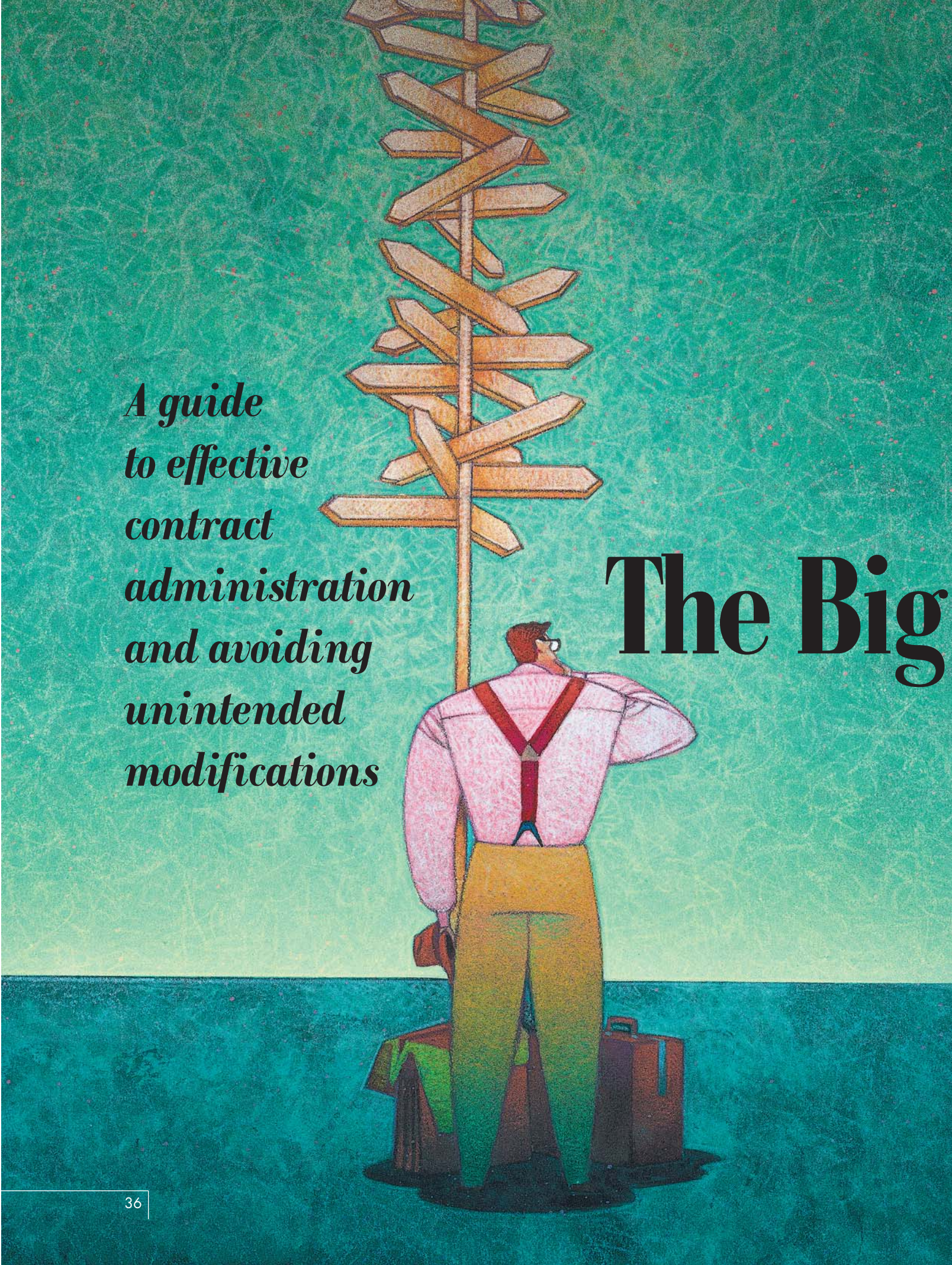


# The Big

*A guide to effective contract administration and avoiding unintended modifications*

# Contract is Signed NOW WHAT?

By John A. Cook, Theresamarie Mantese, and Christine L. Pfeiffer

The success of a company often depends significantly upon its ability to obtain and then successfully administer contracts with many entities and individuals. The contracts may be central to the company's business, involving customers, suppliers, technological resources, and management services. A contract may have been meticulously negotiated or carefully considered by the parties before it was signed. Yet, even after these efforts, it is common for one or both of the parties to then divert attention from the contract's terms, and instead concentrate on general relationships and objectives.

