#79 9/15/77

Memorandum 77-60

Subject: Study 79 - Parol Evidence Rule (Comments on Tentative Recommendation)

Background

The Commission in July distributed for comment its tentative recommendation relating to the parol evidence rule. A copy of the tentative recommendation is attached to this memorandum. The tentative recommendation adopts the UCC formulation of the parol evidence rule, which is close to existing California case law.

We have received a handful of comments on the tentative recommendation attached as exhibits to this memorandum. The purpose of this memorandum is to analyze the comments with the objective of making any necessary changes in the recommendation so it can be printed and submitted to the Legislature.

General Reaction

The general reaction to the tentative recommendation was mixed. There was general agreement that some statutory clarification of the parol evidence rule would be desirable, but there was no general consensus that the statutory clarification tentatively recommended by the Commission is desirable. Three persons felt that the Commission's proposal, based on the UCC, is sound. See Exhibits 3 (Scolnik--green), 4 (Wolford--buff), and 7 (Siemer--white). One person felt that the UCC might not be appropriate for contracts generally. See Exhibit 5 (Orlanski--blue). One person felt that the parties should be able to expressly agree that parol evidence could not be used to interpret their contract. Exhibit 6 (Zack--gold). And two persons expressed the view that the parol evidence rule should be strengthened. See Exhibits 1 (Kipperman--pink) and 2 (Gottfried--yellow).

The staff does not believe that strengthening the parol evidence rule is a viable alternative. The history of the parol evidence rule, and the reason for the innumerable exceptions to the rule, is the struggle to avoid the harshness and injustice caused by strict application of the rule. It is clear that the courts will strive if at all possible to effectuate the intent of the parties; strengthening the parol evidence rule would be a jurisprudential step backwards.

Whether it is appropriate to use the UCC provision (which is designed to cover only sales of goods) for contracts generally, is of course subject to debate. We will debate the subject later in this memorandum in connection with particular aspects of the tentative recommendation and the problems raised concerning them. Likewise, the question whether the parties should be permitted voluntarily to exclude parol evidence will be discussed later.

Preliminary Part

The preliminary part of the recommendation is criticised by Kipperman (Exhibit 1--pink) and Orlanski (Exhibit 5--blue) for stating that the statutes should codify existing case law and then turning around and basing the statutes on the Uniform Commercial Code. In fact, there is no inconsistency here since the Uniform Commercial Code is quite close to existing case law. The staff suggests that this interrelationship be made more clear by revising the preliminary part to read:

> Because the parol evidence provisions of the Uniform Commercial Code are substantially the same as existing California case law concerning the parol evidence rule,[11a] the Commission further recommends that the Uniform Commercial Code serve as the basis for the statutory restatement of the parol evidence rule.

11a. See discussion in text at footnotes 13-15, infra.

Civil Code Sections 1625 and 1639

Both Scolnik (Exhibit 3--green) and Judge Zack (Exhibit 6--gold) feel that statements of the parol evidence rule should not appear in various places in the codes, but should appear only in one place. The staff is sympathetic to this position, but it is not easy to implement.

The Uniform Commercial Code version of the parol evidence rule, for example, is part of a uniform act and relates only to contracts for sale of goods. It could be repealed and the general statement of the parol evidence rule relied upon, but the UCC provision would have to be replaced by a reference to the general law. The staff does not believe this would be an improvement.

Code of Civil Procedure Section 1856 is the basic statement of the parol evidence rule for contracts generally, as well as for deeds and wills. The staff believes that its present placement in the Code of Civil Procedure among the general principles of evidence (which include other rules of construction for statutes and written instruments) is as good as any.

Civil Code Section 1625 is a less developed statement of the parol evidence rule that is placed among the general Civil Code provisions relating to the manner of creating contracts. Since the development of the parol evidence rule has occurred under Code of Civil Procedure Section 1856 rather than under Civil Code Section 1625, the staff believes that Section 1625 could be repealed without loss of substance and without the need to cross-refer to Section 1856.

Civil Code Section 1639 provides the general principle of contract interpretation that the intention of the parties is to be ascertained from the writing alone, if possible; the provision thus impacts only incidentally on the parol evidence rule and should not be repealed. It is located among the other principles of contract interpretation, and hence should not be relocated. Judge Zack points out that the reference to the Uniform Commercial Code in the Comment to Section 1639 raises the implication that Section 1639 does not apply to Commercial Code transactions, hence language should be added to the section to make clear that it does. The question whether Section 1639 applies to contracts governed by the Commercial Code is, so far as the staff has been able to ascertain, an unresolved question. Rather than make clear in the statute that the section does apply to Commercial Code transactions, the staff suggests that we simply delete the offending language from the Comment.

Code of Civil Procedure Section 1856

Section 1856 of the Code of Civil Procedure is the primary statement of the parol evidence rule, and accordingly received the most extensive comment. The analysis of the comments will be by subdivisions of the section.

Subdivision (a). Subdivison (a) is the traditional formulation of the parol evidence rule. There were no comments directed to subdivision (a).

