

Section 5

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Scenario

*“But I didn’t do anything wrong,” insisted Stella.
“How can I be sued?”*

“No, of course you didn’t,” her attorney assured her. “But you can be sued anyway. The client signed the Informed Consent and Release Form, and said they didn’t have any allergies, there’s nothing you or anyone else could have done in this situation. All we have to do is produce the documentation and prove that the client knew the risks and was unaware of her allergy. The fact that this lawsuit is even being presented, well, makes little sense, as we can prove that you provided a reasonable standard of care.”

“You did have the client complete a Confidential Client Medical and Lifestyle History and Client Consultation Form?” asked the attorney.

“Yes, I did and during the consultation when Mrs. Gordon asked about Glycolic Acid Exfoliation Treatment, I even verified that she did not have an allergy to AHAs. See, it’s all written here in her Treatment Documentation Records. I keep them for all my clients. The next thing I did was have her read and sign the Chemical Exfoliation Informed Consent Form.”

“Perfect, it looks like all the bases are covered,” the attorney said, reviewing it. “Stella, based on local law, I think the Informed Consent and Release alone will get the suit thrown out of court.”

“A release can do that?”

“Yes, but not in all legal systems. But even if we were in one where it can’t, it establishes that the client accepted the risk of the glycolic chemical exfoliation treatments, and that’s one of the strongest defenses in a lawsuit.”

- *Having clients complete the Client Medical and Lifestyle History may seem a chore and hassle. How do you suppose this scenario will affect Stella's attitude toward it in the future?*
- *Many legal systems allow for a client to present a claim, even if it is unsubstantiated. Even if you do nothing wrong, you would have to defend yourself. What does this tell you about the importance of maintaining professional liability insurance?*
- *Can you think of any instances where a client's unknown allergies would affect treatments that you currently provide?*
- *What risks, if any, can you identify in your facility?*

What is Risk Management?

As you are entering into a leadership level of becoming an *NCEA Certified Professional*, it's important that you acknowledge that this involves understanding the risks of what you do, and knowing what you can do to reduce risks in your day-to-day treatments and operations.

Because risk management is a broad term, it may not be entirely clear what it means or what it encompasses. A definition for the skin care industry could be the recognition of risk, risk assessment, developing strategies to manage it, and mitigation of risk using managerial resources.

The strategies include transferring the risk to another party, avoiding the risk, reducing the negative effect of the risk, and accepting some or all of the consequences of a particular risk.

Some traditional risk management elements are focused on risks stemming from physical or legal causes (e.g. natural disasters or fires, accidents, death, and lawsuits).

For the purposes of this Study Guide, we are going to divide risk management into legal risk management, professional liability insurance, managing and identifying risks, client health and safety, and your personal health and safety.

Study Objectives

Highlight/underline the answers to the following questions as you read:

1. What is meant by *risk management*?
2. What is meant by *scope of practice*?
3. What is meant by *duty of care* and *negligence* in most legal systems?
4. Why is it recommended that you carry professional liability insurance, even if your employer tells you that you are covered under the group plan?
5. What is the most important obligation that you have to manage legal risk?
6. What does applying good judgment mean?
7. What are 4 steps you can take to manage legal risk?
8. What is the Cosmetic Ingredient Review Board's recommendation for the use of glycolic acid?

Legal Risk Management

Functioning as a *NCEA Certified Professional* and as a licensee in your state (or country) requires knowing and following your *scope of practice*. Your state regulatory board issues guidelines or scope of practice rules that you, as a licensee, are required to abide by. It is your responsibility to know and keep yourself updated on those rules and regulations and, in some cases, changing laws that will affect your practice.

Under most legal systems, you have a *duty of care* towards your clients. This is the legal obligation imposed, stating that you provide the service (for example) at a *reasonable standard of care*. There is always some residual risk or harm that could come to a client, as in the scenario at the beginning of this section. If a client is unaware of an allergy, it could even risk serious harm or death—as in the case of anaphylactic shock. Your *most important* obligation to manage legal risk as a *NCEA Certified Professional* and/or licensee is generally limited to using your best efforts to avoid *reasonably foreseeable* accidents or adverse reactions, within your scope of practice.

Negligence in most legal systems is the failure to meet the duty of care expected. In the event of an accident or adverse reaction to a client, they may bring a legal action against you (this is called a lawsuit or being sued). The *plaintiff* (the client or person suing you) will usually claim that you failed to meet the duty of care, were negligent, and that negligence led to the accident causing injury. You will be held liable and owe for damages as determined by the court, if you are found to be negligent.

Professional Liability Insurance

In looking at the concepts of duty of care and negligence, it's important to recognize that under many legal systems, you can be sued even if you do nothing wrong.

