their good names and then also this possibility of monetary compensation. And the judge is talking about not only compensatory damages, which is to compensate them for lost wages and other things, but punitive damages, which is above and beyond to punish Giuliani for what he did to them.

And I think it's important to hold people accountable like that as a deterrent for other people and just to make the victims hold, to give them something. I'm sure they would never trade away the sanctity of their lives, all that they've been through for this, but at least it is some comfort after they've been through something so awful, that society recognizes their pain and their loss.

Joyce:

I love that Judge Howell ordered Giuliani to pay their legal fees too. That's a nice little chunk of change. It gives the lawyers an incentive to stay involved and go after Giuliani, but I just hope that Ms. Freeman and Ms. Moss take a lot of personal satisfaction from what they've accomplished here.

Jill:

They are heroes.

Joyce:

So, Barb, one of the most challenging issues that I dealt with as a federal prosecutor was people who had had their identities stolen or had been victims of other kinds of unlawful computer access. It was really difficult for people to come back in those situations even when we prosecuted the cases. Did you experience that too?

Barb:

We did. We had plenty of victims. And in fact, I myself, Joyce, maybe you were too, was a victim of this DOJ wide hack.

Joyce:

Yeah.

Barb:

I think it was the Office of Personal Management.

Joyce:

Me and all of my kids.

Barb:

Same. So, it can be a big problem when your identity gets stolen.

Joyce:

So, obviously we all know that our personal info is out there for anyone to find if they're willing to engage in criminal conduct. Data brokers scrape public tax records and sell that information legally too, making it accessible to anyone. We all need to fight back. Y'all it's important, right?

Jill:

It is important. I've been hacked more than once on the same card, and although the card deals with it very nicely and makes the transition as easy as it can, it would be a lot better to stop it and then you don't have to deal with changing your information a hundred different times.

Barb:

I bet there's a lot of people out there who want to be Jill Wine-Banks, but there's only one.

Joyce:

So, when your privacy is paramount, we're thrilled to suggest that you can partner with Aura. Aura is an all-in-one online safety solution that helps protect you and your family from identity theft, financial fraud, and online threats before they happen.

Barb:

With Aura, rest easy knowing you're being looked out for. The app scans the dark web looking for your email, addresses, passwords, social security numbers, and other sensitive information bad actors might have. If anything is found, you'll get alerted in real time. And if you are an ID theft victim, their experienced white glove fraud resolution team helps you navigate credit bureaus, initiate credit freezes or lock and works with you around the clock to resolve it.

Jill:

Boy, doesn't that sound good to have that kind of security? It's a really great feeling. And Aura offers a whole suite of tools to protect you and your loved ones, including real-time alerts on suspicious credit activity, computer virus protection, parental controls, a VPN and a password manager. It's a comprehensive safety solution that provides almost every tool you'll ever need, all in one place. Aura also helps reduce annoying robocalls. Boy, is that a good feature. Telemarketers and junk mail by sending take down requests for you regularly.

Joyce:

For a limited time Aura is offering our listeners a 14-day trial plus a check of your data to see if your personal information has been leaked online, all for free when you visit aura.com/sisters. That's aura.com/sisters to sign up for a 14-day trial and start protecting you and your loved ones. Again, that's A-U-R-A.com/sisters. Certain terms apply, so be sure to check the site for details. And of course you can find the link to Aura in our show notes.

Jill:

Another busy week in the installment of Trump legal news. Arraignments are coming or have been waived and pleas entered, and the judge said the trial will be live-streamed, which will be a wonderful thing because Georgia allows live-streaming of trials. And in the other hand, Trump is continuing to speak in ways that may violate the terms of his release, but there have been some other significant developments this week regarding his trials including his co-defendants. So, let's start with co-defendant, Mark Meadows. Barb, on Monday of this week there was an evidentiary hearing, so talk about what we learned and whether Meadows helped or hurt himself by testifying and was it worth the risk that he took in testifying?

Barb:

It was very interesting, Jill. I mean he was on the stand for almost five hours and I think around the country criminal defense attorneys must have been cringing just because it is really a risky move. It locks you into a story even. If you don't make any admissions that are damaging on their face at that time, it prevents you from changing your story later, because you are locked in under oath to telling a certain story. And here he admitted to engaging in all kinds of inappropriate political activity. He said, "Oh yeah, it's part of my job. Arrange this call with Brad Raffensperger, the Secretary of State of Georgia. It's part of my job to go down to Georgia and try to inspect the matching of signatures."

