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Justin Sweet

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# CONTRACT MAKING AND PAROL EVIDENCE: DIAGNOSIS AND TREATMENT OF A SICK RULE

*Justin Sweet†*

The parol evidence rule determines the provability of a prior or contemporaneous oral agreement when the parties have assented to a written agreement. Courts expect this apparently simple rule to accomplish many objectives. Doubting the trustworthiness of evidence concerning prior oral agreements, and fearful that fact-finders will not appreciate the need for stability and certainty in commercial dealings,<sup>1</sup> some courts expect the rule to improve the quality of judicial resolution of disputes.<sup>2</sup> This is done by precluding finders of fact, especially juries, from considering evidence of such "agreements." Other courts see the rule as insisting that agreements be expressed in proper form.<sup>3</sup> Finally, some see the rule as a method of protecting an intention to integrate a transaction into one final and complete repository.<sup>4</sup>

This "simple" rule is in fact a maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process. Whether the rule has played a significant role in inducing contracting parties to put their entire agreement into one final writing is, at best, doubtful.

The only proper function of the parol evidence rule is to protect truly integrated writings. To achieve this result, both bench and bar must be convinced that the present Rule can no longer be tolerated.

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† Professor of Law, University of California, Berkeley; B.A. 1951, LL.B. 1953, University of Wisconsin. The author expresses his appreciation for the many helpful comments regarding this paper made by his colleagues, Professors David W. Louisell, Ronan E. Degnan, Melvin A. Eisenberg and Herbert Bernstein, and by Professor Stewart Macaulay of the University of Wisconsin Law School. Miss Patricia Muszynski, a second-year law student at Berkeley, provided invaluable research assistance.

<sup>1</sup> Cf. *G.L. Webster Co. v. Trinidad Bean & Elev. Co.*, 92 F.2d 177 (4th Cir. 1937); *Jones v. Guilford Mortgage Co.*, 120 S.W.2d 1081 (Tex. Civ. App. 1938); *Texas Midland R.R. v. Hurst*, 262 S.W. 172 (Tex. Civ. App. 1924); *Godbey & Sons Constr. Co. v. Deane*, 39 Cal. 2d 429, 435, 256 P.2d 946, 950 (1952) (Schauer, J., dissenting).

<sup>2</sup> E.g., *Masterson v. Sine*, — Cal. 2d —, 436 P.2d 561, 65 Cal. Rptr. 545 (1968). See also UNIFORM COMMERCIAL CODE § 2-202, Comment 3 [hereinafter cited as UCC].

<sup>3</sup> *Jones v. Guilford Mortgage Co.*, 120 S.W.2d 1081 (Tex. Civ. App. 1938); *Texas Midland R.R. v. Hurst*, 262 S.W. 172 (Tex. Civ. App. 1924).

<sup>4</sup> E.g., *United States v. Clementon Sewerage Auth.*, 365 F.2d 609 (3d Cir. 1966); *Dunlop Tire & Rubber Corp. v. Thompson*, 273 F.2d 396 (8th Cir. 1959); *Baylor Univ. v. Carlander*, 316 S.W.2d 277 (Tex. Civ. App. 1958).

Further, a set of guidelines must be provided that can assist the courts in determining whether a particular writing is truly integrated. Emphasis must be upon the contract-making and not the judicial process.

## I

THE PAROL EVIDENCE RULE IN THE COURTS: SOME  
HIGHLIGHTS AND IMPRESSIONS

Though the complexity of the parol evidence rule makes thorough discussion impossible, even a brief look reveals the inconsistent character of the rule.

A. *Varying Tests for Determining Intention to Integrate*

Those cases stressing integration as the basis for the parol evidence rule use different tests to determine whether the parties intended to integrate their entire transaction into one final writing. Some decisions permit the trial judge to examine only the writing in determining whether it is integrated.<sup>5</sup> These courts look for apparent "completeness" in deciding whether they will admit any evidence of prior agreements. Other courts<sup>6</sup> and the Uniform Commercial Code<sup>7</sup> permit the judge to look beyond the writing to determine whether there was an intention to integrate.

Written contracts often contain provisions stating that the written agreement is a final integration or that the writing is the whole or entire contract between the parties. Such clauses usually control the question of intention to integrate, unless the writing itself is successfully attacked for fraud, duress, mistake or any other reason showing that no valid agreement had been formed.<sup>8</sup> Since these clauses are often part of a standardized, printed form contract with adhesion overtones, some decisions have refused to give them literal effect or have interpreted them narrowly.<sup>9</sup>

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<sup>5</sup> *E.g.*, *Seitz v. Brewers' Refrig. Co.*, 141 U.S. 510, 517 (1891); *Anchor Cas. Co. v. Bird Is. Produce, Inc.*, 249 Minn. 137, 82 N.W.2d 48 (1957).

<sup>6</sup> *United States v. Clementon Sewerage Auth.*, 265 F.2d 609, 613-14 (3d Cir. 1966); *Atlantic N. Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 96 A.2d 652 (1953).

<sup>7</sup> UCC § 2-202, Comment 3.

<sup>8</sup> *E.g.*, *Rafferty v. Butler*, 133 Md. 430, 105 A. 530 (1919); *Armour Fertilizer Works v. Hyman*, 120 S.C. 375, 113 S.E. 330 (1922); *see* 3 A. CORBIN, *CONTRACTS* § 578 (1960) [hereinafter cited as CORBIN].

<sup>9</sup> *E.g.*, *Luther Williams, Jr., Inc. v. Johnson*, 229 A.2d 163 (D.C. Ct. App. 1967); *International Milling Co. v. Hachmeister, Inc.*, 380 Pa. 407, 110 A.2d 186 (1955).

### B. *Extent of Integration: Partial Integration and Consistent Collateral Agreements*

It is often possible to augment a writing despite the parol evidence rule and despite what appears to be a complete writing. Sometimes it can be contended successfully that only a part of the transaction has been integrated.<sup>10</sup>

Employing a rationale similar to that of the concept of partial integration, some courts permit a party to show evidence of a consistent prior or contemporaneous collateral agreement.<sup>11</sup> If such evidence is admitted and believed, the party, in effect, has been permitted to "add to" but not to "vary or contradict" the writing.

Application of the "consistency" test requires a difficult excursion into interpretation. Determining the *extent* of integration or what is "collateral" is equally difficult. In order for an agreement to be collateral, the Restatement requires a different subject matter and a separate consideration, or a prior agreement which might naturally have been made as a separate agreement.<sup>12</sup> Williston asks whether it would have been normal and natural for the parties to have made both oral and written agreements,<sup>13</sup> McCormick varies this slightly by suggesting that we look at whether it would be natural and normal for the parties to have included the asserted oral agreement in the writing had it been made and intended to stand.<sup>14</sup> The Uniform Commercial Code, in a comment, states the test to be whether "if agreed upon, [the parties] would certainly have . . . included [the alleged agreement] in the document."<sup>15</sup> Wigmore says that admissibility depends upon whether the particular subject was "dealt with" in the writing.<sup>16</sup> The varying tests and the difficulty of their application have resulted in uneven application of the consistent collateral and partial integration rules.<sup>17</sup>

Admissibility of evidence also may depend upon whether the prior "deal" was a warranty, a representation or a promise. Some courts seem

<sup>10</sup> *E.g.*, *United States v. Clementon Sewerage Auth.*, 365 F.2d 609 (3d Cir. 1966); *Henika v. Lange*, 55 Cal. App. 336, 203 P. 798 (1921); *see* 3 CORBIN § 581.

<sup>11</sup> *E.g.*, *Greathouse v. Daleno*, 57 Cal. App. 187, 206 P. 1019 (1922); *see* 3 CORBIN § 583.

<sup>12</sup> RESTATEMENT OF CONTRACTS § 240 (1932).

<sup>13</sup> 4 S. WILLISTON, CONTRACTS § 638 (3d ed. W. Jaeger 1961) [hereinafter cited as WILLISTON].

<sup>14</sup> C. McCORMICK, EVIDENCE § 216, at 441 (1954) [hereinafter cited as McCORMICK].

<sup>15</sup> UCC § 2-202, Comment 3.

<sup>16</sup> 9 J. WIGMORE, EVIDENCE § 2430, at 99 (3d ed. 1940) [hereinafter cited as WIGMORE].

<sup>17</sup> *E.g.*, *Dillon v. Sumner*, 153 Cal. App. 2d 639, 315 P.2d 84 (1957); *Greathouse v. Daleno*, 57 Cal. App. 187, 206 P. 1019 (1922).

more inclined to permit evidence of representations than promises.<sup>18</sup> The theory seems to be that parties do not normally integrate representations, but they do integrate promises. Put another way, we can expect parties to put promises in writing but even a prudent contracting party may not include representations. Warranties, much like promises in importance, seem harder to get into evidence, especially if there is an express warranty in the writing.<sup>19</sup>

With typical parol evidence rule inconsistency, some courts hold that implications of law are integrated and cannot be varied by parol evidence.<sup>20</sup> But even those courts which hold that implications of law cannot be "contradicted" sometimes admit evidence of a prior oral agreement to determine "reasonableness."<sup>21</sup>

### C. Parol Evidence Can Show No Valid Contract Made

The parol evidence rule is predicated upon the assumption that the parties have entered into a valid agreement; a party is always permitted to show that no valid agreement was made.<sup>22</sup> Validity is attacked by allegations that consent was obtained through fraud, mistake, or duress, or that the writing was a sham and was never intended to constitute an enforceable agreement.<sup>23</sup> Also, the parties are permitted to show that there was no consideration for the contract.<sup>24</sup> The defect-in-information cases have developed a complex set of subrules and exceptions that equals the parol evidence rule itself in unevenness of application and confusion.<sup>25</sup>

### D. Oral Agreements Relating to Delivery and Conditions

Two well-known routes for avoiding the parol evidence rule are related to the defect-in-information concept. They are *conditional delivery* and *oral conditions*. Conditional delivery usually relates to the manual

<sup>18</sup> *Richard v. Baker*, 141 Cal. App. 2d 857, 297 P.2d 674 (1956); *Shyvers v. Mitchell*, 133 Cal. App. 2d 569, 284 P.2d 826 (1955).

