

Voir Dire Workshop

Making and Preserving For-
Cause Challenges in Voir Dire

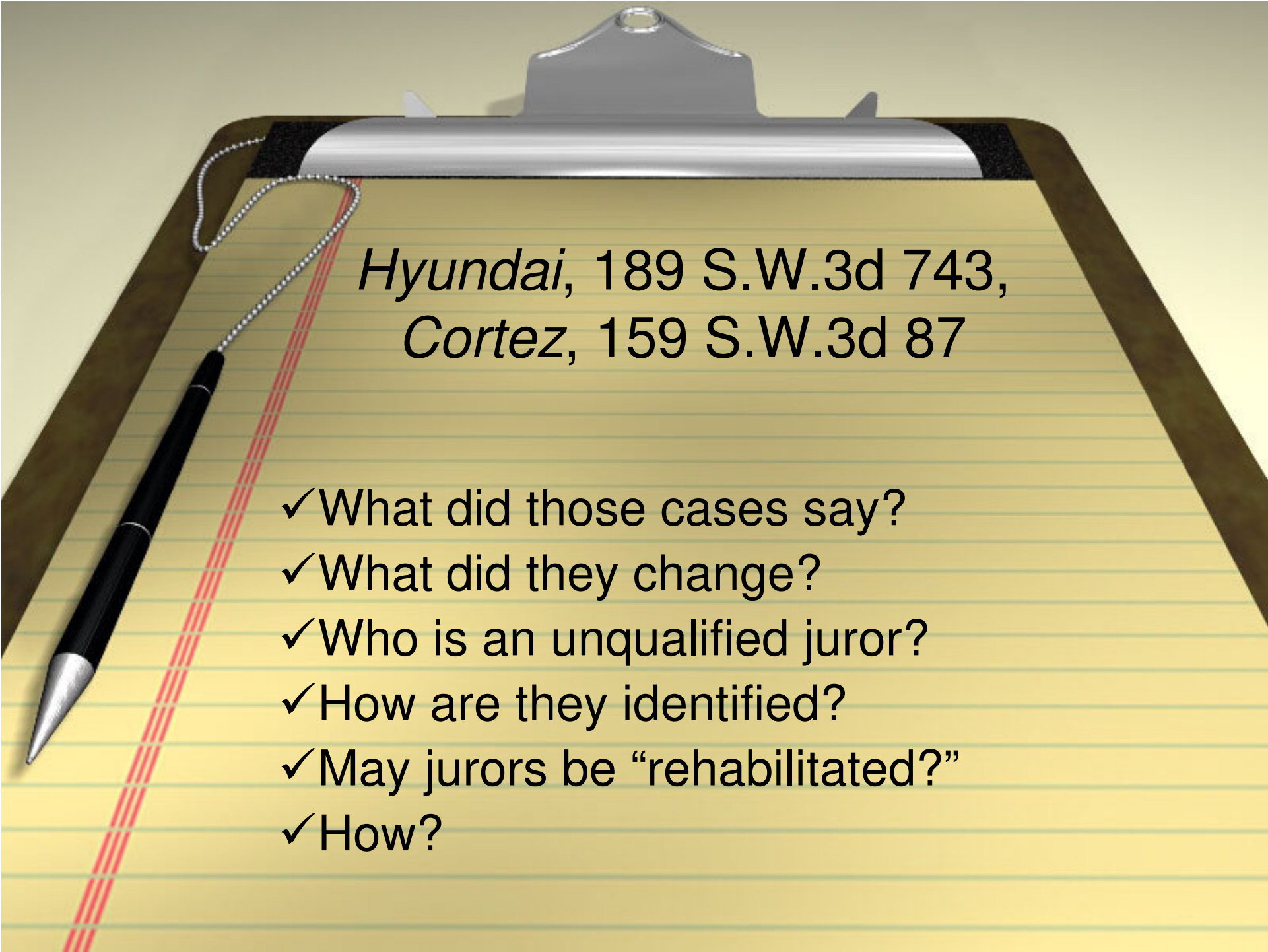
November 15, 2011

Houston, Texas

By