And there's even this email message where he sent that said something like, "Could we help you make it move faster if we gave you some Trump campaign funds to pay for it?" So, I think all of that stuff long-term is likely to hurt him, because he admits that he's involved right in the middle of it all. So, he may win the battle but lose the war. The issue of course is whether this case should go from state court to federal court and the question is whether he was performing conduct within the scope of his employment or it was something outside the scope of his employment. And I think that's really going to come down to whether this is all part of his job description.

So, I think he tried to say, "I set up meetings all the time. I do everything for the president. I do whatever he asked me to do." But I think the prosecution's perspective will be this is political activity, not governmental activity. You aren't governing, you are working for Trump as part of the campaign, not part of executing the laws of the United States on behalf of the taxpayers. So, we'll see. The judge has not yet ruled and we'll see how this comes out, but he took a risk here and we'll see how it pans out down the road.

Jill:

Yeah, I agree with you. I think he hurt himself a lot and Fani Willis used part of that against him by saying, "You're violating the Hatch Act. That's illegal to do." And what he admitted to really does sound like that. And I just want to extend a little bit because we had a question from a listener that I'm going to sneak into this segment. Joe asked about Mark Meadow's petition for removal to federal court, which doesn't change the law that governs, it's still Georgia law and Georgia prosecutors. And she says she understands it, but she is confused by the word a colorable federal defense. And so can you just add that to what it means in the context of a Georgia RICO case?

Barb:

Yeah, I think it would mean that it doesn't mean that it would necessarily win, but that there is a legally recognized defense that is a federal defense that he could assert. And I think the defense here is going to be governmental immunity, that because he's just doing his job, that he would have a defense to that. So, I think that's where that word colorable comes into play. But it doesn't mean that just because he asserts that he was doing his job is enough. I think that the judge has to find that it is within his job description, not the way he did the job, but the description of the taxpayer funded chief of staff to do this job.

Jill:

And so, Joyce, going to you with, again, your appellant hat on. After this hearing the judge asked for some additional briefings, and let's talk about what Judge Jones's question to the lawyers for both sides was and what you think the proper answer is.

Joyce:

Yeah, so it's such an interesting question. It's way inside of baseball. I'm going to try to explain it in plain English, but you guys hold me accountable if I skip steps or descend into jargon. Here's the question that Judge Jones asked the parties to address a couple days after the hearing in briefs. He said, "Whether a finding that at least one but not all of the more than 100 overt acts alleged in the complaint occurred under the color of Meadow's office would be sufficient to justify removing the case to federal court." So, everyone remembers the indictment. There's the RICO conspiracy. There are a ton of overt acts and Meadow seems to be suggesting that it would be enough if any one of them happened in the context of his job. Just that one overt act would mean that everything should get moved to federal court.

So, when Meadows is called upon to answer the judge's question, he of course says, yes, as long as one of those acts occurred in my capacity as the chief of staff, then the whole ball of wax gets moved into federal court. Fani Willis's office though, they have a much more sophisticated and legally correct answer and it sort of makes the point that she and Meadows are arguing like two ships passing in the night. She says she indicted Meadows for his involvement in the conspiracy, not just for an overt act, not even for an overt act. Those are the manner and means by which the conspiracy is executed.

But Meadows is indicted for the RICO conspiracy itself and that means that the judge has to apply this three part test that Barb referenced for whether or not a case should be removed, to the question of whether the defendant was engaged in his official duties and whether he has a federal defense to the RICO charge, not to some of the overt acts viewed independently. So, viewed this way, the correct way, it really undercuts Meadow's argument. I think Fani Willis actually is the winner here.

Jill:

Totally agree, but I personally read that and also wondered what one overt act does the judge think might be within the scope of Meadow's employment. And I looked at it and I thought everything he did was in pursuit of a illegal act.

Barb:

I'm so with you Jill. I thought the same thing. Here are the ones I found, and maybe we're missing some, but he sets up the call with Raffensperger. He goes to Georgia to observe the signature matching. He tries to arrange a call with Scott Perry, representative from Pennsylvania to talk about the election there. He's present in the Oval Office for a meeting with the legislative leaders in Michigan to try to persuade them to reconvene, and he meets with John McEntee to develop a strategy for disrupting and delaying the joint session of Congress. I think those are the overt acts. Don't those all sound like they're campaign related? Do you think there's anything that's official duties?

