

# Opening Statements

EDITED BY LIANE JACKSON / LIANE.JACKSON@AMERICANBAR.ORG

## Accelerated Liberties

To handle its funding surge, the ACLU looks to Silicon Valley

**A MASSIVE INFLUX OF FUNDING IS A BOON TO ANY NONPROFIT.** But it can come with challenges, as well, including: how to swiftly scale the organization to put that money to use; how to maximize the efficiency of every dollar; and how to plan more ambitiously and strategically than before.

Shortly after raising more than \$24 million in a single weekend—more than six times an entire year’s typical donations—the American Civil Liberties Union sought answers to those questions by enrolling in the Y Combinator startup accelerator.

The Mountain View, California-based company’s accelerator program runs for three intensive months. Y Combinator is best known for launching startups such as Airbnb, Reddit and Uber. The ACLU is no startup, of course. It was founded in 1920. But there’s no question that support for and interest in the civil liberties nonprofit has surged since the election.

“When we put the word out that we’d be including the ACLU in our winter batch, more than 1,500 people signed up to volunteer their help,” says YC partner Kat Manalac.

While participating in the accelerator, the ACLU focused on overhauling its app, in addition to finding more experts and volunteers to support its cause. At Demo Day in March, participants presented to a couple thousand potential donors. Y Combinator provided the ACLU with \$200,000, as well as pro bono engineering services to assist with

the organization’s technology platforms and adapt to its growing membership base, says Anthony D. Romero, executive director of the ACLU and an attorney in New York City.

“Beyond financial contributions, the Silicon Valley community can help organizations like ours harness recent membership surges and spread the word about what the ACLU is doing to protect people’s rights from violations by the Trump administration,” Romero says. “Y Combinator and [president] Sam Altman are true pioneers in innovation, and now they’re also pioneers in the defense of civil liberties.”

The ACLU has been challenging President Donald Trump’s travel and immigration ban, and the group plans to continue to work to protect immigrant rights. News about the ACLU’s participation raised some eyebrows because YC’s part-time partner Peter Thiel is a Trump adviser. Romero says Thiel had no role in the project, though the ACLU imposes no political litmus test on its supporters or volunteers.

“We set our own agenda and work with any and all individuals willing to advance our goals of promoting civil liberties and civil rights,” he says.

For its part, Y Combinator doesn’t have a say in what happens to the ACLU’s monetary windfall. “We don’t get anything out of the partnership—other than the honor of helping an organization that has an enormous job right now,” Manalac says.

—Kate Rockwood



**“We set our own agenda and work with any and all individuals willing to advance our goals of promoting civil liberties and civil rights.”**

—Anthony Romero, ACLU executive director

# Overworked, Seeking Overtime

## Contract lawyers push for better pay

**A RECENT JOB POSTING FROM** the Posse List, a temporary legal employment site, reads: *Company X “is seeking attorneys for a project starting tomorrow, March 29th, and running 5-6 weeks. Must have prior document review exp, be admitted to practice in a US jurisdiction. Must be able to work a minimum of 60 hours/wk. Rate: \$30/hr (no OT).”*

Contract lawyers handle everything from document review to intellectual property audits to transactional due diligence to language translation. Since the Great Recession, rates for these services have plummeted from as much as \$60 per hour to as little as \$19. And because of falling wages, many project-based lawyers are seeking something normally reserved for blue- and gray-collar personnel: overtime pay.

Overtime eligibility hinges on whether the worker is considered a professional or a laborer. Courts are split about contract lawyers, says Gregory Bufithis, founder of the Posse List.

In 2015, a federal court tossed out *Henig v. Quinn Emanuel Urquhart & Sullivan*, a class action proposed by a contract attorney against the firm and a staffing agency for failing to pay overtime for document review. The judge determined the work was routine but involved the practice of law, exempting it from the overtime protections of the Fair Labor Standards Act. In a similar case involving overtime, *Lola v. Skadden, Arps, Slate, Meagher & Flom*, an agency and firm settled with three contract attorneys in 2015 for \$75,000.

Reuel Schiller of the University of California’s Hastings College of the Law in San Francisco says there’s an “increasing mismatch” between old labor laws and the reality of modern work. The fact that professional employees are excluded from the FLSA’s benefits “made complete sense in 1938 because no one expected professionals would be doing repetitive tasks,” says Schiller, who specializes in labor and employment law. “Fast-forward to a radically changed economy.”

