From the viewpoint of an attorney, “new associate” employment agreements are relatively simple documents. Yet this simplicity is deceptive. The decisions made in these agreements are tremendously important for the parties’ future relationship. Mistakes made in this document can be difficult to remedy later on.

During my 28 years of working in ophthalmology and with other medical practices, I’ve noticed 10 “new associate” contracting mistakes many ophthalmology practices make. Avoid these mistakes to prevent problems for both the practice and the associate.

1. Failing to check references.
Many times checking references seems unhelpful. However, if used diligently, the reference-checking process may alert you to a candidate’s subpar performance or lack of people skills. In many cases it may simply help you avoid hiring a “jerk.” Hiring a new ophthalmologist is risky. It is important to do your due diligence, even if it doesn’t yield “pay dirt” every time. Be careful about limiting yourself to the candidate’s handpicked reference list. A candidate who has left prior practices under unfavorable circumstances may give the name of a friendly co-associate. However, if you talk with the lead doctor in that practice, you might get a more accurate view.
Avoid these mistakes to prevent problems for both the practice and the associate.

2. Going back on promises made. Unless your initial error—once spotted—is a deal-breaker for the practice, stick with any promises that you make, written or verbal. The short-term benefit of going back on a promise generally isn’t worth the long-term collateral damage to your relationship with a future “partner.”

3. Contracting with the associate as an independent contractor. There are two issues here. One is tax liability. The IRS will almost always, on audit, view the associate as an employee, not an independent contractor. That means the practice could be liable for various employment taxes on the amounts paid to the associate as well as substantial penalties. Misclassification of the associate ophthalmologist as an independent contractor may also threaten the tax-favored status of your practice’s retirement plan.

The determination of independent contractor status is complex but is essentially made by examining the practice’s right to control how, when, and where the associate ophthalmologist performs services. For almost every associate, the practice clearly has those rights, and therefore the associate should be classified and treated as an employee.

The second issue with contractor status is that it encourages a “my practice, your practice” mentality. For example, occasionally the associate ophthalmologist wants to contract through his or her individual professional practice entity so that he/she can deduct various business expenses through that practice entity. Oftentimes this results in a flawed view that “my practice” and “your practice” have equal status and rights. Obviously this is not true. In hiring the associate, the practice is assuming considerable financial risk and providing a patient base as well. Don’t play into erroneous expectations of the associate. Hire the associate as an employee.

4. Agreeing to a “no cut” contract. A “no cut” contract is an employment agreement for a fixed term of one, two, or three years that does not permit the employer to terminate the associate’s employment, except for “cause.” The problem with this is that almost all terminations of an associate’s employment are “without cause.” The typical termination scenario involves an associate who lacks a proper work ethic; relates poorly to staff, referrers, or patients; is clinically subpar; or refuses a reasonable buy-in. None of these is a “cause” event. If you do not have a no-fault right to terminate the contract on 60 or 90 days’ notice, the practice may not be able to terminate an associate’s employment until the end of the stated term of the employment agreement. Alternatively, the practice may try to terminate for insufficient “cause,” making it vulnerable to a lawsuit for “breach of contract” and possible unenforceability of any non-compete provision in the employment agreement.

5. Agreeing to a contract that expires as of a definite date. Some attorneys prepare associate employment agreements that have a fixed term of one, two, or three years (generally the period prior to becoming a “partner” in the practice) but do not provide for automatic renewal of the term at the end of the fixed term. The thought is that the expiring associate employment agreement will be replaced by new “partnership” documents. However, the practice may have problems if new “partnership” documents are not fully executed by the conclusion of the initial agreement, whether due to attorney delays or a practice decision to defer the date of “partnership.” Without an “in force” employment agreement, the practice and the associate will be in a contractual “no man’s land.” If the associate then decides to leave rather than buy in, it will be unclear whether the initial employment agreement, with its non-compete, non-solicitation, and other protections, will still apply.

