

Oregon Women Lawyers  
And Oregon Attorney Assistance Program

*present*

## **Dangerous Situations**

Wednesday, July 1, 2015 | noon to 1:00 p.m.

By Telephone: 712.775.7000, 990709#

**Application has been made for**

**.5 Practical Skills and .5 Ethics Oregon MCLE Credits**

☞ Presenters ☞

Amber Hollister

Kyra Hazilla

Moderator

Kate Lozano

## Speaker Bios

**Amber Hollister, JD – Deputy General Counsel for the Oregon State Bar:** Ms. Hollister, a member of the OWLS Board of Directors, has extensive and state-wide experience presenting on Oregon legal ethics issues.

**Kyra Hazilla, JD, MSW – Oregon Attorney Assistance Program:** Ms. Hazilla is an attorney who also holds a Master's degree in Social Work, is certified in trauma training, and has an extensive background working with violence in social work and law.

# Dangerous Situations

Presented by Oregon Women Lawyers

CLE By Phone

July 1, 2015

Kyra Hazilla, Attorney Counselor, OAAP

Amber Hollister, Deputy General Counsel OSB

## Hypothetical Questions

### **1. Dissolution Desperation**

You represent a young woman on a relatively straightforward dissolution case. The case has been proceeding slowly and you have a custody evaluation in your hands but the trial date has been reset repeatedly. Your client, Amy, has expressed she is beginning to feel “overwhelmed” by the process and has made some odd jokes about “feeling like she’s jumping off a cliff without a parachute.”

During today’s office visit Amy appears very down and says “I don’t want to do this anymore. I want to make it all go away.” You know from the custody evaluation that Amy has a history of depression and attempted suicide once as a young teen.

You know that Amy is seeing a mental health provider and has a very positive relationship with her mother.

How should you handle this situation? What ethics rules are implicated?

### **2. The Lurking Respondent**

You represent a petitioner in a FAPA restraining order case. The allegations in the petition include physical aggression and stalking behaviors by the respondent, Rob. Rob gives you a hard stare at the FAPA hearing and glares at you in the hallway after the hearing ends. Your client’s FAPA petition is successful and you send a close of representation letter. A week later, the respondent files a bar complaint against you, claiming that you lied in court about his conduct.

Weeks later, after the restraining order has been entered, you are heading out the door for home one evening and you see Rob at a bus stop across the street from your office. You remember he lives with his parents at least 15 miles away. You need to walk one block to your unattended parking garage to drive home.

How should you handle this situation? What ethics rules are implicated?

### **3. Escalating Discovery Dispute**

You are in the discovery phase of a civil case with opposing counsel, senior associate Pat Poe. You have had a case previously with Pat and you know Pat to be fairly quick to anger and you have been dreading your conferral on discovery issues for weeks.

You and Pat meet at your office and discuss whether you will be filing a motion to compel. Pat disagrees with your position. Pat's disagreement rapidly devolves into red-faced shouting. Pat stands and shouts at you, spittle flying: "When are you going to put your big girl pants on and learn to be a lawyer!" Pat pounds files on your conference table, snatches up a banker's box and huffs out of your office, slamming the door.

How should you handle this situation? What ethics rules are implicated?

### **Oregon Rules of Professional Conduct, Excerpted**

<https://www.osbar.org/docs/rulesregs/orpc.pdf>

#### **RULE 1.6 CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

\*\*\*

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

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#### **RULE 1.14 CLIENT WITH DIMINISHED CAPACITY**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some

other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

### **RULE 2.1 ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

### **RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS**

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

### **RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

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(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

\*\*\*

#### **RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS**

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

\*\*\*

#### **RULE 8.4 MISCONDUCT**

(a) It is professional misconduct for a lawyer to:

\*\*\*

(4) engage in conduct that is prejudicial to the administration of justice; or

\*\*\*

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.

\*\*\*

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

#### **Additional Authorities**

- **OSB Legal Ethics Op No 2005-41** (An attorney represents a client who appears to be out of character with client's former behavior and contrary to client's own best interests may take reasonable action to protect client's interests. The action must, however, be the least restrictive form of action sufficient to address the situation.) <http://www.osbar.org/docs/ethics/2005-41.pdf>
- **OSB Legal Ethics Op No 2005-104** (An attorney may reveal client confidences and secrets to the extent reasonably necessary to rebut a complaint against the attorney filed with the Oregon State Bar). <http://www.osbar.org/docs/ethics/2005-104.pdf>
- **OSB Legal Ethics Op No 2005-130** (An attorney may not obstruct a deposition in a manner contrary to the Oregon Rules of Civil Procedure.) <http://www.osbar.org/docs/ethics/2005-130.pdf>
- **OSB Legal Ethics Op No 2005-159** (Addresses lawyer who represents a mentally ill parent in a dependency or termination of parental rights case and seeks appointment of a guardian ad litem.) <http://www.osbar.org/docs/ethics/2005-159.pdf>