<sup>19</sup> *Thompson v. Libby*, 34 Minn. 374, 26 N.W. 1 (1885); 4 WILLISTON § 643.

<sup>20</sup> See 4 WILLISTON § 640.

<sup>21</sup> *Id.* But see *California Drilling & Mach. Co. v. Crowder*, 58 Cal. App. 529, 209 P. 68 (1922).

<sup>22</sup> 3 CORBIN § 577.

<sup>23</sup> *Id.* at § 580; see *Thompson v. Price*, — Cal. App. 2d —, 59 Cal. Rptr. 174 (1967), where parol evidence was admitted to show the defendant's elaborate scheme of fraud, rather than to invalidate the contract as written.

<sup>24</sup> E.g. *Penn Mut. Life Ins. Co. v. Utne*, 207 F. Supp. 521 (D. Minn. 1962); *Sweeney v. KANS, Inc.*, 247 Cal. App. 2d 475, 55 Cal. Rptr. 673 (1966); *Strickland v. Hetherington*, 353 P.2d 138 (Okla. 1960).

<sup>25</sup> See Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877 (1961).

transfer of deeds or other formal instruments with an alleged oral condition to the delivery. In many jurisdictions, proof of such conditional delivery may be shown even if the instrument appears to be unconditional on its face.<sup>26</sup>

Sometimes evidence is permitted to prove an oral condition although that condition does not relate to delivery of an instrument. *Pym v. Campbell*<sup>27</sup> held that one party can by oral testimony show that a contract which appears complete is subject to an oral condition of approval by a third party.<sup>28</sup> The court stated that a party can show that no valid contract was ever made. Despite the "no contract" theory, a court usually will not admit evidence if the alleged oral condition is held to be inconsistent with the writing.<sup>29</sup> Also, if some conditions are expressed in the writing, courts sometimes refuse to permit evidence of an additional oral condition.<sup>30</sup>

### E. Doctrines Relating to Consideration

The parol evidence rule does not preclude a showing of absence of consideration. Also, the existence of a separate consideration is one test for determining collateralness of a parol agreement. There are other methods of using consideration to avoid the parol evidence rule. Courts sometimes permit evidence concerning an antecedent or contemporaneous agreement by permitting a party to show the true consideration.<sup>31</sup> Usually these cases involve a fictitious purchase-price recital in a deed made for reasons of secrecy. Also, there may be a fictitious recital that money has changed hands for the purchase of an option in order to make the option irrevocable.<sup>32</sup> Other cases have allowed one party to show that what appears to be a deed is a mortgage.<sup>33</sup>

<sup>26</sup> 3 CORBIN § 587. But in some states a deed absolute on its face cannot be shown to be subject to an oral condition after delivery is made to the grantee. 3 AMERICAN LAW OF PROPERTY § 12.66 (A. Casner ed. 1952).

<sup>27</sup> 6 El. & Bl. 370, 119 Eng. Rep. 903 (Q.B. 1856).

<sup>28</sup> Some courts distinguish between conditions precedent and conditions subsequent. *Dunne Ford Sales, Inc. v. Continental Assur. Co.*, 221 F. Supp. 975 (D.R.I. 1963); *Nutrena Mills, Inc. v. Yoder*, 187 F. Supp. 415 (N.D. Iowa 1960), *aff'd*, 294 F.2d 505 (8th Cir. 1961). In *Aetna Ins. Co. v. Newton*, 274 F. Supp. 566 (D. Del. 1967) an oral condition was shown, but evidence thereon was not admitted because of an integration clause. *Contra*, *Luther Williams, Jr., Inc. v. Johnson*, 229 A.2d 163 (D.C. Ct. App. 1967). See also 3 CORBIN § 589.

<sup>29</sup> *E.g.*, *Stafford v. Russell*, 116 Cal. App. 2d 326, 255 P.2d 814 (1953).

<sup>30</sup> *E.g.*, *United Eng'r & Contract. Co. v. Broadnax*, 136 F. 351 (2d Cir.), *cert. denied*, 197 U.S. 624 (1905); *Travers-Newton Chautauqua Sys. v. Naab*, 196 Iowa 1313, 196 N.W. 36 (1923).

<sup>31</sup> See 3 CORBIN § 586; *Equitable Trust Co. v. Gallagher*, 34 Del. Ch. 249, 102 A.2d 538 (Sup. Ct. 1954); *contra*, *Cassilly v. Cassilly*, 57 Ohio St. 582, 49 N.E. 795 (1897).

<sup>32</sup> *E.g.*, *Raymer v. Hobbs*, 26 Cal. App. 298, 146 P. 906 (1915); *Combs v. Turner*, 304 Ky. 179, 200 S.W.2d 288 (1947).

<sup>33</sup> *E.g.*, *Stambaugh v. Silverheels*, 188 Kan. 124, 360 P.2d 1078 (1961); *cf.* *Wadleigh v.*

In separation agreements, legal issues may depend upon whether money payments are alimony or child support or part of a property settlement. Some courts have permitted a party to pierce a label while others have not.<sup>34</sup> Courts also sometimes confuse failure of consideration with lack of consideration, usually resulting in admission of evidence concerning a prior oral agreement.<sup>35</sup>

#### F. Interpretation

One of the principal ways of avoiding the parol evidence rule is to assert that evidence of the prior oral agreement should be received merely to interpret or explain a writing and that the evidence does not add to, vary, or contradict the written agreement.<sup>36</sup> Usually the party attempting to introduce such extrinsic evidence must first show that the writing is ambiguous and does not have a meaning "plain on its face."<sup>37</sup> If the court wishes to determine what the parties intended when they used certain language, evidence of an oral agreement relating to the crucial area can be very helpful. Although evidence of the parol agreement may be weighed with all other evidence relating to interpretation, if the agreement is admitted, it is likely to control the interpretation question. In this fashion, evidence of a prior agreement, if believed, could determine the obligation of the contracting parties.

"Private code" cases illustrate the narrow line between interpretation and integration. In such cases, one party attempts to show that there was a prior agreement that the terms in a written contract were to have a "private" and not a "usual" meaning. Some courts permit such private

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Phelps, 149 Cal. 627, 87 P. 93 (1906); Campbell v. Ohio Nat'l Life Ins. Co., 161 Neb. 653, 74 N.W.2d 546 (1956).

<sup>34</sup> Egan v. Egan, — Cal. App. 2d —, 59 Cal. Rptr. 705 (1967) (holding labels not conclusive); Yarus v. Yarus, 178 Cal. App. 2d 190, 3 Cal. Rptr. 50 (1960) (holding that parties cannot go behind language to determine whether a discharge in bankruptcy was intended to provide alimony and support).

<sup>35</sup> E.g., *Mihojevich v. Harrod*, 214 Cal. App. 2d 360, 29 Cal. Rptr. 440, cert. denied, 375 U.S. 887 (1963). *Pronzato v. Guerrina*, 400 Pa. 521, 163 A.2d 297 (1960). Lack of consideration means the agreement was not binding. Failure of consideration means one party has not received the bargained-for exchange and can discharge his obligation to proceed further. In the *Mihojevich* case a grantee retransferred title to mining claims to the grantor. The grantee contended that it was agreed orally that in exchange for the retransfer and certain acts, the grantor would pay the grantee one-half of anything recovered in a condemnation action. The evidence was admitted "to prove such failure [of consideration]." 214 Cal. App. 2d at 363, 29 Cal. Rptr. at 442. This was a case of the failure of consideration being in the performance promised by the alleged oral agreement. It had nothing to do with the validity of the contract.

<sup>36</sup> 3 CORBIN § 579; McCORMICK § 217.

<sup>37</sup> McCORMICK § 219.

codes and others do not.<sup>38</sup> When such evidence is admitted, the net result is that the writings are found to have contained only part of the agreement and not the entire agreement. Yet, the problem is usually treated as one of interpretation.

### G. *Reformation*

Equity offers still another method of avoiding the parol evidence rule.<sup>39</sup> The expanding remedy of reformation permits the court to judicially correct the writing if, because of fraud or mistake, the final writing does not reflect the actual agreement of the parties. The fraud or mistake usually occurs in the process of reducing the agreement to writing, but in some cases it relates to the conduct of the parties during negotiations.<sup>40</sup> Reformation goes beyond the negative effect of denying the validity of the contract since it results in enforcement of the alleged oral agreement.

### H. *Not Applicable to Modifications*

The parol evidence rule does not apply to agreements made subsequent to a writing. Only statutory<sup>41</sup> or contractual rules of form<sup>42</sup> relating to modification govern subsequent agreements. If a party can show that a parol agreement was renewed after the writing, he will not run into the parol evidence rule.<sup>43</sup>

### I. *Some Unique Techniques Recently Observed*

New and unique methods of avoiding the parol evidence rule continually appear. One interesting technique is the unilateral contract concept. In a recent case, the purchaser of a car tried to enforce a car dealer's newspaper advertisement. The purchaser signed a written purchase agreement which did not include the terms of the advertisement but did contain an integration clause. The court held that when the buyer purchased the car he completed the act requested by the

38. *E.g.*, *Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.*, 135 Cal. App. 2d 40, 286 P.2d 825 (1955); *Smith v. Wilson*, 3 B. & Ad. 728, 110 Eng. Rep. 266 (K.B. 1832). See 3 CORBIN § 579 at 426.

39. 3 CORBIN § 614; *Palmer, Reformation and the Parol Evidence Rule*, 65 MICH. L. REV. 833 (1967).

40. *E.g.*, *Olson Constr. Co. v. United States*, 75 F. Supp. 1014 (Ct. Cl. 1948); *Hugo v. Erickson*, 110 Neb. 602, 194 N.W. 723 (1923); *Whipple v. Brown Bros.*, 225 N.Y. 237, 121 N.E. 748 (1919); *Superior Distrib. Corp. v. Hargrove*, 312 P.2d 893 (Okla. 1957). See also *Palmer, supra* note 39.

