LAW360®

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Bar's Future: Gupta Wessler's Jennifer Bennett

By **Jeff Overley**

Law360 (December 6, 2024, 7:45 PM EST) -- As a litigator for workers and consumers, Jennifer D. Bennett made her debut at the U.S. Supreme Court at an inauspicious time, when conservative justices were consistently helping corporations move major cases onto advantageous turf in arbitration. But since then, Bennett has amassed a flawless argument record and helped to turn the tide, making her one of the high court's most promising young advocates.

Jennifer D. Bennett

Supreme Court arguments: 3

Professional highlights: Principal, Gupta Wessler LLP; attorney, Public Justice.

Clerkships: U.S. Circuit Judge Marsha S. Berzon, Ninth Circuit; U.S. District Judge Jesse Furman, Southern District of New York; U.S. District Judge Vince Chhabria, Northern District of California.

Education: Yale Law School, J.D.; Yale University, Bachelor of Arts.

Notable: Has a 3-0 record in Supreme Court arguments and won unanimous opinions each time.

Bennett, who heads the San Francisco office at appellate boutique Gupta Wessler LLP, first stepped to the Supreme Court lectern — and actually first entered the Supreme Court building — in October 2018 as a lawyer at nonprofit legal group Public Justice PC, which has an avowed mission to fight "abusive corporate power."

At the time of **that argument** in New Prime v. Oliveira, there were ample reasons to doubt Bennett's odds of thwarting a trucking company's effort to compel arbitration in a worker's proposed class action. She had urged the justices to stay out of the matter, but they elected to review her win at the left-leaning First Circuit — a move that suggested they saw a plausible basis for reversal.

Moreover, the conservative justices were in the midst of a pro-arbitration spree; that trend was exemplified by a bombshell decision in AT&T Mobility v. Concepcion, which in 2011 **dealt a powerful blow** to class cases; it was described by consumer group Public Citizen as a "devastating blow" and **even by defense counsel** as a "grenade detonated at the center of consumer class action law."

But in New Prime, Bennett **prevailed** in a unanimous opinion that was **immediately seen** as **a potential inflection point**. In the ensuing years, she has argued two more Supreme Court cases — Southwest Airlines v. Saxon **in 2022**, and Bissonnette v. LePage Bakeries **this year** — and again secured unanimous opinions for employees resisting arbitration. Experts have said those victories reflect **a clear change of course** in arbitration law with **important implications**, and that they're especially noteworthy against the backdrop of a conservative supermajority that has dominated the high court since 2020.

Bennett's cases are "really hard to win before the current court, and yet, she does it," University of Michigan Law School professor Leah Litman, who clerked for former Justice Anthony M. Kennedy, told Law360.

That track record is why Bennett is among 12 lawyers Law360 is profiling in a series about the Supreme Court bar's **next generation of premier oral advocates**. Although arbitration is a niche area of law, it's relevant in practically all corners of the U.S. economy, pervading employment contracts as well as the terms and conditions to which consumers consent when buying innumerable products. Large judgments against corporations are less common in arbitration, and businesses find it favorable for other reasons, including limits on discovery and appeals.

In 2015, the left-leaning Economic Policy Institute asserted that "the Supreme Court has engineered a massive shift in the civil justice system that is having dire consequences for consumers and employees," with rulings that had "enabled large corporations to force customers and employees into arbitration to adjudicate practically all types of alleged violations of countless state and federal laws."

In an interview with Law360, Bennett shared details about her efforts to shift things back; those efforts include **a pending Supreme Court petition**, backed by consumer law scholars and groups representing military veterans, that involves a timeshare company's arbitration clauses. Bennett also spoke about the distinctive experiences of female oral advocates, why oral arguments are important even when the justices are largely on the same page, and why colleagues still tease her about a joke she cracked during one argument.

This interview has been edited for length and clarity.

Your Supreme Court arguments have all involved arbitration. Could you give me an overview of your practice and the issues you focus on?

My practice is largely an appellate and Supreme Court practice, and it is entirely a plaintiffs and public interest practice. A lot of the focus is on barriers to access to justice. So things like arbitration, qualified immunity, legal standing, personal jurisdiction — all the things that keep people out of court when they have claims. And there's a bunch of other public interest issues in there as well.

How do you get your Supreme Court cases?

Through a number of different mechanisms. A lot of it is from work either I or the firm have done — people who have an issue that's related to issues that we litigate will often just call us. Sometimes it's paying attention to the issues and the cases that are coming up through the district courts and reaching out to those lawyers. Sometimes it's through nonprofits that work on particular issues. So really a whole range of ways.

Famous Supreme Court advocates have argued tons of times, but the court hears far fewer cases than it once did. Do you think we should assess younger advocates a bit differently, and put less emphasis on how their argument numbers stack up historically?

