Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one on parol evidence. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series! Today we are going to be talking about contracts and the parol evidence rule. Let's start by defining parol evidence. Parol evidence is any evidence of an agreement, written or oral, that happened before or at the time as the contract at issue. So, if we signed a written contract today, but yesterday we wrote a few of the terms down on a different document, that writing from yesterday is parol evidence. And if it contradicts our current form today, that writing cannot be introduced in a dispute about our contract. So, our rule statement is as follows: A party cannot introduce a prior or contemporaneous agreement, written or oral, that contradicts a later written contract.

Lee Burgess: However, there are a few exceptions to this rule, and today we'll talk about four of those exceptions. First, parol evidence can be introduced to correct a clerical or typographic error – meaning, if there is a typo in our contract, we can use a prior writing to correct that typo.

Lee Burgess: Second, parol evidence can be introduced to establish a defense against formation. Now, we discussed contract defenses in another episode, but to refresh your memory, the defenses include incapacity, duress, undue influence, mistake, misrepresentation, an illegal contract or a contract contrary to public policy, and unconscionability. So this exception means that a party can use outside evidence to prove that one of these defenses are applicable.

Lee Burgess: Next, parol evidence can be introduced to interpret vague or ambiguous terms. So, if we used the term "season" in our contract, but did not define it, extrinsic evidence can be introduced to establish that we are referring to the process of making wood suitable for use as timber and not the process of adding spices to our food. But note here that courts will interpret terms using the plain meaning rule – in other words, courts will use the literal or ordinary meaning of terms. Only when this is not possible will courts turn to other methods of interpretation, such as extrinsic evidence.

Lee Burgess: And finally, parol evidence can be introduced to supplement a partially integrated writing. Let's take a moment to talk about the difference between a partially integrated writing and a fully integrated writing. If a writing does not contain a complete statement of all the terms, then it is partially integrated, and parol evidence is allowed if it does not contradict the writing. In other words, if it is clear from the document that our contract does not contain all of the terms necessary for our deal, then any evidence of those missing terms can be introduced. So, if our partially integrated contract is silent on the date we agreed for a delivery of roosters, then you can supplement the contract by introducing evidence of our prior agreement that the roosters are to be delivered on the first of the month. But if our contract says that you're going to deliver five roosters, you cannot introduce evidence that we previously agreed to three roosters instead of five, thus contradicting the four corners of the contract.

Lee Burgess: Now, if a writing is a complete and exclusive statement of terms, then it discharges any prior agreements – meaning, it is fully integrated and parol evidence is not permitted. So, if our contract has all of the terms it needs – nothing is missing – then we cannot supplement the contract with evidence of a prior or contemporaneous agreement. Some fully integrated contracts will have a merger or integration clause to expressly state that the writing is complete or fully integrated. Language in a merger clause is typically something to the effect of: "This agreement contains the complete and exclusive agreement between the parties, and any prior representations are deemed merged therein." Any language to this effect is your hint to consider that contract fully integrated and know that parol evidence will not be allowed, unless there is an applicable exception.

Lee Burgess: Now, one quick note here – remember that the parol evidence rule applies only to prior or contemporaneous agreements. The parol evidence rule does not apply to subsequent agreements – meaning, if we make a modification to our initial contract, then that subsequent agreement is not subject to the parol evidence rule.

Lee Burgess: Let's briefly recap our rule and exceptions: A party cannot introduce parol evidence – a prior or contemporaneous agreement, written or oral, that contradicts a later written contract – except to correct a clerical or typographical error, to establish a defense against formation, to interpret vague or ambiguous terms, or to supplement a partially integrated writing.

Lee Burgess: With that, let's get started on our first hypo. This one comes from question 3 on the February 2020 California bar exam, and has been edited for brevity and focus:

Lee Burgess: "Barn Exports hired Sam, an up-and-coming artist whose work was recently covered in Modern Buildings Magazine, to paint a one-of-a-kind artistic design along the border of the ceiling in its newly renovated lobby. After discussing the work, Ed, the president of Barn, and Sam signed a mutually drafted handwritten contract, which states in its entirety: 'Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75,000 upon completion of the work.'

Lee Burgess: When Sam finished painting, he submitted a bill for his work. In response, Barn sent a letter to Sam stating that, because he had not painted the borders in the two public restrooms in the lobby, no payment was yet due.

Lee Burgess: According to Sam, before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations.

Lee Burgess: Barn sued for specific performance to have the borders in the bathrooms painted.

Lee Burgess: Can Sam reasonably try to introduce evidence of the conversation he had with Ed before signing the contract regarding the restrooms? How likely is a court to allow that evidence?"

Lee Burgess: Okay, so this fact pattern is focusing on extrinsic evidence, and that means that we should be on high parol evidence alert. Sam is trying to introduce evidence of an agreement before the contract was signed. That falls squarely within the parol evidence rule. But as we discussed, there are a few exceptions – so let's think about whether one of them is applicable.

Lee Burgess: Because the contract does not define the areas included in the "first-floor lobby", and makes no mention of the borders in the public restrooms, it's possible that this contract is not a complete statement of the terms – meaning it would be a partially integrated writing. Let's talk about a few other indicators of a partially integrated writing that would be good to discuss in your analysis. Earlier, we mentioned merger clauses. You'll note that the language of this agreement did not include a merger clause. And while that is not determinative of whether a writing is fully or partially integrated, the absence of a merger clause is one indicator that the writing may be partially integrated. Now, the facts also tell us that this was a handwritten contract, and the contract was only two sentences long. So, the length and lack of formality of the contract are also two indicators that this contract was not a complete and exclusive statement of the terms of this agreement.

