



## Economic Affairs Interim Committee

---

### 64th Montana Legislature

#### SENATE MEMBERS

GORDON VANCE--Vice Chair  
TOM FACEY  
RICK RIPLEY  
LEA WHITFORD

#### HOUSE MEMBERS

RYAN LYNCH--Chair  
MIKE LANG  
NATE MCCONNELL  
VINCE RICCI

#### COMMITTEE STAFF

PATRICIA MURDO, Lead Staff  
JAMESON WALKER, Staff Attorney  
KRISTINA LIMING, Secretary

as of Aug. 20, 2015

## Dry Needling Memo

**To:** Economic Affairs Committee Members  
**From:** Pat Murdo, Committee Staff  
**For:** Aug. 31 Committee Review of Dry Needling Rule for Physical Therapists

Economic Affairs Committee members individually contacted the committee's presiding officer, Rep. Lynch, to request that adoption of a rule on "dry needling," as proposed by the Board of Physical Therapy Examiners, be put on hold until the committee had a chance to hear from proponents and opponents at its next meeting; that meeting is August 31, 2015. This memo provides the committee with an explanation of options related to the rule, a definition of dry needling, and descriptions of the main issues, pro and con.

#### **Committee options:**

1. Allow the entire draft rule to move forward, thereby implicitly saying the Board of Physical Therapy Examiners has the authority to say physical therapists' scope of practice includes dry needling.

This approach also allows adoption of changes to existing ARM 24.177.501 and 24.177.507 and the repeal of ARM 24.177.2101 and ARM 24.177.2401. The amendments to those rules would remove a requirement for graduation verifications and submission of recent photographs related to examinations or out-of-state applicants. The board said the photo is redundant because a national exam already requires a picture ID. The verifications are an extra cost.

2. Allow the portions of the rule that have nothing to do with dry needling to move forward (see above) but retain the objection to the dry needling rule. This option<sup>1</sup> has two components:
  - Propose no alternative to the dry needling rule but allow opponents the time to draft a bill for a legislative sponsor to let the 2017 Legislature decide for or against dry needling being within the scope of practice of the Board of Physical Therapy Examiners; or
  - Propose legislation as a committee to deal with dry needling. Possible options are:
    - specifically including the practice within physical therapists' scope;
    - denying the practice to physical therapists; or
    - modifying the practice in some way.

#### **What is dry needling?**

"Dry needling" is the term that physical therapists apply to use of filiform needles, which are solid needles

---

<sup>1</sup>The objection was handled under [2-4-305\(9\)](#), which provides that a rule review committee may request a delay in implementation of a rule until after the committee has heard from proponents and opponents at the committee's next meeting. If the committee withdraws its objections, the rule proceeds forward. If the committee retains its objection to one or more parts of the rule, the provisions of [2-4-306\(4\)\(c\)](#) apply and the rule may not go into effect until "the day after final adjournment of the regular session of the legislature that begins after the notice proposing the rule was published by the secretary of state," with some exceptions. The 2013-2014 Economic Affairs Committee took this route on a weights and measures proposed rule. See a [letter](#) to the Commissioner of Labor and Industry on this objection.

(carrying no injectable serums) that are inserted into a person's epidermis. The physical therapists say this practice is not acupuncture, which they say incorporates both the use of filiform needles and a range of oriental medicine philosophies and techniques plus use of the needles along a meridian. Acupuncturists are concerned that use of needles as a minimally invasive practice is one for which the physical therapist rules do not spell out sufficient training. Physical therapists note that they have experience using needles in some of their other practices, such as needle electromyography and nerve conduction studies.

The term "trigger point dry needling" describes use of filiform needles to obtain a "local twitch response" from a trigger point or a muscle area that is neither at its normal length nor properly functioning. The twitch returns the muscle to normality. See Sarah Brady, et al. in *Journal of Manual and Manipulative Therapy*.

### ***What is the main issue to be debated?***

The challenge raised by acupuncturists to the physical therapists' rule is that physical therapists are performing a technique with dry needling that acupuncturists say is solely within their area of expertise and not sufficiently handled within a physical therapist's education to allow use of the practice.