The way to avoid this trap is to include an “evergreen” clause specifying that after the initial term of the employment agreement, the agreement will automatically renew unless notice is given prior to the renewal date that one party or the other does not wish to renew.

6. Being greedy on the non-compete restricted area. If permitted in your state, you should include a

continued on page 16
non-compete clause in the associate’s employment agreement that prevents the associate from practicing within a defined restricted area. However, don’t demand more geographic protection than you absolutely need. We advise practices to limit the restricted area to the area encompassing perhaps 85% of the practice’s core patient service area. Anything more exposes the practice to the risk that a court will invalidate the non-compete as geographically “unreasonable” or “overbroad” under state law. Be sure to check with your attorney to make sure that your selected restricted area will likely be considered “reasonable” under the standards of the statutes and court decisions of your state.

7. Conceding that a non-compete clause will not apply if the associate is terminated without “cause.” This frequently requested concession sounds reasonable (“you are terminating me arbitrarily, without any fault on my part”) but will fatally dilute the protection provided by an appropriate and reasonable non-compete clause. As noted above, almost all terminations of an associate’s employment are “without cause.” The practice’s decision to terminate the associate’s employment—rarely an easy one—will be made all the more difficult if the “price tag” for your decision includes allowing the associate to set up a competing practice across the street.

8. Failing to include a non-solicitation clause. The non-solicitation clause supplements a non-compete clause, discussed above. Consider a departing associate who locates his/her new, competitive practice just outside the restricted area of the non-compete clause and then begins calling or sending a direct mail solicitation (using a list stolen from your practice) to all your patients, including those within the non-compete restricted area. Or perhaps the associate starts to solicit all of your referral sources, asking them to refer to him/her instead of your practice. A properly worded non-solicitation clause prohibits those and other bad acts, such as theft of a patient list or solicitation/hiring of your valuable employees.

9. Failing to specify the handling of malpractice “tail.” Today, most practices are familiar with this issue. With the prevalence of “claims made” malpractice insurance policies, if the associate ophthalmologist leaves the practice’s employ for whatever reason, supplemental insurance (called “tail” coverage) is needed to cover any malpractice claims made after the associate has left the practice but where the alleged claim of malpractice actually occurred while the associate was employed by the practice.

If you fail to specify how the “tail” is to be handled, the practice almost surely will have to pay the entire cost of the “tail.” If this is not what the practice intends, specify who will purchase the “tail” and under what circumstances. Often, the practice and the associate simply agree to split the “tail” cost equally. Also, if you require the associate to buy the “tail,” include a clause providing that if the associate fails to do so, the practice can purchase it on his/her behalf and then deduct the cost from any final pay owed to the associate or otherwise seek reimbursement from him/her. Otherwise, there is a chance that the associate will not purchase the “tail,” which means that s/he and the practice are uninsured for the associate’s acts and omissions while in your employ.

10. Overpaying the associate. Overpaying the associate is at the top of my list of mistakes that ophthalmology practices make with their associates. A high initial salary, a high percentage of collections, and/or an overly generous incentive bonus paid to the associate makes the recruiting/hiring process easier. However, excessive generosity on the front end of your relationship with the associate may come back to haunt you later. Specifically, overpaying the associate will make it hard, if not impossible, to exact a buy-in from the associate if he or she is already earning every last penny of profit on the services s/he provides. Any such buy-in will then necessitate a pay cut to become a “partner,” which is undesirable. Alternatively, the associate may see no advantage to buying-in and prefer to remain a highly paid (i.e., overpaid) associate.

Consult with an experienced healthcare attorney or consultant for advice on appropriate starting salaries and incentive bonus arrangements for ophthalmologists in your area that will not result in overpaying your associate. The key variable with respect to appropriate starting salaries and incentive bonus arrangements is geographic location. Practices in major metropolitan areas or other desirable locations can often pay lower salaries and incentive bonuses, while practices in rural or less desirable locations must offer higher salaries and incentive bonuses to qualified candidates to induce them to relocate.