As a *NCEA Certified Professional* you are required to maintain insurance. This is very important for two reasons:

First, if you get sued, and are found innocent, the cost of defending yourself could be very expensive.

Second, although it's not common, in most legal systems not only can you be named in a lawsuit, but you can be added to one in progress.

Depending on the circumstances, you can be found liable for your actions, even though you were only on the premises when the incident occurred.

Another good example is the common mistake that to think you are “*covered under the physician's license*.” This is completely false. If anything, you may be covered as an employee under the physician's insurance policy—but are you listed as “Additional Insured”? Treatments you perform may be excluded from the physician's insurance policy. Careful review of the insurance policy may also reveal that you are only covered while the *physician is on the premises or under direct supervision*. Another aspect to consider with professional liability insurance is the small print.

If you are operating outside your scope of practice, or are in violation of any local, city, state or federal law, the policy may be null and void.

That means no insurance, no coverage.

So the next time you contemplate providing a treatment that you don't know is within in your scope of practice—**just don't do it!** Be sure your insurance policy covers all of the treatment menu and services you provide.

This also holds true with buying and using equipment that is not within your scope of practice. It is not enough that someone—a sales rep, or another person, tells you it's okay to use it. You need to know for yourself, and to reduce your risk of exposure research the equipment or product for yourself.

The NCEA has developed a series of questions that will better assist you in evaluating equipment.

Lastly, it is important that you make sure you receive appropriate and adequate training for any machine and/or treatment you plan to provide. Just having someone show you how to use equipment or provide a treatment without understanding how and why it works, along with indications and contraindications, is not considered adequate training. Failure to obtain proper training is a lawsuit waiting to happen.

NCEA's Equipment Evaluation Form

Equipment Identification and Information

Name of equipment: _____

Type of equipment: _____

Model number: _____

Price: _____

What is the manufacturers 'Intended Use Statement'?

Company profile information:

Sales Contact Information:

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Tel: _____

Fax: _____

Email: _____

Website: _____

Length of time in business: _____

Distributor Contact Information:

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Tel: _____

Fax: _____

Email: _____

Website: _____

Length of time in business: _____

Registrations / Certifications

- Is the manufacturer registered with the FDA?
If yes, what is the registration number?
- Is the equipment registered with the FDA?
If yes, what is the registration number and class?

Safety Considerations and Equipment Specifications

- What safety certifications does this equipment have (i.e. UL, CSA, CE)?
- What kind of power source does the equipment require?
- Does the manufacturer carry liability insurance on this equipment?
- Is a certificate of insurance available?
- Does the equipment have any cross-contamination safeguards, if applicable?
- What are the contraindications for the use of this equipment?

Warranty and Service Policies

- What are the terms of the warranty?
- Is there an extended warranty available? Is there an additional cost?
- Does the manufacturer have an equipment loaner program?
- Are references available?

Training and Education

- What type of training is included with purchase?
- Where? Total hours?
- Who are the educators?
- Is there an additional cost?

Skin care professionals are required to check in their state as to whether training on the use of equipment is required prior to purchasing, and/or if they can use device under their scope of practice.

Self Assessment Exercise 5-1

1. Risk management is the process of _____ you face while working as a skin care professional.
2. Under most legal systems, “duty of care” is
 - a. Your obligation to prevent any and all accidents.
 - b. Your obligation to use your best efforts to avoid reasonably foreseeable accidents.
3. Under most legal systems, “negligence” means
 - a. You failed to meet your duty of care.
 - b. You didn’t prevent an accident.
4. It’s recommended that you carry your own professional liability insurance because (check all that apply):
 - a. If you get sued, and are found innocent, the cost of defending yourself can be very expensive.
 - b. You can be named in a lawsuit, and you can be added to one in progress.
 - c. It is a requirement of maintaining *NCEA Certified Professional* status.
5. The most important step you can take to manage legal risk is to _____ accidents in the first place.
6. Confidential Client Medical and Lifestyle History are important in reducing legal risk because they (check all that apply):
 - a. Relieve you of all risks.
 - b. May be required by law or insurance coverage.
 - c. Allow clients to assume risk.
 - d. May prevent allergic or adverse post-treatment outcomes by screening those medically ineligible for a procedure or treatment.
7. Where would you find your Scope of Practice rules if you are a licensed professional?

How did you do?

Turn to Appendix C for the answers

Managing and Identifying Risks

The four steps you can take to manage legal risk is to prevent accidents by adhering to the *NCEA Esthetician Code of Ethics*, use good judgment, complete the necessary paperwork and be professional. Identifying risks for you, a *NCEA Certified Professional*, begins with the evaluation of the services, procedures and products that you are using. Section One outlined the attributes that you should have as a *NCEA Certified Professional* and confirming that you are implementing these behaviors, you should be well on your way to assuring risk is managed in your facility.

