Ken & Kale go to Washington!

Our SCOTUS Adventure

Overview

- *Garza v. Idaho* Procedural History
- Briefing the Case
- Arguing the Case
- SCOTUS-Approved Oral Argument Tips
- D.C.-Area Restaurant Recommendations

Garza v. Idaho
Procedural History

Steps to SCOTUS

- *State v. Garza* (district court criminal cases)
- *Garza v. State* (district court post-conviction case)
- *Garza v. State* (Idaho Court of Appeals)
- *Garza v. State* (Idaho Supreme Court)
- *Garza v. Idaho* (SCOTUS)

State v. Garza

Ada Co. case nos. CR-FE-2014-9960; CR-FE-2014-18183

- 2 consolidated criminal cases (aggravated assault & PCS with intent)
- Garza pleaded guilty in both cases pursuant to plea agreements with the State
- Both agreements stated "Defendant Gilberto Garza Jr. waives his right to appeal"
- Garza was sentenced according to plea agreements

Garza v. State

Ada Co. case nos. CV-2015-10589; CV-2015-10597

- Garza filed two petitions for post-conviction relief from the criminal convictions
- Majority of allegations were summarily dismissed except for one: Garza claimed his criminal-case attorney gave ineffective assistance of counsel
- Garza argued defense counsel was ineffective because Garza asked counsel to file appeals in the criminal cases, and counsel refused

6. I was the attorney of record for Gilberto Garza Jr. in CR-FE-2014-0009960, CR-FE-2014-00018183 and CR-FE-2014-0009959.
7. I am in receipt of a copy of the Court Order for Waiver of Attorney Client Privilege concerning Petitioner Gilberto Garza's claims of ineffective assistance of counsel signed by Judge Scott on July 15, 2015 and received by me on July 20, 2015 in CV-PC-2015-10589 and CV-PC-2015-10597.
8. I have received a copy of the UPCPA Petition filed by Mr. Garza in CV-PC-2015-10589 and CV-PC-2015-10597wherein he makes allegations regarding my representation of him in CR-FE-2014-00018183 and CR-FE-2014-0009960.
9. Mr. Garza entered a plea of guilty in CR-FE-2014-00018183 pursuant to an ICR 11(f)(1)(c) Agreement that included the term that he waived his right to appeal.
10. Mr. Garza entered a plea of guilty in CR-FE-2014-0009960 pursuant to an ICR 11(f)(1)(c) Agreement that included the term he waived his right to appeal.
11. Mr. Garza indicated to me that he knew he agreed not to appeal his sentence(s) but he told me he wanted to appeal the sentence(s) of the court. Mr. Garza received the sentence(s) he bargained for in his ICR 11(f)(1)(c) Agreement. I did not file the appeal(s) and informed Mr. Garza that an appeal was problematic because he waived his right to appeal in his Rule 11 agreements.

Defense Counsel did not deny he was asked to file—and refused to file—a notice of appeal.

He explained that he did not do so "because [Garza] waived his right to appeal in his [plea] agreements."

Garza v. State – District Court Decision

- *Strickland* standard: petitioner must satisfy a two-prong test and show counsel's performance was both deficient and prejudicial
- District Court did not reach question of whether trial counsel gave deficient performance by not filing appeal on request (but indicated "[o]ne might reasonably think" it was deficient performance)
- Regarding prejudice, the district court noted the general rule: "failure to file an appeal at a criminal defendant's request" is *presumed* prejudicial, "irrespective of whether the appeal has merit."
- The district court cited to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), for this rule

But!

- In *Flores-Ortega*, the defendant did not have an appeal waiver
- As a result, at that time, there was a federal circuit split as to whether, in light of an appeal waiver, it would still be presumptively prejudicial not to file a notice of appeal on demand…

Federal Circuit Split

Majority Rule (8 circuits)

- Presume prejudice irrespective of waiver

*"We have long held that **a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable**."*

*"… **the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice** because "the adversary process itself" has been rendered "presumptively unreliable." … Put simply, we cannot accord any "'presumption of reliability,'" to judicial proceedings that never took place.*

Minority Rule (2 circuits)

- Defendant would need to *show* prejudice by identifying non-frivolous issues outside the scope of the waiver

*The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time **and to which he had a right**, similarly demands a presumption of prejudice.*