41. *E.g.*, CAL. CIV. CODE § 1698 (West 1954).

42. A statement in the contract that modifications must be in writing will be enforced if signed separately by the other party. UCC § 2:209(2).

43. Most jurisdictions require consideration for modification.

advertisement.<sup>44</sup> The unilateral contract concept avoided having to deal with the integration clause and the parol evidence rule.

In another case, an antecedent oral agreement was admitted through introduction of the deposition of an employee of the opposing party.<sup>45</sup> In the deposition, the witness stated that the parties had agreed upon certain terms orally. It appeared that no objection based upon parol evidence was made, but the deposition was admitted under the admission-against-interest exception to the hearsay rule. By cloaking the testimony in the guise of an admission, the party was able to avoid the parol evidence rule.

### J. Procedural Problems

The first procedural problem involving the parol evidence rule relates to choice of law. If the litigation is in federal court, should the court apply a federal choice of law rule relating to parol evidence, or should it apply the choice of law rule of the state in which the court sits? Once this determination is made, would the appropriate choice of law rule, state or federal, apply the parol evidence rule of the forum or that of the state where the agreement took place? If an action is brought in the state courts, should the forum apply its own parol evidence rule or that of some other state connected with the transaction? For these purposes, most decisions hold that the parol evidence rule relates to *substance* and not to *procedure*.<sup>46</sup> This means a federal court sitting in California will apply the California choice of law rule, which utilizes the law of the state where the transaction occurred.

Some courts hold, however, despite the supposed substantive nature of the rule for choice of law purposes, that failure to object waives any parol evidence issue being raised on appeal.<sup>47</sup> A recent case held that if one party testified to an asserted oral agreement, he could not later object to the other party testifying on the same matter.<sup>48</sup>

Statute of limitations problems can arise in the context of the parol evidence rule. In California there is a four-year period of limitations for obligations founded on a writing,<sup>49</sup> while other contractual

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<sup>44</sup> Johnson v. Capital City Ford Co., 85 So. 2d 75 (La. Ct. App. 1955).

<sup>45</sup> H. K. Porter Co. v. Wire Rope Corp. of America, 367 F.2d 653 (8th Cir. 1966).

<sup>46</sup> E.g., Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co., 242 Ore. 407; 408 P.2d 198 (1965); see H. GOODRICH & E. SCOLES, CONFLICT OF LAWS § 89 (1964); McCORMICK § 213.

<sup>47</sup> E.g., Pao Ch'en Lee v. Gregoriou, 50 Cal. 2d 502, 326 P.2d 135 (1958); see McCORMICK § 213, note 2; but see United States v. Croft-Mullins Elec. Co., 333 F.2d 772, 779 (5th Cir. 1964), cert. denied, 379 U.S. 968 (1965).

<sup>48</sup> Carpenon v. Najarian, — Cal. App. 2d —, —, 62 Cal. Rptr. 687, 697 (1967); see Bandy v. Myers, 227 N.E.2d 183, 187 (Ind. App. 1967).

<sup>49</sup> CAL. CIV. PRO. CODE § 227 (West Supp. 1967).

obligations are subject to a two-year period of limitations.<sup>50</sup> Suppose one party is permitted to offer into evidence testimony of an antecedent oral agreement? The transaction is then partly oral and partly written. If the lawsuit is related to the failure to perform the oral agreement, does the two-year or the four-year period of limitations apply?

Finally, who decides whether the parties have integrated their entire transaction in a writing? Most courts and commentators state that this determination should be made by the trial court judge.<sup>51</sup> On the other hand, Corbin and a few decisions hold that the issue should be treated in the same way as any other issue of fact.<sup>52</sup>

### K. *Hazards of Litigation Prediction*

Although there are many ways of avoiding the parol evidence rule, the rule is by no means dead. The techniques mentioned are not available for avoiding the parol evidence rule with equal ease in every jurisdiction.<sup>53</sup> Many cases deny admissibility of the agreement and phrase the rule in vigorous, absolute terms. However, precedents may be ignored or distinguished on insubstantial grounds, leading to parallel lines of authority. The different policies behind the rule have varying degrees of persuasiveness in different fact situations. The ceaseless flow of parol evidence opinions and the refusal of courts to give the real reasons for their decisions contribute to litigation prediction difficulties.

## II

### EFFECT OF THE RULE ON COUNSELING, LITIGATION AND CONTRACT MAKING

#### A. *Counseling Clients*

Clients frequently ask their attorneys:

1. Can I enforce a prior oral promise made by the other party if I

<sup>50</sup> *Id.* § 339.

<sup>51</sup> *E.g.*, *Charles A. Wright, Inc. v. F. D. Rich Co.*, 354 F.2d 710, 714-15 (1st Cir. 1966); *Gibson v. United States*, 268 F.2d 586, 588-89 (D.C. Cir. 1959); *Yarus v. Yarush*, 178 Cal. App. 2d 190, 197, 3 Cal. Rptr. 50, 55 (1960). *See* McCORMICK § 219; 9 WIGMORE § 2430, at 98; 4 WILLISTON § 638, 639.

<sup>52</sup> *Brazil v. Dupree*, 197 Ore. 581, 598, 254 P.2d 1041, 1045 (1953); *Cobb v. Wallace*, 45 Tenn. 539, 544 (1868); 3 CORBIN § 595.

<sup>53</sup> *See* Chadbourn & McCormick, *The Parol Evidence Rule in North Carolina*, 9 N.C.L. REV. 151, 154 (1931); Degnan, *Parol Evidence—The Utah Version*, 5 UTAH L. REV. 158, 179 (1956); McDonough, *Parol Evidence Rule in South Dakota and the Effect of Section 2-202 of the Uniform Commercial Code*, 10 S.D.L. REV. 60, 61 (1965); Note, *Parol Evidence Rule; The Advent of the Uniform Commercial Code in Iowa*, 52 IOWA L. REV. 512 (1966); Note, *The Parol Evidence Rule in Missouri*, 27 MO. L. REV. 269 (1962); Note, *A Critique of the Parol Evidence Rule in Pennsylvania*, 100 U. PA. L. REV. 703 (1952).

didn't include it in the writing? What would be my chances in court? Would you advise a settlement?

2. Will the law enforce an oral promise which the other party claims I made when no such promise is in the written contract? What are my chances of winning if I am sued? Do you suggest settlement?
3. How can I protect myself from false claims of prior oral "agreements" when a written contract is made?
4. Can a printed paragraph in a contract stating that "this is the only agreement between the parties" shield a person when he has made a prior oral agreement that I have relied on?

Can a lawyer, by digging into the facts and reading some law come with reliable answers? The answer is clearly "no". The deceptive simplicity of the rule hides a bewildering network of subrules and exceptions. Naive attorneys read a few strong judicial pronouncements about the salutary nature of the rule and believe that parol evidence is not admissible to "add to, vary, or contradict a written agreement." They are unaware of cases critical of the rule and of ways of "handling" the rule. Many lawyers are slightly more sophisticated about the rule, having read many cases but not quite enough. They have seen the rule avoided so many times that they believe it is dead. Conscientious attorneys are often simply bewildered by the mass of conflicting decisions and variant statements of the rule. They may realize that they must develop the facts, but they do not know what are the critical facts since judicial opinions rarely state them. Many confuse the rule with the Statute of Frauds and the best evidence rule.

Intelligent attorneys should conclude that the proponent of the oral agreement will be permitted to prove it if the trial judge thinks it likely that the agreement was made and if there are no cogent reasons why it should not be enforced. If there is a well-drafted integration clause,<sup>54</sup> counsel should conclude that the oral agreement will not be provable unless:

- (1) There is some formation defect which makes the entire writing unenforceable; or
- (2) The writing has strong elements of adhesion or mistake and it appears the agreement was made and should be enforced.

Such conclusions are equivocal and often unsatisfactory to the client. But the conclusions are generally accurate. Unfortunately, many attorneys will be dogmatic and frequently wrong.

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<sup>54</sup> See 3 CORBIN § 578; Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 TEXAS L. REV. 361, 362-63 (1949).

## B. *Litigation*

In addition to litigation prediction difficulties, there are other problems that the parol evidence rule has brought to the litigation process. A number of tactical problems are caused by the rule. In order to avoid a waiver, attorneys will object to any testimony concerning an asserted antecedent or contemporaneous agreement when the parties have assented to a writing. Such an objection often takes the form of stating that even *if* the agreement were made, it cannot be proved. If the objecting attorney loses on the question of admissibility, he often tries to prove that the agreement never took place. A jury may have difficulty making the transition from *assuming* the agreement made for purposes of admissibility to *deciding* that no agreement was ever made.

Also, the instinctive reaction of lawyers to object to such testimony often diffuses tactical energies which should be directed elsewhere. If the attorney has a very flimsy parol evidence argument he might better concentrate his efforts on persuading the jury that there never was an agreement, that it was not intended to be binding, that it was discharged by assent to the writing, or that the law should not enforce it even if it were made. If he is convinced the court will find *some* enforceable agreement, he should concentrate on interpretation. Too often his argument is based solely on admissibility, and he is not adequately prepared to handle these other issues.

The quality of judicial decision making suffers from poor handling of parol evidence issues. Attorneys with good facts for permitting proof of the prior oral agreement often do an inadequate job of presenting their case, while attorneys with good facts for denying proof of the agreement are often unable to present their contentions skillfully.

Although the outcome of a case is often correct because courts, as a rule, have a good sense of fairness, there are cases that simply come out wrong. There are non-result-oriented judges who mechanically follow cases phrasing the Rule in its traditional form. Other judges, believing the Rule expresses a sound judicial policy, may refuse to admit the testimony of the oral agreement even if they believe the agreement took place and was intended to stand.<sup>55</sup>

Thus, the judicial process will not look very good to the litigants or the attorneys in parol evidence cases. The by-product of almost every parol evidence dispute is a client who is angry either because he has not been given his day in court or because the opposing party has been permitted to prove an oral agreement that the client claims was not made and which his attorney assured him could not be proven.