NCEA Standards

The NCEA continues to develop *National Standards* and best practices, to provide political representation for our profession to state legislators and licensing boards. Following NCEA Standards is your first line of defense (provided that you have checked with local, city, state or federal laws for superseding rules, regulations or laws). Industry Standards and codes of practice have been evolving for years and include such things as the *Cosmetic Ingredient Review guidelines* (CIR) of Glycolic Acid. It is generally accepted that a glycolic acid of 30% with a pH of 3 is acceptable for chemical exfoliation procedures, whereas a glycolic acid of 12%, pH of 5 is recommended for home care use. With the exception of a few states, this standard has been accepted across the United States. Again, checking within your own state, province or country is recommended.

Good Judgment

NCEA Standards or being a *NCEA Certified Professional* can't account for all circumstances, so following them doesn't relieve you of your responsibility. Applying *good judgment* during client interaction means to be conservative. This means adhering to precautions, contraindications to a particular treatment, or product recommendation. More is not always better. If the client shows up with a slightly burnt face, now is not the time to be administering a microdermabrasion treatment. And that means, even if the client prepaid for a series of six treatments and comes in demanding that the services to be performed, do not put yourself and the facility at risk of being sued, just because the client is unhappy or

Use of Esthetician Titles

It is the position of the NCEA that:

- Estheticians represent themselves according to their licensed title, as designated by their state licensing board or regulatory agency.
- Estheticians must not promote themselves or allow any employer to market them otherwise.

Study Objectives

Highlight/underline the answers to the following questions as you read:

9. What is the role of paperwork and administration in reducing legal risk?
10. What are 3 examples of how you can use good judgment?
11. What are 3 necessary forms of paperwork?
12. Why does NCEA develop National Standards?
13. What should you do if you are in doubt as to whether a treatment should be performed?
14. What is NCEA's position on the use of Esthetician Titles?
15. Why should you have up-to-date client records?

trying to intimidate you. Whenever you're in doubt as to whether a treatment should be performed—and you have no supervising medical personnel on site—err on the side of caution. Don't perform a treatment over a suspicious oozing lesion on the client's lips. If you are suspecting a herpes simplex lesion, ask the client to come back with a medical note or when the lesion is completely cleared.

Paperwork

In one day, and after eight facial treatments, you have probably completed at least 20 documents. Remember Stella? Where would she be right now if she had not had the client complete the *Client Medical and Lifestyle History Form*, *Treatment Documentation Form*, and *Informed Consent and Signed Release*? Earlier in Section 3 each of these forms were discussed and the importance of each individual form should not be overlooked.

There is no denying that paperwork is a hassle. However, it is a *necessary* hassle—in fact, most professional liability insurance requires certain paperwork for the coverage to remain in effect. The absence of paperwork in Stella's situation would certainly have made it more difficult for her attorney to prove that she was not negligent.

Professionalism

Beyond liability concerns, having up-to-date client records allows you as a professional, to view the progress of the client as you take them through their treatment plan, and achieve the goals that you and your client set. The *Client Consultation Form* and *Treatment Documentation Form* are just as important as obtaining *Informed Consent and Signed Release*. Reviewing all paperwork after the client completes it is just as essential as having them do it in the first place. Just having the forms in their client records does not release you from liability. Keeping neat and accurate treatment documentation is key. If you work in a medical setting, having your superior or the physician signoff on your treatment records may also be necessary for your liability and to document supervision, if required.

NCEA's *Code of Ethics* states that it is a *NCEA Certified Professional's* ethical duty to protect confidential client information. The client's trust and frank disclosure of information to the skin care professional ensures proper assessment of risks and precautions for treatment recommendations. In return for the client's honesty, it is generally understood that one does not reveal confidential

communications or information without the client's express consent, unless required to disclose the information by law.

Also be aware of additional confidentiality laws that apply in a medical setting. For more information on patient confidentiality, review the *Health Insurance Portability and Accountability Act* (HIPAA).

Keep all client files for at least seven years, or longer if needed, according to your local laws. Never allow anyone to alter or strike through the language on the forms; if a client does not want to accept the risks of a treatment procedures, then don't perform the treatment.

Client Health and Safety

The health and safety of the client should always be in the forefront of the *NCEA Certified Professional's* mind before, during, and after a treatment session. Most state regulatory boards have *Infection Control and Safety Standards* as part of licensee rules and regulations. These standards will contain your state requirements of the minimum standards that you are required to maintain or achieve in your establishment. They include proper disinfection and sterilization used in accordance with manufacturer's directions on instruments and equipment, storage of implements, maintaining electrical apparatus free of repair, and weekly care required to maintain the state's standards.

There may also be *Building Standards* that your facility will be required to follow in order to ensure you are in accordance with the establishment license. (In most states, a licensee must work in a licensed facility; check your state for your requirements.) These can include things like location of entrances, restroom requirements, location and storage of excess materials and provide ample hot and cold running water.