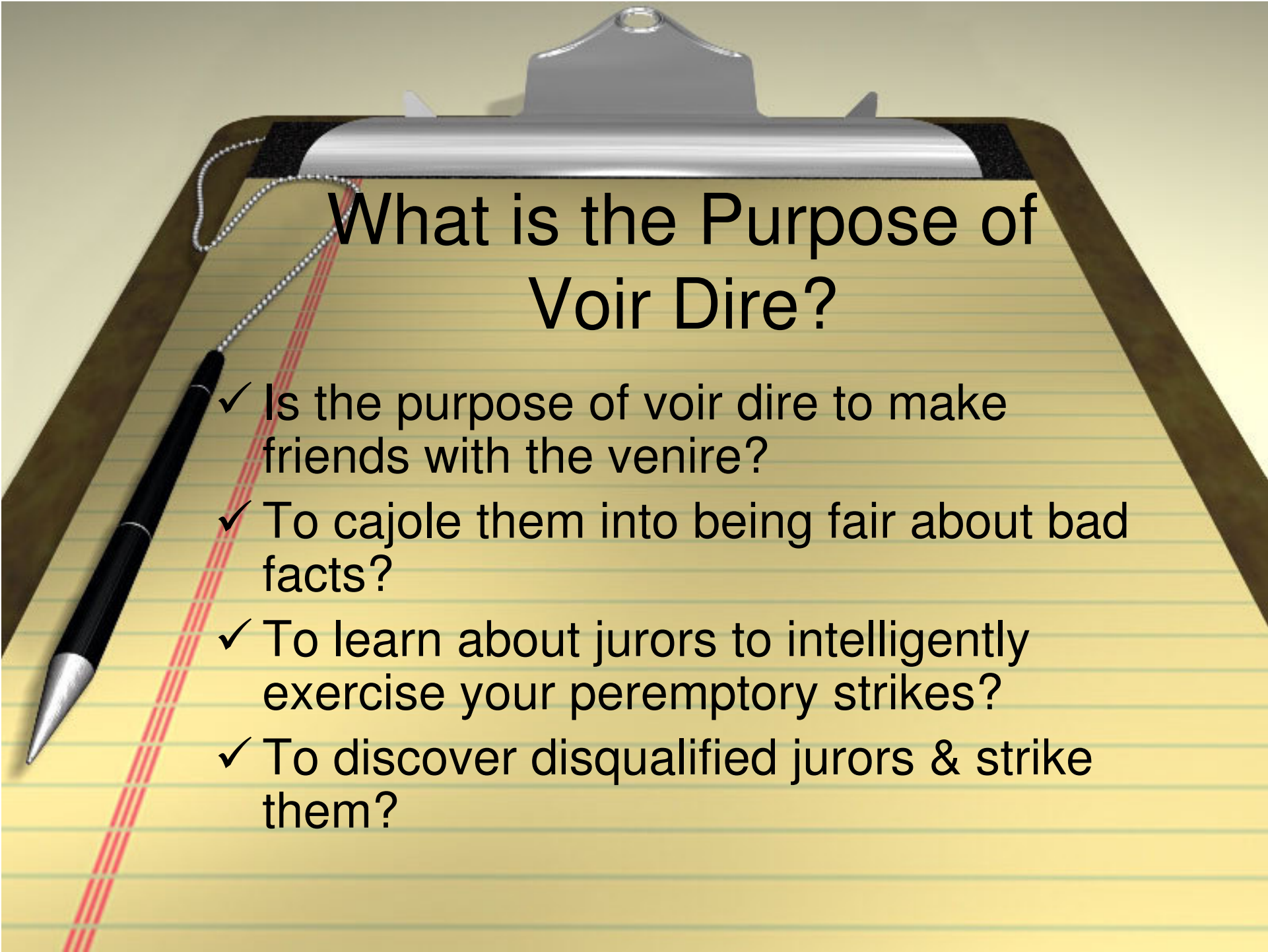
Judge Mike Engelhart

151st Civil District Court



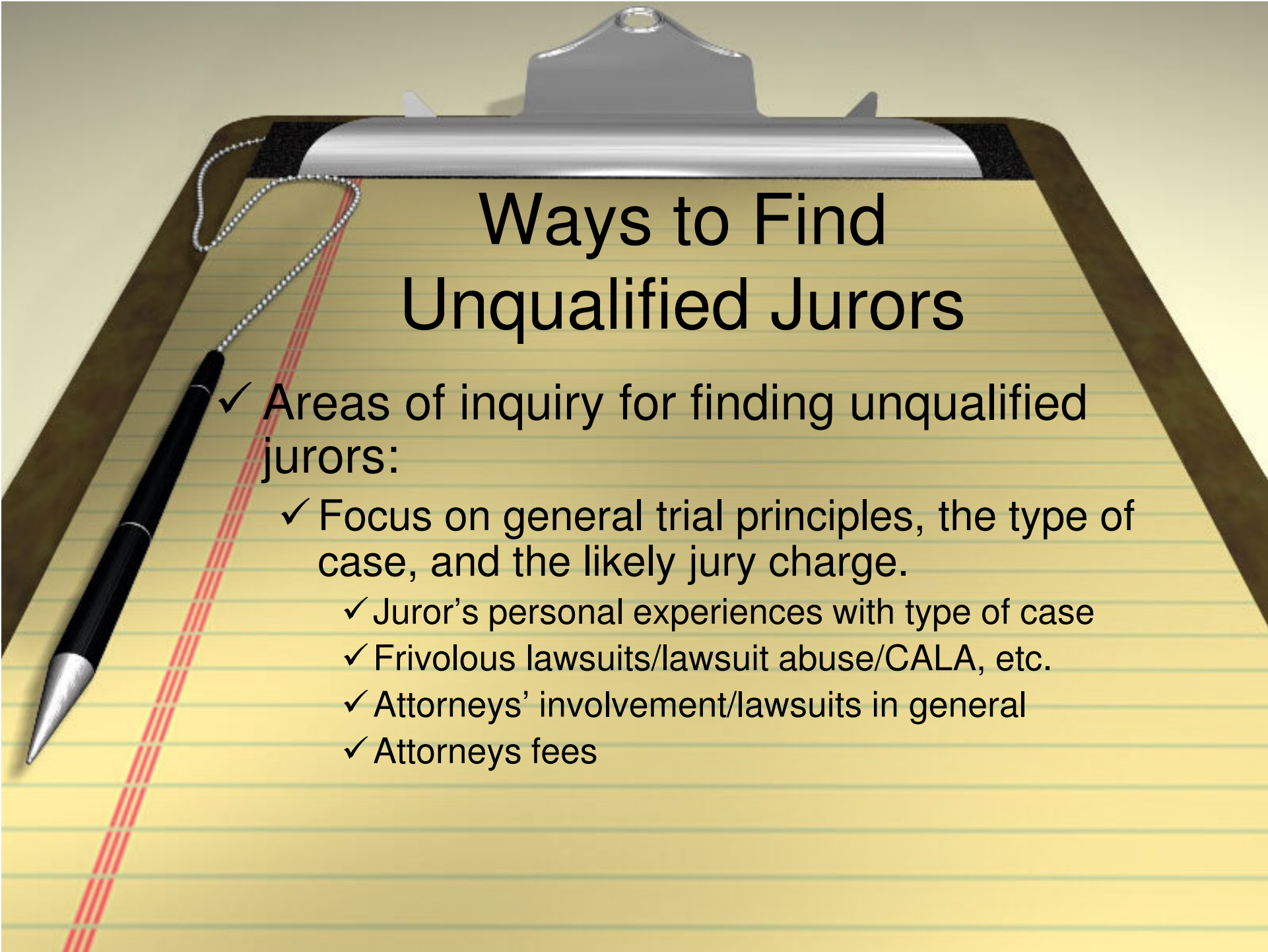
Hyundai, 189 S.W.3d 743,
Cortez, 159 S.W.3d 87