Subdivision (b)(1)-(2). These provisions enact the course of dealing, usage of trade, and course of performance exceptions to the parol evidence rule in language borrowed from the Uniform Commercial Code. Application of these exceptions to non-Commercial Code transactions is questioned by Kipperman (Exhibit 1--pink) and Orlanski (Exhibit 5--blue); they suggest that supplementing the terms of a contract by course of dealing, usage of trade, and course of performance is appropriate only in the context of merchants dealing in sales of goods. The staff believes that this is not a sound position. The California courts have used course of dealing, usage of trade, and course of performance for many years in both sales and nonsales contracts to explain or supplement the terms of the contracts. The preliminary part of the recommendation at footnote 15 refers to a discussion of the law by Witkin; for nonbelievers, we could add a reference to the discussion in the Continuing Education of the Bar Commercial Law text:

> Course of dealing, usage of trade, and course of performance have been used as aids to interpretation by the California courts. See discussions in 1 California Commercial Law §§ 7.37-7.41 (C.E.B. 1966); 1 B. Witkin, Summary of California Law, Contracts §§ 527, 534, 455-56 (8th ed. 1973).

A copy of the C.E.B. discussion is appended as Exhibit 8 (pink). It might also help to state in the Comment that subdivision (b)(1)-(2) to a certain extent codifies prior law:

> Subdivision (b)(1)-(2) codifies prior case law. See discussion in 1 California Commercial Law §§ 7.37-741 (Cal. Cont. Ed. Bar 1966); 1 B. Witkin, Summary of California Law, Contracts §§ 527, 534 at 449-50, 455-56 (8th ed. 1973).

Subdivision (b)(3). The focus of objections to the tentative recommendation was the provision that would admit evidence of consistent additional terms unless the court determines the terms are such that, "if agreed upon, they would certainly have been included in the writing." This language codifies a Uniform Commercial Code Official Comment that was used by the court in Masterson v. Sine, 68 Cal.2d 222, 228-29, 436 P.2d 561, ___, 65 Cal. Rptr. 545, ___ (1968).

Orlanski (Exhibit 5--blue) takes the position that the UCC test has been rejected in subsequent cases in favor of the Restatement of Contracts test, which permits proof of a collateral agreement if it "is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract." While Orlanski is correct in stating that some subsequent cases have not applied the UCC test, he ignores the numerous cases that have applied the test. See, e.g., Brawthen v. H. & R. Block, Inc., 28 Cal. App.3d 131, 139, 104 Cal. Rptr. 486, ___ (1972); Birsner v. Bolles, 20 Cal. App.3d 635, 638, 97 Cal. Rptr. 846, ___ (1971). In light of Orlanski's comments, the staff believes that the preliminary part of the recommendation should state that, while cases have enunciated both the Restatement and the UCC test, the recommendation selects the UCC test for purposes of uniformity:

> The Uniform Commercial Code parol evidence rule differs from existing general contract law in a few aspects. The Uniform Commercial Code precludes evidence of consistent additional terms to explain or supplement the writing if the court determines that the additional terms are such that, if agreed upon, they would certainly have been included in the writing.[13a]

13a. Uniform Commercial Code Section 2202, Official Comment 3. While California cases have adopted the Uniform Commercial Code rule, they have also enunciated an alternate rule of admissibility based on the Restatement of Contracts. See, e.g., Masterson v. Sine, 68 Cal.2d 222, 228-29, 436 P.2d 561, 564-65, 65 Cal. Rptr. 545, 548-49 (1968) (stating both UCC and Restatement tests); Birsner v. Bolles, 637-38, 97 Cal. Rptr. 846, ___ (1971) (applying both UCC and Restatement tests). For purposes of uniformity with the Uniform Commercial Code, the Commission recommends codification only of the Uniform Commercial Code rule.

Similar language should go in the Comment to subdivision (b)(3).

One commentator believes the UCC test "is an entirely unnecessary provision which will leave the court with virtually unfettered discretion and no parol evidence rule at all." (Kipperman--Exhibit 1--pink.) While there is some merit to the point that subdivision (b)(3) gives the trial court fairly broad discretion to admit parol evidence,

it is not true that the subdivision emasculates the parol evidence rule. Subdivision (a) still remains to preclude extrinsic evidence that contradicts the terms of the agreement; subdivision (b)(3) is limited to admissibility of extrinsic evidence of consistent additional terms to explain or supplement the agreement.

Judge Zack sees a different evil in subdivision (b)(3)--"it will lead to uncertainty and additional appeals." (Exhibit 6--gold). It was for just the opposite reason that the Commission included in subdivision (b)(3) authority for the court to preclude evidence of additional terms if it determines that the terms, if agreed upon, would certainly have been included in the writing. The purpose of this provision is to provide the court with a clear objective test as an alternative to the subjective test that the parties "intended" the writing as a complete and exclusive statement of the terms of the agreement. Judge Zack may be right that subdivision (b)(3) as drafted will give rise to appeals, but the staff believes that application of the standard is within the discretion of the trial court, whose judgment will prevail.

Judge Zack recommends that subdivision (b)(3) be replaced by a provision to the effect that evidence of consistent additional terms may be received unless the court finds that "the parties have expressly provided that the terms of the instrument are final and complete terms governing the transaction." The test proposed by Judge Zack, while objective and providing certainty, the staff believes is unduly restrictive. There will without doubt be many cases where the contract contains a boilerplate statement that the written contract is the complete and exclusive embodiment of all terms of the agreement, while in fact the parties did not intend it as exclusive and had a collateral agreement. Conversely, there will be other cases where the parties intended that the written contract be complete and exclusive, but neglected to put in the boilerplate to make it so.