Garza v. State – District Court Decision

- District court concluded the Minority Rule was "better reasoned" of the two approaches
- Presumption of prejudice preconditioned on having a right to the appeal; so no presumption where counsel declines to appeal if defendant has waived his right to an appeal
- Such a defendant would need to *show* prejudice with evidence that the waiver was invalid or unenforceable, or that the claimed issues on appeal were outside the waiver's scope
- Because Garza waived his right to an appeal, and could not show the waiver was invalid, the district court concluded that his counsel was not ineffective for declining to file an appeal

Garza v. State
Idaho Court of Appeals

Case nos. 44015/44016

- Garza appealed from the judgment dismissing his post-conviction petitions
- Idaho Court of Appeals affirmed and adopted Minority Rule
- "Because prejudice is not presumed, Garza was required to make a showing of prejudice with evidence that the waiver was invalid or unenforceable or that the claimed issues on appeal were outside the scope of the waiver."

Garza v. State
Idaho Supreme Court

Case no. 44991

- Garza petitioned the Idaho Supreme Court for review
- Idaho granted review, affirmed, and adopted Minority Rule
- "Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights.
- "This Court does not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver. Rather, a defendant needs to show deficient performance and resulting prejudice to prove ineffective assistance of counsel."

~The End~

or…

was it?

Garza petitioned for a writ of certiorari … and the rest is history!

Briefing the Case

- Cert-Stage Briefing
- Merits Briefing

- **Cert-Stage Briefing**
- Merits Briefing

After a petition for writ of certiorari is filed, the Respondent has two options:

- File a Brief in Opposition
- Waive the filing of a BIO

Sup. Ct. Rule 15.1:

A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), **or when ordered by the Court.**

- **Cert-Stage Briefing**
- Merits Briefing

Considerations Governing Review on Certiorari (from Sup. Ct. Rule 10):

The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

- **Cert-Stage Briefing**
- Merits Briefing

Responding to a Petition for a Writ & Certworthiness Generally :

- Is there a circuit split?
- Are there important federal issues at stake or does a state decision conflict with federal precedent?
- Necessity for further percolation? *(for recurring questions and nature of split is unclear)*
- Or, is this a poor vehicle due to fact-bound issues?

- **Cert-Stage Briefing**
- Merits Briefing

In this case the State of Idaho initially waived the filing of a brief in opposition.

But SCOTUS ordered the State to file a BIO, which the State did.

That brief, and all the briefs filed in this case, can be found at:

- https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-9044.html
- https://www.scotusblog.com/case-files/cases/garza-v-idaho/

- Cert-Stage Briefing
- **Merits Briefing**

Good examples of merits briefs, and transcripts of oral arguments, can be found at:

- https://www.supremecourt.gov/docket/docket.aspx?Search=&type=Docket
- https://www.scotusblog.com/
- https://www.oyez.org/cases/ *(for transcripts)*

The Office of the Solicitor General also posts every Supreme Court brief that it files:

- https://www.justice.gov/osg/supreme-court-briefs

Arguing the Case

- Many Moots
- Argument

- **Many Moots**
- Argument

Many moots were had!

In Idaho:

- Interoffice moots

And in Washington D.C.:

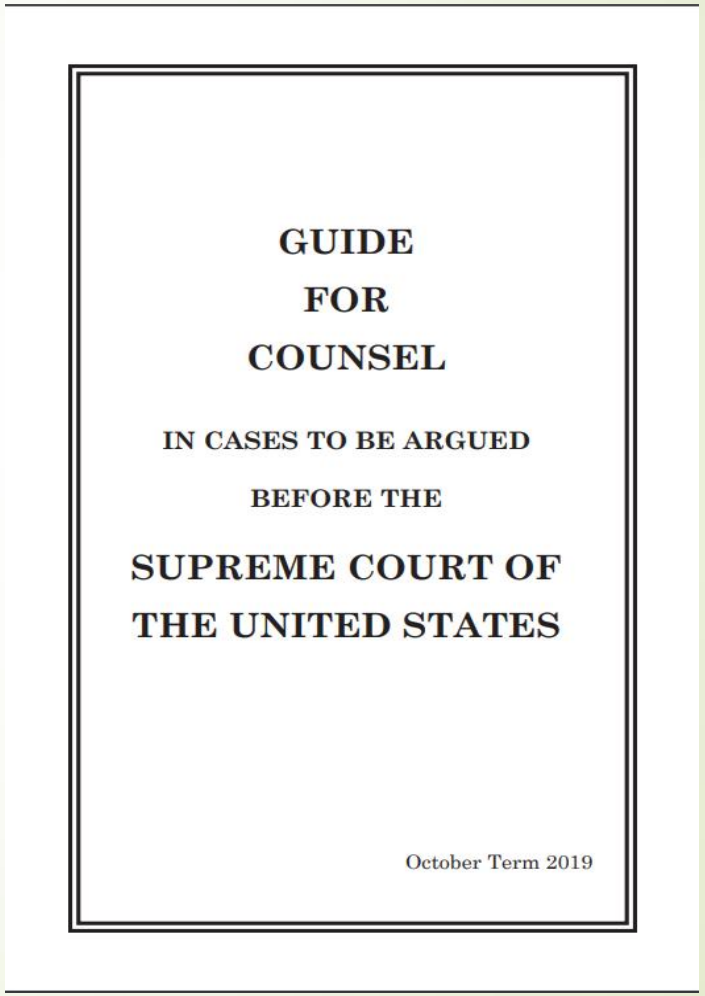
- Heritage Foundation
- National Association of Attorneys General
- United States Solicitor General