- ***In re Koessler*, 18 DB Rptr 105 (2004)** (In a medical malpractice case, attorney failed to comply with court orders requiring the production of documents).  
<http://www.osbar.org/docs/dbreport/dbr18.pdf>

### **Other Helpful Information**

- **Keeping Up With a Changing World: New Rules of Professional Conduct**, Bar Counsel Article by Helen Hirschbiel (April 2015) (includes discussion of new RPC 8.4(a)(7))  
<http://www.osbar.org/publications/bulletin/15apr/barcounsel.html>
- **I'm OK, You're ...? What Lawyers Should Know About Their Clients' Capacity to Make Decisions**, Oregon State Bar Bulletin Article by Janine Robben (August/September 2011)  
<http://www.osbar.org/publications/bulletin/11augsep/imok.html>
- **Top Ten Myths: The Duty of Confidentiality**, Bar Counsel Article by Helen Hirschbiel (June 2009) <http://www.osbar.org/publications/bulletin/09jun/barcounsel.html>
- **Representing Clients with Diminished Capacity and Disability, Chapter 18, The Ethical Oregon Lawyer** by Michael D. Levelle (Available on OSB BarBooks™)

## Dealing with Challenging Situations

- 1) Stress is affecting all of us. People hire a lawyer or have one appointed as a result of stressful circumstances. Many of the issues for which people seek legal representation are anxiety-provoking (divorce, criminal charges, DHS involvement, personal injuries, disputes involving employment, bankruptcy, and malpractice) and clients, opposing parties, witnesses and even other lawyers are sometimes not at their best.
- 2) Stress can negatively affect behavior in many ways:
  - a) Stress can exacerbate existing substance use or mental health impairments.
    - i) As of 2013 in the United States, 20.3 million adults aged 18 or older had a substance use disorder within that year (8.5% of adults).
    - ii) Mental Health diagnoses are more common than heart disease, lung disease and cancer combined. In the U.S., 57.4% of adults will meet the criteria for diagnosis with a mental disorder at some point in their lives.
  - b) Stress can cause mental or physical health issues. (Stress-diathesis model: individual's biological predisposition to particular disorders can be triggered by stressful life events. If the individual is resilient or has low biological vulnerability for a disorder, it would take extremely high levels of stress to trigger symptoms of that disorder. If the individual has high biological vulnerability to the disorder, then it would take lower levels of stress for symptoms to be exhibited.)
  - c) Stress can "flip our lids" and cause our prefrontal cortex to go "off-line" and limit our response flexibility.
    - i) Prefrontal Cortex functions: Most evolved and wise part of our brain. Mediates body regulation, attuned communication, emotional balance, response flexibility, empathy, insight, fear-extinction, intuition and morality.
    - ii) Limbic System: Emotional reactivity, fight/flight/freeze/faint.
      - (1) A threat is perceived
      - (2) The autonomic nervous system automatically puts body on alert.
      - (3) The adrenal cortex automatically releases stress hormones into the bloodstream.
      - (4) The heart automatically beats harder and more rapidly.
      - (5) Breathing automatically becomes more rapid.
      - (6) Thyroid gland automatically stimulates the metabolism.
      - (7) Larger muscles automatically receive more oxygenated blood.
      - (8) The important thing to take away is that the fight or flight response is an *automatic* response.
      - (9) There is no Wise Mind involvement.
  - d) Mirror neurons/amygdala and emotional contagion
  - e) Trauma history