Contract lawyers’ plight reflects an economy saturated with qualified temp workers, whether to run errands or to review discovery files. Every year there’s a glut of new lawyers, while cost-conscious clients are looking for alternatives to paying firm rates for what they consider rote work. So firms and companies outsource. The Posse List, started by Bufithis in 2002, now has about 180 organizations that post temp jobs.

Because they’re not employees, contract attorneys have no benefits or job security, are sometimes relegated to basement-style working conditions, and are typically unemployed between projects. While they perform tedious tasks such as coding documents, they acquire no new skills, have no opportunities for promotion and experience little intellectual stimulation. “The oligarchs



are turning us—as they did to workers in the 19th-century steel and textile factories—into disposable human beings,” Bufithis wrote on his site in March 2016.

But overtime is contentious, dividing even contractors themselves. When the Department of Labor recently re-evaluated the issue, the United Contract Attorneys—an association of temporary lawyers who advocate for overtime—argued that they should be eligible because the work usually doesn’t require professional judgment. Also, they don’t earn a professional salary, despite working more than 40 hours per week.

“The reality is we’re taking on a certain risk because we lose opportunities for permanent positions,” says Andrew Spence, a contract attorney in New York City. “Firms have the option of charging us out at associate rates and making a profit. Plus, we’d feel more like professional attorneys if we get a decent pay rate.”

But other contract lawyers don’t want to lose exempt status. They reason that if overtime is required, regular rates will drop and they’ll be forced to work more to make the same amount. Also, arguing for overtime implies that a JD isn’t necessary, which could further reduce pay and steer jobs to nonlawyers. Document review projects vary, they say, and some require judgment and strategy.

Schiller agrees in part, predicting that contract lawyers won’t be granted overtime pay anytime soon. “In the past, this work would have been done by first- and second-year associates. That doesn’t mean the overtime structure doesn’t require evaluation,” he says. But until that happens, contract lawyers “are probably out of luck.”

—Leslie A. Gordon

SHUTTERSTOCK

# Making It Work

*is a new column in partnership with the Working Mother Best Law Firms for Women initiative, in which lawyers share how they manage life’s challenges and work’s demands. Visit [workingmother.com](http://workingmother.com) for more.*



**By Sonya Rosenberg**

The legal profession is tough on women. When I say women, I mean women of all ages, stages of career and relationship status. I am glad to see that in my 10 years of practice, this issue has gotten some serious attention and some real progress has been made. But I also know the road ahead is still a long and challenging one. I start with this point because I don’t know and can’t claim to provide some kind of a “magic fix” to the ever-elusive goal, for many of us and myself included, of “making it work.” But I can share some guiding principles that consistently have come through for me, helping me to appreciate and enjoy my practice of law.

### 1. Do what’s important to you, and be persistent about it.

I am careful in choosing my words here because I don’t want to suggest you should do only what you love or do that for only as long as you love doing it. If I followed that often-given advice, I am not sure where I’d be. But it would not be a happy place! The practice of law is challenging. You can feel incredibly exhilarated at times and absolutely crushed at others, and the learning curve is steep and leaves little room for error. What we do requires grit and a long-term commitment. But with all that, I have found that as long as I can have a gut check—even at the toughest of times—and I still believe in what I do and it’s still important for me to succeed at it, I will find the drive to push ahead with positivity. The trade-off is that, inevitably, experience tends to make us stronger and better at what we do—and over the years, it has helped to make my practice rewarding.

Outside work, I also have persistently done what has been important and nourishing to me on a personal level—even when that has not necessarily followed conventional wisdom. For example, I married my husband in my first year of law school and had my first child as a junior associate. I refused to view these decisions as problematic because I knew they were personally important and right for me when I made them. So I knew I would do—and I did—what I needed to make them work for me. The same can be said for anything else, no matter how minor or how significant. Whether it’s finding and sticking with an exercise routine that gives you the energy you need to function, taking up a new hobby or something much more serious—such as taking care of an ill parent—I have been unapologetic about my personal commitments. This has in turn helped fuel me with the energy and a healthy perspective I have needed for my work.

