

# Washington Law Review

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Volume 52 | Number 4

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10-1-1977

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### Recommended Citation

Arden J. Olson, Comment, *Parol Evidence in Washington: The Use of Extrinsic Evidence to Address the Integration and Interpretation of Documents*, 52 Wash. L. Rev. 923 (1977).

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## PAROL EVIDENCE IN WASHINGTON: THE USE OF EXTRINSIC EVIDENCE TO ADDRESS THE INTEGRATION AND INTERPRETATION OF DOCUMENTS

The body of doctrines subsumed under the label "parol evidence rule" has long produced chronic litigation<sup>1</sup> and scholarly headaches.<sup>2</sup> The parol evidence rule provides that when parties have embodied an agreement in writing, that writing may not be varied or contradicted by extrinsic evidence.<sup>3</sup> This bare statement, however, sheds no light on two issues crucial to its implementation: first, what evidence may be considered by courts in deciding whether a transaction has been integrated or reduced to a writing; and second, to what extent may extrinsic evidence be considered for the purpose of interpreting a completely integrated writing.<sup>4</sup>

Washington judicial treatment of these related concerns, the integration<sup>5</sup> and interpretation<sup>6</sup> of written contracts, constitutes the

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1. "[T]he so-called parol evidence rule is a euphemism masking a congeries of standards which are in any rational view internally somewhat inconsistent by their usual statement and also unduly difficult to apply in concrete situations at trials. . . . [T]he so-called parol evidence rule has been considered in several hundred Washington opinions—more often than any other general subject [relating to evidence] except the subject of presumptions." 5 R. MEISENHOLDER, *WASHINGTON PRACTICE Evidence* § 121, at 124 (1965). "Any reader of advance sheets is well aware that most of the contract decisions reported . . . involve the parol evidence rule and questions of interpretation . . ." Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 *IND. L.J.* 333, 333 (1967). See also Shattuck, *Contracts in Washington, 1937-1957: Part II*, 34 *WASH. L. REV.* 345, 369 (1959).

2. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §§ 213-214, at 434-35 (1st ed. 1954); J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 390 (1898); 9 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2400, at 3 (3d ed. 1940).

3. 3 A. CORBIN, *CONTRACTS* § 573, at 368 (Rev. ed. 1960); 9 J. WIGMORE, *supra* note 2, § 2425, at 75-76; 4 S. WILLISTON, *CONTRACTS* § 631, at 948 (3d ed. 1961). Extrinsic evidence includes all evidence, oral or written, which arises outside a given document. 3 A. CORBIN, *supra*, § 573, at 358; 4 S. WILLISTON, *supra*, § 631, at 948-49.

4. See Note, *The Parol Evidence Rule: Is It Necessary?*, 44 *N.Y.U.L. REV.* 972, 973 (1969).

5. The term "integration," which apparently was coined by Dean Wigmore, has been used in at least two ways. For Wigmore, it denotes the "embodiment in a single memorial" of a legal act. 9 J. WIGMORE, *supra* note 2, § 2401, at 7. Corbin uses the term to refer only to final and complete embodiments of agreements, 3 A. CORBIN, *supra* note 3, § 573, at 359, in contrast to Wigmore's use which allows for partial integration, covering less than an entire transaction. 9 J. WIGMORE, *supra* note 2, §§ 2400, 2425-2453.

This comment uses the term "integration" or "integrated writing" to refer to any writing intended by the parties to it as a final statement of an agreement's terms. See

focus of this comment. Part One will distinguish integration from interpretation and highlight factors which bear on the choices between conflicting approaches to extrinsic evidence.<sup>7</sup> Part Two will examine the rules governing the ascertainment of integration, by which courts decide whether the parties embodied their transaction in a written memorial, rendering it subject to the parol evidence rule. Part Three will analyze the analogous rules governing the extent to which a court interpreting the parties' language may look to the circumstances surrounding the document's execution. Finally, a suggestion will be made to improve Washington's approach to extrinsic evidence and to resolve current inconsistencies in the law.

## I. INTEGRATION AND INTERPRETATION: PROLOGUE

The relationship between the rules of interpretation and the doctrine of integration must be clarified at the outset, for the failure of courts clearly to distinguish the policies behind them has been a major difficulty in this corner of the law.<sup>8</sup> The doctrine of integration provides that a final agreement intended as such integrates or merges into it all prior agreements between the parties on that subject.<sup>9</sup> The terms of the agreement, therefore, are defined as a matter of substantive law by the integrated writing.<sup>10</sup> This doctrine is the substantive basis for

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RESTATEMENT (SECOND) OF CONTRACTS § 235(1) (Tent. Draft No. 5, 1970). Whether such a writing is a complete and exclusive statement of an agreement is often the primary determination for a court to make in litigation over the agreement; *see* Part II *infra*.

6. The word "interpretation" herein, following Corbin's definition, means the process by which the parties' language is given meaning. *See* 3 A. CORBIN, *supra* note 3, § 579. Thus it is *not* intended to include any of the processes by which a court decides what language represents the terms of the agreement, such as the process of determining whether the parties integrated their transaction. *See* J. THAYER, *supra* note 2, at 410-11.

7. Extrinsic evidence includes all evidence, oral or written, arising outside a document to which the parol evidence rule may apply. 3 A. CORBIN, *supra* note 3, § 573, at 358; 4 S. WILLISTON, *supra* note 3, § 631, at 948-49.

8. Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQ. L. REV. 337, 343 (1965-66); Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547, 555 (1970); *e.g.*, *Henderson v. Bardahl Int'l Corp.*, 72 Wn. 2d 109, 121, 431 P.2d 961, 968 (1967); *Weyerhaeuser Co. v. Burlington N., Inc.*, 15 Wn. App. 314, 318, 549 P.2d 54, 57 (1976). *See also* 3 A. CORBIN, *supra* note 3, § 542; 9 J. WIGMORE, *supra* note 2, § 2461.

9. *See* note 5 *supra*.

10. *Barber v. Rochester*, 52 Wn. 2d 691, 696, 328 P.2d 711, 714 (1958); 9 J. WIGMORE, *supra* note 2, § 2425; 4 S. WILLISTON, *supra* note 3, § 631, at 958. The primary import of the substantive nature of the doctrine is that it is not waived by failure (a) to object to the admission of evidence barred by it or (b) to plead it in a

the parol evidence rule; the rule excludes extrinsic evidence because the doctrine of integration renders such evidence immaterial.<sup>11</sup> Thus, the term "parol evidence rule" may correctly be applied only to tests protecting integrated writings from variation.

Nonetheless, rules governing evidence offered to interpret writings which are admittedly integrated have also been referred to as facets of the parol evidence rule.<sup>12</sup> Interpretation is the process of ascribing meaning to language;<sup>13</sup> the issue is not whether evidence of extrinsic terms may be considered, but rather whether extrinsic evidence purporting to explain terms *in the integrated writing* is relevant and admissible.<sup>14</sup> The parol evidence rule is inapplicable to evidence which

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responsive pleading. 5 R. MEISENHOLDER, *supra* note 1, § 121, at 124–25, and cases cited therein.

The integration principle, insofar as it pertains to contracts, rests upon the intent of the parties, for there is no requirement that contracting parties reduce their dealings to final or exclusive writings. 9 J. WIGMORE, *supra* note 2, § 2429; 4 S. WILLISTON, *supra* note 3, § 633. This contrasts with other types of writings, such as negotiable instruments, wills, and deeds, which are integrated as a matter of law. 9 J. WIGMORE, *supra* note 2, §§ 2450–2453; *Hirt v. Entus*, 37 Wn. 2d 418, 224 P.2d 620 (1950).

11. Strictly speaking, relevant evidence of terms extrinsic to an integrated writing is inadmissible because of the evidentiary rule against admitting evidence tending to show matter which is immaterial, *i.e.*, substantively irrelevant. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 185, at 434 (2d ed. E. Cleary 1972). The doctrine of integration is the substantive principle which defines the terms constituting a transaction, *see* note 10 *supra*, whereas the parol evidence rule provides that all terms not integrated are immaterial to an integrated transaction, 4 S. WILLISTON, *supra* note 3, § 631, at 955–63.

12. The imprecise use of the term "parol evidence rule" has engendered two sorts of mischief. First, it has induced the misapprehension that the rule is a rule of evidence; until recently most evidence textwriters felt obliged to deal with it. See authorities cited in note 2 *supra*; *cf.* C. McCORMICK, *supra* note 11, §§ 218–243 (McCormick's treatment of parol evidence rule omitted from second edition).

Second, because the rule has been confused with an evidentiary principle and said to render evidence "inadmissible," *e.g.*, *Truck-Trailer Equip. Co. v. S. Birch & Sons Co.*, 38 Wn. 2d 583, 590, 231 P.2d 304, 308 (1951), the label "parol evidence rule" has been applied to principles unrelated to integration which bear on the admissibility of evidence—primarily to the rules concerning evidence offered in aid of interpretation. Although commentators agree that the parol evidence rule has no application to such evidence, 3 A. CORBIN, *supra* note 3, § 542; 9 J. WIGMORE, *supra* note 2, § 2470, at 227; 4 S. WILLISTON, *supra* note 3, § 614; *Calamari & Perillo, supra* note 1, at 351–53, courts often refuse to accept such a limitation. See *Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1048–50 (1968) and cases cited therein; *Shattuck, supra* note 1, at 375–76 and cases cited therein. See also 9 J. WIGMORE, *supra* note 2, §§ 2400, 2458–2478.

The view that the parol evidence rule is irrelevant to interpretation is both an answer to the linguistic issue regarding the proper use of the term "parol evidence rule" and a substantive assertion that the rule is solely for the protection of integrated instruments. 3 A. CORBIN, *supra* note 3, § 579; 4 S. WILLISTON, *supra* note 3, § 631, at 955; C. McCORMICK, *supra* note 2, § 217; *Sweet, supra*, at 1048.

13. See note 6 *supra*.

14. The distinction between relevance and materiality, *see* note 11 *supra*, relates to the difference between the bases for excluding evidence offered (a) to prove ex-

clarifies the meaning of a writing's terms; it bars only evidence which varies or contradicts such terms.<sup>15</sup> Consequently, other rules have been developed to govern the admission of such evidence.<sup>16</sup>

The central question raised by the integration doctrine is whether relevant extrinsic evidence may be considered by a court for the purpose of determining whether and to what extent a writing has been integrated. If such evidence is to be considered, a second question arises, *viz.*, what standard ought a court apply to the evidence to resolve issues of integration? Washington cases have split on both questions, espousing various tests on both the amount of evidence to be considered and the standard to be applied to the evidence.

The primary interpretive issue, on the other hand, is whether extrinsic evidence may aid in the interpretation of terms which appear unambiguous. It is generally agreed that extrinsic interpretive evidence is admissible to explain a patent ambiguity.<sup>17</sup> The extent to which such evidence is to be excluded absent such an ambiguity, however, is a matter which has found little unanimity among the authorities.<sup>18</sup>

When considering the merits of alternate substantive approaches to integration and interpretation, Washington courts ought to bear in mind the procedural considerations which affect those approaches. As Professor McCormick pointed out,<sup>19</sup> one of the most significant procedural factors concerning extrinsic evidence is the judge's preeminence over the jury: questions of integration are almost invariably decided by the judge.<sup>20</sup> This judicial control undoubtedly tends to

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trinsic terms and (b) to interpret terms in the agreement. When evidence is offered to prove terms extrinsic to a writing, the primary evidentiary issue is not whether that evidence is relevant to show the terms, but whether the *term is material* to the agreement. When evidence is offered to show the meaning of a term in an agreement, the question is not whether the term is material, but whether the *evidence is relevant* to show the meaning of the term. See C. McCORMICK, *supra* note 11, at 434.