- ✓ What did those cases say?
- ✓ What did they change?
- ✓ Who is an unqualified juror?
- ✓ How are they identified?
- ✓ May jurors be “rehabilitated?”
- ✓ How?




What is the Purpose of Voir Dire?

- ✓ Is the purpose of voir dire to make friends with the venire?
- ✓ To cajole them into being fair about bad facts?
- ✓ To learn about jurors to intelligently exercise your peremptory strikes?
- ✓ To discover disqualified jurors & strike them?



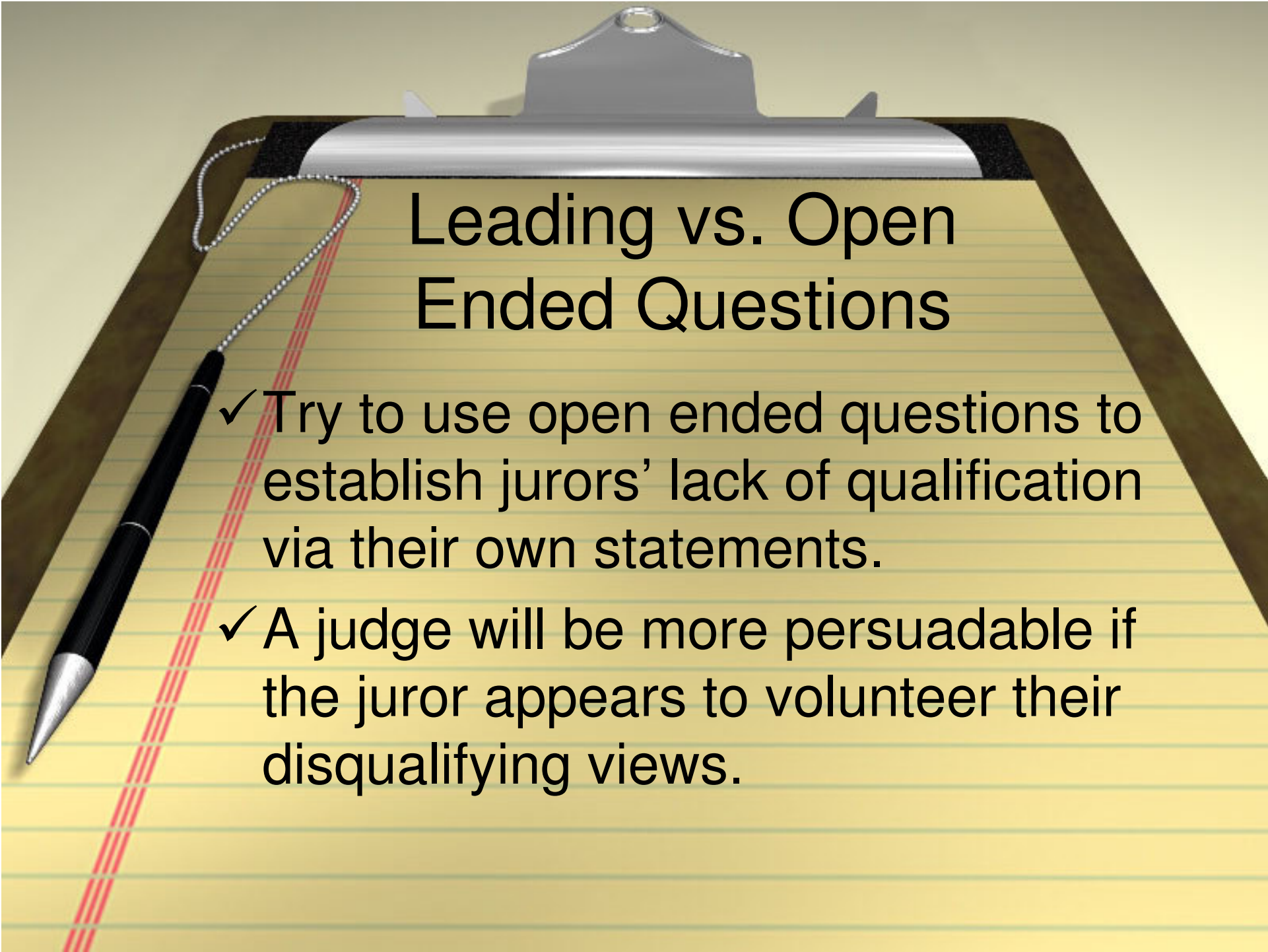
Ways to Find Unqualified Jurors

- ✓ Areas of inquiry for finding unqualified jurors:
 - ✓ Focus on general trial principles, the type of case, and the likely jury charge.
 - ✓ Juror's personal experiences with type of case
 - ✓ Frivolous lawsuits/lawsuit abuse/CALA, etc.
 - ✓ Attorneys' involvement/lawsuits in general
 - ✓ Attorneys fees