Joyce:

I think this is what the judge is doing here. I don't think he asked the question because he disagrees with you and thinks that some of those overt acts were the work of the White House, not the work of the campaign. Because that sort of the distinction I see, right? We're talking about was he working for candidate Trump or President Trump? Those overt acts all sound like candidate Trump to me. I think the judge is setting them up and we'll see an opinion from him where he says, even if one or two of these overt acts were committed in his capacity as the chief of staff, it doesn't matter, right? It doesn't matter. It's the whole overall charge.

And he has now gotten those arguments from the parties. They are on the record. Maybe he thought that they weren't sufficiently on the record before this. This is a judge who has a reputation for being careful and meticulous and thorough, looking at all of the party's arguments and reading the case law for himself. I think we're seeing the first sign here that he lives up to his reputation.

Jill:

So, let's move to the trial schedule and the severance of the different cases. Some defendants have asked for a speedy trial, which has a different meaning in Georgia than in the federal law, but you now have Donald Trump facing an October 2nd trial in New York where the Attorney General is seeking 250 million in penalties and has made a motion for a summary judgment. And then Trump made a motion for a summary judgment, which is different than a default judgment, but ends up ending the case, because there's no issue for a jury to try.

Then he has E. Jean Carroll, actually before even E. Jean Carroll, some of the co-defendants in the Georgia case are going to trial October 23rd. Then in January, E. Jean Carroll's case comes up for the second time. And then the election or coup trial in DC comes up March 4th. And then the New York hush money business records case is March 25th, and the documents case is May 14th. So, Barb, how is this going to all work out?

Barb:

Yeah, he's going to have a busy little stretch there. And by the way, also running for president at that time, which is certainly a full-time job. Well, he can waive his appearance in the civil cases, just as he did in the first E. Jean Carroll trial. I think he may waive his appearance in that case as well as the New York Attorney General case. He needs to show up for the criminal cases. But one thing I will say, we've seen now trials set for March 4th in the election interference case, the federal case, and the New York hush money case, March 25th. I don't know if that's enough time. I can't imagine they're going to be finished with the DC election fraud case, including all the jury selection, which is going to take a long time with someone as polarizing as Donald Trump. I mean I think they can find a jury, but I think it's going to take weeks to find a jury.

So, I can't imagine the New York case really goes until a month later than that. And then we've got the Mar-a-Lago documents case made for May. I will also say this, all of us have had trials, lots of trials, lots of trial dates. It's pretty rare that the first one you get ends up being the real one. And that's because litigation is dynamic and people file motions and lawyers get sick and there's a Covid outbreak and just all kinds of things happen. And so maybe one of these cases dates will stick or maybe more than one, but I know they're not all going to stick.

Jill:

So, here's another question that has puzzled me. The day after his mugshot, Trump raised millions of dollars. In total since then he's raised over seven million based on selling merch and other stuff. And a listener had a similar question, so I'm going to throw that into this too, which is from Jeff. He said, "There's been a lot of reporting about all the money Trump is making from merch with his mugshot on it. If he gets convicted, can the prosecutors come after him for those profits since they are resulting from a crime?"

And so I looked at Georgia Law and Federal Law and the Son of Sam laws as they were known from something that happened in New York. So, Barb, what do you think, or Joyce, either of you, what do you think in terms of will Federal or Georgia law keep him from getting the proceeds due to his crime?

Barb:

Yeah, I don't know. You raise a good point. The Son of Sam laws is about you can't write a book about the episode and profit from it, that typically you have to share the proceeds with the victims of the crime. I don't know about a mugshot. It's kind of different. He's selling it on his own. It's just his picture. It's a public document. I don't know. Once again, Donald Trump is sort of disrupting the model. What do you guys think?

Joyce:

Yeah, I mean I think you're absolutely right. There are some laws, both state and federal, that try to limit this kind of profiteering from crime, but they mostly apply to crimes where there's a readily identifiable victim. They apply really well in the violent crime context. They apply if you're writing a book or making a movie for a certain period of time. It's a lot less clear here. And couldn't you just see Trump coming in with an argument that it's political speech, right? It's campaign activity. It would be vintage Trump. So, Willis is a very aggressive DA. If there's an argument to be made here that he's violating Georgia law, I think that we would see her push it, or maybe some private interests in Georgia would push it, but I've got a bad feeling that Trump will get away with this in large part.

Jill:

Yeah, unfortunately, my study of the laws suggest that it is unlikely that selling his merch is going to lead to a recovery, although it will maybe help in getting some compensation for some... I mean we're all victims, so maybe the government could cover the costs of trying him because of this, but unlikely probably. So, here's another tricky one. If he is convicted, aside from the fact that Republican candidates all said they would still support him, would he be able to vote for himself? What do you think, Barb?