15. The difficulty involved here is distinguishing between evidence which merely clarifies a writing and evidence which varies it. Its resolution must be a matter for the trial judge, after consideration of the offered evidence. Calimari & Perillo, *supra* note 1, at 352; see Part III *infra*.

16. See Part III *infra*.

17. See, e.g., Grant County Constructors v. E. V. Lane Corp., 77 Wn. 2d 110, 121, 459 P.2d 947, 954 (1969).

18. 3 A. CORBIN, *supra* note 3, §§ 535, 542, 542A, 579; 4 S. WILLISTON, *supra* note 3, §§ 609, 627, 630; Calamari & Perillo, *supra* note 1, at 352; Shattuck, *supra* note 1, at 373-76 and cases cited therein.

19. C. McCORMICK, *supra* note 2, § 214.

20. This judicial role stems from the substantive nature of the integration principle; although the parties' intent may be a matter of fact, the admissibility of extrinsic

promote consistent results in commercial cases regardless of the standard governing the judge's determinations.<sup>21</sup> Also, the relative availability of summary judgment under various approaches to extrinsic evidence bears on their desirability. The spectre of spurious claims, brought against businesses in the hope of settlement to avoid litigation costs, is minimized insofar as such claims may be disposed of through summary judgment. To the extent that a resolution of integration issues requires factual determinations regarding the parties' actual intent, summary judgment may be unavailable if that intent is disputed.<sup>22</sup>

## II. DETERMINING THE FACT AND EXTENT OF INTEGRATION

To apply the parol evidence rule to a writing, a judge must determine whether the writing is integrated and, if so, whether the integration is complete.<sup>23</sup> The *fact* of integration may be an easy matter to

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evidence to vary a writing is purely a legal issue. 9 J. WIGMORE, *supra* note 2, § 2430, at 98; 4 S. WILLISTON, *supra* note 3, § 638, at 1042. *Cf.* 3 A. CORBIN, *supra* note 3, § 595, at 570-71 (judge may give close cases to jury).

Interpretation is also normally a judicial matter. 3 A. CORBIN, *supra* note 3, § 554, at 222; 9 J. WIGMORE, *supra* note 2, § 2461, at 188; 4 S. WILLISTON, *supra* note 3, § 616, at 649. When disputes arise upon which reasonable men could differ, however, the jury decides which meaning was intended. 3 A. CORBIN, *supra* note 3, § 554, at 226-27; 4 S. WILLISTON, *supra* note 3, § 616, at 652.

21. The fear that commercial instability would arise from jury control of integration rests on the assumption that commercial litigation often involves an economic underdog with whom juries might sympathize. Although the legitimacy of this fear is difficult to substantiate with data, judges quite likely have more perspective than do juries regarding the law's need for stability. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 366-69 (1932).

22. *See* Barovic v. Cochran Elec. Co., 11 Wn. App. 563, 524 P.2d 261 (1974) (summary judgment reversed on ground that parties' intent regarding integration was a material issue of fact); Diel v. Beekman, 1 Wn. App. 874, 880, 465 P.2d 212, 216 (1970).

23. Calamari & Perillo, *supra* note 1, at 335-37. An incomplete or partial integration is "a final expression of the agreement between the parties only as to such terms as are included therein." University Properties, Inc. v. Moss, 63 Wn. 2d 619, 621, 388 P.2d 543, 544 (1964). *See* 3 A. CORBIN, *supra* note 3, § 581; 4 S. WILLISTON, *supra* note 3, § 633, at 1014-15.

The question whether an instrument is totally or partially integrated is often equivalent in practical terms to the question whether it is integrated at all, unless one takes Williston's stance that partial integration must be determined solely from the face of a writing. 4 S. WILLISTON, *supra* note 3, § 633, at 1014-16. As Corbin observed, a partially integrated writing "does not prevent its own variation by extrinsic evidence," at least to the extent the oral terms add to the written portion. 3 A. CORBIN, *supra* note 3, § 581, at 441. A partially integrated writing precludes extrinsic evidence only to the extent the evidence *contradicts* it; thus provisions arguably consistent with the

determine; the *extent* to which a writing is integrated often involves more complex considerations.<sup>24</sup> This complexity has been compounded by the distinction between partial integrations and collateral agreements.<sup>25</sup> A complete integration never precludes all extrinsic evidence, for additional transactions between the parties may be shown despite such an instrument if they are "collateral," *i.e.*, independent of the writing.<sup>26</sup> Partial integrations prevent only their own contradiction by extrinsic terms, thus precluding a greater or lesser amount of extrinsic evidence depending on their scope.<sup>27</sup>

The partial integration and collateral agreement doctrines both address the same fundamental issue, namely, the extent to which an integrated instrument precludes evidence of additional terms.<sup>28</sup> The distinction between them depends on clear delineations between the parties' transactions: a finding that the writing is partially integrated permits terms related to the unintegrated portion of the action to be shown, whereas a finding that the writing is completely integrated permits only independent transactions to be proved. Because delineations between transactions are often muddled, the results under the two doctrines are frequently indistinguishable.<sup>29</sup>

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writing are equally unaffected by partially integrated and entirely unintegrated documents.

Although the partial integration doctrine is similar to the "collateral agreement" exception to the parol evidence rule in that it limits the preclusive effect of a writing, 5 R. MEISENHOLDER, *supra* note 1, § 124, at 139, it constitutes a broader inroad into the integration doctrine insofar as it permits a jury to consider evidence of terms which admittedly pertain to the same transaction as an integrated writing. This severely limits the preclusive effect of the written portion of a partial integration. 3 A. CORBIN, *supra* note 3, § 581, at 441.

24. Under any of the tests discussed below, an integration will be found if the parties intend a writing to be final on at least one term. This threshold is minimal, for a contractual writing (*i.e.*, a promissory writing assented to by both parties) would have no purpose at all if it imposed no rights or duties not subject to objection. The *extent* to which a writing is integrated is normally the critical issue; disputes commonly arise over whether a writing is exclusive of additional terms. Since one might easily concede that a writing is final as far as it goes, it is inappropriate to resolve the extent issue by finding a writing to be integrated (*i.e.*, final) without inquiring whether it is complete or exclusive. See WASH. REV. CODE § 62A.2-202 (1976) (distinguishes final agreements from complete and exclusive agreements).

25. See, *e.g.*, *Becker v. Lagerquist Bros., Inc.*, 55 Wn. 2d 425, 348 P.2d 423 (1960); *Sears, Roebuck & Co. v. Nicholas*, 2 Wn. 2d 128, 97 P.2d 633 (1939).

26. This independence may or may not include separate consideration. 3 A. CORBIN, *supra* note 3, § 594, at 567; 4 S. WILLISTON, *supra* note 3, § 637.

27. 9 J. WIGMORE, *supra* note 2, § 2430.

28. See 5 R. MEISENHOLDER, *supra* note 1, § 124.

29. See, *e.g.*, *Buyken v. Ertner*, 33 Wn. 2d 334, 343-49, 205 P.2d 628, 633-36 (1949); *Sears, Roebuck & Co. v. Nicholas*, 2 Wn. 2d 128, 133-35, 97 P.2d 633, 635-36 (1939).

The distinction between partial integrations and collateral agreements is useful pri-

A. *Differing Standards in Washington Law*

Commentators<sup>30</sup> and courts<sup>31</sup> alike have observed that certain Washington Supreme Court decisions espouse inconsistent rules governing integration determinations. Three standards may be distinguished in recent cases. The older rule, which has been termed the "mechanical test," permits a judge to consider only the language of a writing.<sup>32</sup> A more recent view adopts the so-called "intent test," which allows judicial consideration of all relevant evidence.<sup>33</sup> Both of these rules are subjective; *i.e.*, they seek by different techniques to ascertain the actual intent of the parties before the court. The third rule, herein termed the "objective test," is largely indifferent to actual intent; the fact and extent of integration turn on whether, considering the nature of the writing and of the additional term, a reasonable person would have included it in the writing.<sup>34</sup>

In addition to these judicially-developed rules, a fourth test has

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marily under the mechanical test (*see* Part II-A-1 *infra*); that rule permits a partial integration to be shown only by noting a writing's incompleteness on its face, whereas a collateral agreement may be shown by considering its relation to the writing. *See* *Buyken v. Ertner*, 33 Wn. 2d 334, 348-49, 205 P.2d 628, 636 (1949). The distinction serves little purpose under the intent test, which permits a court to evaluate the competence of *all* extrinsic terms by examining both the terms and the surrounding circumstances. *See* 3 A. CORBIN, *supra* note 3, § 581, at 441 (suggesting abandonment of "partial integration" distinction).

Uniform Commercial Code § 2-202 distinguishes between integrations which preclude inconsistent terms ("intended . . . as a final expression") and those which preclude consistent additional terms ("intended also as a complete and exclusive statement"). WASH. REV. CODE § 62A.2-202 (1976). The basis of this distinction relates not to the evidence which may be considered, but only to the extent to which the parties intended the writing to control. *See* Part II-A-4 *infra*.

30. 5 R. MEISENHOLDER, *supra* note 1, § 121; Dano, *Parol Evidence—Its Practical Meaning and Usage*, in 2 TRIAL ADVOCACY 79, 89-96 (Wn. State Bar Ass'n 1975). *But see* Comment, *Parol Evidence Rule—In Need of Change*, 8 GONZAGA L. REV. 88, 89-91 (1972). *See also* Shattuck, *supra* note 1, at 374-77, noting a similar divergence in the rules for contract interpretation in Washington.

31. *Weyerhaeuser Co. v. Burlington N., Inc.*, 15 Wn. App. 314, 549 P.2d 54 (1976); *Lynch v. Higley*, 8 Wn. App. 903, 510 P.2d 663 (1973); *Eagle Ins. Co. v. Albright*, 3 Wn. App. 256, 268, 474 P.2d 920, 928-29 (1970).

32. The mechanical test protects only writings complete on their face; it excludes extrinsic evidence except to the extent such evidence shows consistent terms which are "collateral" or independent of the instrument. RESTATEMENT OF CONTRACTS § 240(1)(b) (1932); 4 S. WILLISTON, *supra* note 3, § 638, at 1039-43; 5 R. MEISENHOLDER, *supra* note 1, § 121, at 129-30. *See, e.g.*, *Sears, Roebuck & Co. v. Nicholas*, 2 Wn. 2d 128, 97 P.2d 633 (1939).

33. 3 A. CORBIN, *supra* note 3, § 573, at 359-60; 9 J. WIGMORE, *supra* note 2, § 2430, at 97-98; 5 R. MEISENHOLDER, *supra* note 1, § 121, at 132. *See, e.g.*, *Barber v. Rochester*, 52 Wn. 2d 691, 328 P.2d 711 (1958).

