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Teaching Parol Evidence

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The parol evidence rule is difficult to learn and difficult to teach. It sometimes but not always excludes evidence of prior and contemporaneous agreements when there is a written contract. The rule, which has been described as a "maze of conflicting tests, subrules, and exceptions,"[1] is complex, technical, and difficult to apply. One commentator has observed that "[f]ew things are darker than this, or fuller of subtle difficulties."[2] In my search for approaches to teaching the rule, I have found that the models presented in this Article help my students visualize the rule, understand how it works, and remember it.

I. Rationale and Criticisms

The parol evidence rule aims to protect written contracts against perjured or otherwise unreliable testimony of oral terms.[3] It also excludes prior agreements which have been superseded by the writing, under a theory of merger.[4] In addition, the rule encourages parties to put their complete agreement in writing, which promotes stability in commercial dealings.[5]

The rule has been criticized because it can exclude as much truthful evidence as perjured testimony[6] and because it is too complicated and inconsistently applied.[7] Another argument is

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1. Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 Cornell L. Rev. 1036, 1036 (1968).

2. J. Thayer, A Preliminary Treatise on Evidence at the Common Law 390 (1898).

3. J. Calamari & J. Perillo, The Law of Contracts 137 (3d ed. 1987).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 137-38; Sweet, *supra* note 1, at 1036, 1044-45.

that the rule has never succeeded in forcing people to reduce their entire agreement to writing, and that commerce has survived anyway.[8]

II. The Restatement's Parol Evidence Rule

The Restatement's version of the parol evidence rule and its exceptions occupy no fewer than ten sections of the Second Restatement of Contracts.[9] The key Restatement sections on parol evidence are:

> § 209. Integrated Agreements
>
> (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
>
> (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
>
> (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.
>
> § 210. Completely and Partially Integrated Agreements
>
> (1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
>
> (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
>
> (3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
>
> § 213. Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

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8. J. Calamari & J. Perillo, *supra* note 3, at 137; Sweet, *supra* note 1, at 1036.

9. Restatement (Second) of Contracts §§ 209-18 (1979). I have omitted § 211 (Standardized Agreements), § 212 (Interpretation of Integrated Agreements), and § 218 (Untrue Recitals; Evidence of Consideration) because they are not pertinent to the models presented in this Article. For discussion and criticisms of the Second Restatement's version of the parol evidence rule, see Murray, *The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts*, 123 U. Pa. L. Rev. 1342 (1975).

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

§ 215. Contradiction of Integrated Terms

Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.

§ 216. Consistent Additional Terms

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumstances might naturally be omitted from the writing.[10]

Exceptions to the rule and other explanations are set forth in sections 214 and 217:

§ 214. Evidence of Prior or Contemporaneous Agreements and Negotiations

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

(a) that the writing is or is not an integrated agreement;

(b) that the integrated agreement, if any, is completely or partially integrated;

(c) the meaning of the writing, whether or not integrated;

(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;

(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

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10. RESTATEMENT (SECOND) OF CONTRACTS §§ 209-10, 213, 215-16 (1979).

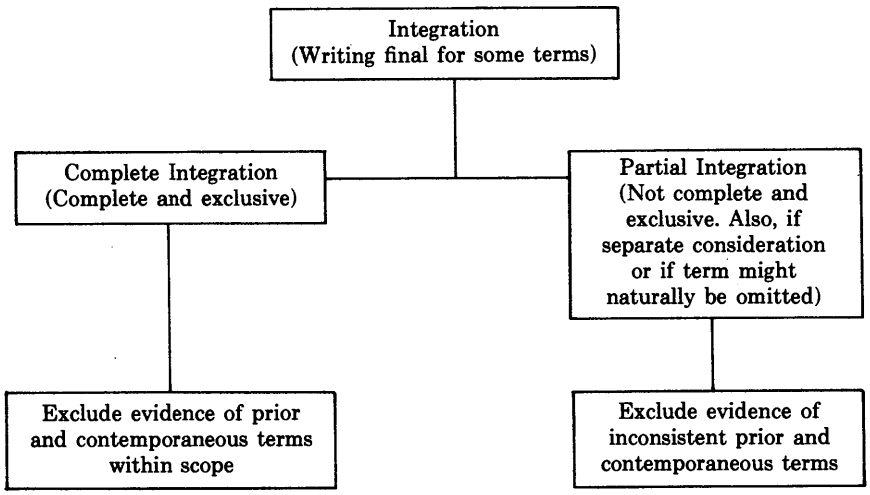
§ 217. Integrated Agreement Subject to Oral Requirement of a Condition

Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition.[11]

A. *Basic Structure of the Restatement's Parol Evidence Rule*

Two concepts are central to the Restatement's parol evidence rule. First, the rule asks whether an agreement is integrated—a final expression of one or more terms. By definition, a "final" expression of a term may not be *contradicted* by evidence of prior or contemporaneous terms. Second, if the agreement is integrated, the rule then asks whether the agreement is completely integrated—an agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement. By definition, an agreement that is "complete and exclusive" may not be supplemented by evidence of *any* prior or contemporaneous terms within its scope. The following diagram illustrates the basic structure of the Restatement's parol evidence rule:

BASIC STRUCTURE OF RESTATEMENT'S PAROL EVIDENCE RULE

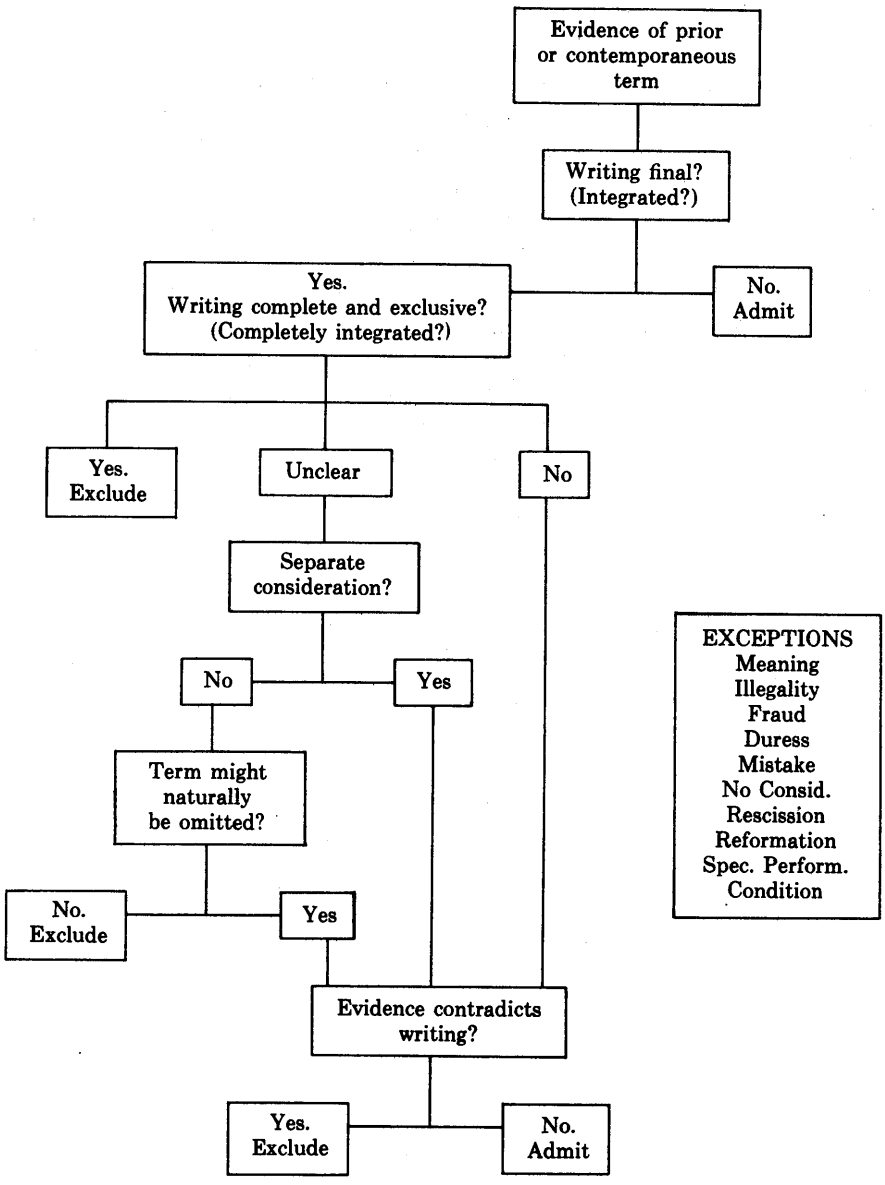


11. *Id.* at §§ 214, 217.

