In his opening statement during his nomination hearings before the Senate Judiciary Committee, Chief Justice John Roberts said that his job is akin to that of an umpire and his role in the courtroom is “to call balls and strikes and not to pitch or bat.” In evidence disputes, umpires and, sometimes, replay officials are necessary. A clear playbook is essential because it allows the litigants the opportunity to become familiar with the rules. For Texas lawyers, that playbook is the Texas Rules of Evidence.

Evidence is instinctual. The study of evidence is akin to the study of a foreign language. All evidentiary analysis involves the relationship between the factum probans and the factum probandum. Evidence may be classified as direct or circumstantial. Evidence is further labeled as primary or secondary; positive or negative; conclusive, corroborative, cumulative, or prima facie; documentary, object, or testimonial; and admissible, credible, or relevant.

Sometimes we receive unexpected glimpses into the lives of Texas Supreme Court justices as a result of a newly discovered object. I recently had the privilege of viewing Peter Gray’s book identifying the laws passed by the First Legislature of Texas. Sam Houston appointed Gray to serve as Harris County District Attorney in 1841. Gray later represented Harris County in the First Legislature and, at twenty-seven years old, he wrote the Texas Practice Act, the first rules of civil procedure in Texas. These procedural rules, promulgated in 1846, contained an evidence

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3 The factum probans is the evidentiary fact by which the factum probandum or fact to be proved is to be established. Compare Factum probans, Black’s Law Dictionary (10th ed. 2014), with Factum probandum, Black’s Law Dictionary (10th ed. 2014).
5 Ibid.
7 Ibid. See Baker Botts, http://www.bakerbotts.com/aboutus/history/175th-anniversary. Gray formed a partnership with Walter Browne Botts. In 1872, Judge James A. Baker joined the firm, which changed its name to Gray, Botts & Baker. Gray was appointed to the Texas Supreme Court in 1874 and died that same year.
section that presented procedures for written depositions.\textsuperscript{8}

Gray's evidentiary rules were quite different from our current Texas Rules of Evidence. His rules were strictly procedural rather than reasoned principles and rules of admissibility. Absent were interrogatories to parties and provisions to compel the production of documentary evidence before trial. Essentially, the only type of discovery in Texas practice for one hundred years was deposition discovery designed to perpetuate admissible testimony.

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Upon Wigmore's retirement from Northwestern University in 1931, he asked that Charles McCormick, a Texan, be chosen as his successor to carry on his work on the study of evidence. McCormick, at that time a law professor at the University of North Carolina, accepted the position and taught at Northwestern for nine years before returning to his alma mater, the University of Texas, in 1940 to serve as Dean of the UT School of Law. Three years earlier, in 1937, McCormick had authored the acclaimed *Texas Law of Evidence* with Roy Robert Ray.

McCormick's *Handbook of the Law of Evidence*, first published in 1954, is viewed as his “greatest masterpiece.” In his preface, McCormick said that “evidence and the decisions on evidence questions are as the sands of the sea.” McCormick’s study of evidence made the application of theoretical and complicated rules accessible and practical.

Before the start of the Second World War, former U.S. Attorney General William D. Mitchell suggested that an “advisory committee should confront the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court.” Legal scholars discussed the idea over the next thirty-seven years.

The Rules Enabling Act, passed in 1934, authorized the U.S. Supreme Court to promulgate rules of procedure for federal courts. The act assigned the responsibility of proposing rules of

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11 UT Faculty Council, “In Memoriam.”
federal practice and procedure to the Supreme Court.\textsuperscript{14}

The Committee on Rules of Practice and Procedure was established in 1958. In 1961, the Supreme Court appointed an Advisory Committee on Rules of Evidence tasked with the development of evidence rules.\textsuperscript{15} The Advisory Committee consisted of trial lawyers, legal professors, and federal judges, including Joe E. Estes, Chief Judge for the Northern District of Texas. University of Texas School of Law Professor Charles Alan Wright assisted the Advisory Committee.