Lee Burgess: And we know there is an exception to the parol evidence rule for partially integrated writings – parol evidence can be admitted to supplement a partially

integrated writing, so long as it does not contradict the writing. Applying this exception to these facts, the first part of our analysis would go as follows: Because the written contract between Sam and Ed was not a complete statement of terms, Sam should be able to introduce evidence of their prior conversation, as long as that prior conversation does not contradict what is included in the contract.

Lee Burgess: Next we should discuss whether the prior conversation contradicts the contract. Ed and Barn will likely argue that the prior conversation does in fact contradict the contract, because it plainly states "all public areas of the first-floor lobby". And if the restrooms are in the first-floor lobby, then they were included in the contract. Sam will argue that "all public areas of the first-floor lobby" means just that – the lobby; and rooms, hallways, or anything else attached to the lobby was not covered under this contract. Because Sam's interpretation is the most literal way to understand this term of the contract, a court would likely accept Sam's interpretation – meaning, the prior conversation would not contradict the writing. Thus, Sam meets each element for the partially integrated writing exception – the writing is not a complete and exclusive statement of the terms, and the extrinsic evidence does not contradict the writing. Accordingly, Sam can reasonably try to introduce evidence of the prior conversation, and a court is likely to allow Sam to do so.

Lee Burgess: Okay, let's move onto our next hypo. This one comes from question 1 on the February 2010 California bar exam. It has been edited for brevity and focus:

Lee Burgess: "On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat $25,000 on the completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, 'This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties.'

Lee Burgess: On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, 'I'm having some problems with program number 3, and I won't have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all, because your computer hardware is nearly obsolete. But I'll get programs numbers 1 and 2 to you by May 1.'

Lee Burgess: Chelsea said in response, 'I'm sorry to hear that. I really need all four programs. If you can't deliver until May 15, I guess I'll have to live with that.'

Lee Burgess: On April 28, Pat emailed Chelsea and said, 'I've worked out the problems with your programs numbers 3 and 4. I'll deliver them to you on May 1, but I'll need $30,000 upon completion of the work. Signed, Pat.'

Lee Burgess: Chelsea responded, 'Great news! Danco will pay you $30,000 upon completion. Signed, Chelsea.'

Lee Burgess: Upon completion of the work, Danco sends a $25,000 check. Pat sues for the remaining $5,000. Is Pat barred by the parol evidence rule from introducing evidence of her April 15 and April 28 conversations with Chelsea?"

Lee Burgess: Once again, this fact pattern is focusing on extrinsic evidence – evidence not in the contract. So, your parol evidence alert may be going off again. But we can immediately answer this question with a resounding "No". The parol evidence rule does not bar this evidence, and that is because the parol evidence rule only bars prior or contemporaneous agreements not contained in a contract. Like we said earlier, subsequent agreements or modifications are admissible. This contract was entered into on April 1, and the conversations in question occurred on April 15 and April 28 – so, after the contract. Thus, those conversations are not barred by the parol evidence rule. Now, you could argue about whether the signed emails met the contract's requirement that it could only be modified in a writing signed by both parties, but that will not be part of a parol evidence analysis. So, for this episode on parol evidence, our analysis ends here.

Lee Burgess: For further review, let's say these conversations happened before Pat entered into contract with Danco. Keeping the terms of the contract exactly the same, would Pat be able to introduce evidence of the conversations to prove that the agreement was for $30,000, despite the contract saying that Danco would pay $25,000?

Lee Burgess: Well, the hypo doesn't give us the exact language of the contract, but we do know at least that it contained the work to be done, the amount to be paid and when it would be paid, the date the work was to be completed by, and an integration clause that stated: "This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties."

Lee Burgess: So, could Pat argue that this evidence is supplementing a partially integrated writing? Probably not. This contract had multiple clauses, one of them being that Pat and Danco agree that the written agreement contained the complete and entire contract. Again, that means they agreed that the contract was a fully integrated writing. The contract even contained a clause on the amount of the agreement, and that is what Pat wants to introduce evidence regarding. The contract expressly states that Danco would pay Pat $25,000. So, even if this

writing was partially integrated, the evidence of the prior agreements contradicts the contract – meaning it could not be introduced in this contract dispute. But it is likely that a court would consider this to be a fully integrated writing.

Lee Burgess: And like we discussed earlier, if our contract has all of the terms it needs – and in this case the contract even stated that it had all the terms it needed – then we cannot supplement the contract with a prior agreement. Accordingly, Pat would not be able to introduce evidence of the conversations to prove that the agreement was for $30,000, despite the contract stating that Danco would pay $25,000.

Lee Burgess: And with that, we're out of time! Hopefully you will now have a handle on the parol evidence rule and its exceptions. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

RESOURCES:

"Listen and Learn" series
Examples & Explanations for Contracts, by Brian A. Blum
California Bar Examination – Essay Questions and Selected Answers, February 2010
California Bar Examination – Essay Questions and Selected Answers, February 2020
Podcast Episode 341: Listen and Learn – Contract Defenses