### 2. Develop a support network at and outside work.

As lawyers, we generally are not known for needing or asking for help. But I have not shied away from doing that. A successful, long-term legal career is difficult, if not impossible, to achieve without a strong support network. That holds true for men and for women.

At work, I seek out and try to build trusting, long-lasting

relationships with mentors, mentees, associates and partners and, of course, my clients and professional contacts. I invest a great deal of time and effort in these relationships. I do it not because I feel like I have to but because I enjoy it! However, by their nature, professional relationship experiences are not seamless, and they cannot all be positive. For example, my first boss was notoriously tough, but I learned a tremendous amount from his case management and charismatic approach. On a similar note, although it’s never pleasant to receive criticism on your work product, being open to it is, at a minimum, a valuable learning experience that contributes to developing a competent and confident style of your own.

Strong professional relationships are half of the puzzle for me—the other half being my relationships outside work. I don’t tell him this enough, but I have a pretty amazing husband. He has a challenging and time-consuming job, too. But through our many years of marriage we have worked together to build a partnership in which we truly support each other. We are equal-level caregivers to our children. And we play to our different, individual strengths to help each other at home and to encourage each other professionally. My family and friends are incredibly important for me, too. I make it a priority to spend time with my parents as they get older and to connect and relax with my friends. All these relationships have helped shape me as a person, and they also have informed how I approach various personalities and situations through my work.

### 3. “Do your best, and forget the rest!”

Imagine Papa Smurf saying this in a thick Russian accent, and that’s just about what my dad sounds like whenever I share any problem or dilemma with him. Although it’s simple, the message is really quite powerful. Many of us, and women in particular, can experience immense guilt about various things we think we should or shouldn’t do, should do differently or should do better. As women juggling work and various personal commitments, it’s normal at times to feel stretched too thin or like it’s impossible to keep up on either front. I certainly get these feelings from time to time, but I refuse to indulge them. As female attorneys, we work too hard and give too much to not appreciate ourselves and what we do. As long as I can be honest with myself, applying the “reasonable person” standard that I did my best, I can move on positively without allowing guilt or resentment to fester while striving to treat myself and the people in my support networks with deserved kindness. ■

*Sonya Rosenberg is a partner at Neal, Gerber & Eisenberg in Chicago. She counsels clients on employee-related legal issues and represents employers in litigation matters, including administrative and appellate proceedings.*

PHOTO COURTESY OF NEAL, GERBER & EISENBERG

10 QUESTIONS

# Field Goals

Dwayne Woodruff, a judge and former NFL player, pushes himself to achieve while he inspires others to succeed

**JUDGE DWAYNE D. WOODRUFF IS ALL ABOUT** the challenge. He challenges others, such as the juvenile offenders who come before him in the family court division of the Allegheny County Court of Common Pleas in Pittsburgh. He directs them to do better and volunteers for several programs to help at-risk kids succeed. Woodruff also rises to his own challenges. A former professional football player—and Super Bowl champion—Woodruff went to law school full time while he played defensive back for the Pittsburgh Steelers. Now, after more than a decade on the court bench, Woodruff is running for a seat on the state supreme court, campaigning nights and weekends while he maintains his docket and his community service commitments.



Judge Dwayne Woodruff

**You're busy right now juggling a lot of different things, but you're no stranger to being busy. When you were in law school, you went to night school for four years while also playing professional football. How did you make that work?**

It was a grind. I'd get out of practice at 4:30-5 p.m., grab a sandwich and be at my seat at school by 6 p.m. I was in class until 9 p.m., and I'd study until midnight and do the same thing all over again the next day.

**Why did you choose to go back to school and not just segue from football to sports broadcasting or coaching?**

For me, it was always about furthering my education. My dad was in the military, and when he came back from Vietnam he was a paraplegic, but he went back to school even though he didn't have to. He showed me that he had the drive to better himself. My mother was a young bride and traveled all over the world with my dad in the service. But she went back to get her associate degree. I have a photo of both of us in a cap and gown—she had just gotten her degree, and I had just graduated from kindergarten. There are kids who look up to me because of football, but that can be taken away from you at any moment. An education is always with you.