<sup>55</sup> See, e.g., *McGamy v. General Elec. Supply Corp.*, 185 F.2d 944 (5th Cir. 1950); *Mitterhausen v. South Wis. Conf. Ass'n*, 245 Wis. 353, 14 N.W.2d 19 (1944).

The administration of justice also suffers because of the parol evidence rule. Almost every parol evidence case involves lengthy and often fruitless bickering on the part of the attorneys. Much time is spent trying to unravel the intricacies of the rule. In addition, because the rule is phrased in admissibility terms, there is a substantial chance of a reversal of trial court decisions because the rule is often as misunderstood by appellate courts as by trial courts.

### C. *Contract Making*

Some of the parol evidence rule's adverse effect on counseling and litigation might be excusable if the rule caused contracting parties to put their entire agreement in the writing. But the rule has not had this effect. The volume of parol evidence cases in the appellate reports indicates that there are many part oral, part written agreements.<sup>56</sup> A recent unpublished study of architectural contracting practices shows that such agreements are quite common in transactions between architects and their clients.<sup>57</sup> Further studies would probably show a similar contract-making pattern in other types of transactions.

When parties do place their entire agreement in one final writing, they are more concerned with efficient contract administration and objective proof of the "deal" if a dispute arises than they are with the parol evidence rule.<sup>58</sup> The rule has adversely affected counseling and litigation without any evidence that it has induced parties to put their entire agreements in writing.

## III

### DIAGNOSIS: TOO MANY CONTROVERSIAL POLICIES FOR ONE "SIMPLE" RULE

The parol evidence rule is expected to achieve a number of debatable objectives that today are questionable.

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<sup>56</sup> In volumes 41-64 of the California Reporter, covering a period of slightly over three years, there were 33 cases involving integration aspects of the parol evidence rule.

<sup>57</sup> In a study by the author, 600 questionnaires were mailed to Northern California members of the American Institute of Architects, of whom 287 responded. Project costs are almost always discussed. Usually, there is a projected cost figure, varying in firmness. In 45% of the agreements the agreed figure was oral. Whether the figure is firm or soft, architects generally do not delete a cost disclaimer clause usually found in form contracts.

<sup>58</sup> A more strict and consistent exclusion of prior oral agreements *might* have channeled contract making into complete writings. But even this is doubtful.

A. *Failure of the Integration Concept as the Sole Rationale*

To Wigmore, the *only* proper function of the parol evidence rule is to give legal effect to an intention to make the writing the final and complete repository of the transaction.<sup>59</sup> But the traditional way of phrasing the rule shows that the integration concept has not preempted the parol evidence field. The admissibility of extrinsic evidence to interpret a contract is still labeled a parol evidence question.<sup>60</sup> Courts state that admission of prior agreements would *violate* the parol evidence rule,<sup>61</sup> and speak of the law *prohibiting* oral testimony to vary, add to, or contradict a written document.<sup>62</sup> This language, expressing the concept that such testimony is untrustworthy and must not be considered by the finders of fact, is inapposite to a rule dealing with integrating antecedent understands into one final repository.

There are other illustrations of reluctance to accept Wigmore's concept. Courts using the "face of the document" test manifest a distrust of evidence outside the writing. It is a strange concept that phrases a test in terms of intention and then proceeds to limit evidence of intention to the writing.<sup>63</sup> This refusal to permit the trial judge to venture beyond the writing shows a distrust of his ability to sift the wheat from the chaff. Why require collateral agreements to be "consistent"? Is the existence of the oral agreement doubtful? Do we distrust the jury? Why must the judge determine whether the prior oral agreement would have been normally and naturally included in the writing?<sup>64</sup> If it was not included in the writing when it is normal and natural to do so, is it because it must not have been made? Why do some courts refuse to permit evidence of an oral warranty when there is an express written warranty even if there is no inconsistency?<sup>65</sup> Why do courts refuse to listen to evidence of an oral condition if there are other written conditions?<sup>66</sup> Again, is it because they doubt the existence of such prior oral agreements or because they distrust jurors?

Even in the defect-in-information exceptions there are signs of dis-

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<sup>59</sup> 9 WIGMORE § 2425.

<sup>60</sup> *E.g.*, *Godfrey v. United States Cas. Co.*, 167 F. Supp. 783, 789 (D. La. 1958); *Lippman v. Sears Roebuck & Co.*, 44 Cal. 2d 136, 28 P.2d 775 (1955).

<sup>61</sup> *E.g.*, *Vealdenos v. Keller*, 254 Cal. App. 2d —, 62 Cal. Rptr. 808 (1967).

<sup>62</sup> *E.g.*, *Carlesimo v. Schwebel*, 87 Cal. App. 2d 482, 197 P.2d 167 (1948); *Steinberger v. Steinberger*, 60 Cal. App. 2d 116, 140 P.2d 31 (1943).

<sup>63</sup> *Calamari & Perillo, Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 340 (1967).

<sup>64</sup> See MCCORMICK § 216, at 441.

<sup>65</sup> See p. 1039 & note 19 *supra*.

<sup>66</sup> See p. 1040 & note 30 *supra*.

trust of the evidence. In some jurisdictions, even when fraud is alleged, it must be shown that the asserted oral agreement would not vary the writing.<sup>67</sup>

A survey of the bench and bar would probably reveal a deep-seated distrust of the ability of the judicial process to ferret out the truth when confronted with contradictory testimony relating to an asserted oral agreement. Lawyers rarely regard the rule as a device to protect an integrated agreement. There are other indications that the integration concept has not carried the day. Cases involving the parol evidence rule are still prominent in evidence casebooks and treatises, and are still classified under the evidence key number.<sup>68</sup> Wigmore spends 247 pages on the rule after he states emphatically that it is not a rule of evidence. Courts still refer to the parol evidence rule rather than some rule dealing with contract making and the process of integration.

Why did Wigmore, and more recently Corbin, fail to persuade bench and bar that integration should be the *sole* basis of the parol evidence rule? First, the term "integration" is foreign to the linguistic habits of most lawyers. Many draftsmen still label their integration clauses as "Entire Contract," "Whole Contract," or "Merger" clauses.

Second, the legal profession was not given a good model of the process of integration. Wigmore had a reasonably clear explanation, but it was buried in the midst of other confusing discussion.<sup>69</sup> Courts and scholars paid little attention to the contract-making process, the relative bargaining power of the contracting parties, and the emergence of standardized forms.

Third, the legal profession is conservative; it will not lightly discard language with which it is both familiar and comfortable. There is a biblical ring to the parol evidence rule when it is phrased in the traditional manner: *Parol evidence is not admissible to vary, add to, or contradict a written contract.* This certainly sounds more legalistic than the vague and the unfamiliar integration concept.

Fourth, lawyers have a strong distrust of the judicial process, especially the jury, as a means of ascertaining the truth. Fifth and finally, the profession has never faced up to the adverse effects of the parol evidence rule upon planning, counseling and litigating. To be sure, many lawyers knew of its complexities and inconsistencies, but they did

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<sup>67</sup> *E.g.*, *Bank of America v. Pendergrass*, 4 Cal. 2d 258, 48 P.2d 659 (1935) (parol evidence admissible to show fraud in inducement of instrument but not to "vary" the promises of the instrument itself).

<sup>68</sup> See generally McCORMICK §§ 210-22; M. LADD, *CASES ON EVIDENCE* 719-56 (1955).

<sup>69</sup> 9 WIGMORE § 2425.

not realize its less obvious deficiencies. Many still think the rule does some good.

### B. *Other Objectives of the Parol Evidence Rule*

Generally, the Statute of Frauds controls the form in which contracts must be cast for affirmative enforcement.<sup>70</sup> Certain transactions require a sufficient memorandum signed by the party to be charged. When some courts phrase the parol evidence rule in the traditional manner, they are refusing enforcement of the parol agreement because the parties have not used the proper form.

The parol evidence rule is designed, in the view of some judges and lawyers, to promote justice in the courts. When one party relies upon a written contract and the other claims upon an asserted oral agreement varying the written contract, perhaps the finders of fact cannot be trusted to resolve the controversy. Oral testimony is viewed as untrustworthy,<sup>71</sup> and juries as either too soft or too gullible to give due weight to the written contract. They may favor the underdog who rarely has the writing on his side. They are too unsophisticated to appreciate the need for commercial certainty and stability which protection of writings should accomplish.

To a lesser degree, this view of the parol evidence rule manifests some distrust for trial judges. Casting the rule as one of admissibility gives an appellate court control over trial judges who might be as soft, gullible or unsophisticated as a jury. Deference to the trial court's determination of credibility is not as strong in parol evidence cases as in others.

The policy of protecting commercial writings is tied in with form and control over the trial process. Fact finders may be trusted in ordinary credibility cases, but not where there is a need to protect writings.

Much of the world's commerce is carried on through the use of writings. Businessmen want to know their rights and duties in order to plan rationally. Contracting organizations try to insure that those who conduct business on their behalf do not make commitments that exceed their authority. Very likely some parol evidence opinions take this into account when denying admissibility to prior oral agreements. Giving the writing special protection can control unauthorized commitments of agents and encourage third parties to make commitments based upon the apparent completeness of a writing.

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<sup>70</sup> I am excluding the use of consideration as form. See generally Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

<sup>71</sup> *Masterson v. Sine*, — Cal. 2d —, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

Secrecy is often the reason a writing does not contain the entire agreement of the parties. There is judicial distaste for such secret agreements because of their propensity to harm third parties or the public.

There are a great many difficult issues that can be avoided by the simple expedient of ruling on the basis of the parol evidence rule. The authority of an agent, the vagueness of oral agreements, and the relevance of oral conditions are typical of the complicated questions that can be avoided by employing the rule. Also, if a trial judge doubts that an asserted agreement ever took place, ruling on the basis of the parol evidence rule avoids commenting on the evidence, instructing on the weight and burden of proof, or granting a new trial. It also avoids branding the witness a liar.

