



POLITICS / GOVERNMENT / LEGISLATION

Dry Needling is Acupuncture: Anatomy of a Legal Victory in Oregon

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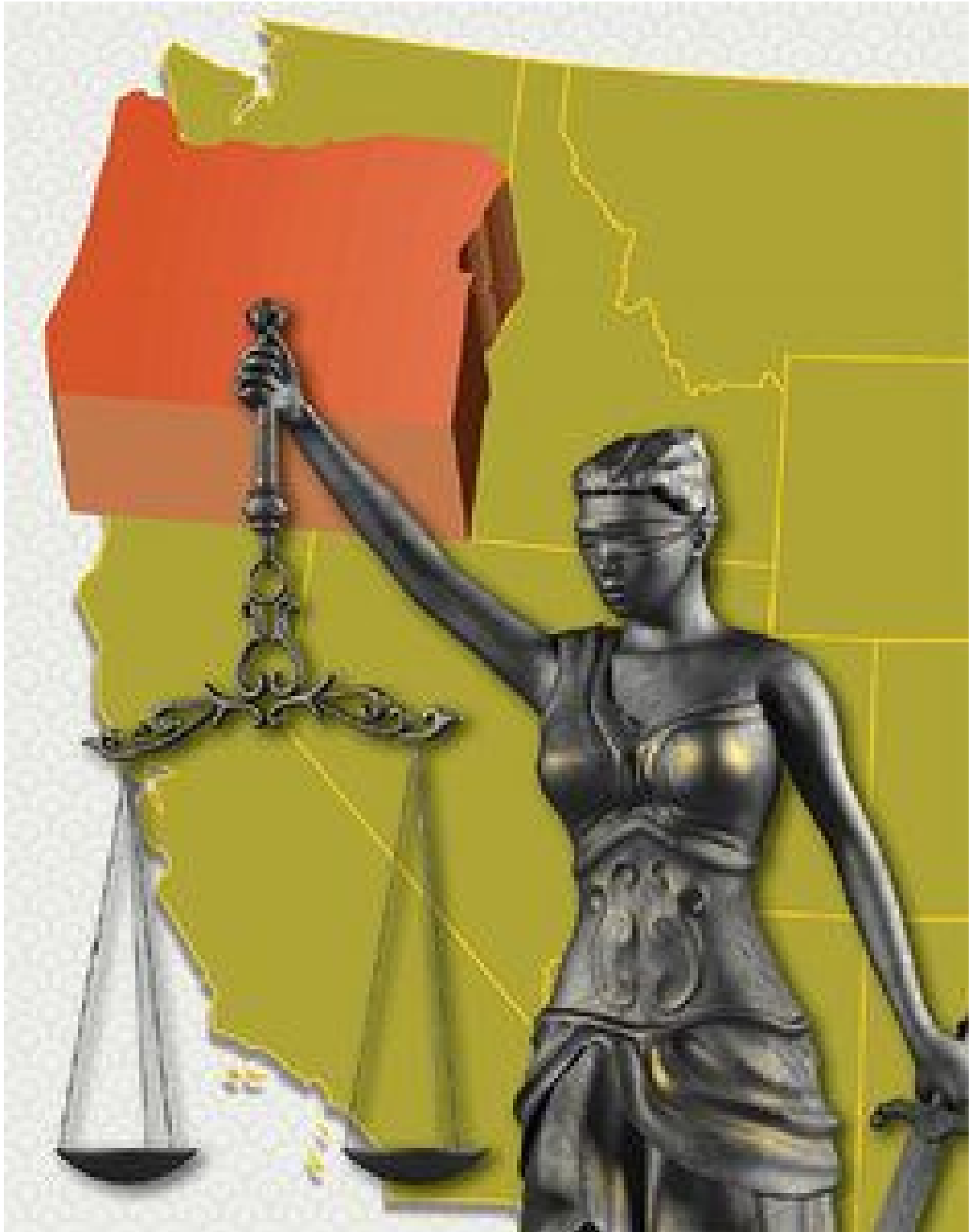
On January 23, 2014, the Oregon Court of Appeals overturned the Oregon Board of Chiropractic Examiners "dry needling" administrative rule, which allowed chiropractic physicians to perform acupuncture after only 24 hours of training. The resulting ruling states that, "Dry needling is not within the practice of chiropractic...and the rule thus exceeds the scope of the board's statutory authority."

This decision marks a final determination in a process extending over the past three years.

Humble Beginnings

The Oregon Association of Acupuncture and Oriental Medicine (OAAOM) was in the middle of a re-branding process when I was elected to the Board in 2010. Having recently reformed in 2008 after the dissolution of two competing state organizations, the OAAOM was not a thriving organization when the "dry needling" story began. Truth be told, I was at the annual membership meeting as a new licensee because the chiropractor who employed me at the time alerted me to a concept known as "dry needling" and recommended I keep an eye on the issue. The chaos and de-structuring leading up to this unification was giving way to new promise and hope, with wide support among leaders in the Oregon AOM community. Within this context the OAAOM Board made the decision to take legal action, a decision that might have bankrupted us as a new organization with a small membership.