Barb:

Well, so that's an interesting question, right? Because some states take away your right to vote if you're convicted, some only while you're incarcerated. So, I guess he moved his domicile from New York to Florida. And so I think you have to restore your right to vote in Florida to get it back. And so it may be that if he has a conviction as of election day, there may not have been sufficient time for him to get his rights restored. So, I'm going to go with no. What do you think?

Jill:

I agree with you. I agree that if he's convicted in Florida, you cannot vote until you have served your sentence and paid back all your fines. And that's not going to happen before the election. So, he might even be jailed and be able to serve as president, but he couldn't vote for himself. So, small compensation to all people who are concerned about that. And Joyce-

Barb:

Man, what if he loses by one vote?

Jill:

It's not going to happen. It's going to be a landslide against him. I believe the people of America, particularly because the trial will be televised and they will see the evidence for themselves, that is assuming that Fani Willis is not impeached or defunded. And the movement to do that seems to be growing, although Governor Kemp sort of said no, but there is a new Georgia law that allows removal and through a commission that he appoints. And it concerns me, because I don't think this is how democracy works. But could it happen?

Joyce:

Yeah, good on Kemp for pushing back when the cameras were all turned on, but we'll see if that approach sticks. Because he's highly partisan and I'll believe that this won't happen to Fani Willis when I see it, given the political forces at work in Georgia. So, I think under the new law it falls to the Georgia Supreme Court to appoint investigative panels that decide whether prosecutors should be disciplined. And that makes it a little bit easier for Kemp to distance himself. He's widely believed to be considering a 2028 political run. This is a nice way that he can set himself apart from the Ron DeSantis's of the world who dug in early on this sort of politicization of prosecutions of Trump. But like I say, talk is cheap when it comes to politicians. So, we'll see how that plays out when the rubber hits the road here.

Jill:

One last issue that has come up this week, which is there seems to be a movement to keep Trump off the ballot under the 14th Amendment. What do you think, is that something that is going to succeed? And Barb, I'm going to turn to you first because one of the people looking at this is your Secretary of

State in Michigan, and there's been a push to say, "Secretaries of state, it's up to you to look at the qualifications for office." And someone guilty of insurrection is, and guilty does not require a finding of guilt in a criminal trial, can't be on the ballot. That's a disqualifying condition to serve as president. So do you think that's going to be successful?

Barb:

Yeah, I don't know. And in fact, the way you said ballot sounded like ballad to me. And so you can imagine the ballad of Donald Trump, like a country and western song about his woes that he can't get on the ballot in Michigan and other states. The Constitution, the 14th Amendment, section three, has this thing that says that if you were in office, you had taken an oath to the United States and then you commit insurrection, you can't hold office again. It's in the Constitution. So, it's not something that you have discretion over or can just blow off, right? It's in the text, all the text to us. There's also a section five though that says something like Congress may pass any law to effectuate this provision. And so there's a debate, I think. I think it's a fair one, as to whether this section three is self-executing. That is must there be a finding?

Must some judge make a finding? Must the Secretary of State have a finding? Does there have to be some sort of legal proceeding where a judgment is made and there's a fact finder who says, "Yes, he committed insurrection and therefore as a consequence he is off the ballot?" There I just said it again too, it sounded like ballad. He's off the ballad, no more sad songs by Donald Trump about not being eligible to be elected to higher office. So, I think it's an open question, but the reason it's in the Constitution is to prevent people who are disloyal. It came after the Civil War, people who wanted to secede from the union, people who were disloyal to the country, preventing them from holding the highest office in the land and other important federal offices. So, I think it's something to watch as the coming months unfold.

Jill:

And while we're at the Texas TribFest, the secretaries of state from several states, including Jocelyn Benson, are getting together to talk about this. So, that's going to be an interesting outcome.

I learned something really important two years ago when I planted bamboo. Yes, even in Chicago, bamboo is hardy enough to survive and I have seen it grow and spread, so I know how sustainable bamboo is, which made me really excited when I found out I could get toilet paper made out of bamboo. Have you done that, Joyce?

Joyce:

We're big bamboo fans too, Jill. Like you, we've got this big bamboo hedge at the end of our backyard. It actually makes really great chicken food, but we like it best as toilet paper. And all of our listeners can now join us in using the sustainable solution that works better than the original to help save our planet, bamboo toilet paper.