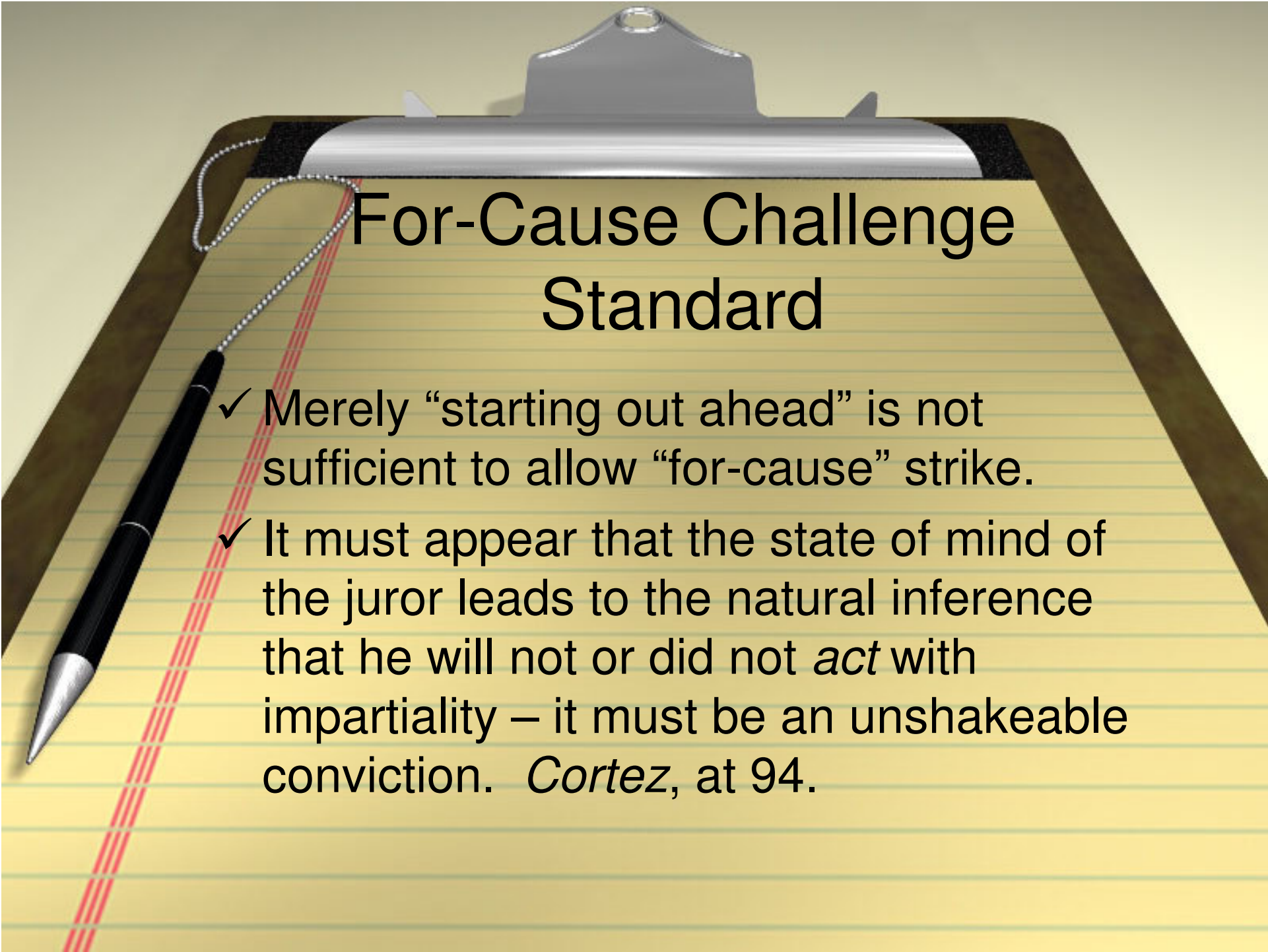
Unqualified Jurors cont.

- ✓ More areas of inquiry for unqualified jurors:
 - ✓ Prepond. vs. beyond a reasonable doubt.
 - ✓ Damages:
 - ✓ Physical/emotional pain & suffering
 - ✓ Disfigurement
 - ✓ Physical impairment (give a definition)
 - ✓ Past & future medical expenses
 - ✓ Past & future loss of earning capacity
 - ✓ Punitive damages (make sure you explain that they are not designed to compensate but to punish but they go to the plaintiff anyway)



Leading vs. Open Ended Questions

- ✓ Try to use open ended questions to establish jurors' lack of qualification via their own statements.
- ✓ A judge will be more persuadable if the juror appears to volunteer their disqualifying views.