Furthermore, in 2010 as now, the AOM profession was not united in its opposition to Trigger Point Dry Needling (TPDN). Many felt that good energy would sort itself out naturally and there was no need to initiate conflict when the righteous place of AOM would just become present by its own natural power, within the field of American medicine. Many OAAOM members preferred to focus our collective efforts toward healthcare reform rather than to take legal action against a fellow CAM profession. We did it anyway.



Why? Because despite the obstacles, as the Board surveyed AOM professionals in Oregon and across the nation, and as we learned more about "dry needling" slipping into Chiropractic Physician's and Physical Therapist's scopes nationally without legal or administrative intervention, it became clear that there was indeed a consensus for taking action. No one else was going to make a legal challenge on behalf of our profession or our patients.

The OAAOM was now poised to turn it into an opportunity to rally together as appropriately licensed and educated acupuncturists (LAc) to build our association, strengthen our relationship

with stakeholders, and stand together with shared ideals. On top of its collective resolve, the Board had confidence in their legal team at Landye Bennett Blumstein -- Thane Tienson and Patrick Foran -- and we're grateful for their willingness to work with a young, small nonprofit.

A Timeline for Action

In 2009, the first attempt by instructors hoping to teach "dry needling" to Physical Therapists in Oregon was countered by Malvin Finkelstein of the Acupuncture Advisory Council (AAC) to the Oregon Medical Board (OMB). Director of the OMB, Kathleen Haley, sent a clear message from the OMB that "dry needling" is acupuncture and as such is regulated by the existing practice act. At the same time the newly minted OAAOM had an active legislative chair, Christo Gorawski, who was leading the charge by attending Oregon Board of Chiropractic Examiners (OBCE) Board meetings to go on the public record, talking with stakeholders and reporting to the OAAOM Board.

At this stage, many licensed acupuncturists in Oregon had not heard of the "dry needling" issue, and there was a lot of misinformation available to compound a lack of consensus within the AOM community. As an early champion for the cause, Gorawski facilitated having OAAOM Board members and Haley personally attend OBCE meetings to testify.

In May of 2011, shortly after Laura Ocker took over the presidency of the OAAOM, Christo ended his term on the Board and Al Thieme came on as legislative chair. His commitment to the cause, grasp of the implications of the issue, and passionate leadership ensured strong forward momentum and maintained the Association's focus on resolving the "dry needling" issue through a variety of channels. However, as the public hearing and rule making process neared its conclusion, and despite letters from CCAOM, AAAOM, the OMB, the OAAOM the two local acupuncture colleges NCNM and OCOM, the OBCE ruled to allow "dry needling" into the chiropractic scope with a mere 24 hours of training.

OAAOM President Emeritus, Laura Ocker, shares her perspective of the events; "As a new president of the Association, I had never hoped that my legacy would include legal action against a fellow CAM profession. I had aspired to work toward greater inclusion of acupuncture under state health care delivery systems. And yet, the problem in front of us was 'dry needling' and it became clear to me that standing by doing nothing was not an option. I began to research the issue earnestly. I reached out to all the leaders in our field, presidents of the colleges, past-presidents and leaders of the Oregon professional associations. It became clear to me that our members were deeply concerned about the prospect of other healthcare professionals adding acupuncture into their scopes with very minimal training standards. They were concerned about patient safety, about the bad reputation acupuncture could gain if it were being performed by inadequately trained practitioners, and about the impact on our professional opportunities and reputation."

Under her leadership and with the full support of the Board, the OAAOM hired Thane Tienson of LBB, who was willing to take on the case as well as negotiate a cap on legal fees for us as a nonprofit. Their first action was to seek an injunction, which was a necessary and time-sensitive legal step to reverse implementation of the rule.

Then and many times again over the subsequent three years, there was some uncertainty about if we should proceed in the face of a well-funded opposition. Early on, the OAAOM was encouraged by another one of their benefactors, the Oregon College of Oriental Medicine (OCOM) whose President, Michael Gaeta, facilitated financial support for the cause from its Board of Trustees because he said he "believed it was essential for the OAAOM Board to continue its legal efforts regarding dry needling."

"It appeared to me that -- at least in Oregon -- this challenge presents a defining moment for the profession. It has been said that it would be a pity to let a good crisis go to waste. Successfully pursuing this legal challenge could serve as a lightning rod to strengthen the acupuncture community in Oregon," said Gaeta. "On the other hand doing nothing and conceding defeat would greatly weaken the profession by encouraging other professions interested in 'cherry picking' the acupuncture profession. I know it seems daunting, but in my estimation the acupuncture profession must unite around the issue, because doing so will strengthen its professionalism and legitimacy. I have spent almost 30 years in healthcare administration in conventional medical settings and witnessed first-hand the importance of traditional healing modalities professionalizing and legitimizing themselves in order to survive."