Jill:

It is for us the best example of being sustainable, Real toilet paper. Using Real paper doesn't feel like you're sacrificing something to help the earth. In fact, it feels like an upgrade. Real is made from 100% bamboo, a faster growing and completely regenerative alternative to deforestation. Something I and anyone who has planted bamboo knows, which means that we don't have to cut down any trees to make high quality toilet paper.

Joyce:

Even better, Real has also partnered with One Tree Planted. So, with every box of Reel that you buy, they're funding reforestation efforts across the country. Unlike the other toilet papers that cut down trees, Reel is helping to actively plant them. It's a great way to help the planet and upgrade your paper products. We'll never go back.

Barb:

And Real paper is now being sold in Target stores, which is a good thing because if it's not sold in a Target store, it doesn't exist in my mother's world. It's like if a tree falls in the forest but doesn't land in a Target, does it exist? But now Real toilet paper is available in a Target and it should be easy to spot. It's the only bamboo toilet paper, and the only option you'll find that is 100% recyclable plastic-free packaging. Check the Target app today for an additional discount to save on your purchase. Make a better choice for your home by switching to Real. Real is paper for the planet. You can also find the link in our show notes.

Well, our final topic is something I would call under the category of Bail to Jail. Joyce, you teach criminal procedure, the adjudication phase. I teach it, and the nickname for the course is Bail to Jail.

Joyce:

Bail to Jail. Yes.

Barb:

Yeah. So, I teach Bail to Jail. And so wanted to take this moment to have a little teachable moment for our listeners. This week we saw Donald Trump and some other defendants waive their arraignments in Georgia. Joyce, can you tell us what is an arraignment anyway and what is its purpose?

Joyce:

Yeah, sure. Arraignments usually generate zero attention. That's why all of the focus on it with Trump and related cases has been sort of intriguing from a prosecutor's point of view. Arraignment is this first or a very early appearance in court after a defendant is indicted. A defendant is indicted of the charges against her, they can be explained to her and an attorney can be appointed if she doesn't have one. She then enters a guilty plea, or rather, at this stage she enters a plea of not guilty.

She has not seen discovery, she has not consulted with her lawyer. If she's being indicted, the plea is not guilty, subject to a change of plea down the road. And a bond is usually set so that the defendant can be released, unless the government is going to seek detention. The whole goal of this hearing is to get everything going, to put the defendant on notice of the charges against her so she understands what she will have to defend against and what's at stake, and to make sure that she has counsel and can continue with the proceedings moving forward.

Barb:

And so, Joyce, how is it that all these people are waiving that arraignment?

Joyce:

Yeah, so this is really interesting. And, Barb, I was thinking about this. I know that you absolutely hate perp walks, right? This procedure where a defendant comes in, well often that's when a defendant

shows up for their initial appearance and for arraignment. And you'll see this sort of perp walk where they turn in and then they're arraigned shortly thereafter. Those two tend to happen together in most cases. In the Georgia case, we're seeing them actually separated.

Georgia has this procedure where a defendant can actually waive their right to be arraigned in court, and that avoids the perp walk effect. Most defendants, and we're seeing that here, take advantage of that. They just fill out a piece of paper and said, "Pleading not guilty, ready to go." And then they don't have to appear in court and run the risk of cameras chasing them up to the courthouse door and even inside of the courtroom.

Barb:

Yeah, the arraignment is there for their benefit. And if they say, "No thanks, I'd rather not travel to Georgia and have my picture plastered all over the media, I'll just sign the paper, my lawyers explain it to me and I'm good to go." Well, one of the things that the arraignment does of course is starts that speedy trial clock. And that's one of the significant consequences of the arraignment. And so, Jill, usually the next step in the process is a scheduling order. A judge will issue a scheduling order. It gives the defendant a right to a speedy trial. In federal court that 70 days, different states have different rules about that. If a speedy trial is supposed to happen within 70 days or thereabouts, why does it take months if not years before these cases go to trial?

Jill:

Well, there's a very good explanation for that, and that is because under the same law that says 70 days, and this is at the federal level in Georgia, you have to go to trial within the term of the court during which you were indicted or the next term. And that case it would've been November 3rd in Georgia. But let's take federal, it says 70 days. So, you would say, "Wow, that's really fast." But there are exclusions that toll the time from running. And those tolls can be quite long. And they include any kinds of absence of a witness. For example, it can include motion practice, which is what the scheduling order sets up is when certain motions have to be filed, a motion for removal, which we've already seen in the Georgia case, would toll the time period. Any pretrial motion would.