I do think that; I think that makes sense. It's less likely that anybody who's not coming out of the [U.S.] Solicitor General's Office is going to argue the number of cases that somebody like [Williams & Connolly LLP appellate chair] Lisa Blatt has argued. So I do think that's probably right. Also, I think it's less likely on the plaintiffs [and] public interest side — you don't see the same kind of several-arguments-a-year that happens sometimes on the corporate defense side.

When I was speaking with a source for this series, I said we might put you on our list of advocates to watch partly because of the distinctive cases you've won. The answer I got was, "Jeff, when you say 'distinctive,' I would describe it as 'really hard to win before the current court,' and yet, she does it. And so, her ability to do that is a big part of why I feel like she obviously belongs on the list." What do you think of that comment?

More High Court Bar's Future

- 12 Lawyers Who Are The Future Of The Supreme Court Bar
- Jenner & Block's Adam Unikowsky
- Stanford Law's Easha Anand
- Solicitor General Elizabeth Prelogar
- Mitchell Law's Jonathan F. Mitchell
- Arnold & Porter's Allon Kedem
- Sullivan & Cromwell's Morgan Ratner

Well, that is very kind. I would love to thank whoever said that. I will say that the kinds of cases I have had so far before the court have fallen into a particular niche of positions that benefit workers or consumers [and] have a really strong statutory and historical argument. And those cases are seeing success before the court — not just for me, but if you look at the last term, Muldrow v. St. Louis , for

example, which was a Title VII case brought on behalf of a woman who argued she was being discriminated against [at a] police department. A lot of circuit courts had put up a really high barrier for those kinds of cases. And the Supreme Court **said no, that's not right**.

It's similar to a straightforward statutory interpretation argument that the lower court's precedent had somehow gone way off the rails. And I think that has been true in arbitration, too. There are a number of these kinds of issues where the lower courts have kind of assumed that the Supreme Court is going to interpret a statute in, often, a pro-corporate way, regardless of what the statute actually says, and the doctrine has kind of gone off in that direction. But then attorneys have gone up to the [Supreme] Court and said, "Hey, you really want to do what the statute says, right?" And then [the justices] have said yes. I think that is a lot of what's going on in these cases.

To be clear, do you think lower courts have increasingly ruled how they think the Supreme Court will rule, even if they've been inclined to rule differently?

I'm not sure it's quite that conscious. But arbitration is a good example: There's a whole series of [Supreme Court] decisions that, over and over again, ruled against the person challenging arbitration and expressed this idea that there's a really strong policy favoring arbitration. And I think courts took that as saying, more or less, the decision that is going to favor arbitration should almost always win. They read that line of cases much more broadly than I think they were necessarily intended, and certainly more broadly than would be supported by the text of the statute. And so, part of it may be trying to predict where the Supreme Court could go. Part of it also may be just getting the gist of what the Supreme Court is saying, and then some doctrines sort of take on a life of their own.

If you get a unanimous opinion, some people might say the oral advocacy didn't matter much. But others might say that if the opinion reverses a lower court, it wasn't a totally easy case, and moreover, that the oral advocacy still shapes what a unanimous opinion actually says. What do you think the unanimity signified in your cases?

I think the unanimity is a reflection of the strong historical and textual argument. And I do think that in most — probably all — cases, oral argument is way less important than anything anybody says in the briefs. I also want to be very clear that in all my [high court] cases, and in every case, the briefs were a team effort. And preparing for argument is the same way. So in cases like these, argument is helpful for testing the reasoning and the limits of a position. But you're right — I don't think it affected the outcomes of these cases.

So, the value of oral argument was mainly to help the justices refine their thinking and that sort of thing?

If it's already going to be unanimous, more or less, I think it serves a few functions. One is to think about the different kinds of reasoning that could appear in the decision — it can allow the justices an opportunity to test the boundaries of positions. I've had arguments where you get a whole bunch of hypotheticals, and those hypotheticals can help the justices figure out what the different implications of the reasoning might be, and also what they may or may not want to say in the opinion. "Do we want to just resolve this question in the narrowest way possible? Or do we want to come up with something broader? What are the advantages and disadvantages of that?" Those kinds of things, I think, really come out in argument; argument can be very helpful for that, even in cases where the opinion is already going to be unanimous.

Were you satisfied with what the opinions said in your three cases?

Yeah, I was. The opinions gave a really clear answer to the question presented and a roadmap for how that issue should be litigated going forward. And one thing that was really helpful about all three opinions [which dealt with the Federal Arbitration Act] is they went out of

their way to say, "We are treating this like an actual statute."

The New Prime opinion is the beginning of a series of opinions in cases where corporations were arguing something to the effect of, "Doesn't matter what they say on the other side — there's this great policy favoring arbitration." And the New Prime opinion essentially says, "We're not going to preference some unwritten policy over the words." And since then, there's a throughline in the Supreme Court's decisions that has been very helpful in helping lower courts see that the statute is actually a statute.

You mentioned a team effort when preparing for arguments — what exactly goes into that effort?