Questions that may be relevant for legislators to ask are:

- Does legislative intent for a physical therapist's scope of practice include allowing minimally invasive practices, which would include using a needle beneath the surface of a person's skin?
- The rule says only physical therapists trained in dry needling may perform that form of therapy. How much training is available for physical therapists for dry needling in comparison with the amount of training required for acupuncturists? Why doesn't the rule, which says PTs may perform dry needling if they have "training in dry needling that meets the standards of continuing education as set forth by the board's continuing education rules," actually spell out training requirements? Will the board review actual training or audit at random for continuing education?
- How much training do physical therapists have overall compared with acupuncturists?
- Is this type of rule something that is appropriate in rule or should the debate occur in the Legislature as a way of determining whether the physical therapists' scope of practice is intended to be broad enough to cover the practice of dry needling?
- Does the Legislature consider overlapping scopes of practice to be a problem for regulators or a benefit to consumers? Or both?
- In terms of the 2015 U.S. Supreme Court decision that weighed in on an occupational board's prohibition on nonlicensees, regarding a state immunity doctrine, there was a reference to the burden of review being different if a board is made up of a preponderance of practitioners. So the question is whether the four physical therapists on the five-member Board of Physical Therapy Examiners are protecting the public or protecting the industry at the expense of the public.

### ***Are other professions allowed to perform dry needling?***

The acupuncture practice act allows exemptions "with particular regard to the insertion of solid needles used to perform acupuncture," to "a licensed health professional... practicing within the scope of the health professional's license." There is no definition of a health professional in Title 37, the title that primarily contains laws on professional and occupational boards. A definition in 41-1-401, MCA, a section of law dealing with minors, says health professionals are "only those persons licensed in Montana as physicians, psychiatrists, psychologists, advanced practice registered nurses, dentists, physician assistants, professional counselors, or social workers." A definition of health professional may be important in Title 37, but that definition would open a door to many professionals wanting that designation. An attorney general's opinion in 1999 noted that a physician licensed under Title 37, chapter 3, may not advertise as performing acupuncture without having an acupuncturist license, but the physician may "as part of the

practice of medicine, use solid needles to perform therapeutic modalities without first acquiring a license to practice acupuncture under Title 37, ch. 13." 48 A.G. Op. 7 (1999)

***Did the Legislature intend that physical therapists' scope of practice include invasive treatment?***

Did the Legislature intend in 1961 when the Board of Physical Therapy Examiners was created that physical therapists' scope of practice was meant to allow for minimally invasive treatments? Have other Legislatures since then accepted this scope? Support for the dry needling rule indicated that the scope of practice is broad. The scope of practice is in the physical therapy definition in 37-11-101, MCA:

(7) "Physical therapy" means the evaluation, treatment, and instruction of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction and pain, injury, and any bodily or mental conditions by the use of therapeutic exercise, prescribed topical medications, and rehabilitative procedures for the purpose of preventing, correcting, or alleviating a physical or mental disability.

Further specifying what physical therapists may do is a statute on treatment in 37-11-104, MCA:

(2) Treatment employs, for therapeutic effects, physical measures, activities and devices, for preventive and therapeutic purposes, exercises, rehabilitative procedures, massage, mobilization, and physical agents including but not limited to mechanical devices, heat, cold, air, light, water, electricity, and sound.

Physical therapists are allowed to apply topical medications under 37-11-106, MCA, using either electricity or ultrasound to enhance the treatment. In passing the topical medication provision, the 1991 Legislature further required that the Board of Physical Therapy Examiners work with the Board of Medical Examiners and the Board of Pharmacy to adopt written protocols for each class of topical medication for which a prescription is required.

***Are Overlapping Scopes of Practice Between Acupuncturists and Physical Therapists a Problem?***

Occupations often have overlapping scopes of practice and protection of these practices results in the familiar term "turf wars." The definition of acupuncture in 37-13-103, MCA, has some similarities to the definition of physical therapy except that acupuncture is primarily dealing with the filiform<sup>2</sup> (dry-point) needles, while physical therapy uses various other manipulations.

(1) "Acupuncture" means the diagnosis, treatment, or correction of human conditions, ailments, diseases, injuries, or infirmities by means of mechanical, thermal, or electrical stimulation effected by the insertion of solid needles. The term includes the use of acupressure and the use of oriental food remedies and herbs.

The statutes that govern acupuncture also specify, however, that "A doctor of medicine, osteopathy, chiropractic, dentistry, or podiatry may not practice acupuncture in this state unless that doctor has completed a course and passed an examination in acupuncture as required by this chapter." (37-13-104(1)(b), MCA) Yet that same statute also states:

(2) Except as provided in 37-13-301 and with particular regard to the insertion of solid needles used to perform acupuncture, this chapter is not intended to limit, interfere with, or prevent a licensed health professional from practicing within the scope of the health professional's license.

(3) This chapter does not affect the practice of an occupation by an individual who does not represent to the public that the individual is licensed under this chapter.

---

<sup>2</sup>Filiform needles are solid, extremely fine, stainless steel needles commonly used in acupuncture, as defined at the free dictionary.com website. These needles do not inject any materials.