On balance, the staff believes that the best test for admissibility of consistent additional terms is that they are admissible unless the court determines that the writing is intended as a complete and exclusive statement of the terms of the agreement. This is embodied in the first part of subdivision (b)(3). The provision that the court might

exclude consistent additional terms if it determines that they would certainly have been included in the writing if agreed upon, the staff believes is helpful. The staff feels it should be kept unless it becomes clear that it will create too many problems.

Subdivision (c). Scolnik (Exhibit 3--green) questions whether the terms "mistake" and "imperfection" in subdivision (c) are redundant. The cases indicate that "mistake" refers to an inadvertent failure of the written instrument to contain terms actually agreed to by the parties. The staff has not been able to discover cases relating to "imperfection," but assumes that the reference is to typographical errors, reproduction defects, and the like. The staff sees no great confusion caused by the reference to imperfection, hence is not particularly sympathetic to clarifying or deleting the reference.

Scolnick also would like to see a more precise delineation of the distinction between "mistake or imperfection" in subdivision (c) and "explain" in subdivision (b). The reference to explanation relates to ambiguity, uncertainty, conflict, and the like in the terms of the writing. The staff believes that this is clear from the words themselves, and requires no further delineation, which could only cause problems.

Subdivision (e). Both Scolnik (Exhibit 3--green) and Judge Zack (Exhibit 6--gold) point out that the reference in subdivision (e) to "illegality or fraud" is superfluous in light of the general reference in subdivision (d) to "validity" of the agreement. While this point has some merit, there are cases of fraud and illegality which do not involve invalidity of the contract. For example, fraud in inception results in a void contract, but fraud in inducement results only in a voidable contract. Moreover, some cases have involved fraud only as to a particular aspect of a contract, thus serving as a basis for reformation rather than for invalidity. Likewise, illegality in a contract may be partial, hence severable. See generally 1 B. Witkin, Summary of California Law, Contracts §§ 321-322, 342-343 (8th ed. 1973). For these reasons, the staff believes it would not be wise to repeal the "illegality or fraud" provision of subdivision (e) in reliance on the general "validity" provision of subdivision (d).

Subdivision (f). Subdivision (f) continues an existing provision making the parol evidence rule applicable to wills and deeds as well as contracts between the parties. Judge Zack (Exhibit 6--gold) raises the question of the interrelation between Section 1856 and Section 105 of the Probate Code, which precludes evidence of prior oral declarations by the testator. The interrelation is that the general rules of Section 1856 are subject to the specific rule of Section 105, as indicated in Estate of Russell, 69 Cal.2d 200, 212, 444 P.2d 353, ___, 70 Cal. Rptr. 561, ___ (1968):

> As we have explained, what is here involved is a general principle of interpretation of written instruments, applicable to wills as well as to deeds and contracts. Even when the answer to the problem of interpretation is different for different kinds of written instruments, "it appears in all cases as a variation from some general doctrine." (9 Wigmore, op. cit. supra, § 2401, p.7) Under the application of this general principle in the field of wills, extrinsic evidence of the circumstances under which a will is made (except evidence expressly excluded by statute)[18] may be considered by the court in ascertaining what the testator meant by the words used in the will.

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18. As for example, under section 105 (see fn. 9, ante) which specifically excludes "the oral declarations of the testator as to his intentions." This opinion does not disturb the statutory proscription against the use of such evidence.

Judge Zack suggests that Section 105 ought at least to be referenced in the Comment to Section 1856. The staff has no objection to adding the following language to the Comment:

> Subdivision (f) makes this section applicable to wills and deeds; this application is subject to express statutory provisions limiting extrinsic evidence. See, e.g., Probate Code Section 105 (excluding oral declarations of testator); Estate of Russell, 69 Cal.2d 200, 212, 444 P.2d 353, ___, 70 Cal. Rptr. 561, ___ (1968).

Principles of Interpretation

Judge Zack (Exhibit 6--gold) suggests that the rule of Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., Inc., 69 Cal.2d

33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968), be codified. The P.G.& E. case states that the test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the trial judge to be plain and unambiguous on its face, but whether the extrinsic evidence is relevant to prove a meaning to which the instrument's wording is reasonably susceptible. This test is not really an aspect of the parol evidence rule, but rather goes to the related matter of contract interpretation.

The staff would be reluctant to begin codifying principles of contract interpretation, unless there is something in the parol evidence provisions that impliedly repeals the principles. Judge Zack sees a potential problem here in that the statute authorizes introduction of evidence to explain or interpret, without limitation. The staff does not believe this is a serious problem. The Comment already refers to the P.G.& E. case; the staff proposes to add the following language to the Comment:

> Nothing in this section is intended to affect the rule of Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., Inc., supra, that the test of admissibility of extrinsic evidence to explain or interpret the meaning of a written instrument is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

Avoidance of Parol Evidence Rule by Mutual Consent

Judge Zack (Exhibit 6--gold) suggests that the parties should be able to avoid the intricacies and uncertainties of the parol evidence rule by agreeing in their contract that the contract will be interpreted solely with reference to the words contained in the contract:

> The parties to an instrument subject to the Parol Evidence Rule may agree in writing that in any litigation arising thereunder no parol evidence may be considered and that the intent of the parties shall be determined by the court solely from the words or other content on the face of the document. In utilizing this section it is sufficient to provide that the agreement (or other document) is subject to the provisions of this section of the Civil Code.