General Requirements that may be mandated by your state regulatory board or even local ordinances, may be that your facility maintains a First Aid Kit, Automated External Defibrillator, (AED) and to keep the facility free of birds or animals, except service animals.

Health Insurance Portability and Accountability Act (HIPAA)

Created by the Federal Government to protect individual health information. Visit:
<https://www.hhs.gov/hipaa/index.html>

Study Objectives

Highlight/underline the answers to the following questions as you read:

16. What minimum standards could your state regulatory board have as part of rules and regulations?
17. What are 2 OSHA Standards that you are required to comply with?
18. The Hazards Communication Standard is based on what simple concept?
19. Why is personal protective equipment necessary to use?
20. What general requirements might your state regulatory board mandate?
21. What type of disinfection and sterilization methods might your state regulatory board mandate that you use?

Personal Health and Safety

Food and Drug Administration (FDA)

As a *NCEA Certified Professional*, you are required to not only maintain your license-mandated requirements, but you should also be staying abreast of *National Standards* as set by the NCEA or Federal or State government. With the advancement of products and equipment in the skin care industry, the Food and Drug Administration (FDA) may issue a warning about use of a certain chemical that is contained in a product, or recall a device that you are using daily in your facility. It will be your responsibility to monitor and keep up with industry by reading professional magazines and medical journals.

Occupational Safety and Health Administration (OSHA)

The *Occupational Safety and Health Administration (OSHA)* is under the *Federal Department of Labor*. The standard on *blood-borne pathogens* was designed to prevent workers from being exposed to *blood-borne pathogens* such as *Hepatitis B* and *HIV*. The skin care industry has been slow to comply with the *Blood-borne Pathogen Act* and the *Hazards Communication Standard*. As a *NCEA Certified Professional*, you will need to take the lead in ensuring these safety standards are followed.

OSHA training of all new employees should take place within 10 days of hiring new staff and Hepatitis B vaccinations should be documented in employee records.

The *Hazards Communication Standard* is based upon the simple concept *that employees have both a need and a right to know the hazards and the identities of the chemicals they are exposed to when working*.

Such chemicals in the workplace include any chemical ingredient used in products, (glycolic acid, salicylic, etc.) or in cleaning supplies. You also need to know what protective measures are available to prevent adverse effects from occurring.

Similar to the *Blood-borne Pathogen Act*, all workplaces where employees are exposed to hazardous chemicals must have a written plan which describes how the standard will be implemented in that facility;

The written program must reflect what employees are doing in a particular workplace.

The written program must describe how the requirements for this and other forms of warning, *Safety Data Sheets*—(SDS formerly known as MSDS which contain data regarding the properties of a particular substance) and employee information and training are going to be met in the facility.

For example, the written plan must:

1. List the chemicals present at the site;
2. Indicate who is responsible for the various aspects of the program in that facility, and
3. Where written materials will be made available to employees.

Personal Protective Equipment

The *NCEA Certified Professional* has the knowledge of what blood-borne pathogens are and as such sets a good example by wearing personal protective equipment such as gloves, gowns, masks and goggles (when required) to protect against accidental exposure.

Disposable gloves can be non-sterile and are available in three types.

- Latex gloves are composed of natural rubber derived from petroleum. This type of glove provides better touch accuracy. However, latex breaks down when exposed to cream and oil products. During the course of a facial treatment this type of glove would be compromised.
- Vinyl or polyvinyl chloride (PVC) gloves provide optimum protection during the course of a facial treatment. Gloves must be worn throughout the facial treatment procedure in order to provide protection.
- Non latex materials—polyvinyl chloride, nitrile, neoprene, and other forms of synthetic rubber can block infectious pathogens. The issue of creating a “latex-safe environment” is also of increasing importance, due to the increased signs of latex allergies.

Self Assessment Exercise 5-2

1. Good judgment, ensuring proper completion of paperwork, and adhering to the *NCEA Code of Ethics* are all examples of:
 - a. Reducing accidents.
 - b. Managing and identifying risks.
 - c. Good behavior.
 - d. None of the above.

2. How long should client records be kept?
 - a. Three years.
 - b. Seven years or longer.
 - c. Until the client moves to another state.
 - d. None of the above.

3. The FDA is a state agency.
True or False.

4. Personal Protective Equipment refers to:
 - a. Gloves.
 - b. Lab coats.
 - c. Masks.
 - d. All of the above.

5. OSHA training of all new employees is to take place within 10 days.
True or False.

6. Vinyl gloves are better than latex due to an increase in latex allergies, and the risk of the latex glove being compromised when used with creams and oils.
True or False.

How did you do?

Turn to Appendix C for the answers