On January 30, 1969, the Advisory Committee on Rules of Evidence sent the first preliminary draft of the Federal Rules of Evidence to the Chairman of the Standing Committee on Rules of

\begin{footnotesize}
\textsuperscript{14} Rules Enabling Act, supra note 4, 48 Stat. 1064, 1064.

\textsuperscript{15} The Advisory Committee members were Professors Thomas F. Green, Jr. (University of Georgia), Edward W. Cleary (Arizona State University), and Dean Charles W. Joiner (Wayne State University); Judges Simon E. Sobeloff (Maryland), Joe E. Estes (Texas), Robert Van Pelt (Nebraska), and Jack B. Weinstein (New York); attorneys Albert E. Jenner, Jr. (Chicago), David Berger (Philadelphia), Hicks Epton (Wewoka, Oklahoma), Egbert Haywood (Durham, North Carolina), Frank Raichle (Buffalo), Herman Selvin (Los Angeles), Craig Spangenberg (Cleveland), Edward Bennett Williams (Washington, D.C.); and Robert S. Erdahl of the Department of Justice. The Committee was assisted by Professors James W. Moore (Yale University) and Charles Alan Wright (University of Texas), and The Hon. Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference. Professor Cleary was the Committee’s Reporter, and Mr. Jenner was its Chairman.
\end{footnotesize}
Practice and Procedure. In a letter attached to the preliminary draft, the Advisory Committee acknowledged the guidance provided by the American Law Institute Model Code of Evidence, Uniform Rules of Evidence, California Evidence Code, and New Jersey Rules of Evidence. Those rules ensured that the Advisory Committee didn’t have to start from scratch.

After the initial draft, the legal community commented on the rules, and various changes were made. Those rules were sent to the Judicial Conference, which then sent them to the Supreme Court. Further changes were made to that draft, including many suggestions from the Justice Department.

In late 1972, the Supreme Court approved and sent to Congress the Federal Rules of Evidence for United States Courts and Magistrates, as proposed by the Advisory Committee. The Senate Select Committee on Watergate delayed enactment of the rules. Following comprehensive hearings, the rules were signed into law on January 2, 1975.16

In 1981, Senate Resolution 565 of the 67th Texas Legislature established an interim committee to “work with the Supreme Court of Texas, the Texas Judicial Council, and the Committee on Administration of Justice of the State Bar of Texas to study codification of the Texas rules of evidence.”17 Lieutenant Governor Bill Hobby appointed Senators (and attorneys) Kent Caperton, Oscar Holcombe Mauzy, and Bob Glasgow to the committee.18 Chief Justice Joe Greenhill designated Justice Jim Wallace as the Supreme Court's member.19 Twenty members of the State Bar were appointed by immediate-past president Franklin Jones, Jr.20 Three members of the Texas Judicial Council were also appointed to the committee.21 Fifteen practitioners of criminal law were appointed by State Bar President Wayne Fisher.22 The Model Code of Evidence for civil trials was promulgated by the Texas Supreme Court on November 23, 1982.23

On January 17, 1983, Chief Justice Jack Pope delivered an address to the 68th Legislature.24 In a section of his speech titled “Preparing for the End of the Century,” Chief Justice Pope outlined work necessary for the creation of Texas rules of evidence.25 Chief Justice Pope recommended similar rules for criminal cases, citing Court of Criminal Appeals Presiding Judge John F. Onion’s reasoning that evidence rules would “avoid many reversals and retrials.”26

18 Ibid. Mauzy served in the Texas Senate for twenty years and, in 1986, was elected to the first of two terms on the Texas Supreme Court.
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 “State of the Judiciary Message.” Beginning with the 66th Legislature in 1979, the Chief Justice of the Texas Supreme Court began making State of the Judiciary speeches.
25 Ibid.
Effective September 1, 1983, the Texas Supreme Court promulgated the Rules of Civil Evidence, repealing numerous statutory provisions and superseding some rules of civil procedure. The original Texas rules were drafted to apply in both civil and criminal proceedings, but the final version only applied to civil matters.