Many parol evidence cases involve difficult credibility questions. An exasperated judge can use the rule to achieve a "plague on both your houses" result. In effect the trial judge can state, "If you don't take the trouble to give some objective evidence and save me from this tough fact question, I just won't rule on it." Here the parol evidence rule gives the judge a means of avoiding an issue which he would rather not decide.

The rule is equally useful for attorneys approached by clients who claim an oral agreement when they have subsequently assented to a writing. If the attorney does not believe his client, or if the case is very shaky, it is easy to advise the client not to sue because he is barred by the parol evidence rule.

This plethora of objectives is at least partially responsible for the Rule's adverse effect on counseling and litigation. Because these objectives are not universally accepted today, and because they are looked upon with varying degrees of approval, they place additional strains on an already difficult rule.

#### IV

##### WHY PRECLUDE PROOF OF PRIOR ORAL AGREEMENTS?

The parol evidence rule relates to claimed agreements. Whether the arbiter of a parol evidence dispute is a court, a commercial arbitrator, a precinct captain, or a respected member of the neighborhood, three basic issues emerge:

- (1) Was the asserted agreement made?
- (2) Is there any reason not to enforce it?
- (3) If it should be enforced, how should it be interpreted?

Concerning the existence of the agreement, the nonjudicial dispute arbiter will consider the credibility of witnesses and any evidence relevant to that issue. He will consider the reasons why the subsequent writing did not contain the prior oral agreement and will determine whether the oral agreement is consistent with the written agreement. He will look at subsequent acts of the parties and will determine whether it is likely that parties situated as these were would have made the oral agreement. But he looks at these things *not* to determine whether he should consider the agreement, but to determine whether the agreement took place. If the written agreement states the price to be \$1,000, it is not likely he will believe an asserted oral agreement that the price was to be \$10,000 for the same goods or performance. Only if he is convinced by persuasive evidence or a good reason why the parties wrote the price as \$1,000 when they really agreed to \$10,000, would he believe that the asserted oral agreement was made.

If he believes there was an agreement, there may be adequate reasons not to enforce it. The parties may have intended to change or cancel their earlier agreement by assent to a subsequent writing. The person making the agreement may not have had the authority to make it. The dispute arbiter might not enforce the agreement because it is illegal or contrary to his sense of propriety. If made and enforceable, the arbiter will have to interpret the prior agreement and fit it into the subsequent written agreement.

This simple model of dispute resolution should be contrasted with a judicial resolution of such a dispute.

#### A. *Was the Asserted Agreement Made?*

Some courts consider the parol evidence rule a rule of form.<sup>72</sup> In determining whether the agreement was made, a court can look only at reliable evidence. Testimony concerning an asserted oral agreement

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<sup>72</sup> For convenience of discussion the Statute of Frauds has been classified as a "rule of form." For choice of law purposes it may be necessary to decide whether the Statute is substantive or procedural. Also, it may be necessary to decide whether compliance with the form specified in the Statute is required before *any* effect can be given to the transaction. In such cases it may be necessary to decide whether the Statute effects "validity" of the contract or merely relates to the method by which it can be "proved."

For choice of law purposes, the Statute is classified as substantive. See 2 CORBIN §§ 293-94. Yet an oral agreement of a type "required" to be evidenced by a sufficient memorandum creates certain legal relationships. It can be the basis for restitution and sometimes actions based upon reliance. *Minsky's Follies, Inc. v. Sennes*, 206 F.2d 1 (5th Cir. 1953). It can be used defensively. 2 CORBIN §§ 296-300. The Statute as a defense is waived unless pleaded. A subsequent memorandum can satisfy the Statute.

The term "rule of form" was chosen to describe a rule which sets forth some requirements of form before the entire legal range of protection will be given to a transaction.

cannot be considered because the agreement, if made, was not expressed in proper form.

This rationale for the parol evidence rule can be evaluated by an examination of the Statute of Frauds. Ideally, the Statute, as a rule of form, should reduce litigation by informing potential litigants of the legal enforceability of their contract, permit judicial resolution without a trial, and avoid lengthy and difficult trials which result when the existence of an agreement is disputed. In addition, the Statute was meant to improve the quality of judicial dispute resolution. Credibility questions could be kept from inexpert juries and softhearted or biased trial judges. A rule of form assumes that parties generally follow formal rules. The absence of proper form indicates it is unlikely that the agreement was made. Also, a rule of form assumes that witnesses will lie or forget facts if it is to their advantage to do so. Such a rule assumes people have poor memories and that litigation is an inefficient method of ascertaining facts.

Has this particular rule of form worked? The history of the Statute is well known. Legislatures strengthen and expand it,<sup>73</sup> while courts and attorneys develop innumerable methods of circumventing its provisions.<sup>74</sup> Statute of Frauds cases are too numerous to count.<sup>75</sup> Although the Statute may have channeled some contract making into written forms, there are certainly more cogent reasons why some contracts are expressed in writing. Parties may feel bound by such formality and be more likely to perform after signing a written contract. In this sense, getting the other party to sign is like receiving earnest money. Also, contract administration and performance should be smoother and more free of disputes if there is a writing. Commercial contracts are expressed in written form for record-keeping purposes. Further, the layman, without knowledge of the Statute of Frauds, manifests a lack of faith in the practical enforceability of an oral agreement by the expression that "it will be my word against yours." Contract making would probably not be much different if there were no Statute of Frauds. Lawyers generally would advise their clients to execute a written contract with or without a Statute of Frauds.<sup>76</sup>

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<sup>73</sup> See, e.g., the history of CAL. CIV. CODE § 1624(5) (West Supp. 1967) on brokerage agreements which have been progressively restricted in 1937, 1963, and 1967.

<sup>74</sup> See generally 2 CORBIN § 279.

<sup>75</sup> Corbin devoted one full volume out of what were then six volumes in his massive treatise on contracts to the Statute of Frauds. This volume consists of 793 pages plus, as of 1964, a 195-page supplement.

<sup>76</sup> It would be interesting to see whether British contract practices have changed since 1954. At that time the Statute of Frauds was abolished for all transactions except those involving surety promises and land sales. Law Reform (Enforcement of Contracts) Act of 1954, 2 & 3 Eliz. 2, c. 34.

The Statute of Frauds teaches a lesson regarding the use of the parol evidence rule as a rule of form. Rules of form have a poor performance record in American law. To regard the parol evidence rule as a rule of form both invades and extends the scope of the Statute. Indeed, the Statute has never required the entire agreement to be expressed in the memorandum.<sup>77</sup> If there is an allegation of a prior oral agreement, the only rule of form applicable should be the Statute of Frauds. If the transaction is one required to be in writing, the question should be whether there was a sufficient memorandum. In parol evidence cases there usually is such a memorandum. The courts should abandon the "vary, add to, or contradict" manner of expressing the parol evidence rule. Fact finders should be permitted to look at all relevant evidence in determining whether an asserted prior oral agreement took place.<sup>78</sup> The failure of the writing to contain the asserted oral agreement may tend to show there was no prior agreement. But the fact that the prior agreement was oral should not preclude its proof.

Although the applicability of rules of form to a prior oral agreement is a crucial consideration, the determination of who decides whether the agreement was made is equally important. The use of the parol evidence rule as a jury control device must be reevaluated.

Jury control as a rationale for the rule must be viewed with skepticism because of the minor part juries play in deciding disputes.<sup>79</sup> Posing the rule in its traditional form carries it over to many non-jury dispute-resolving systems.

The rule is employed in such non-jury adjudicative processes as admiralty,<sup>80</sup> equity,<sup>81</sup> and federal contract litigation.<sup>82</sup> It is relevant to

<sup>77</sup> 2 CORBIN § 499.

<sup>78</sup> See p. 1067 *infra*.

<sup>79</sup> There is a decreasing use of juries in civil actions. For the year July 1959 through June 1960, in federal court cases based on diversity jurisdiction, the use of juries in contract cases contrasted strikingly with that in tort cases. In the contested tort cases actually going to trial, approximately one-fifth of the judgments were after court trial, three-quarters were after jury verdict, and the remaining were rendered by the court during trial. In the contested contract cases actually going to trial, however, nearly two-thirds of the judgments were after court trial. Based on figures in U.S. JUDIC. CONF. & DIR. OF ADMIN. OFF. OF U.S. CTS., ANN. REP. 250-51 (1960).

<sup>80</sup> *E.g.*, *The Delaware*, 81 U.S. 579 (1871).

Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms, or to affect its construction, as all such verbal agreements are considered as merged in the written contract.

*Id.* at 603-04 (footnote omitted). For English law, see generally 2 BRITISH SHIPPING LAWS §§ 509-10 (Colinvaux ed. 1963).

<sup>81</sup> *E.g.*, *Mairon v. Scarbrough*, 44 Tenn. App. 414, 314 S.W.2d 165 (1958).

<sup>82</sup> The following cases represent government contracts disputes decided in federal

dispute resolution by administrative appeals boards.<sup>83</sup> It is involved in trials in which the jury is waived.<sup>84</sup> In England, the parol evidence rule is employed despite the virtual abolition of the jury system in civil cases.<sup>85</sup>

Our system allocates to the jury the function of determining credibility of witnesses. Yet, jury control is given as a rationale for the parol evidence rule. What makes parol evidence cases more difficult for the jury than construction accidents, consumer injuries or gift tax cases? In these areas the jury has been given great control.<sup>86</sup> Why in commercial contracts cases do we strip them of their normal credibility-determining function? Is the jury unable to tell the honest witness from the dishonest? Is it hoodwinked by crafty lawyers? Does it decide the case based upon emotion rather than the evidence and the instructions of the judge? Does it stick the stronger party although it doubts that the agreement claimed by the weaker party was made? Does it disregard language in the contract? Does the jury expect too high a degree of formality from contract makers? How do trial judges compare on these issues?