34. 4 S. WILLISTON, *supra* note 3, § 638, at 1041. *See, e.g.*, *Becker v. Lagerquist Bros., Inc.*, 55 Wn. 2d 425, 348 P.2d 423 (1960).



been adopted in section 2-202 of the Uniform Commercial Code.<sup>35</sup> Under this statutory rule, written terms generally may not be contradicted, but additional terms may be proved absent a finding that a complete and exclusive integration was intended. The test for finding an integration is subjective: look to the parties' intent. The test for evaluating its completeness is objective, utilizing the standard of a reasonable person.<sup>36</sup>

### 1. *The mechanical test*<sup>37</sup>

Until recently, Washington cases predominantly applied a strict standard which limited the integration inquiry to the face of the writing.<sup>38</sup> This test was stated by the Washington Supreme Court as follows: "[W]here a written agreement *purports* to cover the entire subject matter with respect to which the parties are contracting, and fraud or mutual mistake is not claimed, evidence of a contemporaneous or prior oral agreement contradicting or altering the terms of the writing is inadmissible."<sup>39</sup>

The foremost proponent of this approach to integration was Professor Williston, who maintained that the benefits of the parol evidence rule are possible only under such a test.<sup>40</sup> Although the preem-

35. WASH. REV. CODE § 62A.2-202 (1976) (reproduced at note 76 *infra*).

36. See note 76 *infra*. See also WASH. REV. CODE ANN. § 62A.2-202, Official Comment 3 (1966).

See also Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547, 549-50 (1970), which distinguishes a more restrictive version of the "mechanical test" forbidding even consistent collateral transactions to be shown. Any contemporary validity of such a test is doubtful, see 3 A. CORBIN, *supra* note 3, § 594; in any case it does not apply in Washington. 5 R. MEISENHOLDER, *supra* note 2, § 123; see Dano, *supra* note 30, at 112-14.

37. The term "mechanical test" is not used here in a derogatory sense, but because of its prior use. See *Lynch v. Higley*, 8 Wn. App. 903, 908, 510 P.2d 663, 667 (1973). See generally 5 R. MEISENHOLDER, *supra* note 1, § 121.

38. 5 R. MEISENHOLDER, *supra* note 1, § 121, at 129-30 and cases cited at nn.13-14 therein. See also Shattuck, *supra* note 1, at 379-80 and cases cited at n.428 therein.

39. Buyken v. Ertner, 33 Wn. 2d 334, 345, 205 P.2d 628, 634 (1949) (emphasis in original). The cases cited by the court for this proposition make clear that a writing need only be complete on its face to "purport" to cover the entire matter; it need not contain an explicit statement to that effect. See *Hazlett v. First Fed. Sav. & Loan Ass'n*, 14 Wn. 2d 124, 127 P.2d 273 (1942); *Alaska Pac. Salmon Co. v. Matthewson*, 3 Wn. 2d 560, 101 P.2d 606 (1940); *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 P. 621 (1913).

40. 4 S. WILLISTON, *supra* note 3, §§ 633, 638. See also RESTATEMENT OF CONTRACTS § 240 (1932).

Williston reasoned that, although parties may very well omit portions of their transactions from a writing, writings very rarely explicitly address the question of integration. If extrinsic evidence of additional agreements were competent to show there

inence of the mechanical test has recently been questioned,<sup>41</sup> many Washington decisions reflect its continued vitality.<sup>42</sup>

The mechanical test restricts the inquiry regarding both the fact and extent of integration to the terms of the instrument in question. If a writing purports to be integrated, the extent of that integration must be determined by reference to the written terms; a partial integration may be established only by proof that the writing is incomplete on its face.<sup>43</sup>

The advantages and disadvantages of such a formal<sup>44</sup> approach to decisionmaking were recently outlined by Professor Powers.<sup>45</sup> Advantages include its predictability, ease of application to particular facts, and tendency to place responsibility on rulemakers rather than decisionmakers, who might arbitrarily decide similar cases differently. The primary disadvantages of a formal rule are evidenced by the "mapping problem" and the "freezing problem." As Professor Powers points out, "rules do not always translate (map) perfectly the policies which generated them into results in individual cases."<sup>46</sup> They may also "freeze the decisionmaking process into a set of rules that reflect values of one era which are no longer held in the next."<sup>47</sup>

The merits of the mechanical test have been widely debated.<sup>48</sup> Its claim to predictability and easy application is of questionable validity given the amount of litigation it has generated.<sup>49</sup> Its value in protecting against arbitrary decisionmakers is uncertain, because mapping difficulties (*e.g.*, its inability to distinguish carefully negotiated transactions from casual agreements using boilerplate forms<sup>50</sup>) and

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was no integration without such an indication in the writing, the practical value of the parol evidence rule would be minimized. 4 S. WILLISTON, *supra* note 3, § 633, at 1014-16.

41. See Parts II-A-2 & II-A-3 *infra*. See, *e.g.*, Black v. Evergreen Land Developers, Inc., 75 Wn. 2d 241, 450 P.2d 470 (1969); Lynch v. Higley, 8 Wn. App. 903, 510 P.2d 663 (1973).

42. 5 R. MEISENHOLDER, *supra* note 1, § 121.

43. See note 23 *supra*.

44. "A formal decision uses less than all available relevant information by following a rule which screens from the decisionmaker's consideration all information not specifically invoked by the rule. . . . [A] nonformal decisionmaker reaches a 'proper' result without first screening any information from consideration." Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 28 (1976).

45. *Id.* at 28-37.

46. *Id.* at 31.

47. *Id.*

48. See sources cited at note 152 *infra*.

49. See note 1 *supra*.

50. See Green River Valley Foundation, Inc. v. Foster, 78 Wn. 2d 245, 257-60, 473 P.2d 844, 851-53 (1970) (concurring opinion).

freezing problems (*e.g.*, its inconsistency with waxing consumer protection concern and waning interest in freedom of contract<sup>51</sup>) have prevented courts from applying it uniformly.<sup>52</sup>

## 2. *The intent test*

Recently, Washington courts have adopted a less rigid test for ascertaining whether and to what extent a document is integrated. The first major enunciation of this test came in *Barber v. Rochester*,<sup>53</sup> a 1958 case in which the trial court excluded extrinsic evidence offered to show that the three instruments before it did not comprehend all the terms of a sale and exchange of businesses and real estate. The state supreme court, reversing, held that the extent of integration is to be determined with reference to all the relevant evidence, including evidence of the intent of the parties.<sup>54</sup>

The "intent test" has as its foremost proponents Professors Corbin

51. See *Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 250-51, 450 P.2d 470, 476 (1969). See generally Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). Loss occasioned a buyer when a seller breaches his oral promise is analogous to economic loss suffered from a defective product; in both cases, the buyer loses the benefit of his bargain. Some courts have allowed recovery for economic loss proximately resulting from a product's defect on a theory of strict liability, *id.* at 822; a court applying the mechanical test, in contrast, will not permit recovery on the oral promise.

52. Compare *Hansen v. Wightman*, 14 Wn. App. 78, 82, 538 P.2d 1238, 1242-43 (1975) and *Brother Int'l Corp. v. Nat'l Vacuum & Sewing Machine Stores, Inc.*, 9 Wn. App. 154, 157-59, 510 P.2d 1162, 1164-65 (1973) with *Lynch v. Higley*, 8 Wn. App. 903, 908-12, 510 P.2d 663, 667-69 (1973) and *Diel v. Beekman*, 1 Wn. App. 874, 878-80, 465 P.2d 212, 215-16 (1970).

53. 52 Wn. 2d 691, 328 P.2d 711 (1958). Although older cases may be found which align with the intent test, the emphasis here will be upon cases beginning with *Barber*, in which the intent test received its first explicit adoption in this state. See 5 R. MEISENHOLDER, *supra* note 1, § 121, at 127-28, and cases cited therein for examples of earlier decisions.

54. The court stated:

People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the court's duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact.

52 Wn. 2d at 698, 328 P.2d at 715. Although citing authority from other jurisdictions for this proposition, the court's opinion ignored Washington precedent to the contrary; indeed, it appears to overrule sub silentio the mechanical test's tenet that extrinsic evidence is incompetent in the face of a writing purporting to be complete. 5 R. MEISENHOLDER, *supra* note 1, § 124, at 139-40.

Consistent with the objective theory of contracts, only intentions mutually manifested by the parties may be proven. The unexpressed impressions of one party may not be used to establish terms of a contract. *Dwellely v. Chesterfield*, 88 Wn. 2d 331, 560 P.2d 353 (1977); *Frazier v. Kern*, 18 Wn. App. 93, 566 P.2d 956 (1977); *Seattle-First Nat'l Bank v. Hawk*, 17 Wn. App. 251, 562 P.2d 260 (1977).

and Wigmore.<sup>55</sup> They take the position that no instrument is sufficient to show whether it constitutes an integration of the parties' transaction, since some extrinsic evidence is always necessary to relate a document to the factual situation surrounding its execution. Under the intent test, a judge must assess all the evidence to determine whether and to what extent the parties intended a given document to be integrated. If a valid and complete integration is found, then evidence conditionally admitted will be rendered irrelevant by operation of the parol evidence rule.<sup>56</sup>

When a writing contains language to the effect that it is fully integrated, the intent test does not deprive such language of all effectiveness. The test does, however, limit the conclusiveness of such language by requiring that extrinsic facts comport with the statement that the writing is integrated before the provisions of the writing are enforced upon unwary parties.<sup>57</sup> Corbin's approach makes the credibility of extrinsic evidence a judge's sole guide. Notwithstanding the superior probative value of a writing, if a judge is convinced that the parties intended additional terms, evidence of such terms may not be excluded.<sup>58</sup> Although Wigmore seems to suggest that, if a document deals with a particular subject of negotiation at all, then there is a presumption that the document was intended to integrate that subject, his standard also turns on credibility.<sup>59</sup> His "presumption" is not a con-

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55. 3 A. CORBIN, *supra* note 3, § 573, at 360; 9 J. WIGMORE, *supra* note 2, § 2430, at 98. See also *Masterson v. Sine*, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968) (Traynor, C.J.); RESTATEMENT (SECOND) OF CONTRACTS § 240 (Tent. Draft No. 5, 1970).

56. 3 A. CORBIN, *supra* note 3, §§ 582-583; 9 J. WIGMORE, *supra* note 2, § 2430. Corbin treats the issue of ascertaining integration purely as one of fact, which the judge may decide, or, in close cases, allow the jury to decide. 3 A. CORBIN, *supra* note 3, § 595. This stance is criticized by McCormick on the ground that courts will want a more definite standard. C. MCCORMICK, *supra* note 2, § 214.

57. One of the criticisms of the mechanical test is that it has allowed the parol evidence rule to be used by overreaching businesses against unsuspecting consumers, since under the test the fact that parties made oral agreements ancillary to a written transaction is immaterial if not evident upon the face of the writing. See *Green River Valley Foundation, Inc. v. Foster*, 78 Wn. 2d 245, 258-59, 473 P.2d 844, 851-52 (1970) (concurring opinion).

58. 3 A. CORBIN, *supra* note 3, § 583, at 469. After such evidence is admitted, its weight and credibility become primary considerations; a person offering evidence of the parties' mutual intent has the burden of proving that intent. *Dwellely v. Chesterfield*, 88 Wn. 2d 331, 560 P.2d 353 (1977).

59. "If [the particular element of the alleged extrinsic negotiation] is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element . . ." 9 J. WIGMORE, *supra* note 2, § 2430, at 98-99.