Beginning in 1984, Texas courts made a series of amendments to the rules. On June 25, 1984, the Texas Supreme Court issued amendments effective November 1, 1984. Then, on November 10, 1986, further amendments were made, effective January 1, 1988. These changes included altering the title to the Texas Rules of Civil Evidence in order to distinguish the civil rules from the newly enacted criminal rules.

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27 In the Supreme Court of Texas, Order, 46 Tex. B.J. 196, 197–217 (1983); see also New Rules of Evidence, Order, 641 S.W.2d XXXV, LXVIII (Tex. 1982) (Court listed 39 statutes as repealed). The Rules of Evidence were developed after consultation and collaboration with Senator Kent Caperton, then chairman of the Senate Interim Committee on Rules of Evidence, and Erwin McGee, the Interior Study Committee’s general counsel. Ibid.
In 1985, the Texas Legislature provided the Texas Court of Criminal Appeals with rulemaking authority related to evidence. On December 18, 1985, the Court of Criminal Appeals promulgated the Texas Rules of Criminal Evidence, effective September 1, 1986. The rules were again amended on June 26, 1990, effective September 1, 1990. In 2014, Rule 902(10) was amended.28

In 1997, the Texas Supreme Court and the Court of Criminal Appeals ordered the adoption of uniform rules to become effective on March 1, 1998.29 Although the rules are now unified, application of the rules is sometimes distinctive. For example, Rule 509 relates to the physician-patient privilege, which is unavailable in criminal cases.

In the early 1990s, Judge Robert Keeton, chair of the Standing Committee on Rules of Practice and Procedure, and Professor Wright proposed a redesign of the Federal Rules of Evidence. The purpose of the redesign was to “adopt clear and consistent style conventions.”30

On March 10, 2015, the Texas Supreme Court approved the redesign of the Texas Rules of Evidence.31 This redesign attempted to remedy the fragmented amendments of the ‘80s and ‘90s. The updated rules, effective April 1, 2015, are easier on the eyes, thanks to the influence of Texas lawyer and lexicographer Bryan Garner and his exceptional style conventions.32 The Court made it clear that the amendments were “intended to be stylistic only.”33 Substantive amendments were limited to Rules 511 and 613.34

On February 16, 2016, the Texas Supreme Court and the Court of Criminal Appeals issued a joint order adopting amendments to Rule 615 concerning the production of witness statements in criminal cases.35

Although Texas was not a leader in the development of the rules of evidence, Texans like Charles McCormick, Charles Alan Wright, Robert Keeton, and Bryan Garner have influenced the federal rules and inspired Texas rules that provide increased transparency to litigants. Evidence questions may remain “sands of the sea” making umpires necessary while evidence disputes remain, but the rules of evidence offer a playbook and guidance for the players and umpires.

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28 The Court invited public comments in Misc. Docket No. 14-9080 and the amendments were finally approved in Misc. Docket No. 14-9174.

29 In the Supreme Court of Texas and the Court of Criminal Appeals, Final Approval of Revisions to the Texas Rules of Evidence, 61 TEX. B.J. 373, 374 (1998).


34 Ibid.

35 Misc. Docket No. 16-9012 finally approved this amendment, which is necessary following enactment of the Michael Morton Act.
IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97-92814

APPROVAL OF REVISIONS TO THE
TEXAS RULES OF CIVIL EVIDENCE

ORDERED that:

1. The Texas Rules of Civil Evidence are amended as follows;

2. These amendments, with any changes made after public comments are received, take effect March 1, 1998;

3. The notes and comments appended to these changes are incomplete, are included only for the convenience of the bench and bar, and are not a part of the rules; and

4. The Clerk is directed to file a copy of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the Texas Bar Journal.

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RACHEL PALMER HOOPER, a former prosecutor and trial attorney in the Harris County District Attorney’s Office, is an associate in Baker Hostetler’s Houston office with a focus on civil and complex commercial litigation.