The answers to these questions rest upon legal folklore and little else. Much depends upon individual jurors, the judge, the parties and the particular issues involved. There is little reliable data on any of these questions. To justify the complex and confusing parol evidence rule on unproven and doubtful assumptions makes no sense,

And is the parol evidence rule the only mechanism with which to

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courts: *United States v. Croft-Mullins Elec. Co.*, 333 F.2d 772 (5th Cir. 1964), cert. denied, 379 U.S. 968 (1965); *Commodity Credit Corp. v. Rosenberg Bros.*, 243 F.2d 504 (9th Cir. 1957); *United States v. Bethlehem Steel Co.*, 215 F. Supp. 62 (D. Md. 1962); *Baggett Transp. Co.*, 319 F.2d 864 (Ct. Cl. 1963).

<sup>83</sup> E.g., *Pan American Overseas Corp.* 65-1 CCH Bd. Cont. App. Dec. ¶ 4802 (1965). "However, even if there had been such an oral agreement (which there was not), such a contemporaneous oral agreement could not be effective to vary the terms of the written contract." *Id.* at 22,798. *Reeves SoundCraft Corp.*, 1964 CCH Bd. Cont. App. Dec. ¶ 4317, at 20,877-78 (parol evidence rules used to exclude express warranty in sale of goods).

<sup>84</sup> E.g., *DuFrene v. Kaiser Steel Corp.*, 231 Cal. App. 2d 452, 41 Cal. Rptr. 834 (1964) (semble); *Mangini v. Wolfschmidt, Ltd.*, 165 Cal. App. 2d 192, 331 P.2d 728 (1958).

<sup>85</sup> E.g., *Hutton v. Watling*, [1948] Ch. 398, 404; *Campbell Discount Co. v. Gall*, [1961] 1 Q.B. 431, 439 (C.A.).

<sup>86</sup> Construction accidents: For a discussion of the fast disappearing privity defense for architects see Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361, 1379 (1967). The abolition of privity in products liability cases, W. PROSSER & Y. SMITH, CASES ON TORTS 844-922 (3d ed. 1962), has effectively given more control to the jury by getting rid of the judge-controlled privity rule. For a discussion of Federal Employers Liability Act, see Comment, *The FELA and Trial by Jury*, 21-OHIO L.J. 422 (1960). Tax cases: *Commissioner v. Duberstein*, 363 U.S. 278 (1960). The *Duberstein* case was decided initially in the tax court, but the rule articulated would also apply where the tax payer is requesting a refund. Such a case be brought in the district courts (with juries) and the courts of claims.

control juries? A trial judge who wishes to protect the litigants and the judicial system can accomplish a reasonable amount of jury control without such a rule.

In the federal courts and in some state courts, the judge can comment on the evidence. His power to comment can materially control the jury. Also, cross examination is a potent weapon for probing testimony of questionable credibility. By giving an attorney wide latitude, a judge can affect the jury decision in such matters. Further, a judge can exert some control over the jury by his instructions on credibility. The way he phrases instructions on burden of proof can, to a degree, control the jury. If the judge makes it clear that the party asserting the oral agreement must by a preponderance of the evidence convince them that the agreement occurred, the party with weaker evidence will often lose.

A judge who is firmly convinced that the jury was wrong can control them to a substantial degree by his power to grant a motion for a new trial. Often, ordering a new trial causes a settlement or abandonment of the action.

Finally, there may be many situations in which a judge need not submit a fact question to the jury because an agreement would not be enforceable for other reasons even if it had been made. This is the basis for the integration theory of the parol evidence rule. Whether the agreement was made need not be considered because, even if made, it has been superseded by the later written agreement.

Jury control should not be the basis for the parol evidence rule. Even if the jury must be controlled in parol evidence cases, which is doubtful, there are other methods which are less costly to the litigation system.

A third pertinent consideration concerning the existence of a prior agreement is the degree of security that should be afforded writings. How clear is the need to protect writings from gullible or softhearted juries or judges? In an era dominated by adhesion contracts, inequality of bargaining power and the pervasive use of liability limitations and exculpations, such commercial certainty should be subordinate to the protection of reasonable expectations. The law should be more concerned with protecting the *actual* agreement of the parties than with protecting written agreement that *appears* to constitute the entire agreement. Parties at least should be given a chance to prove an alleged oral agreement.

Finally, what about convenience as a rationale for the rule? It enables judges to avoid calling clients and litigants liars. It allows the

judge to avoid deciding difficult issues which he does not wish to decide. But what do we pay for this convenience? Proper issues may be missed or ignored, and the real reasons for the decision may not be given. Convenience should not be a justification for the parol evidence rule.

*B. Is There any Reason Not To Enforce the Agreement?*

Even if there is a prior agreement, there may be reasons why the law should not enforce it. First, have the requirements of a valid contract other than "agreement" been established? Did the parties intend to be bound? Was the prior agreement definite enough to be enforced? Was consent free of fraud, mistake, or duress? Was there consideration or something else sufficient to make the promise enforceable? If there is a required *form* set by law or contract, was it present? If the required form was not present, does justice require that we disregard its absence? Did the persons who made the prior agreement have authority to do so?

The rule may be used to protect a principal from unauthorized acts of his agent. A contract maker wants to rationally plan and perform his contracts. He wants to be certain that his representatives do not make unauthorized commitments. The contracting organization can plan and operate more efficiently if it can assume that the writing passed among the various units of the contracting party contains the entire commitment. From a legal standpoint, the primary means of shielding principals from unauthorized commitments of their agents was to give principals the legal defense that their agent or employee lacked authority to make the commitment. But the law began to protect the reasonable expectations of persons who dealt with these agents. As a result, lack of authority protection became subservient to apparent authority and estoppel.<sup>87</sup> In order to counterattack, principals went to contract law, and frequently included provisions in their contracts that negated their agents' authority to make any commitment not expressed in writing. They also included integration clauses designed to preclude assertion of any prior oral agreements.<sup>88</sup> Principals could then assert the parol evidence rule as a defense when confronted with prior oral representations made by their agents.<sup>89</sup> Although it is difficult to quarrel with rational planning or operational efficiency as desirable objectives, the parol evidence rule cannot be justified as a vehicle to accomplish these goals.

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<sup>87</sup> See RESTATEMENT (SECOND) OF AGENCY §§ 8, 8B (1957).

<sup>88</sup> *E.g.*, *Holland Furnace Co. v. Williams*, 179 Kan. 321, 295 P.2d 672 (1956).

<sup>89</sup> *E.g.*, *Watson-Warren Constr. Co.*, 65-1 CCH Bd. Cont. App. Dec. ¶ 4867, at 23,026 (1965). *In re Atlantic Times, Inc.*, 259 F. Supp. 820, 825 (N.D. Ga. 1966).

First, assuming that an authority issue is present, the best method to accomplish rational planning and operational efficiency is to make certain that agents do not make unauthorized statements. Providing the principal with a shield against liability may in many instances inhibit or discourage internal control of agents.

Second, hiding an agency question under the garment of the parol evidence rule obscures the central issue. This has been one of the principal vices of the rule and has been used consciously or unconsciously as a means of avoiding other legal issues.

Third, many prior oral agreements are made and intended to survive subsequent assent to a writing. The parol evidence rule should not be used to frustrate the reasonable expectations of contracting parties. Nor should it be a surrogate for a weakening lack of authority defense.

There may be other reasons not to enforce a prior oral agreement. The Statute of Frauds can be classified as a rule affecting the *validity* of the agreement. If a writing is needed to make the agreement valid, the law will not enforce the agreement even if made. When this drastic step is taken, it is done to channel contract making into written form, to impress upon the contracting parties the seriousness of their actions and to avoid enforcement of impulsive promises.

However, the tendency in Statute of Frauds cases is to enforce those oral agreements that appear to have been made despite failure to comply with formal rules. Many techniques designed to avoid the Statute, such as part performance and estoppel, are premised on the idea that they provide evidence that the parties made an agreement. Under the Uniform Commercial Code, there is enforceability of oral agreements to the extent of any admission by either party in the course of litigation.<sup>90</sup> In most jurisdictions, failure to assert the Statute as a defense is a waiver. The parol evidence rule should not be considered as relating to validity of the prior oral agreement.

There are other more important reasons why it may be desirable not to enforce agreements that parties have made. Here we have a true recognition of the need for commercial certainty. In commercial paper disputes the maker of a negotiable note is not allowed to assert many defenses against a holder in due course. Lenders and financing companies may be entitled to rely upon a writing as a complete expression of the entire contract. When there has been reasonable reliance by third parties upon the apparent completeness of a written agreement, estoppel may preclude assertion of the prior oral agreement.

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<sup>90</sup> UCC § 2-201, Comment 7.

Still other reasons exist. Clearly the prior oral agreement would not be enforced if it were illegal. However, there are many less odious types of prior oral agreements.<sup>91</sup> Secrecy is often a reason for the written document not incorporating the entire agreement, but the immortality or shadiness of secrecy varies greatly. A secret oral agreement made to avoid letting other salesmen know what commission was to be paid to a particular salesman may not be offensive.<sup>92</sup>

An inflated contract price in a building contract meant to deceive a construction lender is more offensive. The important thing is to recognize that these are issues that should not concern the parol evidence rule.<sup>93</sup> If these agreements are not to be enforced, it is because the law does not wish to lend its assistance to shady or immoral deals; it has nothing to do with the parol evidence rule.<sup>94</sup>

Even if made, and even if the requisite elements of a valid contract are present, have the contracting parties done anything to change or discharge the prior oral agreement? In parol evidence cases this usually means an inquiry into the effect of any subsequent writing between the parties. This determination is the basis of the integration concept.

Professor Corbin suggested that the rule could be characterized as one which permits contracting parties to change or discharge a prior agreement by subsequent acts.<sup>95</sup> The rule, however, has existed so long that its total abandonment is not likely even if it could be shown that it is not needed. The most recent codification of the rule, the Uniform Commercial Code, corrected some of the worst features but did not abolish it. If the rule must be lived with, it should be limited to a generally accepted and desirable objective—the protection of truly integrated writings. If the parol evidence rule is limited solely to protecting integrated agreements, many difficult parol evidence issues

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<sup>91</sup> *E.g.*, *Sweney v. KANS, Inc.*, 247 Cal. App. 2d 475, 55 Cal. Rptr. 673 (1966).