Wigmore's statement has been claimed to contradict Corbin's credibility standard.

clusive test;<sup>60</sup> rather, it is one of several factors in deciding whether the parties intended the writing to cover a particular subject.<sup>61</sup> Both writers agree on the fundamental test; the effect under both approaches is to withhold judicial enforcement of recitations which fly in the face of extrinsic evidence.<sup>62</sup>

Clearly defining the extent of integration is less important under the intent test than under the mechanical test. The practical issue is whether the parties intended to include in a transaction a term extrinsic to their writing. If a court determines that the term in question covers a subject not integrated, it is irrelevant that other subjects are integrated; the term in question may be proven.<sup>63</sup> The intent test looks not only to the parties' intent regarding the entire transaction, but also to their intent regarding the contested term.<sup>64</sup> In ascertaining this intent, no relevant evidence is denied judicial consideration.

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Note. *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547, 550-51 (1970). Corbin's criticism of any test excluding evidence which contradicts the terms of a document, however, is identical to Wigmore's criticism of the same test. Corbin stated that, although evidence which contradicts a writing will likely be improbable, it ought not be excluded absent a finding of integration. 3 A. CORBIN, *supra* note 3, § 583, at 468-70. Wigmore also criticized elevating his "index for the judge." 9 J. WIGMORE, *supra* note 2, § 2430, at 98, to the level of a test, for to do so begs the question, attempting "to decide whether something conceded to be different from the writing ought to be excluded, by showing that it is different." *Id.* § 2431, at 102. Thus the distinction between Corbin's and Wigmore's positions breaks down; Wigmore's index is no more than an acknowledgement of one significant factor to which a judge should look in evaluating credibility. *Id.* § 2430, at 98-99.

60. 9 J. WIGMORE, *supra* note 2, § 2431, at 102.

61. *Id.* § 2430, at 97-98.

62. *See, e.g., Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 250, 450 P.2d 470, 476 (1969).

63. A term is "integrated into" a writing when an integrated writing is sufficiently complete that the parties are determined, by whatever test, to have covered its subject by the writing.

A computer provides a good analogy. All possible terms on subjects intended by the parties to be covered by the writing (the printout) are fed into the machine (the negotiation process). Of the terms fed into the machine, not all will appear on the printout, since some will be screened out by the negotiation process. These terms, although not appearing on the writing, were nonetheless integrated into it. Such terms must be found in the writing or they may not be proven. *See* RESTATEMENT (SECOND) OF CONTRACTS § 235 (Tent. Draft No. 5, 1970).

The mechanical test presumes that all possible terms on all subjects represented by a transaction were "fed into the machine" and thus must appear on the printout or be barred. The intent test, in contrast, seeks to determine whether a particular term doesn't appear on the printout because it wasn't intended to be covered (not fed into the machine) or because it was screened out by the negotiation process; it permits terms of the former type to be proved, because parties are not required to integrate all their terms.

64. *See, e.g., Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 249, 450 P.2d 470, 475 (1969). *See also* WASH. REV. CODE ANN. § 62A.2-202, Official Comment 3 (1966).

3. *The objective test*

The mechanical test and the intent test are both subjective;<sup>65</sup> that is, the object of both is to ascertain the actual intent of the parties.<sup>66</sup> The tests differ only in the amount of evidence considered most likely to do so consistently.<sup>67</sup> The Washington courts have employed a third test which ignores the parties' actual intent;<sup>68</sup> instead, this test considers evidence of the writing and of extrinsic terms in light of the predispositions of a reasonable person.<sup>69</sup>

A court applying this standard, herein termed the "objective test," determines whether and to what extent a writing is integrated by considering whether a reasonable person would normally or naturally have integrated the subject of the extrinsic term in the writing, given the nature of the writing and the additional term.<sup>70</sup> This approach does not limit the quantity of evidence the judge may consider, but rather defines a formal standard<sup>71</sup> by which this evidence is to be evaluated. The underlying assumption is that the actual intent of the parties will most often be discerned by assuming that in the case at bar they acted as reasonable persons would act.<sup>72</sup> This assumption permits

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65. See RESTATEMENT (SECOND) OF CONTRACTS § 238, Comment a (Tent. Draft No. 5, 1970).

66. See *Washington Fish & Oyster Co. v. G.P. Halferty & Co.*, 44 Wn. 2d 646, 659-60, 269 P.2d 806, 814 (1954); 3 A. CORBIN, *supra* note 3, § 539; 4 S. WILLISTON, *supra* note 3, § 633.

67. Compare 3 A. CORBIN, *supra* note 3, § 573, at 361-62, with 4 S. WILLISTON, *supra* note 3, § 633, at 1014-15.

68. *Shelton v. Fowler*, 69 Wn. 2d 85, 95, 417 P.2d 350, 356 (1966); *City Nat'l Bank v. Moliter*, 63 Wn. 2d 737, 388 P.2d 936 (1964); *Becker v. Lagerquist Bros.*, 55 Wn. 2d 425, 348 P.2d 423 (1960). See also *Buyken v. Ertner*, 33 Wn. 2d 334, 348-49, 205 P.2d 628, 636 (1949) (alternate holding).

Although the *Becker* opinion states the intent test, it looks to the nature of the parties' agreement and the extrinsic term, rather than to the parties' actual intent, to determine whether the subject of the term was integrated; thus the test it actually applies is not the intent test at all.

69. Professor Williston stated: "The point is not merely whether the court is convinced that the parties before it did in fact [simultaneously make both a written and a parol agreement], but whether parties so situated generally would or might do so." 4 S. WILLISTON, *supra* note 3, § 638, at 1041. Although in Williston's view this test serves only to distinguish collateral agreements from the principal integrated transaction, it has been applied as a general test for determining whether an extrinsic term is integrated into a writing. See cases cited in note 68 *supra*. See also notes 28-29 and accompanying text *supra*.

70. The classic discussion of the "objective test" may be found in *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928). The test has support in the RESTATEMENT (SECOND) OF CONTRACTS § 242, Comment d (Tent. Draft No. 5, 1970).

71. See notes 44-47 and accompanying text *supra*.

72. Thus those who in good faith but unreasonably omit some terms from a writing receive no protection under this test. In this aspect, the objective test resembles

a court to ignore the actual intent of the parties before it (given the possibility that they were unreasonable in their intent) without undercutting the notion that contract integration is dependent upon the intent of parties generally.<sup>73</sup>

The objective test has healthy support in the authorities, although it has most commonly been applied to determine whether an agreement is collateral: *i.e.*, to determine the *extent* of integration.<sup>74</sup> There is no logical basis, however, for so restricting the test. The heart of the objective test is its concern with the nature of the writing or term involved. The test may appropriately be used to determine whether a writing is integrated in fact; if such writings normally or naturally are intended to be final expressions of the parties' agreement, the court applying this test will not permit contradiction of the writing.<sup>75</sup>

#### 4. *Integration under the Uniform Commercial Code*

Contracts for the sale of goods are governed in Washington by section 2-202 of the Uniform Commercial Code, which defines the extent to which extrinsic evidence may be considered despite the existence of a writing.<sup>76</sup> Section 2-202 precludes extrinsic evidence when "confirmatory memoranda" exchanged by the parties agree on material terms,<sup>77</sup> or when a court finds the instrument or instruments to have been "intended by the parties as a final expression of their agree-

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the tort principle that a person who lacks the capacity to act reasonably is nonetheless held to the standard of the reasonable man. *See* O. HOLMES, *THE COMMON LAW* 108 (1881).

To apply the analogy of the computer, *see* note 63 *supra*, the objective test presumes that all terms on subjects which reasonable persons would feed into the machine were in fact fed in and therefore must appear on the printout.

73. 4 S. WILLISTON, *supra* note 3, §§ 633, 637-638.

74. *See* sources cited at notes 68-70 *supra*.

75. *E.g.*, *University Properties, Inc. v. Moss*, 63 Wn. 2d 619, 388 P.2d 543 (1964) (leases are normally integrated).

76. WASH. REV. CODE § 62A.2-202 (1976) provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (RCW 62A.1-205) or by course of performance (RCW 62A.2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

77. *See id.* § 62A.2-207 for additional provisions governing transactions involving multiple memoranda.

ment with respect to such terms as are included therein.”<sup>78</sup> Exclusion in the former situation amounts to estoppel; a party will not be permitted to contradict the terms of his own memorandum.<sup>79</sup> Exclusion in the latter situation requires a preliminary finding by the court that the parties intended the writing to be final on those terms included within it.<sup>80</sup> Consistent additional terms are permitted by section 2-202 absent a finding by the court that a writing was “intended also as a complete and exclusive statement of the terms”<sup>81</sup>—*i.e.*, that it was completely integrated.

One difficulty with these provisions is ascertaining when extrinsic terms contradict a writing, a problem which must be resolved by the

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78. *Id.* § 62A.2-202.

79. *Id.* § 62A.2-207(3) similarly provides that in the event of partially consistent writings, the terms “consist of those terms on which the writings of the parties agree.”

80. The requirement that a court find a partial integration in order to exclude evidence of inconsistent terms arises both from the text and structure of § 2-202. The text forbids contradiction of terms “set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein.” *Id.* § 62A.2-202. A writing is not to be *presumed* to have been intended by both parties as a final expression; the parties’ intent must be ascertained by the court. Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 DUKE L.J. 881, 905-07 (1970). The structure of § 2-202 supports this conclusion. It reveals two levels of inquiry into integration: first, in order to exclude evidence *contradicting* terms of a writing, the court must find the parties intended it as a final expression of the agreement; second, in order to exclude evidence of *consistent additional* terms, the court must find the parties intended it as a complete and exclusive statement. In the latter case, the requirement of judicial inquiry is explicit, suggesting a similar requirement for ascertaining integration under the former situation. WASH. REV. CODE § 62A.2-202(b) (1976).

81. WASH. REV. CODE § 62A.2-202(b) (1976).

The controversy regarding integration often focuses on the effect to be given so-called “merger clauses,” which explicitly address the extent to which a writing is intended to be the sole repository of a transaction’s terms. *See generally* Comment, *The “Merger Clause” and the Parol Evidence Rule*, 27 TEX. L. REV. 361 (1949). For examples of such clauses designed for use under the U.C.C., *see* W. SHATTUCK & R. COSWAY, *WASHINGTON PRACTICE Uniform Commercial Code Forms* § 2-202, at 64-66 (1967). The term “merger clause” herein refers only to clauses purporting to exclude evidence of terms arising prior to execution of the writing, not to clauses purporting to govern subsequent modifications. *Cf.* WASH. REV. CODE § 62A.2-209 (1976) (modification, rescission, and waiver).

The mechanical rule gives conclusive effect to a merger clause, absent grounds for avoiding the transaction. 4 S. WILLISTON, *supra* note 3, § 633, at 1014. Although Corbin also would generally give effect to such clauses absent fraud, 3 A. CORBIN, *supra* note 3, § 578, some courts utilizing the intent test have treated them as recitals of fact which may be false. *See, e.g.*, *Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 250, 450 P.2d 470, 475-76 (1969).