Sometimes a defendant has to be transported somewhere and that tolls the time. If you're considering a plea, that period of time during which you're discussing a plea could toll the time period. So, you add all these things up and any interlocutory appeal tolls the time. And while the court is taking certain things under consideration, the time period is tolled. So, for every one of those, and if you start filing frivolous motions, unless the court acts really promptly, all of those motions get heard on argument, they get decided, they have some time period for consideration, and that extends the period of time.

So, we know that some of these defendants want to go to trial fast and they're willing. But for Donald Trump who has said, "I do not want a speedy trial," he can use any delaying tactics he wants to get it beyond the period of time that would otherwise be required by the constitution. The Speedy Trial Act is set up to comply with the Sixth Amendment right to a speedy trial, but you can extend it unduly and unnecessarily.

Barb:

Yeah, a lot of ways to keep kicking the can down the road or moving the goalposts, use your favorite metaphor. Joyce, after that scheduling order comes out is usually the discovery process. What is discovery?

Joyce:

Yeah, so discovery in criminal cases is a little bit different than the complicated process we discussed in civil cases like Rudy Giuliani's. It's a little bit more one-sided. It mostly involves the government turning over its evidence to the defendant, although the defendants have some obligations to engage in reciprocal discovery. It's just not enforced by most courts as vigorously as the government's obligations are. Barb, I see you snickering as I say that.

Barb:

I'm not sure I ever got discovery from a defense attorney until they try to use the exhibit at trial and you say, "Objection, I haven't seen this before." And then they throw a copy of it on your desk and they just keep proceeding, right?

Joyce:

It would be like an alibi, which in federal court the rules actually require them to give you notice of and they would just raise it for the first time during a witness's testimony and the judge would be like, "Whatever, go on Mr. So-and-So counsel for the defendant." But in reality, prosecutors do have serious constitutional obligations. For starters, they have to turn over what's called exculpatory evidence. That's any evidence that could help the defendant prove that they are not guilty, and that is not viewed through the prosecutor's eyes, that's viewed through the eyes of a three judge panel down the road when the conviction is on appeal.

So, the wise prosecutor is very expansive in thinking about what evidence might be deemed as helpful to the defendant and making sure that they turn it over. Similarly, they've got to turn over any evidence that weighs on the credibility of a witness. So, all of that stuff goes. But in modern practice, federal prosecutors and increasingly state prosecutors turn over most of the evidence that they anticipate that they'll use at trial, whether or not they actually do use it. That's just the best practice. We don't want defendants to be tried or convicted by surprise. That's not justice. The whole goal is to give them the evidence and let them prepare their case.

So, in addition to physical evidence, that can mean transcripts of witness testimony, video, audio tape, what have you, expert testimony, cell phone records, other sorts of electronic data. Whatever it is that prosecutors have compiled, much of it will go to defendants. Districts actually have different policies on this. There are 94 federal districts. One of my jobs when Barb and I were US attorneys was I helped to re-envision the discovery process nationwide after the department had a little bit of a debacle in the prosecution of Alaska Senator, Ted Stevens, where it turned out that discovery had not been turned over.

And there was a little bit of discomfort by the judge, by the Senate, as you might imagine. And one of the activities that we undertook was to redo nationwide the discovery policy that the Justice Department used. And we made a decision that we couldn't have one uniform nationwide discovery policy, because different federal courts have different requirements. For instance in Montgomery, Alabama, prosecutors have to turn over discovery to defendants at the time that they are arraigned. That's really early. Montgomery is a small district. You can see how that might be less possible in larger districts doing perhaps more complicated cases more routinely.

And so a decision was made that each federal district US Attorney's office could have its own discovery policy, but they had to have that reviewed and they had to make it available for others to look at. And to this day, you can go online and Google discovery policy for a specific district, and in most of the districts you'll see that district's discovery policy, which is up for everyone to take a look at. Some offices are a

little bit later to turn over, but by and large, what you get is pretty much something that I wouldn't say is open file discovery, but you get the relevant, the important stuff in the file. There might be a little bit of a difference in timing.

So, discovery is really important. I mean this is not formalistic like arraignment. This is the point where prosecutors and good prosecutors will in some ways lay out their case for defendants, because of course you want to encourage defendants to plead. And if you can show them how strong your evidence is, sometimes that can have a powerful impact. But woe to the prosecutor who does not turn over discovery as they're required to. That's a lesson that the department learned nationwide following the Ted Stevens case. And since then prosecutors have been far more attentive to their responsibilities.