- Many Moots
- **Argument**

(Ken will extemporize here.)

SCOTUS-Approved Oral Argument Tips

- SCOTUS has a Guide for Counsel that is freely available at https://www.supremecourt.gov
- It covers SCOTUS-specific logistics and preparation, but also has some great tips for oral argument in front of any appellate court
- Such as…



GUIDE
FOR
COUNSEL

IN CASES TO BE ARGUED
BEFORE THE

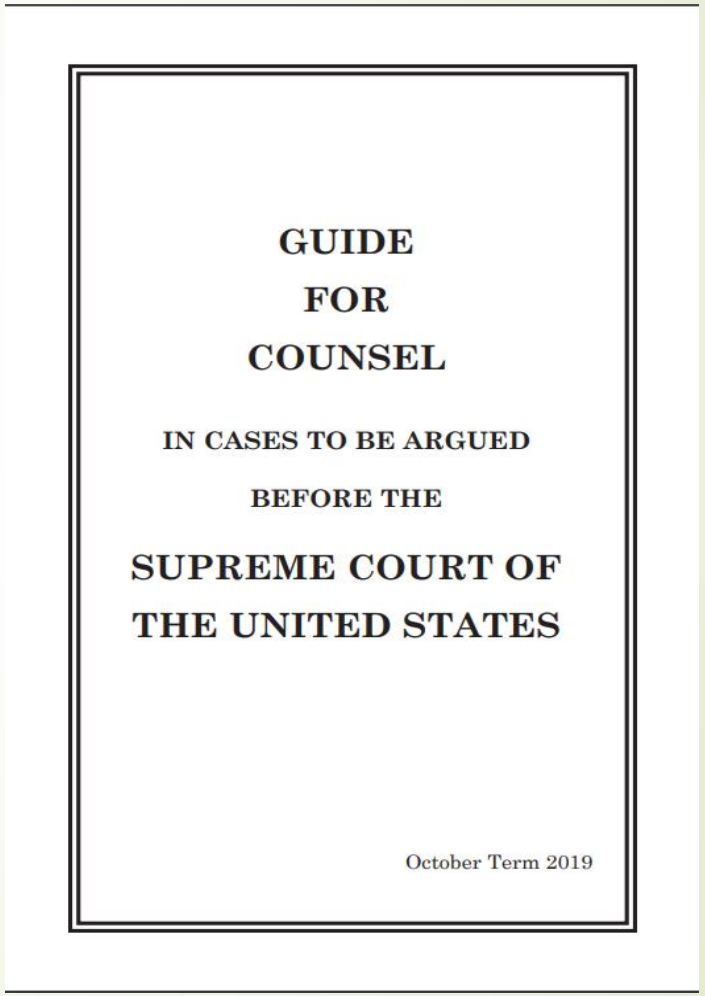
SUPREME COURT OF
THE UNITED STATES

October Term 2019

"Remember that briefs are different from oral argument."

A complex issue might take up a large portion of your brief, but there might be no need to devote argument time to that issue. Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but to stress the main issues of the case that might persuade the Court in your favor.