The staff finds this concept attractive but sees a number of problems with it. First is the problem of consumer contracts: Such a provision could easily be put into an adhesion contract to allow an

unscrupulous merchant to make any number of oral promises knowing he will not be bound by them. The provision could be drafted so as to exclude consumer contracts. A second related problem is the form contract that contains the parol evidence waiver, which the parties did not necessarily intend to be bound by. This problem could be solved by requiring the waiver to be in distinctive type, or separately signed or initialed. A third problem is where the parties have agreed to be bound by the terms of the contract, but there is some ambiguity in the terms, or some term that was not covered, or a term that was altered or omitted through mistake, or the like. This problem could be resolved by limiting the waiver to evidence that contradicts the terms of the written contract.

With these problems resolved, a waiver provision such as the one suggested by Judge Zack would not look much different from the parol evidence rule as it has evolved and as codified in the tentative recommendation. If the parties knowingly sign an express provision that their written agreement is intended as complete, exclusive, and final, parol evidence would be admissible neither under Judge Zack's proposal nor under the parol evidence rule (unless the court determines that the parties did not so intend despite the integration clause). The staff believes that Judge Zack's proposal, as modified to cure the problems, would add little to the parol evidence rule. The staff prefers the flexibility of the parol evidence rule to the certainty offered by the proposal.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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July 26, 1977

California Law Revision Commission
Stanford Law School
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Attention: John H. DeMoully
Executive Secretary

RE: TENTATIVE RECOMMENDATION RELATING TO THE PAROL EVIDENCE RULE

Dear Mr. DeMoully:

Please forward this letter to the Commission when it considers the above-mentioned tentative recommendation.

It is difficult for anyone to quarrel with the general proposition that the statute should reflect the law as applied by the cases and your recommendation "that California's parol evidence rule statutes be revised to conform to existing law" seems harmless enough and, indeed, the proper course to take. However, the very next sentence causes one to question whether that is really what the Commission has in mind, for the next sentence says that the UCC shall "serve as the basis for the statutory restatement." (Page 3).

One would have assumed that the basis for the statutory restatement would have been the cases set forth in footnotes 5-9 which purport, according to the text, to constitute the present law relative to the statutes to be revised. It is not at all clear that the UCC version of the parol evidence rule, applicable as it is only to a very limited class of transactions, is or should be the same law as is or should be applicable to the isolated private transaction outside the context governed by the UCC. Indeed, if a transaction is governed by the UCC, then the revision of the other statutes does not appear to be relevant in any event. I take it no proposed changes to UCC § 2202 are proposed at all.

Indeed, the proposed revisions are going to inject uncertainty and confusion. For example, the reference in your proposed § 1856(b)(1) & (2) smack of UCC terminology which, we presume by definition (since we are referring to § 1856 of CCP), is non-existent in the particular kind of transaction which necessitates a reference to § 1856 rather than to the UCC. In the context of

an isolated transaction, what is a "course of dealing or usage of trade" or "course of performance"? Also, I tend to think that the proposed § 1856(b)(3) (and particularly the words following the word "or") is an entirely unnecessary provision which will leave the court with virtually unfettered discretion and no parol evidence rule at all.

If what the Commission wants to do is to repeal the parol evidence rule, that is one thing which I can understand (but would oppose). But to de facto repeal it, with a provision such as § 1856(b)(3), is I think less than completely honest. Indeed the language in that provision which I object to is virtually nonsensical. How could something ever exist that a court could say certainly would have been included in a writing if agreed upon when in fact the hypothetical agreement was not included in the writing. This is surely a strange notion of certainty.

Very truly yours,

STEVEN M. KIPPERMAN

SMK:dr

EXHIBIT 2

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July 26, 1977

California Law Revision Commission
Stanford Law School
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Comments re Tentative Recommendation
Relating to Parol Evidence Rule

Gentlemen:

I agree that the parol evidence rule has been rendered non-existent by the legislative action of the various courts. However, I do not agree that your proposal will remedy the situation.

Either you have the rule or you do not. Why pussyfoot by stating the rule and then making exceptions? Of course, the rule - without exceptions - will do injustice in some instances. But once people learn that the rule has no exceptions, they will make the writing complete and unambiguous or take the consequences. It will stifle all the "phony" lawsuits filed on the theory that "hard cases" will incite pity, etc.

Once you start with exceptions - there is no end.

For example, if the writing specifically recites that there are no representations, etc., except as contained therein, all the defendant has to show is that the agreement was entered into by mistaken reliance on outside representations, etc., and the entire agreement falls.

If a party is represented by a lawyer, his remedy is against the lawyer for mistake, etc. If he wants to be his own lawyer, that is at his own risk.

I suggest that all you need do is use the present language of CCP 1856, up to the word "writing". Then place a period after that word, and delete all the rest. Then add the words "There shall be no exceptions to the foregoing". And that would be it!