B. The Restatement's Parol Evidence Rule

The following decision tree provides a more complete model of Restatement's parol evidence rule:

RESTATEMENT'S PAROL EVIDENCE RULE



C. *Comments on the Restatement's Parol Evidence Rule*

A few points about the Restatement's parol evidence rule deserve comment. First, the rule can exclude written as well as oral evidence.[12] Second, the comments state that even an integration may be explained or supplemented by usage of trade, course of dealing, and course of performance.[13]

Third, the rule is not as clear as it could be about evidence of consistent contemporaneous terms when there is an allegedly complete integration. However, comment (a) to section 213 explains, "Where writings relating to the same subject matter are assented to as parts of one transaction, both form part of the integrated agreement. Where an agreement is partly oral and partly written, the writing is at most a partially integrated agreement."[14] Therefore, the rule appears to follow the First Restatement's view that a contemporaneous writing is generally part of the integration.[15] For evidence of a consistent contemporaneous oral term, the rule is slightly more complicated. If the judge finds that the parties really agreed to the oral term, the writing is by definition not completely integrated, and evidence of the term is admitted to the jury, which then decides for itself whether the parties agreed to the term. On the other hand, if the judge finds that the parties did not really agree to the oral term, the evidence does not destroy the complete integration and is not admissible.

There are several points of uncertainty and opportunities for manipulation in the application of the rule. The judge has considerable latitude in determining whether the agreement is integrated, whether it is completely integrated, whether the proffered term might naturally be omitted from the written agreement, and whether the proffered term contradicts the writing. While this last point might appear less obvious than the others, some commentators observe that "there is little or no consistency in the cases on the question of what is contradictory and what is consistent."[16]

The exceptions set forth in the Second Restatement sections 214 and 217 permit additional flexibility, uncertainty, and

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12. *Id.* at § 213 comment a.
13. *Id.* at § 209 comment a.
14. *Id.* at § 213 comment a.
15. *See* RESTATEMENT OF CONTRACTS § 237 comment a (1932).
16. J. CALAMARI & J. PERILLO, *supra* note 3, at 155.

manipulation in the application of the rule. This is particularly true of section 214(c), which provides that parol evidence is admissible to establish the meaning of the writing.[17] While a majority of courts still follow the plain meaning rule,[18] which bars extrinsic evidence offered to interpret a term which appears plain and unambiguous on its face, the Second Restatement and an increasing number of courts condemn the plain meaning rule.[19] For instance, one court has held:

> [A]ll relevant evidence pointing to meaning is admissible because experience teaches that language is so poor an instrument for communication or expression of intent that ordinarily all surrounding circumstances and conditions must be examined before there is any trustworthy assurance of derivation of contractual intent, even by reasonable judges of ordinary intelligence, from any given set of words which the parties have committed to paper as their contract.[20]

While some courts have held that the proffered interpretation must be one which the written words will bear,[21] under the Second Restatement unambiguous words may be interpreted to mean even the opposite of their usual meaning.[22]

III. THE UCC'S PAROL EVIDENCE RULE

The Uniform Commercial Code's (UCC's) parol evidence rule differs somewhat from the Restatement's version. UCC section 2-202 provides:

> Final Written Expression: Parol or Extrinsic Evidence
>
> 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

17. *See generally id.* at 166-78.

18. *Id.* at 166-67.

19. *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 212 comment b (1979).

20. Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 496, 189 A.2d 448, 454 (1963).

21. *Id.* at 497, 189 A.2d at 455; RESTATEMENT OF CONTRACTS § 242 comment a (1932) ("Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express.").

22. RESTATEMENT (SECOND) OF CONTRACTS § 212 comment b, illustration 4 (1979) ("buy" means "sell" if the parties orally agree that it does). *But see* RESTATEMENT OF CONTRACTS § 231 illustration 2 (1932) ("buy" cannot mean "sell" unless reformation of the writings is granted).