Ironically, inattention to the contract after the closing may ultimately undermine both the contracting parties' relationships and the objectives of the arrangement. Of even greater risk is that the parties may unintentionally modify hard-fought, negotiated terms by words, conduct, or supplemental writings—especially in situations where actual performance is in the hands of lower-ranking personnel or department heads who may not appreciate the importance of some of the contract language. Many times, the values of friendly interaction, practicality over legalism, or saving time will displace a consistent adherence to the formalities agreed upon in the contract. In other circumstances, the terms may seem so obscure that a party forgets them, or becomes complacent in the potentially false hope that they may never be enforced.

## Subsequent Conduct May Harm Contract Rights

The language of a contract may be obvious and complete, so that the intention is clear. That is important, because in the event of a dispute, courts and arbitrators enforce contracts according to the expressed intention of the parties. However, the conduct of the parties in the course of performance may obscure the original intention as to some terms, or may cause a party to lose a firm hold on its original rights and benefits. This question of whether a party's contract rights are harmed hinges on whether the party engaged in conduct after the signing that may constitute a modification of the contract.

In the event of uncertainty as to the meaning of a contract's language, courts and arbitrators will resolve a dispute by attempting to discern and enforce the intentions of the parties, as expressed in the contract and as interpreted in practice by the parties.[1] The same rule applies to the question of whether the parties' post-signing words and activities show an intention to modify the contract, as well as

the question of how such conduct should be interpreted.[2] Yet mere sloppiness in adhering to the contract's terms can raise questions about the parties' intention and the proper construction of both the original contract and any intended modifications, which in some cases can be difficult and expensive to resolve.

In the last analysis, it is always better to closely adhere to the agreement in a cordial but businesslike and consistent manner, and, when necessary, to supplement or amend the agreement deliberately and with the same attention to detail that went into the original document. Unfortunately, this is not always what occurs in the day-to-day administration of a contract. Long after the attorneys and the executive officers have completed the fine points in solidifying the terms and conditions, they or other personnel may act in a manner that is inconsistent with the strictures of the contract, either intentionally or through inattention. This can lead to misunderstandings, disputes, and possibly litigation.

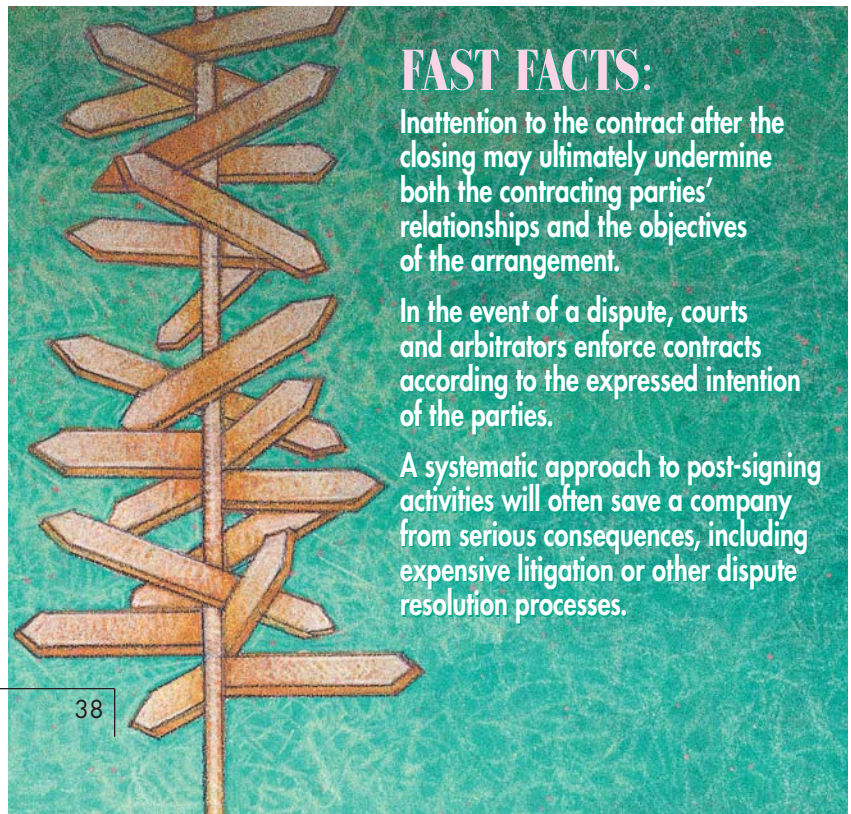
In the event of formal dispute resolution, a court or arbitrator may resolve ambiguities by examining evidence outside the original contract and outside any later writing that a party claims to constitute an amendment, to ascertain the parties' intentions.[3] Michigan courts have held that resolving these issues does not stop at the four corners of the written document. In *SFA Studios, Inc v Docherty,*[4] the court stated: "[i]t is sometimes the case that the writing represents only a part of the contract, the other parts being expressed orally; and in such cases, those parts not reduced to writing which are consistent with the writing, may be shown." Indeed, Michigan law also recognizes that contracts may be implied in fact, meaning that where there is notice of the terms on which a party will act, followed by consistent performance by the party that is accepted by the other party, the other party will be taken to have agreed to the terms.[5]