**Were you concerned you'd get injured and not be able to play anymore?**

No. Injuries are part of the game. As a player, you

don't dwell on it; you just do your job. I went to law school because I knew football was going to be over someday, and I was still going to be a somewhat young man. This was back in the day before the million-dollar contracts, and I needed to be in a position to continue to care for my family when my football career was over.

**Can you share the fun story behind your choice to pursue a law degree?**

My wife and I had been constantly thinking about what I was going to do after football, and we were watching PBS one night during the pledge drive, and one of the items on the auction table was an LSAT prep course. We'd talked about law school, so I thought, "Maybe this is a sign." I bid and bid again, and then I won! I took the course, took the test, did well and got accepted to law school.

**You give a lot of inspirational speeches, and you've worked as a mentor to at-risk kids. It's easy to say "Work hard, stay in school." But how do you make sure that message resonates with today's kids? Does your role in family court give you an insight for how to reach them?**

It does. A lot of kids who come into my courtroom don't think they have anyone in their corner. I tell these kids: "Don't let anyone tell you that you can't be successful." Everyone makes mistakes, but you can't let a failure in one phase of your life define you. I

don't give up on them. I say: "I believe in you." They just need to hear that someone believes they can do it, and they can make it.

**As a former professional athlete, how do you approach the election process? Do you enjoy the competitiveness of campaigning?**

I approach the election process as a requirement, a necessity. We are public servants, so it's important that the public has access to us.

**Are there fans who come to your campaign events because you're a former Pittsburgh Steelers player? If so, does that annoy you?**

I do get fans who come to meet me, and they bring balls and photographs for me to sign. I take a lot of selfies. I don't mind—I understand the idea of campaigning, and I understand what it's like to be a fan and to see someone you've watched for 12 years. So it's my time to thank them for their support of the team and to ask them for their support in this race. I hope they'll see what I'm about and when they leave, they'll think I'm not just a good football player—I am someone they want to represent them, as well.

**Is there a program or a ruling that ranks among those you're most proud of?**

There are two things that I am very proud of. The first is serving on the board of the National Council of Juvenile and Family Court Judges, and I am happy to have had a leadership role in making judicial education mandatory in the state. The second is a national campaign called Do the Write Thing. It's a program that asks middle schoolers to discuss in written form how violence has affected their lives and what can be done about it. We have a banquet to recognize the participants, and two are chosen to serve as national ambassadors and to go on an all-expenses-paid trip to Washington, D.C. It's a big opportunity for them, and it gives the community great ideas on how to stop violence.

**What do you think of the science about the correlation between football and brain injury?**

I am fortunate not to have had any aftereffects from playing football. I had a great time, and I loved every minute of it. But it's a demanding, high-impact game. When you hit something, something has got to give. In my day, they didn't call it a concussion; they'd call it a "dinger." They'd give you smelling salts, you'd come to, and they'd send you back into the game. But concussions are a serious matter, and I think the league and the players are addressing it appropriately.

**Do you ever use football metaphors on the court bench?**

Not really. If you come to my courtroom, it's serious. That calls for serious talk, and football metaphors rarely have a spot in that discussion. I try to keep it uplifting, encouraging and supportive. At the same time, there are consequences for kids who come to my courtroom, so we have to talk about that. But sometimes I'll show kids my Super Bowl ring. Not the first time they come in, but if they're on the right track, I'll let them try it on. I'll say: "Look, you can accomplish great things—maybe things you can't even think about now—but success will come to you." —*Jenny B. Davis*

PHOTO COURTESY OF DOMINIQUE COGNEE

# Winner's Circle

Canadian lawyer saddles up to test the limits of her endurance

**Heidi Telstad, 43, enjoys** her job as vice president, general counsel and chief legal officer for Pacific Customs Brokers in Surrey, British Columbia, where she handles imports and exports, tariffs and contracts.

But for Telstad, office life can't compare to the excitement that begins when her four weeks of vacation roll around.

Telstad has an unusual hobby: She likes to race horses. Most recently, she won the 2016 Mongol Derby in China, crossing the finish line with two other riders.

"Mongolia was my first time racing semi-feral horses. I enjoy adventures and always need something to look forward to," Telstad says. "I must admit, I am a thrill-seeker, as there must be a dangerous element to it."

