



## *Are health clinics operating in large retail stores violating the corporate practice of medicine?*

By Terrell J. Isselhard, Esq.

### **Introduction**

Several years ago, the Illinois Supreme Court ruled that hospitals could employ physicians since hospitals were licensed medical facilities regulated by the state and an integral part of the delivery of healthcare services, in conjunction with physicians providing professional care.

Today there is an evolution in healthcare, the introduction by large retail operations such as Wal-Mart, CVS, Walgreen's and K-Mart, just to name a few, of the retail store-based health clinics ("retail clinic"), located within their retail stores. These retail clinics are generally staffed by nurse-practitioners to provide convenient, low-cost healthcare. The patients (customers) may have no insurance coverage. However, in some cases, insurance companies are actually covering the cost (or a portion of the cost) of such visits. The express goal is to provide convenient healthcare services in a cost-efficient manner for treatment not requiring direct physician involvement.

There have been significant discussions and many articles written exploring the advantages and disadvantages of this medical retail economic model. Proponents argue that the primary reasons to support this trend are:

- **Convenience.** Today many people do not have time or the ability to schedule an appointment with a physician.
- **Cost.** It is less expensive to be treated by a nurse-practitioner than by a physician.
- **Monitoring care.** The nurse-practitioner, if faced with a medical problem beyond the clinic's scope of treatment, would refer medical care to an appropriate physician for consultation and treatment.
- **Timeliness of Treatment.** By being treated at the more convenient and less costly retail clinic, more people would receive treatment sooner rather than later for their minor medical needs before they became more complex and costly to treat.

### **AMA's view**

The American Medical Association, on behalf of physicians, recently expressed its view of the dangers of such retail clinics and what, if anything, needs to be done to monitor the treatment at such facilities. Among the various concerns expressed by the AMA was the potential conflict of interest by joint ventures between retail clinics and pharmaceutical chains. The AMA requested an investigation into whether such relationships will create additional store traffic, including increasing sales of lucrative prescription drugs (that may otherwise not be needed), and other non-healthcare-related products.

The AMA voted to adopt the following three directives:

1. Ask the appropriate state and federal agencies to investigate ventures between retail clinics and pharmacy chains with an emphasis on inherent conflicts of interest in such relationships, patient's welfare and risk, and professional liability concerns.
2. Continue to work with interested state and specialty medical societies in developing guidelines for model legislation that regulates the operation of retail clinics.
3. Oppose waiving any state and/or federal regulations for retail clinics that do not comply with existing standards of medical practice facilities.

### **Corporate practice of medicine vs. evolution of healthcare services**

It is clear that our healthcare delivery system, while the best in the world, needs to continue to evolve if we are to deliver quality healthcare services to our citizens in a timely and efficient manner. Historically, physicians have been the gatekeepers of the delivery of medical care. The cornerstone of this concept has been that only *physicians* can practice medicine. Most states have long adopted legislation limiting the practice of medicine to individuals who are licensed, approved,

and regulated by the state to provide medical services to the public. Legislatures (and case law) have reinforced these laws by enforcing the concept that a commercial business cannot practice medicine. This concept is known as prohibiting the Corporate Practice of Medicine, i.e., a retail store cannot practice medicine, since it is not licensed or monitored by the state to provide such professional services.

As stated earlier, the state of Illinois does allow hospitals to employ physicians because hospitals are rigidly licensed and monitored by the state, and the way hospitals are operated interfaces with the physicians in providing medical care. Likewise, if large retail stores are going to be able to operate or joint venture with another entity to operate store-based health clinics in their retail facilities, these facilities should be regulated and monitored by the state to ensure that no matter what level of medical or healthcare is provided, the primary goal is the protection of patients' safety. The issues, therefore, that need to be addressed are:

#### •ISSUE 1

Do retail clinics, operated as joint ventures with a large retail store, have sufficient autonomy and independence to provide independent and safe medical advice?

#### •ISSUE 2

To *what* extent, *not if*, should physicians be actively involved in the operation of retail clinics, if such clinics are to be allowed to continue to operate? Additionally, should these clinics be owned by physicians, or merely have physicians overseeing the operation of such clinics and/or having a protocol for referring healthcare matters to physicians if the local retail clinic cannot provide the necessary health care?