Barb:

If there is ever a place for our prosecutor misconduct, it's often in this discovery phase with the failure to turn over that exculpatory evidence that is a significant responsibility of a prosecutor. Well, let's end today's lesson there on Bail to Jail. I'm sure we will be back with more installments as these cases play out.

I know we all aspire to be superheroes, but not everyone can be Jill Wine-Banks. So, I do what I can in my little things like sustainably caught fish and sustainably source meat and working to sustain rural farms. And you can do it too with Moink. From small family farms to your dining table, Moink, a.k.a. moo plus oink, gives you access to the freshest sustainably source meat and fish, all while supporting family farms in America. You can help save the family farm and get access to the highest quality meat on earth when you join the Moink movement today.

Moink delivers grass fed and grass finished beef and lamb, pastured pork and chicken and sustainable wild caught Alaskan salmon straight to your door. Moink Farmers farm the way our grandparents' generation did, and as a result, Moink meat tastes the way it should. The Moink difference is a difference you can taste, and you can feel good knowing you're helping family farms stay financially independent too.

Joyce:

You choose the meat delivered in every box. You can pick rib eyes or chicken breasts, pork chops and salmon filets and lots more. And plus you can cancel at any time. But I never have. I've been a Moink subscriber since the first time they advertised with us, in large part because we love the bacon. Shark Tank host, Kevin O'Leary called Moink's bacon the best bacon he's ever tasted. And Ring doorbell founder, Jamie Siminoff, jumped at the chance to invest in Moink. Plus they guarantee that you'll say, "Oink, oink. I'm just so happy I got Moink." I'm not sure that I say that other than when we're doing the ad, but I think it a lot. We really do love this meat and you'll love it like we do. It's the perfect option for a family meal or a summer party.

Jill:

And I personally love saying Moinked, and we almost got Barb to say the by saying moo plus oink.

Joyce:

I wish you would every week.

Jill:

I was just happy to hear Barb say the combination, because keep America farming going by signing up at moinkbox.com/sisters. Right now do it. And listeners of this show will get a free ground beef for a year. Every time you order, you get free ground beef. That's one year of the best ground beef you'll ever taste, but it's only for a limited time. So, act now. It's spelled M-O-I-N-K box.com/sisters. That's moinkbox.com/sisters. And of course, you can also find the link in our show notes.

Barb:

Well, now comes the part of the show that we really like the best, the part where we answer your questions. If you have a question for us, please email us at sistersinlaw@politicon.com or thread or tweet using #sistersinlaw. If we don't get to your question during the show, please keep an eye on our Threads feeds throughout the week where we will answer as many of your questions as we can. Our first question comes to us from Elaine in Rochester, New York. "My question is about severability. What are the benefits to the defendant and obstacles to prosecution in a RICO case?" Jill, you want to take that one?

Jill:

Yeah, that's a great question, so I will take that one. And I'm going to try to keep it generic, not limited to the severability issues in the Trump RICO case. But just in general, there are some benefits to defendants who don't want to be tried with one of their co-defendants for one of a number of reasons. It could be because they feel like they're a small part of the case and they don't want to be tarred by the evidence that goes really primarily to the chief of the criminal act. And so they may want to be tried separately.

They may want to be tried separately because it will be a faster and easier trial for them not being in a case where 19 lawyers cross-examine every witness. Now, on the other hand from the prosecution standpoint, it means putting in the same evidence multiple times. Because in a RICO, or basically almost in any conspiracy case, everything that is admissible against one is admissible against all. And so you would make your most compelling case and you'd have to present the evidence multiple times. You run the risk that a witness will say it differently in the third telling than in the first, and that you'll end up with a cross-examination because of that difference.

So, it's not effective in terms of courtroom time. The court doesn't like having all these separate trials. Sometimes one defendant, as in this case, will want a speedy trial and another says, "I need more time." Sometimes a lawyer for one of the defendants, this happened in Watergate, one of the defendant's lawyers got very ill and so he wanted a separate trial. And Judge Sirica said, "No, you have perfectly good co-counsel and we're going to go ahead with that co-counsel." His conviction ended up getting overturned because he didn't get a separate trial. So, that's what is considered as justice overall is one of the main considerations in a judge deciding whether to sever or not.

Barb:

All right, very good. Our next question comes to us from Jan Kriner who asks, "How do courts ensure the anonymity and safety of jurors in these January 6th trials and the Trump trials?" Joyce, you have an answer to that?