Or, use the lenguage of Commercial Code §2202 up to the words

"and agreement", deleting the "but may be explained or supplemented", and the balance of the "garbage".

It would be a one-sided wager to bet that in the first case to come before the courts, that your proposed language would be rendered meaningless.

Yours very truly,

ABRAHAM GOTTFRIED

AG/mh

EXHIBIT 3

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California Law Revision Commission
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Gentlemen:

I offer the following comments concerning your tentative recommendation relating to the parol evidence rule:

(1) I agree with the objective and the reasons.

(2) Considering the history and your objectives and reasons, is it not possible - and desirable - to eliminate the proposed changes to CC 1625, 1639 by simply repealing them and setting forth all the necessary statutory law in CCP 1856? That would certainly put everything in one place for easy reference.

(3) With respect to the proposed new CCP 1856,

(a) Is it possible to delineate more precisely the distinction between "explaining" the terms of the written agreement (subsection (b), and the reference to "mistake or imperfection" (subsection (c)?

(b) The term "imperfection" in subsection (c) is certainly not as self-evident as the term "mistake." Could a clearer word or phrase be substituted for "imperfection?"

(c) Subsections (d) and (e) seem to be to overlap to a large degree. (d) seems to be the general statement, and (e) a particularization. Is this necessary or desirable? Does it not breed a source of confusion and argument? Indeed, subsection (e) in referring to "ambiguity," "interpret," seems to duplicate subsection (c) to a substantial extent.

If the overall objective is logical clarity, as well as centralization, might not the organization and language of the proposal be improved in light of the foregoing points?

It goes without saying that since I am not a legal scholar, or legal authority on this subject, or on the subject of legal draftsmanship, I trust I will be forgiven if my comments have no merit. They are not intended as nitpicking but only some possible ways of attaining the overall objective more fully.

I will appreciate receiving a copy of your final recommendation and draft.

Very truly yours,

Robert J Scolnik

EXHIBIT 4

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August 1, 1977

OUR FILE NUMBER

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation Relating to Parol Evidence Rule

Gentlemen:

I am pleased to see the effort to update the code provisions relating to the parol evidence rule, and think the proposed changes are desirable in form. It would be advantageous if more could be done in other areas along the lines of conforming the general law of contracts with the U.C.C.

Sincerely,

Dick Wolford

Richard H. Wolford

RHW:ndb

EXHIBIT 5

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August 18, 1977

California Law Revision Commission
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Stanford University
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Re: Parol Evidence Rule

Gentlemen:

Your effort in advancing the tentative recommendations on modification of the Parol Evidence Rule is commendable, but it is questionable whether the conclusions you have reached find solid support in the leading cases. Moreover, your choice of the Uniform Commercial Code standard is inappropriate because the policy consideration present in a sale of goods transaction may not be universally applicable to general contract transactions and conveyances.

The proposed amendment to Code of Civil Procedure, Section 1865(b)(3) advanced by you would exclude parol evidence of consistent additional terms if such additional terms would "certainly" have been included in the writing. But, Riley v. Bear Creek Planning Committee, 17 Cal.3d 500 (1976) has summarized Masterson v. Sine as follows:

> "In Masterson v. Sine, supra, 68 Cal.2d 222 (this court) abandoned the rule that evidence of oral agreements collateral to an agreement in writing must be excluded where the instrument on its face appears to be an integration. Rather, the court held that credible extrinsic evidence of a collateral oral agreement is admissible if, considering the circumstances of the parties, the agreement is one which 'might naturally be made as a separate agreement'". Riley v. Bear Creek Planning Committee, 17 Cal.3d at 509. (Emphasis added.)

Thus, while you recommend the "certainly" test, Riley tells us that Masterson laid down the "naturally" test.

The significance of the distinction between the "naturally" test and the "certainly" test was recognized by

Masterson v. Sine which noted that the Restatement standard permits proof of a collateral agreement if it "'is such an agreement as might naturally be made as a separate agreement'" but that the "draftsmen of the Uniform Commercial Code would exclude the evidence in still fewer instances: "'If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court'". Masterson v. Sine, 68 Cal.2d 222, 227-228 (1968).

Your recommendation of the "certainly" test over the "naturally" test is not supported by Masterson v. Sine which declined to make that choice and is not in accord with the view of Masterson taken by Riley and with Sayler Grain & Milling Co. v. Henson, 13 Cal.App.3d 493, 501-502, 91 Cal.Rptr. 847 (1970) which adopted the "naturally" test. It is, therefore, not completely accurate to state as you did that: "The Law Revision Commission recommends that California's Parol Evidence Rule statutes be revised to conform to existing law".

Moreover, the wisdom of your recommendation that the Uniform Commercial Code serve as the basis for the statutory amendments which you seek is equally open to question. Masterson v. Sine, which had the opportunity to select the Uniform Commercial Code standard over the Restatement standard declined to do so. Riley, in telling us what Masterson v. Sine stands for, selected that portion of Masterson v. Sine which quoted the Restatement standard, i.e., the "naturally" test.