To summarize, it has been said that "the court should look to all relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent."[6] Relevant circumstances for determining the intent of the parties also include other objective evidence—"such as expressed words and visible acts,"[7] and "the language employed, the subject matter, and the surrounding circumstances under which the parties entered into the agreement."[8]

## Contract Terms Do Not Necessarily Protect Against Unintended Modification

Attorneys are generally aware that even terms contained in a contract restricting the ability of the parties to modify the contract without a written and signed amendment may be ineffectual to prevent subsequent modifications. In *Quality Products & Concepts Co v Nagel Precision, Inc,*[9] the Michigan Supreme Court held that parties could subsequently modify a contract even if the contract terms provide that modifications or waivers must be in writing to be enforceable. The Supreme Court stated: "[i]t is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses. This is because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed."[10]

Even in situations where the contract's expiration date is an express term in a contract, Michigan courts have long recognized that continued performance by the parties in a manner consistent with the terms of an original, written agreement that has expired may establish an implied renewal of the contract. For example, in *Toledo Machine & Tool Co v Byerlein,*[11] the court held that a contract for employment existed even after the expiration of a written contract, where the employee continued to "perform the same service, duties, and obligations, and in the same way that he had theretofore been performing, under the written contract."[12]



**FAST FACTS:**

**Inattention to the contract after the closing may ultimately undermine both the contracting parties' relationships and the objectives of the arrangement.**

**In the event of a dispute, courts and arbitrators enforce contracts according to the expressed intention of the parties.**

**A systematic approach to post-signing activities will often save a company from serious consequences, including expensive litigation or other dispute resolution processes.**

## Ten Rules for Effective Contract Administration

The legal principles of contract interpretation and modification make it advisable for legal counsel to make sure that the same coveted rights and benefits that were bargained for and that are contained in the written document are not lost or diluted during the course of the relationship, for lack of training or knowledge as to how to protect those rights. The authors therefore suggest that there are at least ten rules for the effective administration of a contract, which should be the basis for counsel's advice to the client.

1. **Identify the responsible person.** The person responsible for administration of the contract should be clearly identified at the outset, and should review the contract periodically to assure that the systems, procedures, and other performance of the parties remain consistent with the written terms. He or she should be aware of the performance by the parties and maintain

*A systematic approach to post-signing activities will often save a company from serious consequences, including expensive litigation or other dispute resolution processes.*

control of any deviations from the contract; for example, reporting methods may evolve over time, so that crucial data are no longer being tracked. Questions should be referred to higher executives with authority in the matter, or, if appropriate, directly to legal counsel. Where necessary, a simple written amendment, drafted or reviewed by legal counsel before execution, may avoid future confusion or disagreements.

2. **List all critical performance and monitoring steps.** Immediately after the agreement is signed, make a list of specific items to be completed and monitored under the agreement that might be forgotten if not listed at the outset. Examples include: requirements for meetings and reports; need for internally tracking data to assure that billing and payments adhere to standards or change points specified in the agreement; monitoring the compliance of each side with the use of contractual standards for performance; and the completion, initialing, and attachment of any exhibits that were not ready for attachment at the time the agreement was signed.

3. **Maintain reference materials.** Use the agreement and internally prepared list or lists as the reference material and guides for performance by all personnel involved, and require that involved personnel read and understand these documents.

4. **Maintain supervision.** The person directly responsible for administration, or other senior management, should supervise and monitor subordinate personnel when there are indications of nonperformance by either side.

5. **Control use of contract or modification summaries.** Do not share any internally prepared lists or memos on contract standards or performance with the other party, or provide the other party with any form of summary of the agreement or a modification. There is at least some risk that such documents will state a matter in terms that are ambiguous when read in the light of the agreement itself, or clearly contradict it. Either way, the result may be adverse to the company and cost it money and/or the benefit of its bargain. As a corollary, do not accept any attempt by the other party to "summarize" or paraphrase the terms of the agreement. Always refer to the agreement itself, unless otherwise approved by legal counsel.

6. **Be vigilant about waivers of performance.** Do not ignore failure of the other party to adhere to terms of the agreement. Even if there is a clause in the document stating that failure to enforce a term in one instance is not a waiver or permission to repeat it in the future, any acquiescence may be deemed to be an unintended amendment. Usually, complaints about such items arise when other performance issues arise, but by then it may be too late to do anything about the earlier issues.