The Mongol Derby certainly fits the bill with a grueling 10-day, 1,000-kilometer trek (that's more than 621 miles) through inhospitable terrain. First, riders choose a horse.

"The horses did not like strangers," Telstad says. "They would bite us, turn around and kick us. And one particularly aggressive horse struck my partner in the face. That was all before we even mounted."

Then there was the weather. Telstad rode through blistering heat of 100-plus degrees. Sometimes she had to dismount and lead her horse, with little access to water. Hours later she found herself riding up the mountains into a snowstorm. And that wasn't even the worst of it.

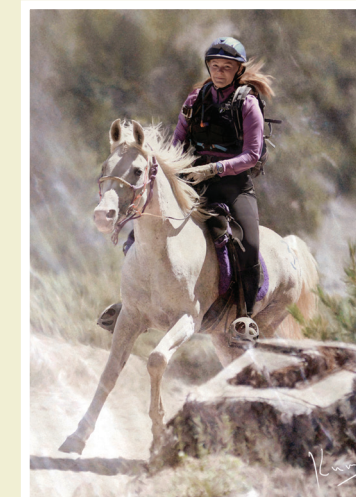
"It was terrifying when packs of big dogs were chasing our horses and biting at our legs. We knew if our horses stumbled that the dogs would tear us apart," Telstad says.

Telstad, who grew up on a farm in Canada, has been riding horses almost her entire life. Despite her equestrian experience, she says one of the hardest parts about the race was getting over the fear of being hurt. About 40 riders competed, but only 23 finished. Competitors' injuries included a dislocated shoulder, fractured spine and brain hemorrhage. Telstad says all riders had GPS tracking devices so they could be found if injured.

Telstad is happy she can check the Mongol Derby off her bucket list, and she is already considering what her next feat will be.

Her cousin Kimberley St. Pierre wasn't surprised that Telstad was willing to sign up for such an extreme experience.

"I was thoroughly impressed that she chose this as her next adventure and knew that this was going to be an extremely tough test," St. Pierre says. "I mean, a 1,000-kilometer race on horseback—who does that? It is a true testament to Heidi's character and drive." —*Cristin Wilson*



Heidi Telstad raced 621 miles over 10 days in the Mongol Derby.

# Tearing Down Walls

Challenges to solitary confinement are effecting change

**GARY C. MOHR, THE DIRECTOR OF THE OHIO** Department of Rehabilitation and Correction, was on the phone with Tom Clements, his counterpart in Colorado, the day before Clements was murdered by a man who had just been released directly from solitary confinement into the community.



The topic of their conversation? How to address public safety concerns, including the high numbers of inmates released from solitary confinement in both their states without intervention.

“That’s not irony,” Mohr says. “That’s a sin.”

Mohr and other experts say the 2013 murder of Clements, who was known for his reform efforts, was a galvanizing factor in a growing nationwide movement that seeks to reduce excessive reliance on solitary confinement, also known as restrictive or segregated housing.

“There was an era in which solitary confinement was seen as a solution to a problem, and now solitary confinement is seen as a problem,” says Judith Resnik, the founding director of Yale Law School’s Arthur Liman Program and Fund, which has co-published studies on the issue with the Association of State Correctional Administrators.

The United Nations special rapporteur on torture defines solitary confinement as holding someone in isolation for at least 22 hours a day, a practice known to have harmful effects on mental and physical health. The U.N. calls for an outright ban on solitary confinement that is indefinite or lasts more than 15 days.

The ABA’s Governmental Affairs Office has testified before Congress about the detrimental effects of the practice, and the ABA Criminal Justice Standards on the Treatment of Prisoners state: “Segregated housing should be for the briefest term and under the least restrictive conditions practicable.”

Nevertheless, at least 67,442 people were being held in such conditions for 15 days or more in the United States in fall 2015, according to a Yale/ASCA study. This year, a lawsuit was filed on behalf of Louisiana death row inmates who are automatically placed in solitary. One plaintiff has been isolated for more than 30 years.

Amy Fettig, deputy director of the American Civil Liberties Union’s National Prison Project, says such statistics have helped propel the movement to reduce such housing. “Solitary confinement would not have developed the way it did in this country if the sunshine had been let in [earlier],” Fettig says.