<sup>92</sup> *Brandwein v. Provident Mut. Life Ins. Co.*, 3 N.Y.2d 491, 146 N.E.2d 693, 168 N.Y.S.2d 964 (1957).

<sup>93</sup> In an illegal contract, whether the law will take any role may depend upon the relative culpability of the parties. If both are equally guilty, the law may simply refuse to intervene. Some relief may be given if one party is less guilty than the other. If the construction contract price is expressed as \$125,000 where the real agreement is for \$100,000, refusal to listen to evidence of the prior oral agreement because of the parol evidence rule would result in the contractor having a valid claim for the additional \$25,000. If the problem is treated as one of illegality, the success of any action brought by the contractor for the \$25,000 or any action brought by the owner to recover the full contract price paid should depend upon comparative guilt and unjust enrichment.

<sup>94</sup> *See, e.g.*, Note, *Taxpayer Held Bound by his Contractual Allocation of Value of Covenant Not to Complete*, 42 N.Y.U.L. REV. 991 (1967). This note treated tax questions only, without any need to discuss the parol evidence rule.

<sup>95</sup> § 3 CORBIN § 574.

and subissues will disappear. There will be no need to wrestle with consistent collateral agreements, oral conditions, oral delivery, fraud, sham, true consideration and the like as devices to avoid the rule.

C. *If the Agreement Should Be Enforced, How Should It Be Interpreted?*

Once it is decided that it is desirable to enforce the prior oral agreement, it must be interpreted in light of the subsequent written contract. Normally, this will be an attempt to fit the two of them together, but if there is a conflict, the later expression will be preferred.

This raises the problem of subsequent written agreements expressly contradicting prior oral agreements. The more the oral varies from the written, the more convincing the evidence will have to be that the prior agreement was not discharged by the subsequent agreement. But the variation *itself* should not effect the *provability* of the prior oral agreement.

D. *A Rule To Protect Truly Integrated Writings*

The parol evidence rule should not be:

- (1) A rule of form;
- (2) A manifestation of distrust of the credibility of the evidence;
- (3) A method to control inefficient or irrational fact finders in the judicial system;
- (4) A device to protect those who deal with written contracts and rely upon their completeness; or
- (5) A tool to protect principals from unauthorized representations of their agents.

The rule should be limited to protecting truly integrated writings.

V

PROPOSALS FOR IMPROVING THE PAROL EVIDENCE RULE

The methods will be suggested for improving the rule. The first is a series of proposals for tinkering with the rule which can avoid some of its worst aspects. The second, a less modest suggestion, proposes a substantial overhaul of the rule with a view toward limiting it to the protection of truly integrated writings.

A. *Tinkering with the Rule: A Minor Overhaul*

Improvement can be made within the existing structure. First, the face of the document test for determining intention to integrate should be abandoned. This has been done in the Uniform Commercial Code<sup>96</sup> and has been suggested by Professors Calamari and Perillo.<sup>97</sup> Even with the assistance of the consistent collateral rule, the face of the document test is simply not acceptable. A rule cannot be tolerated that almost conclusively presumes that the mere act of assent to a subsequent writing discharges every earlier agreement unless the earlier agreement can be fitted neatly into the later. Too many agreements are partly oral and partly written for such a rule to prevail.

Second, courts might be convinced to draw a line between prior agreements contradicting and those adding to a written agreement, provided that an addition or augmentation to a truly integrated writing is not permitted. This proposal would simply mean elimination of the various tests for collateralness. It would be as if the rule were phrased, "We will not listen to parol evidence of a prior oral agreement if it will directly contradict a subsequent written contract."

Third, courts might be convinced to draw a line between prior and contemporaneous agreements. Perhaps agreements made at or about the time the written agreement is executed could be admitted. This proposal would recognize that such changes or additions often may not be integrated into the writing.

Fourth, as has been suggested by Professor Palmer,<sup>98</sup> the equitable remedy of reformation could be expanded to include not only fraud and mistake in reducing an agreement to writing, but also the fraud and mistake that induced a party to make an agreement. Expansion would permit reformation where there has been a conscious omission from the writing, subject to the "clean hands" rule.

Fifth, a rule could be suggested that would require the proponent of an oral agreement to establish it by clear and convincing evidence, rather than by a mere preponderance of the evidence. This would be desirable only if the rule is no longer used as a method of prohibiting testimony that may be untrustworthy, nor as a tool to enable courts to avoid deciding difficult credibility questions.

Sixth, courts could begin to recognize *overtly* that some transactions are typically not integrated while others are typically integrated. A recent study of architectural contracting practices showed that costs

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<sup>96</sup> UCC § 2-202, Comment 1a; *but see id.*, Comment 3.

<sup>97</sup> *See Calamari & Perillo, supra* note 63.

<sup>98</sup> *See Palmer, supra* note 39.

are almost always discussed in advance, but agreements on costs are commonly not included in the written contract.<sup>99</sup> Even clauses which are contradictory to some of the actual agreements may not be deleted from the contract. If this is the case, a court should not apply any parol evidence rule to an architect-client contract, unless one of the parties can show that this was not a typical contract and that the agreement in question was truly integrated. Other studies of contracting practices could furnish similar information which could be the basis for presumption of integration or non-integration.

### B. *A Major Overhaul*

The above proposals would help, but they would be halfway measures adding other uncertainties to the already muddled parol evidence rule. A line between antecedent and contemporaneous agreements would have to be drawn. The line between adding to and contradicting an agreement is a difficult one to draw. It is not certain whether fact finders pay attention to burden of proof instructions. Abolition of the face of the document test helps, but guidelines are needed to determine intention to integrate. Classification according to type of transaction would help, but it would take much time and research to make meaningful classifications.<sup>100</sup> Increased use of refor-

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<sup>99</sup> See note 57 *supra*.

<sup>100</sup> What is needed is a method of convincing the trial court that the mere showing that the transaction is, *e.g.*, an architect-employment contract, means that prior oral side agreements are to be considered, subject to a showing that there was not true integration. Many trial judges will want to be able to point to statutes, precedents or perhaps secondary authority, before they will take this step.

What about a possible legislative solution? It would be possible to break transactions down into those typically concluded by integrated writings and those which are not. The contract formation key facts, *see pp. 1065-67 infra*, would assist in this determination. Such classifications could be accomplished by empirical studies made by legislative committees or law revision commissions. However, legislatures traditionally have not taken an active role in solving these types of problems. Only where certain types of transactions have proved particularly troublesome has there been comprehensive legislative reform. Opposition by interested trade groups and preoccupation with more pressing problems would militate against an active legislative role. At best, only a few legislatures might take such a course and this would not be enough. If emphasis on type of transaction is to make any real mark on American law, it must be made by the courts.

It is not likely that an attorney in specific litigation will try to introduce evidence of type of transaction at the trial level. Such evidence is expensive and difficult to collect. Also, most trial judges would consider such evidence irrelevant. If a trial court did admit it, there would be a strong possibility of reversal on appeal. Finally it is easier to introduce evidence relating to the particular transaction in question rather than evidence of typicality.

The impetus for, and approval of, a transactional approach must come directly from the appellate courts. Overt judicial recognition of this concept will require that:

(1) Legal scholars and attorneys must probe into reported appellate cases and demonstrate that, in fact, courts treat different transactions differently. Examples are cases in-

mation would be desirable, but the right to a jury trial would be lost to the party seeking relief.

Any or all of these minor overhauls could help. However, what is really needed is a recognition that true integration should be the only basis for any rule that limits provability of prior oral agreements. The desirable objectives now sought through the parol evidence rule can be accomplished more directly through other accepted legal doctrines. To make the integration concept work, however, there is a need for workable and realistic methods of recognizing the objective trappings of a true integration. A model of a truly integrated contract should be created and criteria developed for identification of truly integrated writings.

### C. *A Model of a Truly Integrated Contract*

The hallmark of a truly integrated contract is that it is put together carefully and methodically. In this sense it resembles the creation of a statute or a treaty. A good deal has occurred before the act of integration. The person preparing the integration, usually the attorney, gathers all the evidence of what has transpired in order to prepare a draft. He will look at letters, wires, memoranda, agreements, contracts and any other data relevant to the final document. Drafts are reviewed by negotiators, tax advisors, patent and insurance counselors, and technical personnel. The attorney will then prepare a draft for submission to the other party or parties. Drafts are exchanged and revised. Provisions are traded, eliminated or modified. Each party uses its persuasiveness to support inclusion or deletion of specific clauses. Language is reviewed carefully with a view toward achieving phraseology satisfactory to both parties. Usually, a clause stating that the writing covers the entire transaction is included. Attorneys look over the final draft and confer with the top negotiators in order to iron out final details. The final draft is prepared and the date set for exe-

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volving bank notes, insurance, deeds, and separation agreements. See cases cited note 18 *supra*; Egan v. Egan, — Cal. App. 2d —, 59 Cal. Rptr. 705 (1967); Degnan, *supra* note 53, at 174.

(2) Using factors such as the key formation facts, empirical studies must be made to examine particularly troublesome transactions, with a view toward determining whether such transactions are normally culminated by integrated writings.

(3) Judges must be willing to consider these research efforts and frame their opinions in type-of-transaction language.

(4) Even without these research efforts, judges must be willing to use their own knowledge and experience to draw conclusions as to transactional typicality, and to frame their opinions in appropriate terms.

(5) The courts must recognize the unmistakable and desirable trend in contract law to develop variant legal rules for different types of transactions.

cution. Top executives of the contracting parties and other interested persons gather to sign or to witness the execution of the agreement. Each party receives copies of the contract for distribution. The originals are kept in vaults of the contracting parties.