The history of U.C.C. § 2-202 makes clear that its authors did not intend that merger clauses be given conclusive effect. The American Law Institute considered modifying it to require enforcement of merger clauses; Professor Llewellyn criticized the amendment, however, on the ground it would unduly tie the hands of a court, and the Institute defeated the amendment. 21 ALI PROCEEDINGS 90-91 (1943-1944).



judge through interpretation.<sup>82</sup> To the extent that a judge, interpreting the written terms in light of the parties' course of dealing, usage of trade, and course of performance, finds that extrinsic terms contradict the writing, those terms may not be considered by the trier of fact.<sup>83</sup>

The structure of section 2-202 reveals a three-step methodology. First, a court must exclude evidence contradicting memoranda between the parties which agree on material terms. Second, a court must determine in cases of single or inconsistent writings whether the parties intended any writing to be an integrated, final expression of their intent. Third, if consistent additional terms are alleged, the court must ascertain whether the parties intended the writing not only as a final expression, but "also as a complete and exclusive statement of the terms."<sup>84</sup>

The standards by which these determinations are to be made under section 2-202 reflect a compromise between the various policies underlying the mechanical, objective, and intent tests. Where memoranda of the parties agree, the approach of the mechanical test seems to be preserved; to the extent of such agreement, the court must find the transaction to be integrated.<sup>85</sup> Although the section outlines no clear standard for the inquiry into whether other writings were intended to be "final expressions," it seems to require a subjective finding of actual intent, which supports the utilization of either the

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82. Here, at the point of ascertaining a writing's terms and their consistency with extrinsic evidence, interpretation and the integration doctrine are most closely associated. See note 128 *infra*.

83. This preliminary interpretation is particularly crucial when a writing is found to be only partially integrated, for such writings are always affected to some degree by the terms omitted from them. 3 A. CORBIN, *supra* note 3, § 581, at 441.

84. WASH. REV. CODE § 62A.2-202 (1976). See note 76 *supra*.

85. The statute equates "[t]erms with respect to which the confirmatory memoranda of the parties agree" with terms "set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein." *Id.* In doing so, it does not require courts to make any finding that such terms are final or integrated; it creates a partial integration by operation of law by simply defining such terms as final expressions. See also Comment, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (The Statute of Frauds and the Parol Evidence Rule)*, 4 B.C. INDUS. & COM. L. REV. 381, 392-93 (1962-63).

This result is also required by § 2-207(3), which provides:

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case *the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Title.*

WASH. REV. CODE § 62A.2-207(3) (1976) (emphasis added).

mechanical or the intent test.<sup>86</sup> The final inquiry, into the extent of integration, reflects the influence of the objective test; the official comments direct the court to look to the nature of the writing and of the extrinsic terms to determine whether the additional terms are such that, had they been agreed upon, they would certainly have been included in the instrument.<sup>87</sup>

Section 2-202, therefore, incorporates aspects of each of the three

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86. See notes 32 and 33 and accompanying text *supra*. Although some commentators conclude that § 2-202 gives no guidance regarding the standard for determining whether parties intended a final expression, relegating the issue to pre-Code standards, others suggest that § 2-202 requires a finding of actual intent. Compare J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-10, at 69 (1972) and Comment, *supra* note 85, at 393, with WASH. REV. CODE ANN. § 62A.2-202, Washington Comment ii (1966); 5 R. MEISENHOLDER, *supra* note 1, § 121, at 132; and Broude, *supra* note 80, at 905-07.

The bare fact that the statute uses the word "intended" sheds no light on whether actual intent is required, for the official comments endorse an objective test, not dependent on actual intent, to govern whether the parties "intended" the writing as a complete and exclusive statement. WASH. REV. CODE ANN. § 62A.2-202, Official Comment 3 (1966). Comment 2 does suggest that actual intent is to be required however: "2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade, and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached." WASH. REV. CODE ANN. § 62A.2-202, Official Comment 2 (1966) (emphasis added).

87. WASH. REV. CODE ANN. § 62A.2-202, Official Comment 3 (1966) provides:

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. 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.

This standard parallels the objective test except it requires a greater showing of objective probability; the standard is not what persons naturally or normally do, but whether the parties would *certainly* have included such terms if they were made.

This more stringent objective standard comports with the structure of the statute. Section 2-202 places the burden of proof on the party which claims a writing to be complete and exclusive by permitting additional terms unless a court finds a complete integration. J. WHITE & R. SUMMERS, *supra* note 86, § 2-10, at 69. The more common pre-Code approach assumes that writings are completely integrated until a party demonstrates why "resort to extrinsic evidence" is appropriate. See, e.g., Green River Valley Foundation, Inc. v. Foster, 78 Wn. 2d 245, 248, 473 P.2d 844, 847 (1970); Grant County Constructors v. E.V. Lane Corp., 77 Wn. 2d 110, 121, 459 P.2d 947, 954 (1969).

The provisions of the *Restatement (Second) of Contracts* on parol evidence have generally extended the UCC policies in this area to all contracts. RESTATEMENT (SECOND) OF CONTRACTS §§ 239-242 (Tent. Draft No. 6, 1971); 1971 ALI PROCEEDINGS 442 (1971). In an interesting exception, however, the *Restatement (Second)* endorsed the objective test as outlined in Part II-A-3 above, using the standard of the normal or natural actions of a reasonable person, rather than the more stringent standard of certainty endorsed in Comment 3 of § 2-202. RESTATEMENT (SECOND) OF CONTRACTS § 242, Comment d (Tent. Draft No. 6, 1971). The reasons for this exception are unclear. 1971 ALI PROCEEDINGS 454-59 (1971).

standards, presumably to maximize the benefits of each. It avoids the harshness of enforcing terms to which the parties did not assent, a possible result under the objective test, by focusing on actual intent to establish the fact of integration.<sup>88</sup> It preserves some benefits of the mechanical test by prohibiting the contradiction of writings to which the parties' assent is found.<sup>89</sup> In addition, the predictability of the objective test is promoted by evaluating the extent of integration according to a "reasonable person" standard. In fusing elements of all three tests, section 2-202 outlines an approach which may be sufficiently flexible to avoid both the mapping difficulties of the mechanical test<sup>90</sup> and the indifference to actual intent inherent in the objective test.<sup>91</sup> At the same time, its provisions are sufficiently objective to ensure the predictable enforcement of well-drawn and carefully negotiated agreements.

### 5. *The need for predictable standards*

The past three decades have seen the Washington Supreme Court undermine the supremacy of the mechanical test by intermittently utilizing other standards.<sup>92</sup> The uncertainty resulting from these inconsistent standards has left courts free to adopt whatever approach seems best suited to the case at hand, thus impairing the ability of lawyers and litigants to plan transactions and predict court rulings.

Determining whether writings are final, *i.e.*, the fact of integration, has not proven to be a source of difficulty; the issue has arisen in only a few Washington cases.<sup>93</sup> Apparently, transactions of consequence

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88. It has been suggested that the concern of § 2-202 with the *actual* intent of *both* parties constitutes a substantial modification of the common law parol evidence rule. Broude, *supra* note 80, at 886-90, 905-07.

89. In cases involving fraud, mistake, or unconscionability, evidence contradicting a writing may be permitted. WASH. REV. CODE §§ 62A.1-103, .2-302, .2-721 (1976).

90. See notes 44-51 *supra*. The mechanical test assumes that the parties' actual intent can best be determined on a consistent basis by looking only to their writing. Whereas this assumption may be warranted in the case of carefully negotiated commercial contracts, it seems less so in other situations. Green River Valley Foundation, Inc. v. Foster, 78 Wn. 2d 245, 257-60, 473 P.2d 844, 851-53 (1970) (concurring opinion).

91. See Part II-A-3 *supra*.

92. See Parts II-A-2 and II-A-3 *supra*.

93. Heath Northwest, Inc. v. Peterson, 67 Wn. 2d 582, 584, 408 P.2d 896, 897 (1965); Bond v. Wiegardt, 36 Wn. 2d 41, 216 P.2d 196 (1950); Mapes v. Santa Cruz Fruit Packing Corp., 26 Wn. 2d 145, 173 P.2d 182 (1946). See also University Properties, Inc. v. Moss, 63 Wn. 2d 619, 621, 388 P.2d 543, 544 (1964) (dictum applying objective test to fact of integration).

are rarely put in writing unless the parties expect the writing to have some final effect. What confusion and uncertainty have arisen revolve around whether writings are complete and exclusive, *i.e.*, the extent rather than the fact of integration. Analysis of Washington decisions reveals significant inconsistencies stemming from the differing standards which Washington courts have used to deal with integration. Although several decisions verbalize one standard while utilizing another,<sup>94</sup> the mechanical, intent, and objective tests have generally been applied in discrete lines of cases, which neither acknowledge the existence of alternate standards nor overrule them.<sup>95</sup> Only recently has the Washington Court of Appeals confronted the application of these disparate standards.<sup>96</sup>

Two patterns worthy of note emerge from these cases. Those Washington Supreme Court opinions which reject the mechanical test reflect increasing reluctance to give effect to "merger clauses";<sup>97</sup> argu-

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94. *E.g.*, *Dix Steel Co. v. Miles Const. Co.*, 74 Wn. 2d 114, 443 P.2d 532 (1968) (stated objective test and applied intent test); *Becker v. Lagerquist Bros.*, 55 Wn. 2d 425, 348 P.2d 423 (1960) (stated intent test and applied objective test).

95. Cases utilizing the mechanical test include *Henderson v. Bardahl Int'l Corp.*, 72 Wn. 2d 109, 431 P.2d 961 (1967); *Health Northwest, Inc. v. Peterson*, 67 Wn. 2d 582, 408 P.2d 896 (1965); *Seattle-First Nat'l Bank v. Pearson*, 63 Wn. 2d 890, 389 P.2d 665 (1964); *Hansen v. Wightman*, 14 Wn. App. 78, 538 P.2d 1238 (1975); *Brother Int'l Corp. v. Nat'l Vacuum & Sewing Mach. Co.*, 9 Wn. App. 154, 510 P.2d 1162 (1973); and *Schinell v. Doyle*, 6 Wn. App. 830, 496 P.2d 566 (1972).

Cases adopting the intent test include *Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 450 P.2d 470 (1969); *University Properties, Inc. v. Moss*, 63 Wn. 2d 619, 388 P.2d 543 (1964); *Dawson v. Schearer*, 53 Wn. 2d 766, 337 P.2d 46 (1959); *Barber v. Rochester*, 52 Wn. 2d 691, 328 P.2d 711 (1958); *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wn. App. 761, 565 P.2d 819 (1977); *Barovic v. Cochran Elec. Co.*, 11 Wn. App. 563, 524 P.2d 261 (1974); *Lynch v. Higley*, 8 Wn. App. 903, 510 P.2d 663 (1973); and *Diel v. Beekman*, 1 Wn. App. 874, 465 P.2d 212 (1970).

The objective test was applied in *Shelton v. Fowler*, 69 Wn. 2d 85, 417 P.2d 350 (1966); *City Nat'l Bank v. Molitor*, 63 Wn. 2d 737, 388 P.2d 936 (1964); and *Becker v. Lagerquist Bros.*, 55 Wn. 2d 425, 348 P.2d 423 (1960). *See also* *Buyken v. Ertner*, 33 Wn. 2d 334, 205 P.2d 628 (1949) (alternate holding).

96. As a result of the indecision in this area, the most recent court of appeals opinions appear to conflict with the recent decisions of the supreme court. The primary Washington statements of the intent test appear in a series of Washington Supreme Court opinions written by Justice Foster. *See* *Becker v. Lagerquist Bros.*, 55 Wn. 2d 425, 348 P.2d 423 (1960); *Dawson v. Shearer*, 53 Wn. 2d 766, 337 P.2d 46 (1959); and *Barber v. Rochester*, 52 Wn. 2d 691, 328 P.2d 711 (1958). Since Justice Foster's death in 1962, the supreme court has utilized the intent test with decreasing frequency, *see* notes 94-95 *supra*, and its most recent opinions tend to reaffirm the mechanical test. *See* *Green River Valley Foundation, Inc. v. Foster*, 78 Wn. 2d 245, 473 P.2d 844 (1970); *Grant County Constructors v. E.V. Lane Corp.*, 77 Wn. 2d 110, 120-21, 459 P.2d 947 (1969); 5 R. MEISENHOLDER, *supra* note 1, § 121.