Today, there is a growing awareness of the harms of solitary confinement. In March, TV station Spike aired a documentary on Kalief Browder, a 16-year-old charged in 2010 with stealing a backpack who spent three years at Rikers Island—two in solitary—without facing trial. Eventually, the charges were dismissed. But after he was released, Browder committed suicide in 2015. He was 22.

Like Clements’ case, Browder’s rose quickly to the top of high-level conversations about restrictive housing abuse. Last year, President Barack Obama cited Browder when he banned solitary confinement for

juveniles in federal prisons. Justice Anthony M. Kennedy did, too, in a 2015 concurring opinion that asked whether “workable alternative systems for long-term confinement exist and, if so, whether a correctional system should be required to adopt them.”

Big changes are already in progress. Last year, the American Correctional Association (Mohr is president-elect) adopted standards to regulate the use of solitary confinement. Litigation in California and New York, led by advocates and teams working pro bono from Weil, Gotshal & Manges and Morrison & Foerster, respectively, resulted in sweeping reforms in those states’ prison systems. New York City Mayor Bill de Blasio has banned the use of solitary confinement for inmates who are 21 and younger.

In Connecticut, first-of-its-kind legislation was introduced earlier this year to codify many steps the state has taken to voluntarily reduce the number of inmates in solitary confinement. Since 2003, the number of inmates in solitary has decreased from more than 200 to fewer than 40. The ACLU of Connecticut expected the bill, H.B. 7302, to be voted on in the full legislature by the end of May.

“We’re in a really amazing place in terms of reform,” says David J. McGuire, executive director of the ACLU of Connecticut, which has worked with the prison system there.

In some cases, the only opposition to such efforts has come from corrections officers who argue that they are less safe without the threat of restrictive housing.

Leann Bertsch, the director of the North Dakota Department of Corrections and Rehabilitation and a former prosecutor, says she faced pushback when she began making changes. “It’s easy to always take the risk-averse choice—‘Someone’s not behaving perfectly? Put them in solitary,’” she says. “But we’re the department of corrections. We’re not actually correcting behavior when we do that.”

—Rebecca Beyer

## Hearsay

### Merger Mania

Law firm mergers and acquisitions set a blistering pace in the first quarter of 2017, with 28 combinations announced at press time in the United States. The largest combo of the quarter: Norton Rose Fulbright, a global firm with 3,700 lawyers, and Chadbourne & Parke, a New York City-based 300-lawyer firm.

Source: altmanweil.com (April 5).

### Sound Advice

A new study by audio-branding company PHMG warns that law firms risk losing business if they make customers wait on hold for more than half a minute. The research found **46 percent** of law firms leave customers waiting in silence, **41 percent** use generic music, and **13 percent** subject callers to beeps. A previous study of 2,234 U.S. consumers found that **59 percent** won’t do business with a company again if their first call isn’t handled satisfactorily, and **65 percent** of customers feel more valued if they hear customized voice and music messages while on hold.

Source: phmg.com (Jan. 10).



## Did You Know?

African-American prisoners convicted of murder are about **50 percent** more likely to be innocent than other convicted murderers. Part of that disparity is tied to the race of the victim. Black people imprisoned for murder are more likely to be innocent if they were convicted of killing white victims. About **15 percent** of murders by African-Americans involve white victims, but **31 percent** of innocent black murder exonerees were convicted of killing white people.

Source: law.umich.edu (March 7).



## 2%

The percentage increase of employees who worked remotely within the legal industry from 2012 (41 percent) to 2016 (43 percent), according to Gallup. Researchers predict the number of remote workers will continue to increase with greater mobility and the surge in on-demand legal services providers.

Source: nytimes.com (Feb. 15).



## Cartoon Caption Contest

**CONGRATULATIONS** to Frank M. Kocs of Paso Robles, California, for garnering the most online votes for his cartoon caption. Kocs’ caption, far right, was among more than 130 entries submitted in the *Journal’s* monthly cartoon caption-writing contest.

**JOIN THE FUN** Send us the best caption for the legal-themed cartoon at right. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, June 11, with “June Caption Contest” in the subject line.

For complete rules, links to past contests and more details, visit [ABAJournal.com/contests](http://ABAJournal.com/contests).



piccolo

“I never thought I would get to witness blind justice on appeal.”

—Frank M. Kocs of Paso Robles, California