Aside from the question of whether your recommendations are representative of existing case law, it is not clear that you have considered the policy implications underlying the Uniform Commercial Code test. It may well be that the Uniform Commercial Code was designed to institutionalize practices which have developed over the years in the goods industry. One could well tolerate the omission of written terms among merchants who deal on a repetitive basis in patterned transactions without necessarily being as liberal in general contractual disputes which arise outside of the goods industry.

Your recommendations on modification of the Parol Evidence Rule should, therefore, be revised to more accurately reflect existing California case law and should articulate the policy considerations inherent in your recommendations.

I would appreciate you letting me have your views on the questions raised by this letter.

Very truly yours,

FRESHMAN, MARANTZ, COMSKY & DEUTSCH

By Leib Orlanski
Leib Orlanski

LO/mec

EXHIBIT 6

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
ERNEST J. ZACK, JUDGE

TELEPHONE
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August 23, 1977

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

Through the courtesy of Mr. Richard H. Keatinge of Los Angeles I have received a copy of your proposals for revision of the Parol Evidence Rule for possible comment. My questions and possible suggestions are as follows:

(1) Under the draft (and at the present time) to examine and apply the statutory provisions as to the Parol Evidence Rule one has to consult the Civil Code, the Code of Civil Procedure, the Commercial Code and the Probate Code. It seems to me that confusion would be reduced, and the purposes of codification more likely be achieved, to have all provisions on this subject in one series in one code.

(2) Under the draft, the Civil Code section 1625 provides that a final written agreement supersedes all prior negotiations to the extent provided in section 1856 of the Code of Civil Procedure. If the Commercial Code is to have separate provisions on the Parol Evidence Rule (section 2202), it seems to me that Civil Code section 1625 should, as it applies to transactions within the Commercial Code, be limited correlatively by Commercial Code section 2202. In other words, I suggest that the language added to section 1625 should read as follows: instrument to the extent provided in section 1856 of the Code of Civil Procedure and by section 2202 of the Commercial Code. If this is not done, it is implied, by the reference to the Parol Evidence Rule in Commercial Code section 2202 in the Comment, that there is some difference in the application of Civil Code section 1625 as applied to Commercial Code transactions on the one hand, and non-Commercial Code transactions on the other.

(3) The same would seem to apply to the amendment to Civil Code section 1639. Under the draft of section 1639 the intent of the parties is to be ascertained from the writing

alone, if possible, subject to the other provisions in that title and to section 1856 of the Code of Civil Procedure. It seems to me that Civil Code section 1639 must be applied when Commercial Code section 2202 is involved, and that the latter section should be added to the underlined changes in the draft for section 1639 as is suggested in paragraph (2) of this letter for section 1625. The words added to section 1639 should therefore be: title and to sections 1856 of the Code of Civil Procedure and section 2202 of the Commercial Code.

(4) In the proposed subdivision (b) of section 1856 of the Code of Civil Procedure it is provided that evidence of consistent additional terms may be received unless the court finds that the terms used were exclusive or that such additional terms, as agreed upon, would "certainly have been included in the writing." Although the latter language is mentioned in Masterson v. Sine, 68 C.2d 222, and in the Uniform Commercial Code Commissioner's notes to section 2022, it seems to me it will lead to uncertainty and additional appeals. I suggest, rather, a provision to the effect that evidence of consistent additional terms may be received unless the court finds that the parties have expressly provided that the terms of the instrument are final and complete terms governing the transaction.

(5) One of the purposes of these revisions of the Parol Evidence Rule is to harmonize the statutes and the cases following Masterson v. Sine, supra. The proposed section 1856 seems to me to reflect Masterson, but it does not codify the equally important Pacific Gas and Electric Co. v. Thomas Drayage Co., 69 C.2d 33 at 37. It should do so.

This is a matter of substantial importance. Subsection (a) of section 1856 limits its prevention of contradiction of the document to proof of prior agreements, or contemporaneous oral agreements. Moreover, there is no limitation in subsection (b) (allowing explanation of the instrument by course of dealing, trade usage, or course of performance) to the effect that such evidence may not contradict the terms sought to be explained. Moreover, this omission may be considered significant since the Comment does refer to the ability to contradict it with a contemporaneous written agreement.

Similarly, subsection (e) allows use of evidence of circumstances under which the instrument was made or to which it relates as defined in section 1860 ("...including the situation of the subject of the instrument and of the parties to it").

There is obviously no provision in either section 1856(e) or section 1860 that such evidence may not be used to provide a meaning of which the language is not reasonably susceptible, as Pacific Gas requires.

It is therefore suggested subsection (f) be made subsection (g). Subsection (f) should codify Pacific Gas (p. 37) by providing:

> "(f) the evidence referred to in subsections (b) and (e) shall not be used to prove a meaning to which the language of the instrument is not reasonably susceptible."

(6) The draft, as before, makes the rule applicable to wills as well as agreements and deeds. Section 105 of the Probate Code provides, among other things, that "the oral declarations of the testator" may not be received to correct mistakes, omissions or descriptions in a will. The relationship between that Probate Code section and the proposed section 1856 is not clear to me. Is section 105 of the Probate Code an additional limitation on the reception of parol evidence, or is it impliedly modified by section 1856? Whatever the answer to this question, since the section applies to wills, Probate Code section 105 ought at least to be referenced in the Comment to section 1856.