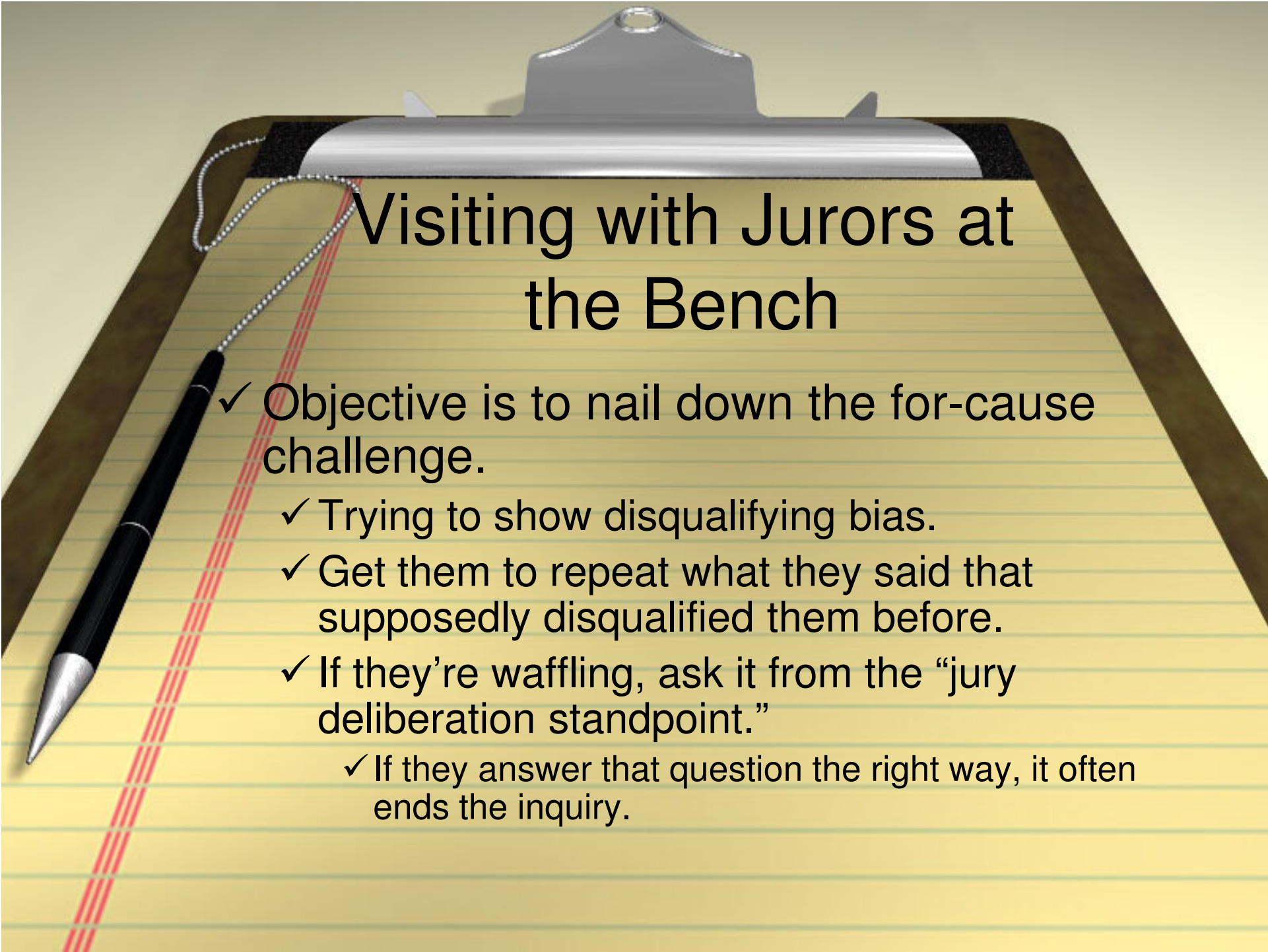
For-Cause Challenge Standard

- ✓ Merely “starting out ahead” is not sufficient to allow “for-cause” strike.
- ✓ It must appear that the state of mind of the juror leads to the natural inference that he will not or did not *act* with impartiality – it must be an unshakeable conviction. *Cortez*, at 94.