Guide for Counsel, p.5



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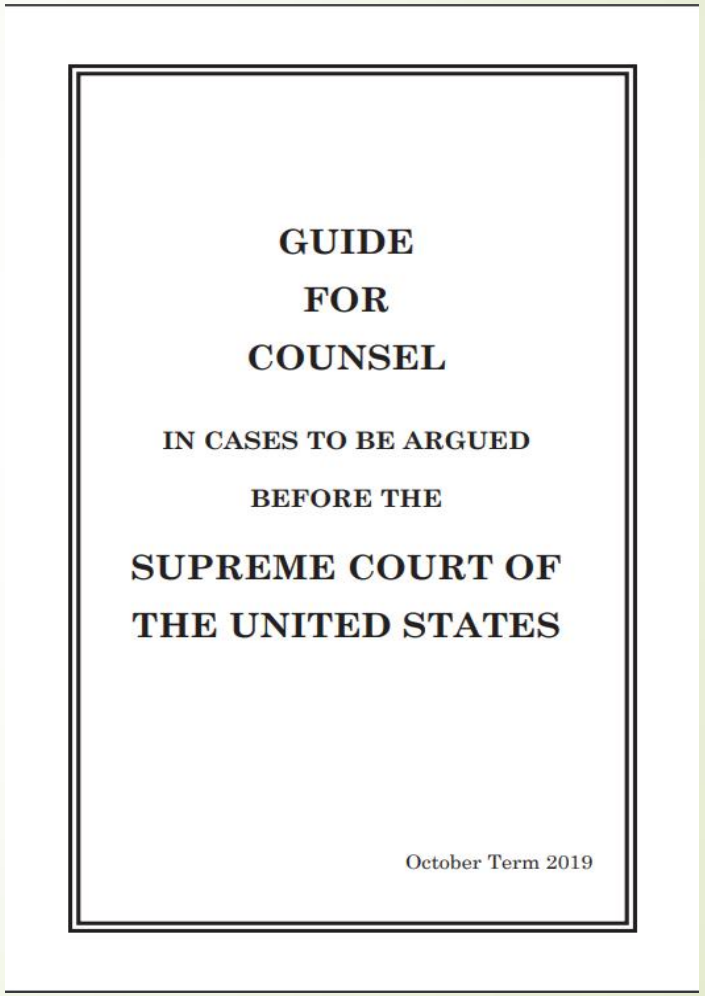
"Know your client's business."

One counsel representing a large beer brewing corporation was asked the following by a Justice during argument: "What is the difference between beer and ale?" The question had little to do with the issues, but the case involved the beer brewing business. Counsel gave a brief, simple, and clear answer that was understood by everyone in the Courtroom. He knew the business of his client, and it showed. The Justice who posed the question thanked counsel in a warm and gracious manner.

Guide for Counsel, p.6



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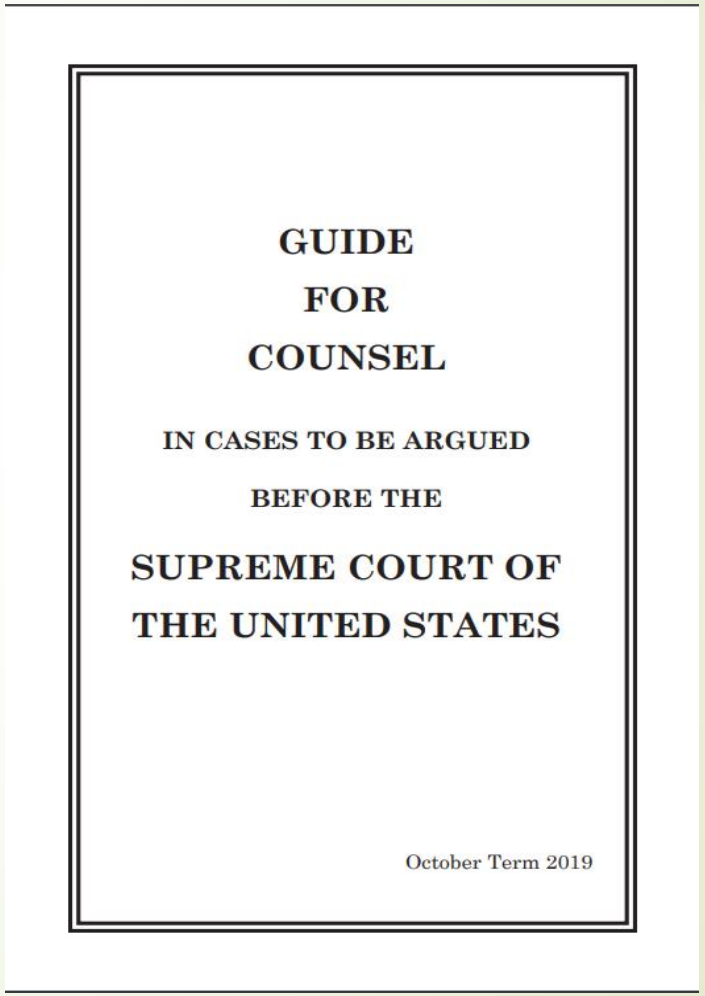
"Strunk and White warned us to 'avoid fancy words' when writing. The same is true for oral argument."