That's the most helpful thing I do: to have the smartest people, who are willing to spend the time, asking me the hardest questions they can think of, and then talking through how they felt about the answers and strategizing about them. To me, that is the heart of the preparation. And for every argument I've done, the public interest community has been extremely generous with their time. It's kind of a wonderful process, actually, because I've gotten to meet people I didn't yet know, and I now have additional friends and colleagues in the bar.

And then, of course, each case had case-specific things. A lot of the preparation for at least a couple of the cases was all the crazy hypotheticals someone could think of. For the Southwest Airlines v. Saxon case, which was about baggage handlers, we expected a bunch of questions about how other workers should be treated, and one of my colleagues brought in his child's Richard Scarry book about the airport. And we pointed to different characters and whether the people, the mouse, the dog or the cat would be exempt from the Federal Arbitration Act, which is maybe my favorite argument preparation I've ever done.

And then, in terms of rituals, my colleague has a ritual of having a grilled cheese the night before an argument, and I have stolen that one, mostly because I liked grilled cheese and it's a good excuse.

Are we talking old-school with Wonder Bread and Kraft Singles or something fancier?

Probably cheddar cheese instead of American, but otherwise, you basically got it.

That's your preparation style — what about your argument style? How would you describe it?

I hope that it is conversational. My goal is to genuinely answer the questions the justices have and to explain, ideally in a plain English way, our arguments. I try to have sort of a calm, friendly conversation. I leave it to other people to let me know whether that succeeds.

In connection with your first argument in 2018, we produced a video interview with you, and you described a fine line that women have to walk at the high court, between coming across as either meek or aggressive. Do you still think about that fine line?

First, I don't think it's unique to the Supreme Court. In general, there are a lot of expectations in society about how women will speak and act. And then, I will say that I think about it a lot less now that I have more experience and my style has solidified. But certainly, particularly in the beginning of my career, I did think a lot about, "Is this too timid? Is this too aggressive? How are people going to react to it?" And I do think gender plays some role in that.

But I don't think it's just gender. Everybody has to ask themselves that question, and it has to sort of match their natural personality. Lisa Blatt is going to be much more assertive at arguments than I will ever be, because that matches her personality. And if I tried to [argue

like] Lisa Blatt, I don't think it would work very well. So I do think that is something that many women advocates think about and certainly something that I have thought about.

You alluded to an evolution between your first argument and your most recent one. How has your argument style changed over the years?

I think I'm now more confident in my own skin and in my style and in having a sense of what's going to happen. And my first argument was actually my first time in the Supreme Court at all — I had never even been to the building. So, you walk in, and it's much smaller than expected, and the justices are much closer to you [than expected], and everything is new. Now it feels like I have a much more solid sense of how everything is likely to go, and how I'm likely to perform, and what works best for me.

Did that surprise affect how you felt at your first argument?

With every argument I do — and I don't know how many arguments I've done total [in all courts] at this point, but it's a lot — I still get a little bit nervous before each one. And it immediately subsides when someone asks me a question, because then we're having a conversation. But in my first Supreme Court argument [which preceded a policy allocating **two minutes at the start of arguments** without questions from the bench] it was a really long time before anybody wanted to ask any questions. I just kept talking and talking and talking. So being there the first time, having everybody so close together, and having the thing happen at the Supreme Court that everybody says never happens at the Supreme Court, was certainly an unusual experience.

That does sound a bit unnerving, like, "Please, somebody, ask me something." Have you had any other memorable moments?

In the Saxon argument — and this comes to mind because people continually rib me about it still, to this day — a justice asked me a question about the other kinds of [transportation] cases they might be seeing in the future; you know, planes, trains, automobiles, etc. And I made some joke about space travel, and I still never hear the end of that.

Why do people still bring it up? Did the joke fall flat?

I mean, I don't think it was my best joke. And the thing you tell everyone is, don't make any jokes at any argument. But it just sort of came out. And so, the idea that we would have, like, these arbitration cases about space, and that I'm going to be a space lawyer, continually comes back to me.

Last question: Have you had any especially influential mentors or formative experiences?

I've had so many wonderful mentors. I clerked for three judges, and all of them were just incredible mentors [by] helping me figure out legal writing, helping me figure out my personal style, supporting me in figuring out what kind of career I wanted. And they continue to be incredible mentors to this day, still listening to my arguments and talking to me about them. I've been really fortunate that way.

I've also been really fortunate in terms of the people I've worked with. I used to be at Public Justice, and that's where I was when I did my first Supreme Court argument. I felt like I had barely gotten there when it happened, and they were just incredibly supportive. The director, Paul Bland, spent a bunch of time helping and was really wonderful. And my current colleagues are the best lawyers I know; they have also been really wonderful — everything from working together on briefs, to giving advice on arguments, to everything in between.

--Editing by Brian Baresch and Kelly Duncan.

Editor's note: *Law360's profiles of the 12 oral advocates will be published during the coming weeks.*