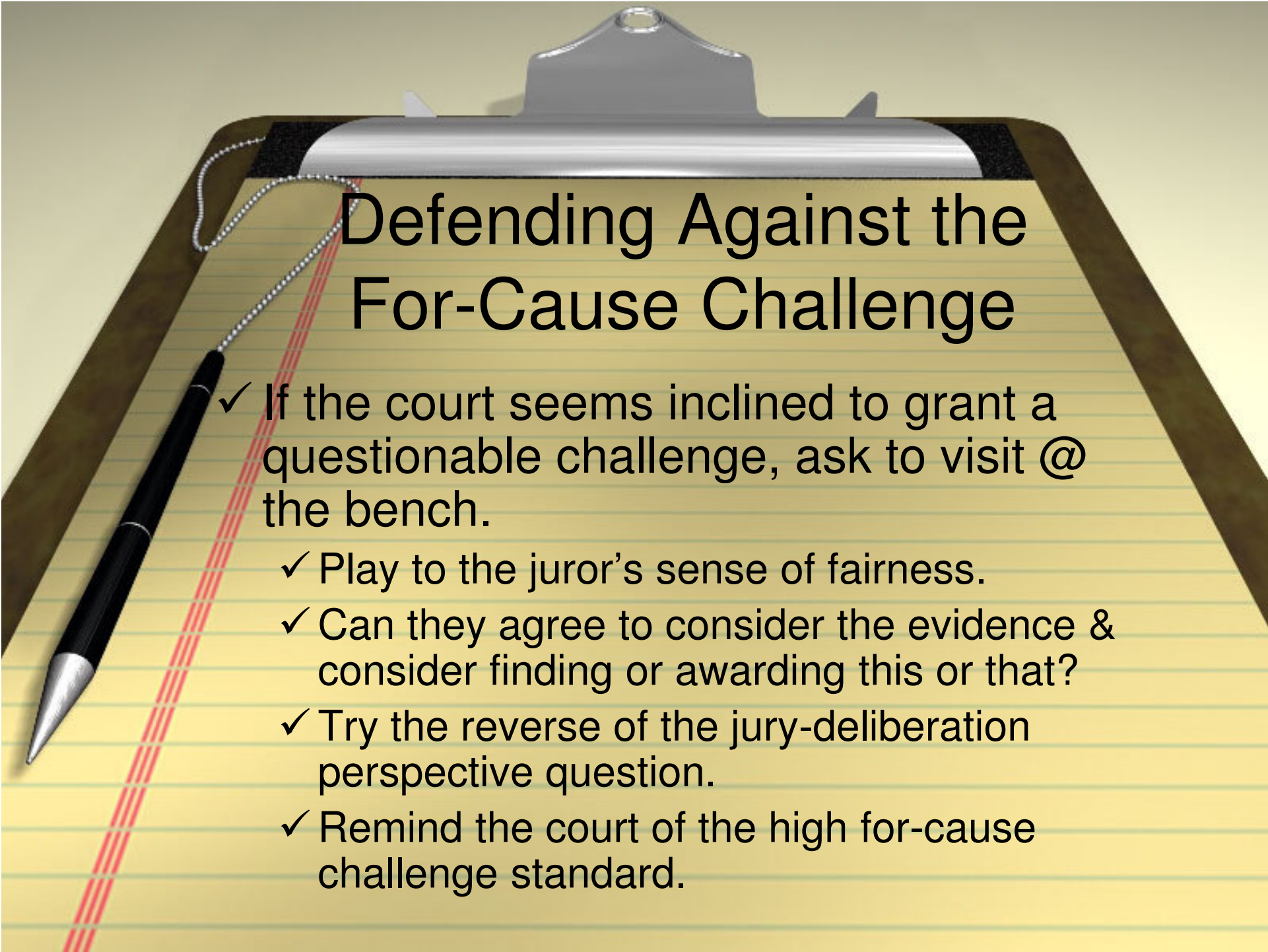
Making the For-Cause Challenge

- ✓ Typically done after jury excused to the hallway after questioning.
- ✓ Make a record.
- ✓ Take good notes. Bring help.
- ✓ Be specific. Quote if possible.