Counsel used the word "orthogonal" in a recent case. This caused a minor disruption that detracted from the argument. Counsel could just as easily have said "right angle."

Guide for Counsel, p.10



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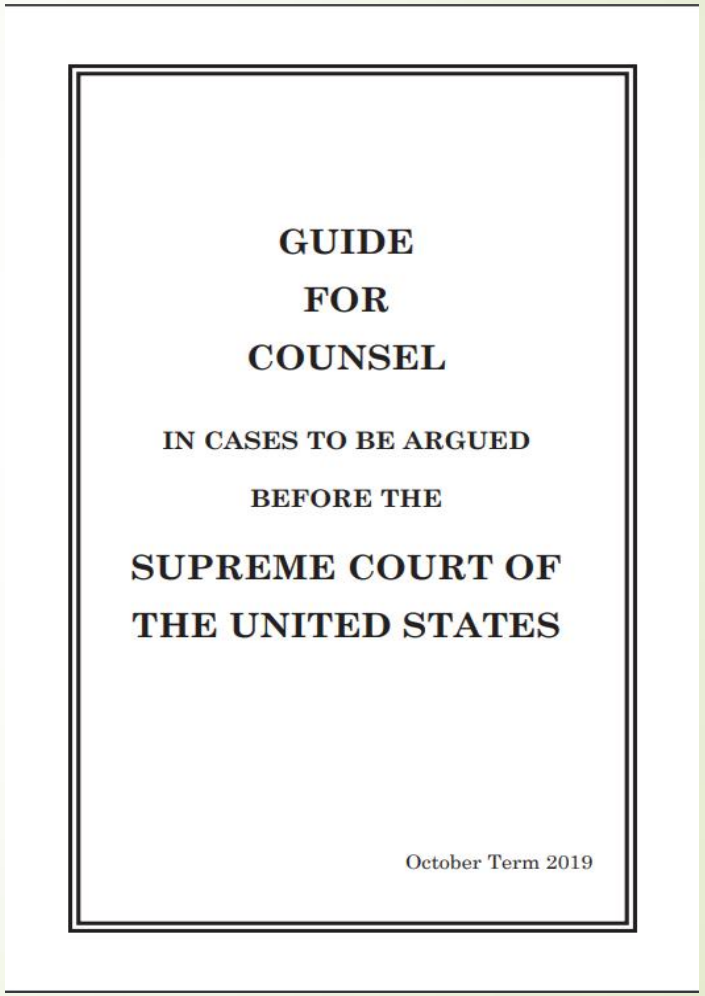
"There is no requirement that you use all your allotted time."

Rebuttal can be very effective. But you can be even more effective if you thoughtfully waive it when your opponent has not been persuasive. If you have any rebuttal, make it and stop.

Guide for Counsel, p.10



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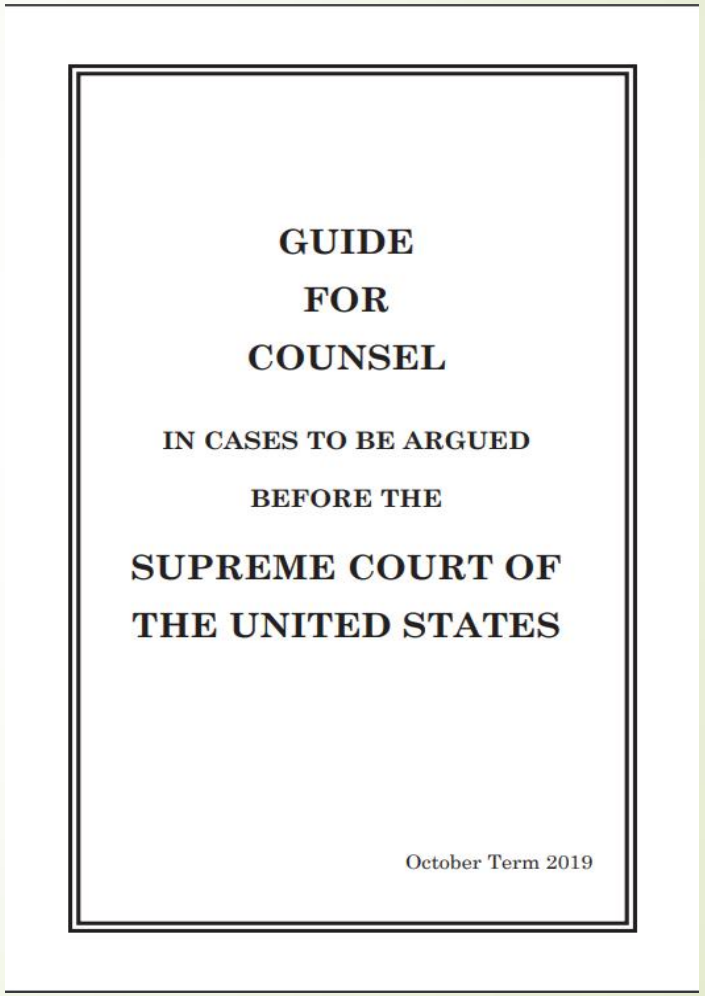
"Expect questions from the Court, and make every effort to answer the questions directly."