(7) Subdivision (e) of section 1856 concludes that it does not exclude evidence "...to establish illegality or fraud." This language seems redundant. Subsection (d) allows evidence to prove all cases of invalidity of the instrument, which should include illegality or fraud.

Dean Wigmore refers to the Parol Evidence Rule as the most difficult subject in the whole law of evidence. The Commission will perform a great service if it can clarify the Rule in California. On the other hand, Masterson (and the cases that followed) added to the confusion in California. In the interest of the certainty of business transactions, and in the application of the law thereto by the courts, care should be taken that this draft does not add to that confusion. I am afraid it does. I am not confident that the confusion will ever be completely eliminated because the Rule has such a varied history, and covers such a wide variety of transactions. The Parol Evidence Rule will probably always be a peril to the draftsman.

Accordingly, I would suggest, as an alternative for those draftsmen who wish to avoid most of the problems of the Rule, legislative sanction for waiving the right to introdice evidence to explain or interpret the document, somewhat as follows:

> "The parties to an instrument subject to the Parol Evidence Rule may agree in writing that in any litigation arising thereunder no parol evidence may be considered and that the intent of the parties shall be determined by the court solely from the words or other content on the face of the document. In utilizing this section it is sufficient to provide that the agreement (or other document) is subject to the provisions of this section of the Civil Code."

If I may be of any service to the Commission in this matter, I would be happy to help in any way possible.

Sincerely,

Ernest J. Zack

EJZ:bk

EXHIBIT 7

[transcription]

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8/4/77

John H. DeMoully, Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Sir:

Agree with your purpose and feel statutory changes reflect current law. No criticism.

Very truly yours,

/s/ Robert Siemer
Legal Counsel, Memorial-LB

Exhibit 8

D. Evidence To Explain or Supplement Terms

1. Consistent Additional Terms

a. [§7.37] *Admitted Unless Writing Intended To Be Complete*

The code permits written sales contract terms to be "explained or supplemented . . . by evidence of consistent additional terms unless the court finds the writing to have been intended . . . as a complete and exclusive statement of the terms of the agreement." §2202(b). The basic noncode parol evidence rule, as usually stated, excludes additional terms: When the parties make an agreement in writing, the agreement is said to become "integrated," *i.e.*, the writing contains all its terms, and no evidence of other terms (consistent or inconsistent) can be introduced between the parties. CC §1625; CCP §1856; *Estate of Gaines* (1940) 15 C2d 255, 264, 100 P2d 1055, 1060; see Witkin, CALIFORNIA EVIDENCE §§714, 720 (2d ed, 1966). But the courts evolved an exception to the basic rule, giving a result similar to the rule of §2202(b). If it is determined that the parties made an agreement but did not incorporate all the terms of their agreement into the writing, evidence is admissible to prove orally agreed terms on which the writing is silent, if they are not inconsistent with the written terms. *Spurgeon v Buchter* (1961) 192 CA2d 198, 13 CR 354; see Witkin, EVIDENCE §§720, 733–734.

In one important respect this noncode judicial exception appears to be enlarged by §2202(b). Under the noncode rule, the court ordinarily determines from the face of the document whether the writing embodies all or only some of the contract terms. If the writing purports to be a complete contract, parol evidence of any further terms is inadmissible. *Corporation of Presiding Bishop v Cavanaugh* (1963) 217 CA2d 492, 506, 32 CR 144, 152; see Witkin, EVIDENCE §721. Section 2202(b) probably requires the court to decide the parties' intent, *i.e.*, whether the writing was the complete contract, as a preliminary fact and to consider relevant extrinsic evidence as well as the document itself. See CCP §2102; Evid C §§400–405. The contrary argument is that a determination of completeness *from the face of the document* fully satisfies §2202(b) on intention of completeness. These arguments are discussed in 1 New York Law Revision Commission, STUDY OF THE UNIFORM COMMERCIAL CODE 599 (1955).

From the wording of §2202(b) it appears the burden of showing that the writing was intended to state the complete agreement is placed on the opponent of evidence of consistent additional terms, rather than the proponent. See Note, 112 U PA L REV 564, 566 (1964). Under Evid C §§400–401, the evidence of consistent additional terms is "proffered evidence" whose inadmissibility depends on a "preliminary fact," *i.e.*, that the writing was intended as the complete agreement. Evidence

Code §405(a) requires the court to allocate the burden of proof of disputed preliminary facts according to the applicable "rule of law," in this case, §2202(b). Therefore, the court will place the burden of showing intended completeness on the opponent of the consistent additional terms. Although Evid C §403(a)(1) states that the *proponent* of proffered evidence has the burden of establishing a preliminary fact on whose "existence" the admissibility of the evidence depends, this section is inapplicable for two reasons: (1) Under §2202(b), the admissibility of evidence of consistent additional terms (proffered evidence) depends not on the *existence* of a fact, but on the *absence* of a finding that would exclude the evidence, *i.e.*, that the writing is "a complete and exclusive statement" of the agreement; and (2) the preliminary facts to which Evid C §403(a)(1) applies may become jury questions (Evid C §403(c)); this is inconsistent with §2202(b), which requires "the court" to make the preliminary finding. Preliminary facts under Evid C §405(a) are decided wholly by the court. Evid C §405(b).