#### •Issue 3

Based upon a resolution of the two issues above, the primary issue left to be resolved, and the goal to achieve, is whether such a healthcare economic delivery model will improve the healthcare provided to the citizens of our country.

The AMA, state and county medical societies and every individual physician need to recognize that how these issues are resolved directly affects how they practice medicine.

### Current status of retail clinics

Recently there has been a backlash to the development of retail clinics. Two hospital systems have removed themselves from joint venturing with national retailers who wish to establish such retail clinics. SSM Healthcare, a health system in St. Louis, Missouri, which operates eight hospitals and is affiliated with approximately 2,000 staff physicians, had agreed to supervise Take Care Clinics, to review medical records, and ensure that patient care was appropriate. Recently SSM Healthcare terminated that relationship. The reason given by Ronald J. Levy, CEO of SSM, for the termination was "an increasing number of physicians, particularly pediatricians, have voiced concerns about retail based health clinics."

Likewise, in the state of Illinois, Advocate Health Partners, the largest healthcare delivery system in Illinois, with over 2,900 affiliated physicians, "mutually agreed" with Walgreen's to terminate their relationship to oversee their retail clinics. Parties to these transactions have provided various reasons for the failure of the business ventures. It is widely believed, however, that a major factor in both instances was that physicians were not comfortable with this business model.

It is easy for proponents of the retail clinic to say that physicians are afraid of "loss of patients," but that is an over-simplification and clearly ignores the basic issues of monitoring the quality of the care provided to patients and the potential conflict of interest when such retail clinics are located in large chain retail stores with pharmaceutical departments and other healthcare products.

### State legislation adopting restrictions on retail clinics

The *Wall Street Journal* had an excellent article on Aug. 9, 2007, regarding several states, at the insistence of physician groups, proposing or adopting legislation in regard to the ownership and operation of retail clinics. According to the article, the AMA is concerned about retail clinics increasing the risk of infection, both to patients and to other shoppers in the facility where the retail clinic is located. Many health regulators, who have in the past granted such clinics extensive waivers from hygiene and safety restrictions, are now taking a more restrictive view of the matter, requiring clinics to operate in the way other healthcare facilities operate.

Several states have recently enacted legislation regarding the regulation of retail clinics:

- California passed a law that retail clinics must be owned by physicians.
- Florida passed a law that requires retail clinics to post a sign indicating whether physicians are present, and that medical personnel must disclose their credentials to patients before treatment.
- Massachusetts passed a law limiting how often a patient can go to a retail clinic.

State regulators are now concerned, as Philip C. Nasca, a member of the State Public Health Council, and Associate Dean of Research at the University of Massachusetts, Amherst's School of Public Health, stated, that "this kind of commercialized setting" might not result in optimum physician care." The article also states that hygiene standards required to be met by traditional physician offices, including restroom facilities, are generally not provided at such retail clinics.

While these examples may be argued only to represent physical structures that can be remedied, they clearly show the lack of basic regulation of such facilities, and the need for significant review and regulatory monitoring. The physical facilities must be identical to physician offices for patient safety, and the medical treatment provided must be of the same quality in a physician's office.

## Summary

Over the last 30 years, HMOs have dictated to

physicians what is "medically necessary." The medical profession has spent significant time completing paperwork and numerous telephone calls justifying what, in their professional opinion, is proper medical care. Frankly, some of this interference with the practice of medicine may have been avoided if physicians had taken a stronger position in demanding that they have the majority voice in the manner in which medical treatment is delivered to their patients.

Physicians have an obligation, and therefore the duty, to provide proper medical care. HMOs, pharmaceutical companies, pharmacy retailers and other suppliers of ancillary products to physician/patients should not be permitted to control physicians' treatment of patients. When physicians perceive an intrusion or restriction into the delivery of proper healthcare or to the safety of their patients, they should be free to act without interference from such non-medical professionals.

Physicians and their professional organizations need to take an active roll in the evolution of medical care delivery to their patients. The concept of store-based health clinics is a good place to start. ■

*The author is an equity partner in the Chicago-based health law firm of Chuhak & Tecson, PC. Comments and suggestions should be e-mailed to Mr. Isselhard at [tisselhard@chuhak.com](mailto:tisselhard@chuhak.com)*

---