If at all possible, say "yes" or "no," and then expand upon your answer if you wish. If you do not know the answer, say so.

Anticipate what questions the Justices will ask and be prepared to answer those questions.

Guide for Counsel, p.11



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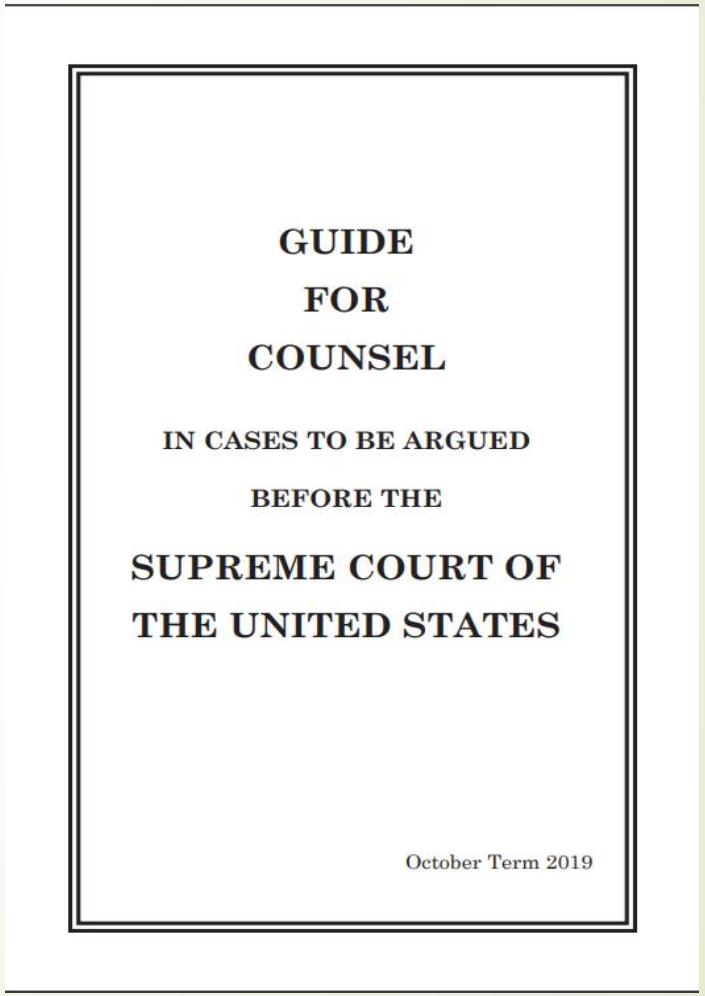
"If a Justice poses a hypothetical question, you should respond to that question on the facts given therein."

In the past, several attorneys have responded: "But those aren't the facts in this case!" The Justice posing the question is aware that there are different facts in your case, but wants and expects your answer to the hypothetical question. Answer, and thereafter, if you feel it is necessary, say something such as: "However, the facts in this case are different." … Nevertheless, your answer should be carefully tailored to fit the question. A simple "yes" or "no" in response to a broad question might unintentionally concede a point and prompt a follow-on question or statement which ultimately may be damaging to your position.

Guide for Counsel, pp.11-12



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D.C.-Area Restaurant Recommendations

Carmine's – Family-style Italian fare at a reasonable price
425 7th Street NW at, E St NW, Washington, DC 20004

Hill Country Barbecue Market – Texas BBQ, byzantine procedural rules for ordering but worth it in the end

410 7th St NW, Washington, DC 20004

Jaleo– Tapas by acclaimed chef José Andrés
480 7th St NW, Washington, DC 20004