**Parol Evidence Rule**

Welcome to this podcast on the Parol Evidence Rule brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is the Parol Evidence Rule. By the way, if you are listening and not reading, I hope you are visualizing the correct spelling of “parol” -- it is P-A-R-O-L with no E on the end. The goal of this podcast is to get you to analyze basic problems that can be solved by application of the rule.

Let's begin by thinking about oral agreements. Oral agreements are much maligned, but in general there is nothing wrong with them. There are a few exceptions where the agreement has to be evidenced by a writing to satisfy the Statute of Frauds, but by and large oral agreements are perfectly valid.

For example, assume that we have a landlord and a tenant who make an agreement for the lease of property that is not within the statute of frauds. They can orally agree to all the terms. Now of course a dispute might arise as to whether a particular term had been agreed to one way or another. Let’s say the tenant claimed that she was allowed to have a cat and the landlord claimed that she was not allowed to have any pets. That of course would be just a question of fact – who's telling the truth. So there are a lot of reasons why parties would want to put their agreement in writing to prevent that type of fact question from arising.

So, now let’s assume that our landlord and tenant wrote down the terms they agreed to. What if there were no term with respect to pets and the issue came up about whether the tenant was allowed a pet. It might be that they had discussed it, had come to some agreement and had left that term out when it came to writing down their contract terms. If that was the case, then we would have a mistake in the formation of the contract and we would reform it by then adding that term that they had inadvertently left out of the agreement.

Okay, on to the next hypothetical. Assume they put in the writing “No pets allowed.” Later on, the landlord wants to evict the tenant for having a pet. The tenant says, “But before we signed the agreement, you said I could have a declawed cat.” The landlord points to the writing, which says “no pets allowed.” This is a classic parol evidence rule issue because the question is how much weight we are going to give the writing. If the entire agreement of the parties is found in the writing, then they agreed to no pet. But if the agreement includes their oral agreement, then they orally agreed that the pet would be ok in spite of the writing. So how do we decide whether we are going to go by the writing or by the oral agreement?

The answer is found in the parol evidence rule. Here is what the rule says: “Once the parties have reduced their agreement to a writing that they intend to be the final and complete expression of their agreement, then evidence of other understandings or promises offered to supplement it is excluded.”

Notice the problem in applying the rule. It doesn’t say that once the parties have reduced their agreement to writing, no evidence of oral understandings is permitted. That would go too far, because there is nothing wrong with an agreement that is partly written and partly oral, which the Restatement of Contracts calls a “partial integration.” The evidence is only excluded when they intend the writing to be the entire agreement, which the Restatement calls a “full integration.” That is where the difficulties come up with applying the parol evidence rule -- How do you determine the parties’ intention? That is, how do you determine whether they intended their agreement to be found entirely in the writing?

Unfortunately for us, there is no clear answer. The early twentieth-century Contracts scholar Samuel Williston, who was very formalistic, said one way parties can evidence their intent is to put a merger clause in the contract that flat out says the intention of the parties is to have their entire agreement to be found in the writing and there are no other understandings or promises. And that would be the end of it for Williston. But a more modern point of view, expressed by the Restatement of Contracts, says that the merger clause is some evidence of the intent of the parties, but it is not conclusive. It is probably fair to say that a merger clause will have great weight if it is found in a negotiated contract between two sophisticated parties, but less weight if it was buried in boilerplate at the back of a contract of adhesion.

To further complicate things, the absence of a merger clause is not going to determine the question either. Let’s say you have a separation agreement between a husband and a wife or a sale of real estate where the whole purpose of the agreement was to resolve all the issues involved in the transaction. Even if there weren't a merger clause, a court is unlikely to admit additional evidence because parties in that situation probably intended the writing to include everything. Note that this is an objective test – the question is not whether *these* parties made a side agreement, but whether *reasonable parties* would have made a side agreement in these circumstances.

Now we get another issue with the parol evidence rule and that is whether the oral understanding contradicts the writing or supplements it. In our lease example, where the writing says no pets and the oral understanding was that a declawed cat would be okay, that's obviously a contradiction. And most authorities will say that the writing is going to govern. I think the theory is that if the parties came to that agreement, why didn't they change the writing? And you may want to channel the behavior of contracting parties by encouraging them to put their agreements in writing.

Let’s assume now that the writing is silent on the issue and the tenant wants to offer that evidence. Now it would supplement the agreement rather than contradict it, and that is the hardest case for the courts to resolve. So again, applying the rule, the court would have to determine whether the parties intended their complete agreement to be found in the writing. If the answer is yes, the tenant’s evidence is barred. If the answer is no, the tenant’s evidence is admitted. Note that question is decided by the judge as a matter of law. Once the evidence comes in, it is still up to the trier of fact to determine whether the parties really agreed to it. But if they did, it is just as much part of the agreement as if it were written in there.