In contrast, those cases in the Washington Court of Appeals which acknowledge the conflict and take a position generally adopt the intent test. *See* cases cited in note 31 *supra*.

97. *See* note 81 *supra*.

ably this signals a greater willingness to look beyond formalisms to the substance of a transaction.<sup>98</sup> A more general development is an increasing willingness to analyze parol evidence problems by focusing on the question of integration, rather than disposing of them with summary recitations of the parol evidence rule. This treatment tends to expose the bases for judicial rulings on extrinsic evidence, rather than concealing them behind the rule.<sup>99</sup>

In *Green River Valley Foundation, Inc. v. Foster*,<sup>100</sup> the most recent state supreme court opinion to address a parol evidence problem, the court was presented for the first time with a case in which the parties raised the conflict between the mechanical and intent tests, each relying on a different standard.<sup>101</sup> After pondering the case for two years, the court avoided the parol evidence issue and did not decide whether the parties' agreement was integrated.<sup>102</sup>

Notwithstanding its failure to dispose of the problem of inconsistent standards, the court in *Green River* presupposed the continuing

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98. Earlier Washington cases have held that a merger clause which excludes warranties may not be challenged. *Jones v. Mallon*, 3 Wn. 2d 382, 101 P.2d 332 (1940); *Webster v. Romano Eng'r Corp.*, 178 Wash. 118, 34 P.2d 428 (1934). One more recent case limited a general merger clause to establishing the fact of integration; it then determined the extent of integration by applying the objective test. *Becker v. Lagerquist Bros.*, 55 Wn. 2d 425, 348 P.2d 423 (1960). The effect was to deny the clause preclusive effect. This trend continued in *Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 450 P.2d 470 (1969), which denied such a clause any conclusive effect whatsoever; the clause was treated as rebuttable evidence that the writing was integrated.

99. See, e.g., *Black v. Evergreen Land Developers, Inc.* 75 Wn. 2d 241, 450 P.2d 470 (1969); *Dix Steel Co. v. Miles Const. Co.*, 74 Wn. 2d 114, 443 P.2d 532 (1968); *University Properties, Inc. v. Moss*, 63 Wn. 2d 219, 388 P.2d 543 (1964). But see *Henderson v. Bardahl Int'l Corp.*, 72 Wn. 2d 109, 121, 431 P.2d 961, 968 (1967); *Hansen v. Wightman*, 14 Wn. App. 80, 82, 538 P.2d 1238, 1242-43 (1975).

100. 78 Wn. 2d 245, 473 P.2d 844 (1970).

101. Although the court was asked to choose between the mechanical and intent tests in *Shelton v. Fowler*, 69 Wn. 2d 85, 417 P.2d 350 (1966), the plaintiff in that case sought to fit within the factual pattern of *Becker v. Lagerquist Bros.*, 55 Wn. 2d 425, 348 P.2d 423 (1960), without extensive argument of the theory behind the intent test. Brief of Appellant at 6-17. *Shelton v. Fowler*, 69 Wn. 2d 85, 417 P.2d 470 (1966).

102. The parties in *Green River* focused their arguments on the propriety of considering certain extrinsic evidence. Brief of Appellant at 9, 16-17. Brief of Respondents at 7-8. *Green River Valley Foundation, Inc. v. Foster*, 78 Wn. 2d 245, 473 P.2d 844 (1970). The court expended considerable time and effort on the parol evidence issue before eliminating it by use of various techniques of construction. 78 Wn. 2d at 252, 473 P.2d at 848.

The court decided the case *sua sponte*, finding alternatively that (a) the writings involved, properly construed, were unambiguous or (b) even absent such construction, differences between the writings created ambiguity justifying the use of extrinsic evidence. 78 Wn. 2d at 248, 473 P.2d at 846.

vitality of the mechanical test.<sup>103</sup> Its alternative holdings rest on the principle that facially complete and unambiguous writings preclude consideration of extrinsic evidence regarding the parties' actual intent.<sup>104</sup> Even Justice Finley, who attacked the majority disposition, seemed to concede that the mechanical test reflects current law.<sup>105</sup>

In *Green River*, the Washington Supreme Court indicated its willingness to dispel the confusion between the mechanical, intent, and objective tests when the issue arises in an appropriate case.<sup>106</sup> A definitive resolution would substantially eliminate the dark subtleties which have plagued Washington's parol evidence rule.<sup>107</sup> The time is especially ripe for a clarification since all relevant supreme court decisions to date arose prior to the effective date of the Uniform Commercial Code.<sup>108</sup> In the interest of uniformity, section 2-202<sup>109</sup> should figure prominently in any judicial reconsideration of the problems in this area.

## B. *Diverse Methodologies in Washington Law*

### 1. *Two approaches*

The erosion of the mechanical test in recent years is linked to one further factor evident in Washington decisions, namely, a gradual shift in the methodology by which courts address integration issues.

Two general approaches to integration problems are distinguishable in Washington cases.<sup>110</sup> The predominant one may be termed the

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103. See Part II-A-1 *supra*.

104. 78 Wn. 2d at 249-50, 473 P.2d at 847.

105. *Id.* at 252-54, 473 P.2d at 848-49. Justice Finley's opinion proceeds on the premise that it proposes a major change in the law; he urged adoption of "the standard of commercial reasonableness" as a test for determining the fact and extent of integration. The standard which he suggested combines the objective and intent tests: (a) courts should look to the nature of the agreement in light of the parties' expertise to determine whether it is reasonable for such parties to omit additional terms from such an agreement; (b) if such omission is reasonable, courts should consider the parties' intent regarding additional terms. *Id.* at 257-61, 473 P.2d at 851-53.

106. *Id.* at 249 n.1, 473 P.2d at 846 n.1.

107. See J. THAYER, *supra* note 2, at 390.

108. The U.C.C. was adopted in Washington on April 8, 1965, and became effective on June 30, 1967.

109. WASH. REV. CODE § 62A.2-202 (1976). See Part IV *infra*.

110. Methodology in parol evidence problems is primarily significant at the trial court level where most such determinations are made. It is possible that the methodologies reflected in the opinions of the Washington Supreme Court and Court of Appeals do not accord with the practical methodologies utilized at the trial level. It will

“rule-exception” approach. Most opinions which address integration proceed as if the *fact* of integration is the crucial determination. Because the finality of a writing (as far as it goes) is rarely seriously contested, merely invoking the parol evidence rule often suffices to dispose of this issue.<sup>111</sup> The *extent* of integration is then commonly ignored, except insofar as “exceptions” to the rule are found to apply.<sup>112</sup> An alternate methodology, herein termed the “preliminary examination” approach, seeks to ascertain the fact and extent of integration prior to applying the parol evidence rule.<sup>113</sup>

The primary difference between the “rule-exception” and the “preliminary examination” approaches is that courts applying the former proceed on the assumption that writings before them found to be final are also complete, at least until evidence to the contrary is offered.<sup>114</sup> The “preliminary examination” approach permits no such assumption. It requires a court to look to the basis for the parol evidence rule, applying the rule only if appropriate.<sup>115</sup>

The shift to the “preliminary examination” approach for integra-

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be assumed herein that trial courts adopt the methodology as well as the standards laid out in Washington appellate opinions.

111. See note 93 and accompanying text *supra*.

112. For discussions of the various “exceptions” to the parol evidence rule, see Dano, *supra* note 30, and 5 R. MEISENHOLDER, *supra* note 1, §§ 121–132. This comment undertakes no systematic treatment of these exceptions; in the author’s view, courts should focus not on whether a defined exception to the rule may be found, but on whether, in light of the doctrine of integration, the rule applies in the first place.

113. *E.g.*, *Barber v. Rochester*, 52 Wn. 2d 691, 328 P.2d 711 (1958). The supreme court in *Barber* held that the trial court erred by refusing to consider all relevant evidence before applying the parol evidence rule.

114. Although this distinction is analogous to the difference in the amount of evidence permissible under the mechanical, intent, and objective tests, the two are not identical. Courts applying the mechanical test commonly leave unclear which methodology was followed, because the only preliminary examination permitted under the mechanical test is directed at the writing. The methodologies are most easily distinguished by looking to a court’s stated reasons for excluding or considering extrinsic evidence. Washington appellate courts predominantly cite as the reason for excluding extrinsic evidence the general proposition that writings are integrated, not an evaluation that the writing before them evinces an intent of the parties to integrate their agreement. See, *e.g.*, *Shelton v. Fowler*, 69 Wn. 2d 85, 417 P.2d 350 (1966); *Seattle-First Nat’l Bank v. Pearson*, 63 Wn. 2d 890, 389 P.2d 665 (1964); *Fleetham v. Schneekloth*, 52 Wn. 2d 176, 324 P.2d 429 (1958).

115. The practical consequence of this difference in methodology is in the burden of proving to the judge whether or not a writing is final and complete. Under the “rule-exception” methodology, a court begins from the general proposition of the parol evidence rule that extrinsic evidence is to be excluded, thus placing the burden on the party contesting the writing. See J. WHITE & R. SUMMERS, *supra* note 86, § 2–10. The “preliminary examination” approach is theoretically neutral regarding burdens, although the U.C.C. version of that methodology tends to place the burden on the party seeking to exclude the evidence. See note 87 *supra*.

tion issues is only gradually becoming apparent and is by no means settled.<sup>116</sup> It has its roots in an increasing application of the intent and objective tests, which require more extensive judicial inquiries into the fact and extent of integration than does the mechanical test.<sup>117</sup> This approach also has support in the methodology outlined by section 2-202 of the Uniform Commercial Code, which appears to proceed from the assumption (contrary to the “rule-exception” approach) that writings, even if final, are not complete unless shown to be so.<sup>118</sup>

The common denominator in these developments is an increasing focus on integration as a basis for the application of the parol evidence rule, rather than the rule itself being the starting point for judicial analysis. Insofar as the doctrine of integration continues to define the threshold inquiries in parol evidence cases, the “preliminary examination” approach promises to gain increasing acceptance as a model of judicial procedure.

## 2. *Addressing the right issues*

The predominant use of the “rule-exception” methodology in Washington cases has contributed to the uncertainties surrounding the parol evidence rule. Its primary drawback is the imprecision it promotes by focusing only secondarily upon whether a writing was intended to be completely or partially integrated.

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116. Washington Supreme Court decisions only occasionally manifest the “preliminary examination” methodology. The primary examples are *City Nat'l Bank v. Molitor*, 63 Wn. 2d 737, 388 P.2d 936 (1964); *Dawson v. Shearer*, 53 Wn. 2d 766, 337 P.2d 46 (1959); *Barber v. Rochester*, 52 Wn. 2d 691, 328 P.2d 711 (1958); and *Bond v. Wiegardt*, 36 Wn. 2d 41, 216 P.2d 196 (1950). The court's most recent decisions uniformly utilize the “rule-exception” approach, regardless of the standard applied. *See, e.g., Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 450 P.2d 470 (1969).