> 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 (Section 1-205) or by course of performance (Section 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.[23]

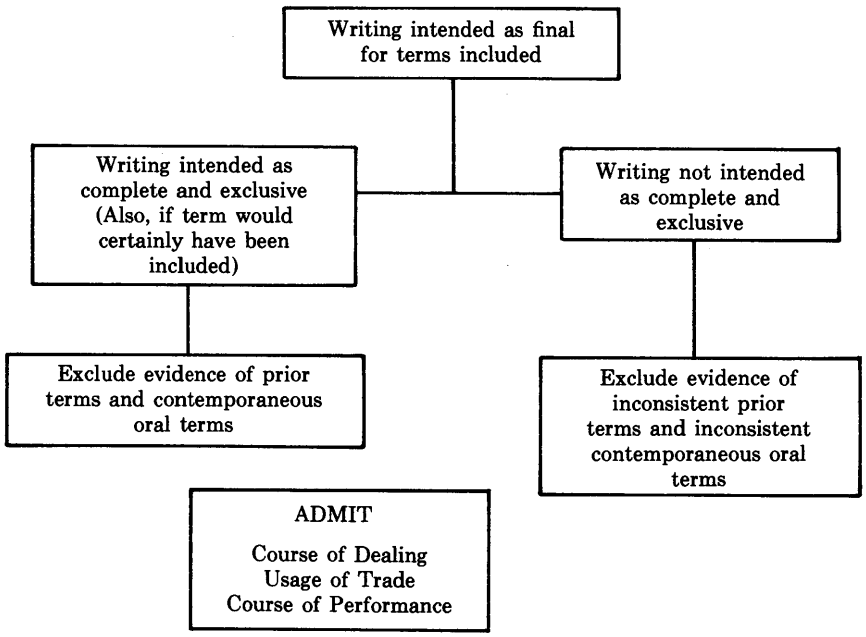
Comment 3 to section 2-202 explains:

> 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.[24]

A. Basic Structure of UCC's Parol Evidence Rule

The following diagram illustrates the basic structure of the UCC's parol evidence rule:

BASIC STRUCTURE OF UCC'S PAROL EVIDENCE RULE

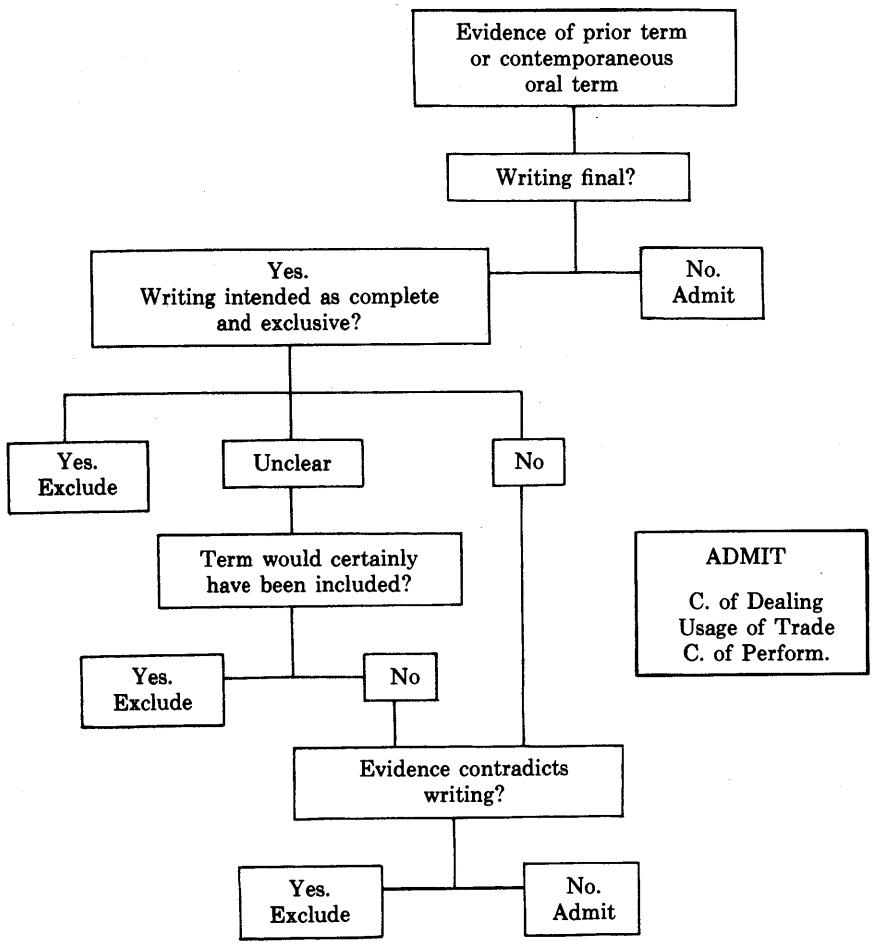


23. U.C.C. § 2-202 (1978).
24. *Id.* at § 2-202 comment 3.

B. The UCC's Parol Evidence Rule

The decision tree for the UCC's parol evidence rule is:

UCC'S PAROL EVIDENCE RULE



C. Comments on the UCC's Parol Evidence Rule

Some points about the UCC's parol evidence rule should be noted. First, the rule is ambiguous about contemporaneous writings. The first part of the rule does not exclude them, but paragraph (b) might, because it provides that even consistent additional terms are inadmissible if a writing was intended as a complete and exclusive statement of the terms of the agreement. Some commentators assert that, like the Restatement, the UCC adopts the position that a contemporaneous writing is part of the integration.[25] One writer argues that "the fact that there are other writings contemporaneously executed indicates that the writing with which those other writings are contemporaneous was not intended as the exclusive statement of the agreement of the parties."[26] Under this reasoning, at least consistent contemporaneous writings are admissible.

Second, it is unclear whether a course of dealing, usage of trade, or course of performance that contradicts the writing is admissible. Some writers assert that they are inadmissible,[27] while others argue that they are admissible because the rule does not expressly exclude them.[28]

Lastly, it is generally agreed that at least some of the common law exceptions to parol evidence apply to the UCC's rule,[29] because UCC section 1-103 provides that common law principles supplement the UCC,[30] and because some of the exceptions prevent or destroy the writing's effectiveness as a final expression of the agreement.[31]

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25. J. CALAMARI & J. PERILLO, *supra* note 3, at 136 & n.15, 151.

26. 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE 152 (3d ed. 1982).

27. *Id.* at 179, 181; 2 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES 48 (1984). *Cf. id.* at 52 (evidence of course of performance which occurs after integration is admissible). *See also* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 85 (2d ed. 1980).

28. Kirst, *Usage of Trade and Course of Performance: Subversion of the UCC Theory*, 1977 U. ILL. L. F. 811, 816, 832-35; *see* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 166-67 (1970); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971).

29. *See* R. ANDERSON, *supra* note 26, at 166, 170-77; W. HAWKLAND, *supra* note 27, at 45-46; J. CALAMARI & J. PERILLO, *supra* note 3, at 162; J. WHITE & R. SUMMERS, *supra* note 27, at 81-82, 88-89.

30. J. CALAMARI & J. PERILLO, *supra* note 3, at 162; J. WHITE & R. SUMMERS, *supra* note 27, at 88. U.C.C. § 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103 (1978).

31. W. HAWKLAND, *supra* note 27, at 45-46; *see* R. ANDERSON, *supra* note 26, at 166,

IV. CONCLUSION

The above diagrams illustrate only the basic elements of the parol evidence rule. The ways in which the rule and its exceptions have been interpreted and applied are complex.[32] However, without an understanding of the rule's basic structure, students cannot proceed to the finer points of analysis or evaluate whether they think the rule is good or bad. The above models shed some light on what is, for many students, mostly darkness.

170-75; J. CALAMARI & J. PERILLO, *supra* note 3, at 162; J. WHITE & R. SUMMERS, *supra* note 27, at 81-82.

32. *See generally* J. CALAMARI & J. PERILLO, *supra* note 3, at 132-83; 3 A. CORBIN, CORBIN ON CONTRACTS 356-578 (1960); Sweet, *supra* note 1; J. WHITE & R. SUMMERS, *supra* note 27, at 75-95.