Obviously, the percentage of contracts made in this manner is small. It can be argued that if we protect only true integrations of this sort, we are in effect abolishing the parol evidence rule. But these are the only types of written agreements which can confidently be assumed to integrate the entire transaction in one repository.

The model presumes a large corporate contractor, but a group of physicians, a small or medium-sized business, or a wealthy couple about to separate might make a similar integrated contract without the review of tax, insurance, engineering, patent and legal departments. It is the care and deliberation that point to an integrated agreement.

Even a contract put together in a manner suggested by the above model would not invariably integrate everything relating to the transaction. Contracts which appear to be integrated contracts *may* not contain everything. Oral agreements may be made simultaneously with the execution of a complete and final-looking written agreement, and may nevertheless be enforceable.

#### D. *Criteria for Determining Integration*

With the model in mind, what are realistic and workable guides that can be used to find truly integrated writings so that the parol evidence rule can be limited to its proper function?<sup>101</sup>

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<sup>101</sup> Professor McCormick has suggested that the judge should listen to testimony of an alleged oral agreement, consider evidence which might tend to substantiate the agreement, and compare the alleged oral agreement with the writing. The judge should then decide whether the asserted oral agreement is one which parties situated as these were would *normally* and *naturally* have recited in the writing itself, had they made it and intended it to stand. MCCORMICK § 216, at 441. If the judge decides that had such an oral agreement been made and intended to stand, the parties normally and naturally would have placed it in the writing, he should deny admissibility. He should not give the jury or himself a chance to determine whether the agreement took place. If he decides that had the agreement been made and intended to stand, and it would *not* have normally and naturally been set forth in the writing, he should admit the evidence to the finder of fact, whether it be judge or jury, who will decide the issue of the existence of the agreement.

Putting aside issues of lack of guidelines and of when oral agreements are normally and naturally included in the writing, this test would probably be applied as follows: When a witness testifies as to an asserted oral agreement, the opposing attorney will interpose an immediate objection based upon the parol evidence rule. The judge would reserve ruling until he hears the testimony, considers the possible substantiating evidence and compares the testimony to the writing. At this point, his views as to the existence of the agreement can run the following range of possibilities:

(1) A *firm conviction* that the agreement took place;

In many parol evidence cases certain key facts have played significant roles in determining how the parol evidence issue was resolved. Evaluation of these facts will aid in spotting the objective trappings of a truly integrated contract. Such key facts in determining integration are:

(1) *Subject matter of the transaction.* The more important, the more complex, and the more extraordinary a transaction, the greater the likelihood that it was concluded by an integrated writing.<sup>102</sup>

(2) *Length of the negotiations.* The longer the negotiations, the greater the likelihood that the transaction was concluded by an integrated writing.

(3) *Adequacy of time to make the writing conform to the oral agreement.* If the asserted oral agreement is made after the final contract is prepared for execution, the transaction is less likely to have been concluded by an integrated writing.

(4) *Business experience of the parties.* The greater the business experience, the greater the likelihood that the transaction was concluded by an integrated writing.<sup>103</sup>

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- (2) A firm conviction that it did not;
  - (3) A belief in the *likelihood* that the agreement took place;
  - (4) A belief in the *likelihood* that it did not;
  - (5) No opinion either way on whether the agreement took place.

Let us first assume that the judge believes that it is *unlikely* that the asserted oral agreement did occur or that the story of the party asserting the agreement is not plausible. Putting aside his doubts, if the judge decides that it would *not* be normal and natural to include it in the writing, he should admit the evidence. But if he doubts that the agreement took place, he is more likely to find that normally and naturally such an agreement would have been included in the writing and thus deny admissibility. An honest application of a "normal and natural" test is most unlikely where he doubts the existence of the agreement.

Now let us assume that the judge has no feelings one way or the other regarding the existence of the agreement. Here we may get an honest application of the test. However, the judge is more likely to deny admissibility in close cases if he applies this test. This is due to the frequent judicial impatience with informality in contract making and a judicial attitude which often holds contracting parties to an unreasonably high level of formality. Also, the way the test is framed will often constitute a tie-breaker against admissibility in close cases.

The McCormick test creates a standard for contract formation which is difficult to apply, penalizes parties who do not rigidly conform to the standards of normal and natural contract making and emphasizes the credibility of the testimony rather than the contract making process.

<sup>102</sup> However, even in very important transactions, prior oral agreements are often made and intended to be given effect. *H.K. Porter Co. v. Wire Rope Corp. of America*, 367 F.2d 653 (8th Cir. 1966) (purchase of \$3,000,000 business); *Hunt Foods & Indus., Inc. v. Doliner*, 49 Misc. 2d 246, 267 N.Y.S.2d 364 (Sup. Ct. 1966).

<sup>103</sup> *E.g.*, *TSS Sportwear, Ltd. v. Swank Shop, Inc.*, 380 F.2d 512 (9th Cir. 1967). The

(5) *Participation in the negotiations by an attorney or other experienced contract negotiators.* The more active the participation by an attorney or other experienced party, the greater the likelihood that the transaction was concluded by an integrated writing.<sup>104</sup>

(6) *The bargaining situation.* The greater the onesidedness of the bargaining situation, the less likely it is that the bargain was concluded by an integrated writing.

(7) *The degree of standardization of the writing.* The greater the standardization of the writing, the less likely that the transaction was concluded by an integrated writing.

(8) *The presence of an integration clause.* The presence of an integration clause makes it more likely that the transaction was concluded by an integrated writing. The likelihood is strengthened if the clause was prominent, was called to the attention of the party who did not prepare the writing, or was not part of a printed boiler plate.

(9) *Type of transaction.* If the transaction in question can be classified as typically concluded by an integrated writing, this determination is conclusive unless the other party can show a contrary intention in the making of the specific written agreement.

These key facts emphasize the methods contracting parties use to put their transactions together. Three principal objections can be made to the key-facts approach. First, this technique goes into elements which are normally considered irrelevant, such as representation by counsel, use of form contracts, type of transaction, and business experience. Yet, courts have frequently considered these elements whether or not they have so stated in their opinions. The law is beginning to awaken to the realities of the contract-formation process.

Second, the effectiveness of integration clauses is downgraded. But making a validly-created integration clause conclusive elevates these clauses to a stature they do not deserve. Many times integration clauses are buried in boiler plate. In many transactions the integration clause will not be pointed out or discussed. There are too many instances where oral side agreements are made and intended to be effective, despite the presence of integration clauses. The presence of such a clause may be quite significant, but it should not be conclusive.

Third, the use of variable key facts makes application and prediction uncertain. But factors such as those discussed are the only way

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court said that the complainant was a businesswoman inexperienced in legal matters. See Sweet, *supra* note 25, at 905 n.150.

<sup>104</sup> See Holm v. Shilensky, 269 F. Supp. 359 (S.D.N.Y. 1967); Leyse v. Leyse, — Cal. App. 2d —, 59 Cal. Rptr. 680 (1967).

of predicting parol evidence cases. It is necessary to keep in mind that the test is still *intention to integrate*. The key facts merely assist the court in resolving this difficult question, and a proper evaluation of the facts should *improve* predictability. And, if the type-of-transaction factor is developed, some of the present case-by-case uncertainty can be eliminated.

#### E. *Extent of Integration*

Even if only true integrations are protected by the parol evidence rule, occasionally it may be necessary to determine the extent of the integration. A manufacturer may be dealing with an oil supplier who would like to supply oil to two different plants of the manufacturer. That same manufacturer may be dealing with a car dealer for the supply of a fleet of cars and for a fleet of trucks. The fact that the negotiations for the oil for one plant or for the supply of the fleet of cars are concluded by a truly integrated writing does not necessarily preclude either party from showing a prior or simultaneous oral agreement for the supply of oil for the other plant or the sale of a fleet of trucks. There may be reasons why such oral agreements will not be enforced, but it is not because of any parol evidence rule. Just as the parol evidence rule does not require that all aspects of one transaction be integrated, it does not require that all transactions between two parties be integrated when one transaction is concluded by an integrated writing. The function of the parol evidence rule does not include telling parties how to make their contracts.

Because truly integrated contracts are made infrequently, extent-of-integration questions will be rare. The troublesome cases have always been the one transaction, one subject matter arrangements. Where extent of integration is an issue, the court should apply a subject matter or transaction test. Where there is a true integration, all aspects of the deal pertaining to the subject matter expressed in the writing or to the transaction referred to in the writing will be integrated. Whatever difficulties there are relating to extent of integration can be eliminated if the draftsmen of the integration clause in a truly integrated contract delineate the scope of the integration.

#### F. *Judge and Jury*

If distrust of the fact finders' ability to evaluate evidence and to make a finding in accordance with its evaluation is eliminated as a factor, and if it is realized that all writings do not merit special protection, then there is no need to treat the parol evidence rule more

reverently than any other trial issue. In most cases, the jury, properly instructed, should decide whether an asserted agreement took place. On the question of integration, the jury should decide, after proper instructions, whether the evidence indicates that the parties intended a writing to be a final and complete repository.<sup>105</sup> However, if the facts are so clear that reasonable men cannot differ, the judge should apply the parol evidence rule. If he finds that the contract clearly was integrated, he should not submit the making of the agreement to the jury.

There is some difficulty in judge-jury relationships because the integration issue is based upon intention. But it is likely that the intention question will be resolved on the basis of an evaluation of the surrounding facts and circumstances and not upon statements of intention by the contracting parties or the negotiators. Generally, intention to integrate will *not* involve credibility, and the judge should be able to decide the question unless what happened during the negotiations is in dispute.

#### CONCLUSION

We can no longer ignore the evils of the parol evidence rule. The rule must not be expected to achieve a number of controversial objectives. Where these objectives are desired, they can be attained by other legal doctrines. The rule must be limited to the protection of truly integrated writings. These writings can be identified if focus is placed upon the contract making process and not the judicial process.

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<sup>105</sup> Cf. *Meyers v. Selznick Co.*, 373 F.2d 218 (2d Cir. 1966).