7. **Respond to claims relating to the contract.** It is necessary to respond promptly and in writing to any verbal or written statement by the other side that attempts to excuse that party's lack of performance or claim non-performance by your side. Many company personnel prefer to remain silent or merely respond verbally with no written follow-up, seeing this as non-confrontational and good for the overall relationship. Or, they may consider themselves too busy for such correspondence. Such passivity or neglect merely results in a "default" written record created by and consistently favoring the other party, and can be very frustrating when later trying to explain the true state of things to the company's Board, senior officers, or legal counsel.

8. **Avoid involving non-signing affiliates.** When only a company's subsidiary or other related company is the party to the agreement, make sure that subsequent documents do not involve the parent company or other non-signing companies. Legal counsel may have carefully built a wall against liability and responsibility on the part of such other entities. Every letter or memo bearing the name or letterhead of a non-contracting company chips away at that wall, or may tear it down entirely.

9. **Refer material amendments to legal counsel.** If there is an intention to amend the original agreement in any material way, have it handled by legal counsel. Changes in performance standards, payment terms, or the allocation of responsibilities and risks may be critical to the overall value of the contract, and should be treated as seriously as when the original contract was drafted or agreed to. If counsel's involvement was deemed appropriate for the "big" agreement, it may be even more important for any subsequent amendments. Continuation of that consulting process will assure that any defined terms are used consistently, and that the language of the amendment does not inadvertently (or perhaps purposely, if drafted by the other party) relieve the other party of any burdens or liability beyond what was actually intended by the company in agreeing to or asking for the amendment.

10. **Do not let disputes pile up.** Disputes should not be allowed to grow stale, unless the company intends to waive the causes for them. Resolving disputes while they are fresh will not only avoid the hostility that can result from bringing up old matters, but will also assure that any damages or other adverse effects resulting from non-performance by the other party can be remedied before they get out of hand. Always keep in mind that the other party may not be collectable for large sums that may be awarded in a judgment or other dispute resolution process, and that if the parties want to continue their relationship, it will be easier if the amounts required to settle grievances remain relatively low.

## Conclusion

The ten practical rules listed here are not exhaustive. There may well be additional or different procedures that a contracting party should follow, because of the unique nature of its business. Whether all of the suggestions made here—or other measures to protect a party's position under a contract—are adopted and followed will depend to some extent on how critical the contract is to the business, and the size of potential damage to the business that can come from another party's claims of modification, waiver, or breach. Nevertheless, a systematic approach to post-signing activities will often save a company from serious consequences, including expensive litigation or other dispute resolution processes. ◆

*John A. Cook is a principal in the firm of Cook, Goetz & Rogers, P.C. in Bloomfield Hills, Michigan. Theresamarie Mantese and Christine L. Pfeiffer are senior attorney and associate, respectively, of the firm.*

## Footnotes

1. *Amtower v William C Roney & Co,* 232 Mich App 226, 234; 590 NW2d 580 (1998). See also, *In the Matter of DMR Fin Servs, Inc,* 274 BR 465, 468 (ED Mich 2002) ("under Michigan law… the primary goal in the construction or interpretation of any contract is to honor the intent of the parties") (omission in original, internal citations omitted).
2. *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 364–365; 666 NW2d 251 (2003), reh den 669 NW2d 812 (2003) (parties may "*mutually* waive or modify their contract" and evidence of such mutual waiver or modification "is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct…") (emphasis in original).
3. *Grand Traverse Band of Ottawa & Chippewa Indians v United States Attorney for Western District of Michigan,* 198 F Supp 2d 920, 937 (WD Mich 2002), aff'd 369 F3d 960 (CA 6, 2004).
4. 12 Mich App 170, 173; 162 NW2d 670 (1968).
5. See e.g., *Tustin Elevator & Lumber Co v Ryno,* 373 Mich 322, 330; 129 NW2d 409 (1964) ("[a] contract is implied where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used, or things done by them, or other pertinent circumstances attending the transaction").
6. *Eberhardt v Comerica Bank,* 171 BR 239, 243 (ED Mich 1994).
7. *ADR North America, LLC v Agway, Inc,* 303 F3d 653, 658 (CA 6, 2002).
8. *Gary Boat Club, Inc v Oselka,* 31 Mich App 465, 472; 188 NW2d 127 (1971).
9. *Quality Products* supra.
10. Id. at 372.
11. 9 F2d 279, 280 (CA 6, 1925).
12. See also, *Ferries v Copco Steel & Eng'g Co,* 344 Mich 345; 73 NW2d 850 (1955) (where no new agreement or modification of the parties' oral employment agreement was effected after the agreements' expiration, employment continued on the basis of the original agreement).