The Washington Court of Appeals has utilized both approaches, although the “preliminary examination” model has predominated. It appears in *Barovic v. Cochran Elec. Co.*, 11 Wn. App. 563, 524 P.2d 261 (1974); *Lynch v. Higley*, 8 Wn. App. 903, 510 P.2d 663 (1973); *Pederson v. Peters*, 6 Wn. App. 908, 496 P.2d 970 (1972); *Pacific Gamble Robinson Co. v. Pay'n Save*, 2 Wn. App. 728, 469 P.2d 571 (1970); and *Diel v. Beekman*, 1 Wn. App. 874, 465 P.2d 212 (1970). The “rule-exception” methodology prevails in *Hansen v. Wightman*, 14 Wn. App. 80, 538 P.2d 1238 (1975); *Brother Int'l Corp. v. Nat'l Vacuum & Sewing Mach. Co.*, 9 Wn. App. 154, 510 P.2d 1162 (1973); and *Schinell v. Doyle*, 6 Wn. App. 830, 496 P.2d 566 (1972).

117. Although a sizable number of cases apply the intent or objective tests through the “rule-exception” methodology, the author has found no case which clearly utilizes the “preliminary examination” methodology and applies the mechanical test. *See note 114 supra.*

118. J. WHITE & R. SUMMERS, *supra* note 86, § 2-10.



The “rule-exception” methodology focuses primarily upon the parol evidence rule and its so-called exceptions.<sup>119</sup> This approach tends to overemphasize the proscriptive element of the rule (extrinsic evidence is barred) and overlook its limiting caveat (extrinsic evidence is barred *to the extent a writing is integrated*).<sup>120</sup> In some cases, this misplaced emphasis leaves the rule divorced almost entirely from any independent indications of the parties’ intent regarding integration, reducing it to a shibboleth based on the inaccurate assumption that writings are necessarily integrated.<sup>121</sup> In other less dramatic cases, the court’s preoccupation with the rule’s proscriptive element has merely obscured the basis for its ruling.<sup>122</sup>

The emphasis of this approach on “exceptions” has also created excesses. The primary exceptions to the parol evidence rule are those in favor of collateral agreements and partial integrations.<sup>123</sup> The Washington Supreme Court in several cases seems to have abandoned the proscription of the rule, emphasizing these exceptions under the intent and objective tests to the point where they leave little room to apply the rule.<sup>124</sup> The rule itself is based on the integration doctrine; exceptions which merely exempt all terms not integrated beg the question, failing to address the crucial issue of how to determine whether or not the terms are integrated.

These maladies—overemphasis on the rule and its exceptions—are the twin results of distracting judicial attention from the primary issue presented by evidence of extrinsic terms. That issue, whether the parties intended a writing to have been a final and complete statement, should consistently be addressed at the outset when additional terms are pleaded. The “rule-exception” methodology discourages

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119. See Part II-B-1 *supra*.

120. This emphasis on the rule’s prohibition is consistent with the traditional notion that writings generally are considered to be completely integrated until proven otherwise. See J. WHITE & R. SUMMERS, *supra* note 86, § 2-10, at 69.

121. See *Henderson v. Bardahl Int’l Corp.*, 72 Wn. 2d 109, 431 P.2d 961 (1967); *Schinnell v. Doyle*, 6 Wn. App. 830, 496 P.2d 566 (1972). See also *Sears, Roebuck & Co. v. Nicholas*, 2 Wn. 2d 128, 97 P.2d 633 (1939) (outlining the presumption of integration). Cf. *Black v. Evergreen Land Developers, Inc.*, 75 Wn. 2d 241, 450 P.2d 470 (1969) (reversing trial court’s assumption of integration).

122. See *Heath Northwest, Inc. v. Peterson*, 67 Wn. 2d 582, 408 P.2d 896 (1965); *Seattle-First Nat’l Bank v. Pearson*, 63 Wn. 2d 890, 389 P.2d 665 (1964); *Fleetham v. Schneekloth*, 52 Wn. 2d 176, 324 P.2d 429 (1958); *Hansen v. Wightman*, 14 Wn. App. 78, 538 P.2d 1238 (1975).

123. See notes 25-29 and accompanying text *supra*.

124. See cases cited in note 99 *supra*.

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such inquiry and provides no discernable benefit to counterbalance its difficulties.<sup>125</sup>

Not only does the "preliminary examination" approach find support in some of the Washington decisions,<sup>126</sup> it also is consistent with section 2-202 of the Uniform Commercial Code, which requires that writings be demonstrably final and complete before relevant evidence is excluded.<sup>127</sup> Washington courts should adopt this methodology because it encourages clarity by assuring that the courts consider at the outset the fundamental principles upon which applicability of the parol evidence rule is based.

### III. PAROL EVIDENCE OFFERED IN AID OF INTERPRETATION

Extrinsic evidence is often offered for the purpose of clarifying the meaning of an instrument's terms. Such evidence seeks only to explain rather than change terms; thus it is unaffected by the rule.<sup>128</sup> Nevertheless, confusion arises because courts mistakenly apply the "parol evidence rule" label to rules defining the competence of interpretive evidence.<sup>129</sup>

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125. Arguably the "rule-exception" methodology serves as an aid to judicial convenience by avoiding inquiry into uncontested issues. This hardly outweighs the detriments of imprecision which seem to have accompanied its use, however. See notes 121-22 *supra*.

126. See note 116 *supra*.

127. WASH. REV. CODE § 62A.2-202 (1976). See notes 76-91 and accompanying text *supra*.

128. 3 A. CORBIN, *supra* note 3, § 579; C. McCORMICK, *supra* note 1, § 217; 4 S. WILLISTON, *supra* note 3, § 631, at 955.

To an extent, the claim that evidence admitted to explain a writing does not vary its terms is tautological. It presumes that the writing in fact means that which the evidence was offered to show. Any extrinsic evidence varies the terms of an instrument, if only by clarifying them, or else such evidence would not be offered. 4 S. WILLISTON, *supra* note 3, § 639, at 1049. Nevertheless, a court seeking to interpret a writing must do so either with the aid of extrinsic evidence or without it; the alternative, to refuse enforcement to any writing requiring interpretation, is untenable. Interpretation without the aid of extrinsic evidence results in enforcing the court's impression of the terms' meaning, which may not be the meaning adopted by the parties. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (Traynor, C.J.). Accordingly, a court should inquire into the parties' intent regarding those terms. Admitting evidence of that intent is consistent with the parol evidence rule, since it is necessary in order to ascertain what the terms are. See generally Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

129. J. THAYER, *supra* note 2, at 410-14; 9 J. WIGMORE, *supra* note 2, §§ 2400, 2458-2478, at 4, 179-265; Murray, *supra* note 8, at 343; Sweet, *supra* note 12, at 1048-51.

The parol evidence rule has been said to exclude evidence absent ambiguity on the face of an instrument.<sup>130</sup> This invokes a coarse analogy between the apparent *completeness* of a writing, which bars extrinsic evidence under the mechanical test, and its apparent *clarity*, which relates to the need for interpretation.<sup>131</sup> The difficulty with subsuming both integration and interpretation under the label "parol evidence rule" is that they involve different policy considerations; the doctrine of integration protects integrated writings from variation by agreements extrinsic to them, whereas interpretive rules define the extent to which the language admittedly a part of a writing may be shown to have particular, or peculiar, meanings.<sup>132</sup>

This section focuses on the extent to which courts may consider evidence offered to interpret language which is not patently ambiguous, examining Washington court decisions and the Uniform Commercial Code.

#### A. Interpretation in Washington Decisions

As in the area of integration, the Washington Supreme Court has been inconsistent in ruling on interpretive evidence, permitting examination of circumstances surrounding the execution of a facially unambiguous writing in some cases and refusing to permit it in others.<sup>133</sup> The former cases<sup>134</sup> adopt the position, favored by Corbin, Williston, and both Restatements, that pertinent evidence of the circumstances surrounding a document's execution may always be shown for interpretive purposes (the "context rule").<sup>135</sup> The latter cases adopt the position that a court may not look beyond a document's terms absent patent ambiguity (the "four corners rule").<sup>136</sup> As Professor Shattuck

130. See, e.g., *Grant County Constructors v. E.V. Lane Corp.*, 77 Wn. 2d 110, 121, 459 P.2d 947, 954 (1969); *Fleetham v. Schneekloth*, 52 Wn. 2d 176, 178-79, 324 P.2d 429, 430-31 (1958); *Washington Fish & Oyster Co. v. G.P. Halferty & Co.*, 44 Wn. 2d 646, 658-59, 269 P.2d 806, 813 (1954).

131. Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547, 555-56 (1970).

132. See generally Calamari & Perrillo, *supra* note 1, at 345-53; Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

133. Shattuck, *supra* note 1, at 374-76 and cases cited.

134. See, e.g., *Clements v. Olsen*, 46 Wn. 2d 445, 282 P.2d 266 (1955); *Carroll Constr. Co. v. Smith*, 37 Wn. 2d 322, 223 P.2d 606 (1950).

135. Shattuck, *supra* note 1, at 374-75; 3 A. CORBIN, *supra* note 3, § 536; 4 S. WILLISTON, *supra* note 3, §§ 609, 618, 629; RESTATEMENT OF CONTRACTS § 230 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 238 (Tent. Draft No. 5, 1970).

136. E.g., *Jones v. Hollingsworth*, 88 Wn. 2d 322, 560 P.2d 348 (1977); *Grant*

pointed out, the cases which refuse to look beyond the four corners of a document have justified this position as either a principle of interpretation or an application of the parol evidence rule. He found neither rationale persuasive, stating that the former rests "on an assumption about the clarity of written language which experience shows to be ill-founded," while the latter fails because "what is to be protected cannot be known until the writing has been interpreted."<sup>137</sup>

This comment does not evaluate the merits of the four corners rule as a principle of interpretation. As an application of the parol evidence rule, however, the four corners rule cannot be justified. Commentators generally agree that exclusion of evidence under the parol evidence rule rests on the doctrine of integration, which determines where the terms of a transaction are to be found, not how a court may undertake to understand those terms.<sup>138</sup> They differ, however, on the chronological relationship between interpretation and the parol evidence rule. Corbin suggests that interpretation is a condition precedent to any valid application of the rule.<sup>139</sup> Williston, on the other hand, maintains that until the terms of an integration have been identified, a court will not know what there is to interpret.<sup>140</sup> In practice, it is undoubtedly a rare case which affords the judge an opportunity to follow *either* approach in any neatly-drawn fashion.

An appropriate theoretical resolution of this problem might be drawn from the distinction between determining the fact of integration and determining its extent.<sup>141</sup> Until a writing has been found to be integrated in fact, there is no reason to exclude any relevant evidence concerning it. Upon finding that the parties intended it as a final expression of their agreement, *i.e.*, at least a partial integration,

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County Constructors v. E.V. Lane Corp., 77 Wn. 2d 110, 459 P.2d 947 (1969); Poggi v. Tool Research & Eng'r Corp., 75 Wn. 2d 356, 451 P.2d 296 (1969).

137. Commenting on the inconsistent decisions, Shattuck continued:

These two groups of cases appear to be irreconcilable. The schism developed before 1937 and the fact of its existence has been ignored in the later cases. That it is not known to the court seems unlikely. The cases are too numerous. Conflicting decisions are often close together in time. . . .

It would be useful to know why the court permits this conflict to continue.

Shattuck, *supra* note 1, at 376-77 (footnotes omitted).

138. See note 12 *supra*.

139. 3 A. CORBIN, *supra* note 3, § 579. See also Calamari & Perillo, *supra* note 1, at 352; Shattuck, *supra* note 1, at 376-77.