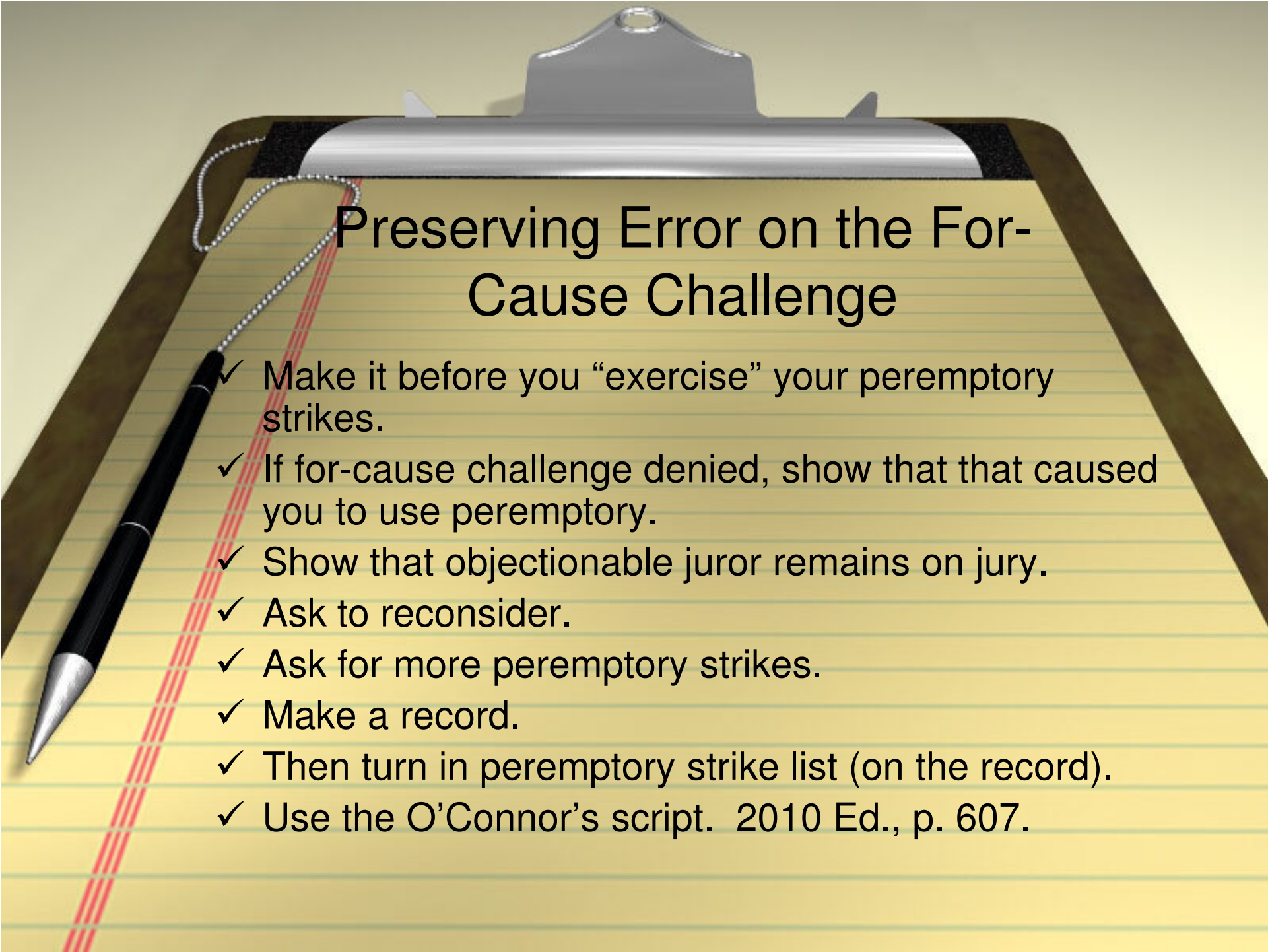
Visiting with Jurors at the Bench

- ✓ Objective is to nail down the for-cause challenge.
 - ✓ Trying to show disqualifying bias.
 - ✓ Get them to repeat what they said that supposedly disqualified them before.
 - ✓ If they're waffling, ask it from the "jury deliberation standpoint."
 - ✓ If they answer that question the right way, it often ends the inquiry.



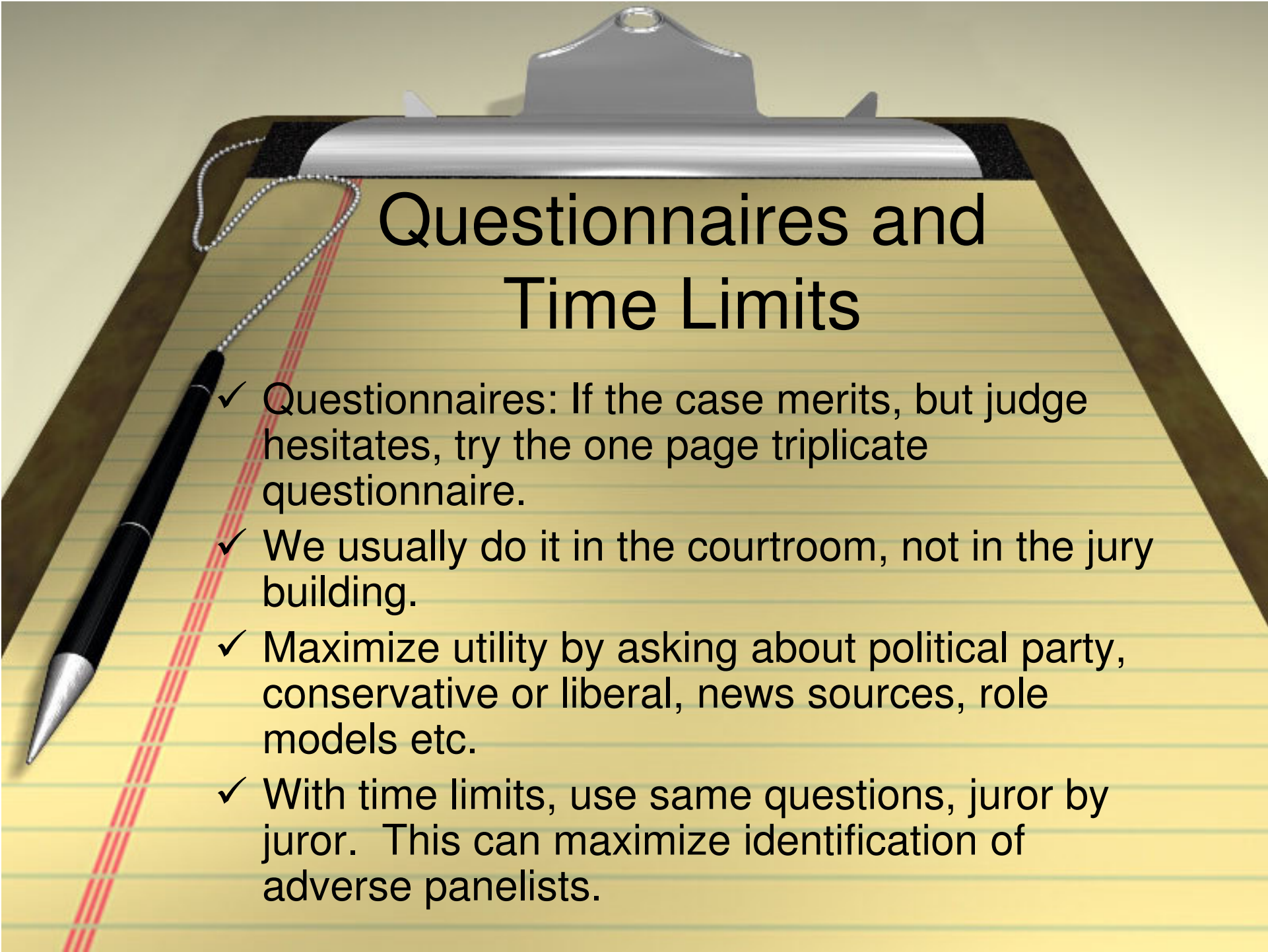
Defending Against the For-Cause Challenge

- ✓ If the court seems inclined to grant a questionable challenge, ask to visit @ the bench.
 - ✓ Play to the juror's sense of fairness.
 - ✓ Can they agree to consider the evidence & consider finding or awarding this or that?
 - ✓ Try the reverse of the jury-deliberation perspective question.
 - ✓ Remind the court of the high for-cause challenge standard.