Joyce:

This is really a great question because earlier this week, the jury in the Brandon Fellows case, he's one of the January 6th defendants who broke into the Capitol. The jury in that case sent the judge a question

during their deliberations and they said, "We wanted to confirm that the defendant does not have any personal information on individual jurors since he was defending himself, includes name, address, et cetera." So, this is a federal case in the District of Columbia. And the judge responded and he said, "Both parties are given limited biographical information on prospective jurors at the outset of the trial. The court collects those sheets from the parties at the conclusion of the trial."

And that's pretty much the standard practice. That means that most juries aren't anonymous. There is an exception though. There's a procedure, and it's something that I've actually used a couple of times where prosecutors in federal cases at least, can file a motion and ask the judge to permit the jury to remain anonymous. The standard is very, very high. It's a request that's only granted very rarely. Just like in some cases, prosecutors will ask that juries be sequestered, that they not be permitted to go home at night, but they all have to stay in a hotel together with the US Marshals looking over them. And that's typically to prevent the jury from being exposed to any extraneous material evidence argument going on outside of the courthouse.

That too is very rarely granted. This request for an anonymous jury even more so. And even when it happens, that doesn't mean that the parties don't know who the jurors are. They might be identified as juror number 29 in reporting. But in any situation, the parties have to have enough information about the jurors to engage in meaningful jury selection practices. So, juries don't get total anonymity.

Barb:

All right. And our final question comes to us from Gilda Sanders who asks, "If Sidney Powell and Ken Chesebro are found guilty in their initial speedy trial, is it not the case under RICO laws that all defendants are therefore found guilty?" Gilda, I like the way you think. You've got real prospect as a prosecutor. Unfortunately, the answer is no. And that's because each defendant has their own rights to due process. I mean I say unfortunately in jest. Of course, all of us are presumed innocent and each defendant has a right to a jury trial, and the government has the burden of proving the guilt of each and every defendant beyond a reasonable doubt. So, even if they were all tried to gather, the jury would have to make a separate finding as to each defendant. Now I see where you're going with this, which is, well, you had to believe this RICO enterprise existed.

And there are all these allegations about how the enterprise functioned and why they were functioning together. But it could be that they find that 18 of them were absolutely working toward this goal, but one of them was not, that their involvement was innocent or they didn't do the things they're alleged to have done. And so just because a jury makes a finding that, yes, there was an enterprise and there was this RICO conspiracy, they're really only making findings as to, in your example, Sidney Powell and Ken Chesebro, and the other 17 defendants get their own separate opportunity for an individualized finding by a jury.

Joyce:

There's a great example of that one from this week, Barb, where we had sentencings in the Proud Boys case and they sentenced on Friday the one member, the one defendant in the Proud Boys case who was not convicted on seditious conspiracy charges. Everybody else was convicted on that charge. But this one defendant sentenced today, the jury didn't think that there was enough evidence. He was a new member of the Proud Boys. They felt like perhaps he had been directed by others as opposed to joining the agreement. So, these due process rights, they're serious. They're there for a reason. We are not a country where we lock people up until they are found guilty at trial or on a plea. And I think we have to all be super careful to resist any efforts by Donald Trump to change our national character as a party that believes criminal defendants are entitled to these rights.

Barb:

Yeah. Important point and great example. Well, thank you for listening to #SistersInLaw with Joyce Vance, Jill Wine-Banks, and me, Barb McQuade. Kim will be back with us next week. And remember, you can send in your questions by email to sisterinlaw@politicon.com or tweet them for next week's show using #sistersinlaw. Please support this week's sponsors OSEA Malibu, Aura, Real Paper and Moink. You can find their links in the show notes. Please support them as they really help make this show happen.

And go to politicon.com/merch to buy our shirts, totes, and other goodies. To keep up with us every week follow #SistersInLaw on Apple Podcasts or wherever you listen. And please give us a five star review, it really helps others to find the show. You can also find other shows you might find enjoyable on the Politicon YouTube channel or when you search Politicon on your favorite podcast sites. See you next week with another episode #SistersInLaw.

Joyce:

Okay. Do we keep rolling or do we need to-

Barb:

All right.

Joyce:

Rudy, Rudy, Rudy, what a moron.

Barb:

That was [inaudible] by the way.

Joyce:

Can that be a coda? That's a great little coda.

Barb:

That could be the coda.

Joyce:

Could that be the Coda?

Barb:

Come on. That's a great coda.