Sticking to the Point

Things got a little easier when we were granted a stay on the rule in July 2011. The explicit wording in the document issued by the court made things look very favorable for us moving forward, bolstering the OAAOM's courage and resolve as well as providing an opportunity for some positive press to resonate that feeling across the profession. The stay offered credibility to our cause, and it helped to mobilize the entire AOM community. According to language of the stay, " it appears that dry needling is substantially the same as the insertion of needles treatment modality of acupuncture...and even recognizing that 'dry needling' is but one technique or modality within the broader practice of acupuncture, respondent has not explained how 24 hours of training, with no clinical component, provide sufficient training to chiropractors to adequately protect patients."

Our opponents tried to shrug the whole thing off as a "nasty scope battle." Certain individuals representing Chiropractic Physicians and Physical Therapists were quick to imply that "dry needling" was a biomedical practice, much different from the Asian-*qi*-meridian-mystical acupuncture experience, and that there was really no conflict of scope.

These arguments came across as condescending and the result was that those of us who were looking for answers began to see more clearly that "dry needling" should be stopped. Especially infuriating were the classes that were being advertised at University of Western States for "dry needling" - which were advertised almost as soon as the rule was established. It became clear there was a market to teach non-LAc health care professionals to put acupuncture needles into people and attempt to increase incomes by being able to bill for the procedure under another name.

As the OAAOM matured throughout this process, messaging about "dry needling" needed to change. Some of our earlier statements to the acupuncture community were all about "the chiropractors" and the terrible things that could happen. It became clear to us over time that it was a small minority within the chiropractic profession that were very aggressive about adding "dry needling" into the scope and that the entire chiropractic profession was not unified in supporting this change. Most of those who the OAAOM interviewed were neutrally quiet. Thus, we shifted from writing about "the chiropractors" to a more professional and neutral tone about "the OBCE 'dry needling' rule." In the end, we still hoped to work with many individual Chiropractic physicians as well as their professional association on a number of issues, so it was a natural shift from making it about a specific action versus the entire content of their profession.

The other major contributor to our staying power was patience. It took a long time with a lot of waiting in between when the stay was issued, a motion for reconsideration was submitted, and the University of Western States joined the OBCE on the lawsuit, and when the stay was upheld in November 2011. Both sides were able to submit lengthy briefs in 2012, but we weren't able to present oral arguments before the court of appeals until May 13, 2013. It was then another eight months before the final decision was handed down by the Appellate Court in January 2014. This

can be a challenge for fundraising amongst acupuncturists and the community, the energy to fight can wane while the judicial gears slowly grind.

Anatomy of a Victory

Since the January 23 decision became final, as of the first week of March 2014, when both the OBCE and UWS declined to file an appeal, I have been asked many times how we did it and what states in similar struggles should do. First, hire a lawyer. Second, hire a lobbyist with a good reputation. Third, form a Legislative Committee that will work with the lobbyist and legal team to help you build bridges across professions, identify allies and coordinate swift opposition as required. When it comes to the process of legislation and rule-making there are many places to address a challenge and that challenge is usually a time-sensitive endeavor.

A legal team with an interest in health advocacy and willing to work with a growing non-profit association is essential -- discuss up front capping rates and accepting payment over time. Honoring your agreements, keeping in contact and being honest is important as our actions in these struggles represent the entire profession. Having contracted help who are professionals in their respective fields -- policy and law -- creates a team with a greater impact than the sum of their separate parts. In the end it is about relationships -- we found our lawyer, for example, through a personal connection of the Board.

Also, it all starts with the schools. A strong student and faculty membership in the Association carries the message. The evidence and experts you need to support your case can be found there. OCOM has been instrumental in everything, as the schools are the hub of the communities, and the place where new community members are grown.

Finally, if what you are doing is newsworthy, turn it into news. It is ideal for any Association engaged in a similar legal challenge to identify a spokesperson for the press, craft releases for each newsworthy step along the way and then leverage the media to get the word out. This builds awareness around the issue, the profession and your association.

The Impact of the Ruling

This decision has potential implications not just for licensed acupuncturists in Oregon, but for legislative and legal challenges happening across the nation. This ruling becomes part of the record for each state acupuncture Association to use in it's own fight for appropriate licensure, training and practice.

The precedent set by the OAAOM may assist in similar challenges in the near future.

Most patients don't study the laws regarding what types of practitioners can actually practice acupuncture. All they see is the needle. It is our professional duty to change the message that a weekend seminar is comparable to the more than 700 hours of clinically supervised training obtained by the LAc.

The Oregon Court of Appeals decision is a victory for patient safety and also for the acupuncture profession. However, it does not mean that the challenge is over. When you have pulled all the pieces together for the challenge you find your Association with a strong advisory team, motivated members and volunteers, and a keen eye for the next profession looking to pick up "dry needling." The OAAOM is ready.