140. He states that the parol evidence rule "fixes the subject matter for interpretation, though not itself a rule of interpretation." 4 S. WILLISTON, *supra* note 3, § 631, at 955.

141. See Part II-A *supra*.

interpretation is required in order to protect it from contradiction. At this point the judge must interpret the parties' terms. If any party proves that the writing was intended also as a complete and exclusive statement of the transaction, then all terms (regardless of their interpretation) which fall outside the scope of the writing are to be kept from the factfinder.

In the fifteen years since Shattuck raised his criticism, the Washington Supreme Court has taken no substantial step to resolve the conflict between the four corners rule and the context rule. On the contrary, it has compounded the difficulty in later decisions by approaching the problem in various inconsistent fashions.<sup>142</sup>

Two recent decisions of the Washington Court of Appeals have recognized the continuing conflict between the four corners and context rules.<sup>143</sup> In both cases the court found it unnecessary to choose between them, although dictum suggests endorsement of the context rule.<sup>144</sup>

142. In one case, the court acknowledged the conflict and deferred its resolution to a more appropriate case. *Sommerfeldt v. Union Painting Co.*, 57 Wn. 2d 250, 254 n.2, 356 P.2d 601, 604 n.1 (1960).

In other cases, the court cited both traditions and proceeded as if they were consistent, ignoring the conflict. For example, Professor Shattuck quoted *Clements v. Olsen*, 46 Wn. 2d 445, 282 P.2d 266 (1955) to characterize the context rule and *Boeing Airplane Co. v. Fireman's Fund Indem. Co.*, 44 Wn. 2d 488, 268 P.2d 654 (1954) to represent the four corners test. Shattuck, *supra* note 1, at 377. In *Dickson v. Hausman*, 68 Wn. 2d 368, 370-71, 413 P.2d 378, 380 (1966) and *Bremerton v. Kitsap County Sewer Dist.*, 71 Wn. 2d 689, 699-700, 430 P.2d 956, 962 (1967) the same language was quoted by the court as if there were no question of inconsistency. See also *Grant County Constructors v. E. V. Lane Corp.*, 77 Wn. 2d 110, 120-21, 459 P.2d 947, 953-54 (1969); *Ramsey v. Sedlar*, 75 Wn. 2d 901, 906, 454 P.2d 416, 419 (1969).

A third group of cases cited the four corners tradition as the accepted rule. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn. 2d 911, 916-17, 468 P.2d 666, 670 (1970); *Poggi v. Tool Research & Eng'r Corp.*, 75 Wn. 2d 356, 364-65, 451 P.2d 296, 301 (1969); *Schauerman v. Haag*, 68 Wn. 2d 868, 873, 416 P.2d 88, 91 (1966).

The fourth series of cases confused the parol evidence rule with the rules governing interpretation. In *Fleetham v. Schneekloth*, 52 Wn. 2d 176, 324 P.2d 429 (1958), the parol evidence rule was restated as follows:

[W]here there is no ambiguity, all conversations, contemporaneous negotiations, and parol agreements between the parties prior to a written agreement are merged therein. In the absence of accident, fraud, or mistake, parol evidence is not admissible for the purpose of contradicting, subtracting from, adding to, or varying the terms of such written instruments.

*Id.* at 178-79, 324 P.2d at 430. By its use of ambiguity, the court made the apparent clarity of a writing dispositive of whether it is integrated, although even under the mechanical test integration is a function of a writing's completeness. See Part II *supra*; see also *Grant County Constructors v. E.V. Lane Corp.*, 77 Wn. 2d 110, 459 P.2d 947 (1969); *Heath Northwest, Inc. v. Peterson*, 67 Wn. 2d 582, 408 P.2d 896 (1965); *Seattle-First Nat'l Bank v. Pearson*, 63 Wn. 2d 890, 389 P.2d 665 (1964).

143. *Weyerhaeuser Co. v. Burlington N., Inc.*, 15 Wn. App. 314, 549 P.2d 54 (1976); *Eagle Ins. Co. v. Albright*, 3 Wn. App. 256, 474 P.2d 920 (1970).

144. *Eagle Ins. Co. v. Albright*, 3 Wn. App. 256, 269, 474 P.2d 920, 929 (1970).

*B. Interpretation under the Uniform Commercial Code*

Section 2-202 of the Uniform Commercial Code provides that written terms may always be explained by course of dealing, usage of trade, and course of performance; *i.e.*, by all relevant circumstances surrounding the execution of a document.<sup>145</sup> The official comments explicitly reject any requirement that “a condition precedent to the admissibility of [evidence of course of dealing, usage of trade, or course of performance] is an original determination by the court that the language used is ambiguous.”<sup>146</sup> These factors demonstrate the Code’s rejection of the four corners rule, since that rule limits the admission of extrinsic evidence for interpretive purposes to cases involving patent ambiguities.

The position of the Code on interpretive evidence substantially embraces the context rule, which permits consideration of circumstances surrounding an instrument’s execution.<sup>147</sup> Under sections 1-205 and 2-208, the competence of such extrinsic evidence is limited to showing meanings which are consistent with the express terms of a writing.<sup>148</sup> Since all language is ambiguous to some degree, even terms which appear to be unambiguous must be understood in their

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145. WASH. REV. CODE § 62A.2-202(a) (1976).

146. WASH. REV. CODE ANN. § 62A.2-202, Official Comment 1(c) (1966).

147. *Id.* Wash. Comment (i).

148. Sections 1-205 and 2-208 of the Uniform Commercial Code provide that the express terms of an agreement and any course of dealing, usage of trade, or course of performance shall, if possible, be construed to be consistent with each other, but if that is unreasonable, then “express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.” WASH. REV. CODE § 62A.2-208(2) (1976) (citation omitted); *see also* WASH. REV. CODE § 62A.1-205 (1976).

As Professor Johnson has pointed out, the phrase “express terms” is susceptible of two different interpretations: “a clear and unambiguous term of the writing,” (a) “determined as of the time it is signed” or (b) “as of the *time of trial*.” Johnson, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 34 WASH. L. REV. 78, 103-04 (1959). The former definition would render meaningless the provision of § 2-202 which admits evidence of course of performance without requiring a finding of ambiguity, because any term found to be an express term, given only factors known to the parties at the time of execution, would be unassailable by evidence of course of performance. Such a consequence is inconsistent with the Code’s rejection of the four corners rule insofar as course of performance is concerned. WASH. REV. CODE ANN. § 62A.2-208, Official Comment 2 (1966). Consequently, the clarity of a term ought to be ascertained as of the time of trial, after consideration of course of dealing, usage of trade, and course of performance. Johnson, *supra*, at 104. If the term is found to be unambiguous after consideration of these factors, evidence of them is irrelevant and must be stricken. WASH. REV. CODE § 62A.2-208 (1976).

proper context.<sup>149</sup> Thus course of dealing, usage of trade, and course of performance are relevant to show the *nature* of a writing's express terms, despite the provision that express terms will control in the event of inconsistency.

This view of a writing's express terms gives the trial judge the responsibility for protecting the parties' intended meanings. The judge alone determines when the words of a writing are sufficiently unambiguous, notwithstanding any contrary evidence, to warrant the protection of section 2-208.<sup>150</sup> This is quite consistent with the Code's stance on integration, which assumes integration only to the extent that memoranda from both parties agree and requires the judge to find a complete or partial integration before relevant extrinsic evidence is excluded.<sup>151</sup>

#### IV. ANALOGICAL REASONING: A PROPOSAL

The merits of the formal and nonformal approaches to integration and interpretation outlined above have been debated at length,<sup>152</sup> and disagreement on the policies behind them undoubtedly will continue. Considerations unrelated to the merits of these rules, however, favor a policy of looking to the Uniform Commercial Code as a general guide for resolving parol evidence problems.

The first consideration is the policy of encouraging uniformity in the law. A substantial portion of parol evidence problems are now governed by Article 2 of the Code. The *Restatement (Second) of Contracts* has recognized the general applicability of the Code principles concerning parol evidence and extended them to cover all contracts.<sup>153</sup> Given the impact of the Code, there remains little reason to persist with pre-Code approaches to integration and interpretation.

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149. For a well-reasoned statement on ambiguity in language, see Chief Justice Traynor's opinion in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968).

150. The statutory protection of § 2-208(2) is primarily a limitation upon the fact finder; consequently, the determination whether given words constitute express terms to be protected under it is legally, as well as practically, a judicial matter. WASH. REV. CODE § 62A. 2-208(2) (1976).

151. See Part II-A-4 *supra*.

152. See Calamari & Perillo, *supra* note 1; Sweet, *supra* note 12; Note, *The Parol Evidence Rule: Is It Necessary?*, 44 N.Y.U.L. REV. 972 (1969).

153. 1971 ALI PROCEEDINGS 442 (1971).

Second, statutes have increasingly been accepted by courts as policy statements from which to reason by analogy to areas which the statutes do not technically govern.<sup>154</sup> This is especially true of the Uniform Commercial Code, which influences an increasing number of areas heretofore dominated by common law principles.<sup>155</sup>

Washington has already adopted the practice of analogizing from the Code. In *Baker v. Seattle*,<sup>156</sup> the supreme court extended Washington's public policy on warranty disclaimers and limitations of remedies, applicable to the sale of goods under sections 2-316<sup>157</sup> and 2-719,<sup>158</sup> to govern rental of goods as well.<sup>159</sup> Although no panacea, a similar approach to the problems of extrinsic evidence would provide more guidance than do present principles, and encourage a positive development of uniformity in the law.

## V. SUMMARY

Washington cases have used inconsistent standards to resolve difficult parol evidence and interpretation problems. Although the "mechanical test," which renders any writing purporting to embody a complete transaction a completely integrated agreement, has long been considered the rule in this state, recent cases have challenged its supremacy. Some cases adopt the "intent test," which uses all relevant evidence to ascertain the parties' actual intent, while others utilize the "objective test," which demands an evaluation of the nature of the writing involved to determine whether a reasonable person would omit material terms. Similarly, the venerable "four corners rule" of interpretation, barring extrinsic evidence absent a patent ambiguity, has been drawn into question by judicial use of the less rigid "context rule," which permits examination of the circumstances surrounding the execution of writing in order to interpret it.

Article 2 of the Uniform Commercial Code, which governs the sale

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154. See generally Landis, *Statutes and the Sources of Law*, 2 HARV. J. LEGIS. 7 (1965); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

155. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1970-71).

156. 79 Wn. 2d 198, 484 P.2d 405 (1971). Cf. *House v. Thornton*, 76 Wn. 2d 428, 457 P.2d 199 (1969) (extending an implied warranty of fitness to new houses).

157. WASH. REV. CODE § 62A.2-316 (1976).

158. WASH. REV. CODE § 62A.2-719 (1976).

159. 79 Wn. 2d at 201-02, 484 P.2d at 407.



of goods, has adopted policies which, although largely consistent with the "intent test" and "context rule," aim to combine the advantages of both the formal and the nonformal methodologies. Given the trial judge's practical control over the resolution of parol evidence and interpretive questions, there is little reason to fear commercial uncertainty under the Code methodology. The present uncertainties in Washington case law, however, require a definitive resolution. Extension of the policies adopted in the Uniform Commercial Code can provide a much-needed resolution to the present uncertainties in Washington case law dealing with interpretation and parol evidence.

*Arden J. Olson*