Note that defenders of the rule will say that it is a bar to perjury because it is very easy for someone to claim that they made an agreement that is not in the writing. Furthermore, contracts are sometimes bought and sold so third parties need to rely on the content of what they see in the writing. So there are many policies in favor of a strong parol evidence rule. On the other hand, the rule may well exclude a lot of agreements that were really made. This is what makes the rule so controversial and subject to manipulation by the court.

Let’s see if we can pull this all together with a final example. A small business owner is discussing the purchase of a copier with a salesman from an office supply store. The overzealous salesman says, “This copier will make 200 copies per minute,” when in fact it only makes 100. The buyer then signs a contract that does not contain that term and that states that the writing is the final and complete agreement of the parties. When the buyer discovers that the copier does not perform as promised, it seeks a remedy for breach of warranty. The seller claims that the writing does not contain this promise and the writing is the entire agreement. Note that this is not a fact question – the seller may admit that the salesman may have said that, but still argue that it is not legally binding because it is not in the writing.

Imagine the trial. The buyer gets on the stand and says, “Just before we signed the contract, the salesman told me ….” He is cut off by the defense lawyer shouting, “Objection. Parol Evidence Rule!” The court will now kick out the jury and decide the question of law – did the parties intend the writing to be the final and complete agreement? A court is likely to conclude that they did, so it will sustain the objection and the case is over because the buyer can’t put into evidence what the salesman told him. If, however, the court decides that the writing is only a partial integration, then it can admit evidence that supplements it. In that case, the objection would be overruled. The jury would be called back and the buyer could complete his testimony. It would then be up to the jury to decide as a matter of fact whether they believe that the promise was really made. But the court has decided for them that if it was made, it is part of the agreement.

This example, by the way, involves the sale of goods, so the UCC Parol Evidence Rule, found in § 2-202, applies. It is very similar to the common law rule, but it makes one thing clear -- evidence of course of performance, course of dealing, and trade usage can always be admitted. So in our previous example, if it was a customary specification in the trade for that kind of printer to print 200 pages per minute, then that evidence would be admissible to supplement the writing even if the writing was final and complete.

There are a number of exceptions to the rule, for evidence outside of the writing can be offered for a number of different purposes. It is a parol evidence rule issue only when the evidence is offered for the purpose of adding an additional term to the writing. Evidence can be offered for lots of other reasons and they are not within the parol evidence rule. For example, if you offer evidence of an issue of interpretation, that is not a parol evidence rule question. You have to do a different analysis on whether a court is going to admit that evidence. It might be offered on a question of formation. If there is a claim that one of the formation defenses like fraud, duress, or mistake applies, then that evidence will come in because that evidence is offered not to add a term to an agreement, but to show that there was no agreement at all. Also, if there was an oral understanding that the effectiveness of the written agreement was to be conditional on some event, then courts will usually allow evidence of that condition.

Modification is also not a parol evidence rule issue. There is a similar kind of analysis as to whether oral modifications to a written agreement are going to count, but we have to find the agreement that was formed before we can talk about modifying it. In other words, the agreement might have been just the writing or it might have been the writing plus that oral understanding and then one or the other terms may have been modified. So if we are talking about supplementing the agreement with a term that was agreed to *before* the written agreement was initially formed, then it’s a parol evidence rule question. If we are talking about agreements the parties made *after* the initial formation, then it’s a modification question.

Finally, we might have two agreements. For example, I’m showing you my house that is for sale and you ask if the refrigerator is included. I say it is, but the written agreement says no personal property is included in the sale. You will likely not be able to offer evidence of that promise because a court is likely to find that the written agreement was final and complete. But let’s back up. Suppose you ask if the refrigerator is included, and I say, “I’ll sell it to you for $100” and you say, “It’s a deal.” There is nothing wrong with two agreements – a written one for the sale of the house and an oral one for the sale of the refrigerator. Most of the time, however, the promise that a party seeks to enforce separately from the writing doesn't have any separate consideration. So the only way to make it enforceable is to bring it under the consideration that was offered as part of the writing.

Let’s briefly review this podcast. After listening to it, you should be able to state the parol evidence rule and determine whether it applies in a particular fact situation. If it does apply, you should be able to analyze whether a court will admit the evidence or not.

I hope you’ve enjoyed this podcast on the Parol Evidence Rule.

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