On usefulness of a merger clause in meeting the burden of proving that the writing was intended to be complete and exclusive, see §7.43.

The effect of §2202(b) in actual practice may be less drastic than appears on its face. Even under noncode law, when courts rule on whether a written agreement is complete on its face, they may be influenced by extrinsic evidence of the surrounding circumstances. See 1 Hawkland, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 166 (1964).

On exclusion by the noncode statute of frauds (CC §1624) of evidence of oral terms that vary or add to the "essential" terms stated in a writing, see §§7.11, 7.32. On admissibility of additional warranty terms under the parol evidence rule, see §§6.95–6.96.

b. [§7.38] *Partial Exclusion*

Even when the court declines to find "that the writing was intended by both parties as a complete and exclusive statement of all the terms," §2–202, Comment (3), suggests that it may admit some additional oral terms and exclude others. "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." Thus, if a written contract deals exhaustively with the time, place, and manner of the buyer's payment, the court may exclude evidence of an additional payment term on the ground that if the term had been agreed on, it would have been included in the document. Yet the same document may contain so little about the time or manner of delivery that an additional agreed delivery term might have been omitted from the document and would be admissible in evidence. See also §2–202, Comment (1)(a), emphasizing that a writing may be final on some matters but not include all the matters agreed on.

The exclusion of an additional term as suggested by §2–202, Comment (3), is compatible with §2202(b) itself if the term that otherwise "would certainly have been included in the document" is considered not "consistent" with the document. See 1 Hawkland, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 168 (1964).

2. Circumstances of Agreement

a. [§7.39] *Course of Dealing*

Written contract terms may be explained or supplemented by evidence of the parties' previous course of dealing with each other. §§2202(a), 1205(1). A course of dealing may be used to interpret, supplement, or qualify the express terms of an agreement. §1205(3); see §1–205, Comments (1), (3); §2–202, Comment (2); §5.7.

Although §2202 does not expressly prohibit the contradiction of a written term by evidence of a course of dealing, §1205(4) provides that an express term supersedes a course of dealing with which the term cannot reasonably be reconciled. Course of dealing may also be superseded by an inconsistent course of performance. §2208(2); see §7.41.

The noncode parol evidence rule permits explanation of the terms of a contract by evidence of the circumstances under which the contract was made. See Witkin, California Evidence §725 (2d ed, 1966); 1 Witkin, Summary of California Law 249 (7th ed, 1960). These circumstances may include course of dealing. The noncode rule, however, does not permit this evidence of circumstances to be used to explain terms that have a plain meaning and are free of ambiguity. *William B. Logan & Associates v Monogram Precision Indus., Inc.* (1960) 184 CA2d 12, 7 CR 212; Witkin, Evidence §§727, 730. The code rejects this limitation; ambiguity is not a prerequisite for admitting evidence of course of dealing. See §2–202, Comment (1)(c). The noncode restriction may continue to apply, however, to evidence of circumstances that is not expressly admissible under §2202(a)–(b), *e.g.*, a single conversation between the parties too brief to qualify as "a sequence of previous conduct" constituting a course of dealing (§1205(1); see §5.7).

On contractual exclusion of course of dealing evidence, see §7.44.

b. [§7.40] *Usage of Trade*

Evidence of an applicable usage of trade is also admissible to explain or supplement the written contract terms. §2202(a). On the definition of trade usages and their applicability to particular parties and transactions, see §1205(2)–(3), (5); §§5.9–5.13. A usage of trade is superseded by any express term, course of dealing, or course of performance with which it cannot reasonably be reconciled. §§1205(4), 2208(2).

The noncode parol evidence rule permits evidence of trade usage to explain words even if their meaning appears to be plain and unambiguous. *Beneficial Fire & Cas. Ins. Co. v Kent Hicks & Co.* (1939) 48 C2d 517, 525, 297 P2d 428, 431; see Witkin, California Evidence §732 (2d ed, 1966). Since the noncode rule does not subject evidence of trade usage to the restrictions that it imposes on other explanatory evidence (see §7.39), admissibility of trade usage evidence is not substantially enlarged by §2202(a). See §2–202, Comments (1)(c), (2); 1 Witkin, Summary of California Law 253 (7th ed, 1960).

For discussion of contractual limitations on evidence of trade usage, see §7.44.

c. [§7.41] *Course of Performance*

One party's voluntary acquiescence in the other party's repeated conduct in performing a particular sales contract may establish a course of performance by which that contract can be interpreted. §2208(1). A course of performance can establish any meaning reasonably consistent with the contract's express terms (§2208(2)) and, subject to the limitations of §2209, may also be evidence of a waiver or perhaps even a modification of a term (§2208(3)). See §3.4.

Section 2202(a) provides that the written terms of a sales contract may be explained or supplemented by course of performance. This provision is in accord with the noncode parol evidence rule, which restricts evidence of occurrences at and before the making of the contract, but not evidence of the parties' subsequent dealings. See *Chohan v Kersey Kinsey Co.* (1959) 173 CA2d 548, 343 P2d 614, Witkin, California Evidence §743 (2d ed, 1966). For noncode law on interpretation of contracts through subsequent conduct of the parties, see 1 Witkin, Summary of California Law 249 (7th ed, 1963).