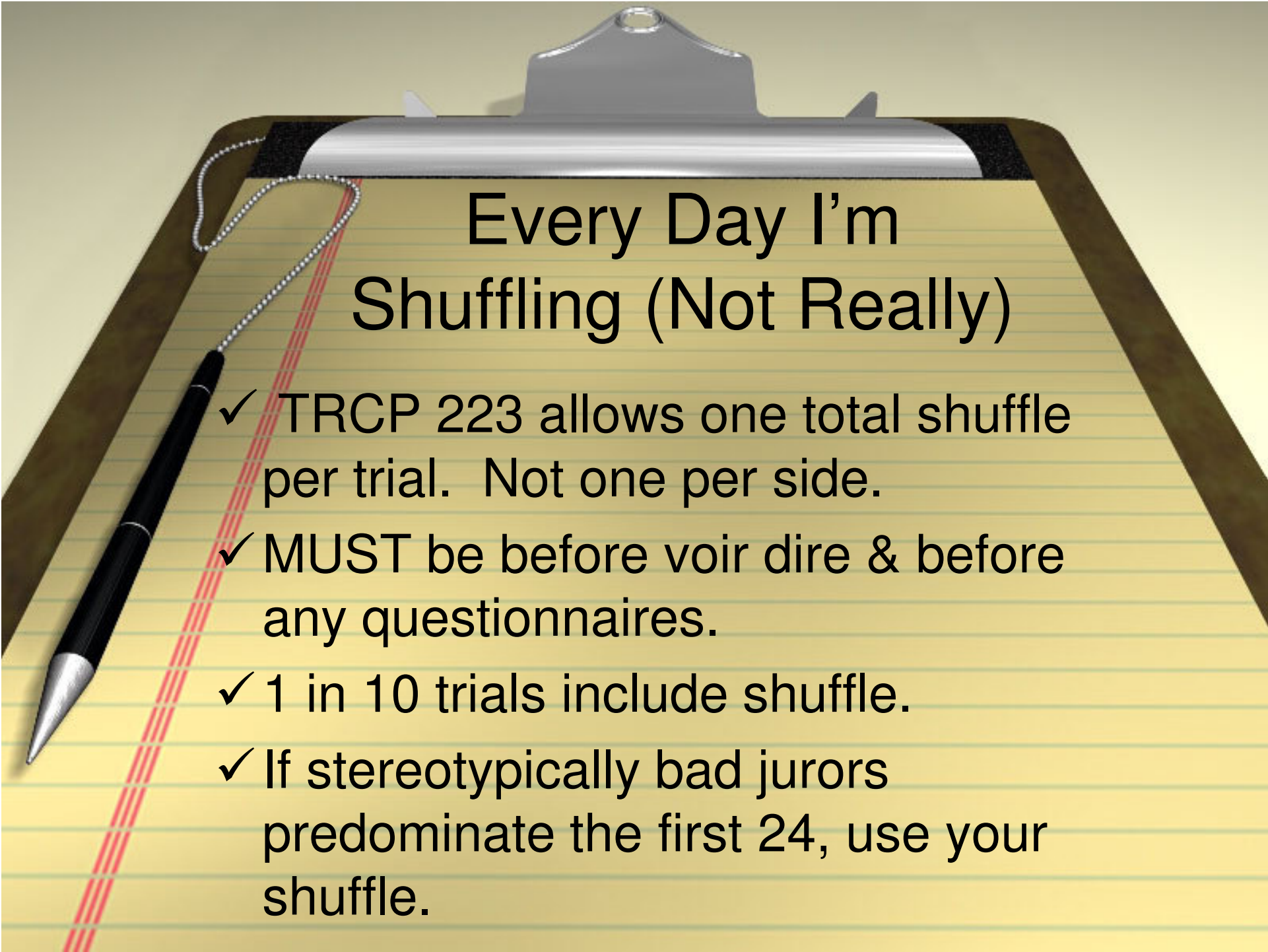
Preserving Error on the For-Cause Challenge

- ✓ Make it before you “exercise” your peremptory strikes.
- ✓ If for-cause challenge denied, show that that caused you to use peremptory.
- ✓ Show that objectionable juror remains on jury.
- ✓ Ask to reconsider.
- ✓ Ask for more peremptory strikes.
- ✓ Make a record.
- ✓ Then turn in peremptory strike list (on the record).
- ✓ Use the O’Connor’s script. 2010 Ed., p. 607.



Questionnaires and Time Limits

- ✓ Questionnaires: If the case merits, but judge hesitates, try the one page triplicate questionnaire.
- ✓ We usually do it in the courtroom, not in the jury building.
- ✓ Maximize utility by asking about political party, conservative or liberal, news sources, role models etc.
- ✓ With time limits, use same questions, juror by juror. This can maximize identification of adverse panelists.



Every Day I'm Shuffling (Not Really)

- ✓ TRCP 223 allows one total shuffle per trial. Not one per side.
- ✓ MUST be before voir dire & before any questionnaires.
- ✓ 1 in 10 trials include shuffle.
- ✓ If stereotypically bad jurors predominate the first 24, use your shuffle.



Summary

- ✓ Don't run from bad jurors, run towards them.
- ✓ Identify and exploit biases.
- ✓ Make a record.
- ✓ Learn to preserve error.
- ✓ Use questionnaires.
- ✓ Use your shuffle.