### 3) What to do when things are challenging.

- a) How to work with a stressed client.
  - i) Setting limits
    - (1) Limits in the Representation (managing client expectations)
    - (2) Limits on unacceptable behavior
  - ii) Meeting clients where they are, using empathy and active listening
  - iii) Defusing/Non-Violent Communication
    - (1) What is the need that the person is expressing?
  - iv) Know yourself
    - (1) What is most likely to trigger you?
    - (2) Touching raw spots
    - (3) Vicarious trauma
  - v) Consult: with colleagues, experts, the OAAP
- b) How to work with challenging people outside the attorney/client relationship.
  - i) Setting limits
    - (1) Communicating in writing
    - (2) Communicating with the Court
    - (3) Setting boundaries
  - ii) Defusing/Non-Violent Communication
  - iii) Keep yourself safe
    - (1) Meetings at the courthouse, or public place like the library or the Oregon Lawyers' Conference Room
    - (2) Safety planning
    - (3) Trust your intuition and recognize where trauma is triggering you
  - iv) Get social support
- c) How to take care of yourself.
  - i) Recognize that it is a wonderful and amazing part of being human that allows us to be affected by those around us.
  - ii) Self-care
    - (1) Healthy work habits (eating lunch, getting outside, exercising, grabbing coffee with a friend, and checking in with yourself regularly).
    - (2) Use Self-Care Inventory as an aspirational checklist.
  - iii) Trauma, even if it's not objectively life or death situation, your body believes it is.
  - iv) Recognize that in times of personal stress, we have much less ability to respond to professionally challenging situations with equanimity.
  - v) Call the OAAP for help, (503)226-1057. We have Attorney Counselors available 24 hours a day, 7 days a week, 365 days a year.

### 4) Crisis Situations

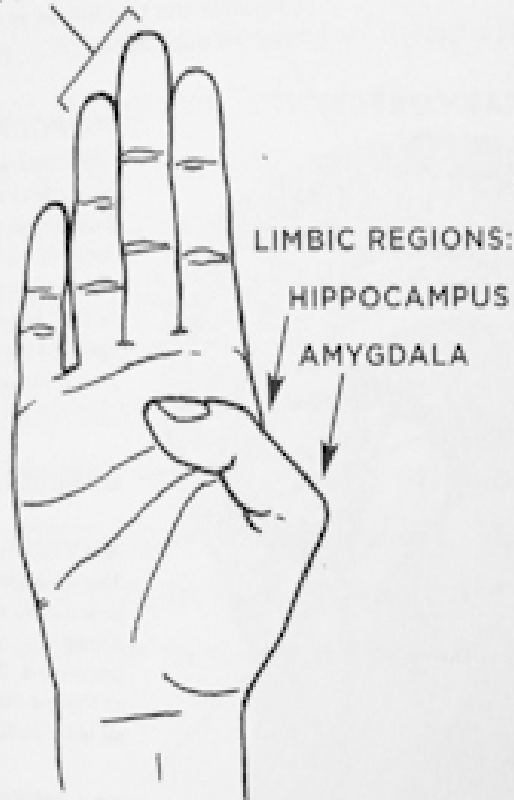
- a) Mental Health First Aid: Many of us have been trained in providing first aid. First aid is the help given to an injured person before/until medical treatment can be obtained. In 2001, Australians Betty Kitchener and Anthony Jorm developed the concept of Mental

Health First Aid. Mental Health First Aid is the help offered to a person developing a mental health condition or experiencing a mental health crisis until appropriate professional treatment and support are received or until the crisis resolves.

- i) Many people with mental health conditions do not seek help or delay in seeking help.
  - ii) In the United States, only 41 % of the people who had a mental disorder in the past year received professional health care or other services.
  - iii) Half the people who seek help for depression delay seeking help for 8 years or more.
  - iv) Individuals with mental health challenges frequently do not seek professional assistance/treatment for a variety of reasons.
    - (1) The stigma still associated with mental conditions.
    - (2) People with mental health conditions may not have the insight that they need help or may be unaware that effective help is available.
    - (3) Lack of access to professional mental health services.
- b) The aims of Mental Health First Aid
- i) Preserve life when a person may be in danger to self or others.
  - ii) Provide help to prevent the condition from becoming more serious.
  - iii) Promote and enhance recovery.
  - iv) Provide comfort and support
- c) The Mental Health First Aid Action Plan
- i) **Action A:** Assess for the risk of suicide or harm
  - ii) **Action L:** Listen nonjudgmentally
  - iii) **Action G:** Give reassurance and information
  - iv) **Action E:** Encourage appropriate professional help
  - v) **Action E:** Encourage self-help and other support strategies
- d) Assessing for the risk of suicide or self-harm
- i) Warning signs:
    - (1) Thinking or talking about things like:
      - (a) Wanting to die
      - (b) Feeling hopeless or having no reason to live
      - (c) Feeling trapped or in unbearable pain
      - (d) Feeling like a burden to others and/or that others would be better off without them
    - (2) Behaviors suggestive of suicidal intent:
      - (a) Talking or writing about death, dying or suicide
      - (b) Looking for ways to kill himself/herself (seeking access to pills, weapons or other means)
      - (c) Increased use of alcohol or drugs
      - (d) Being anxious, agitated or reckless
      - (e) Sleeping too little or too much
      - (f) Withdrawing from usual activities
      - (g) Isolation from others
      - (h) Showing rage or talking about seeking revenge
      - (i) Displaying dramatic changes in mood

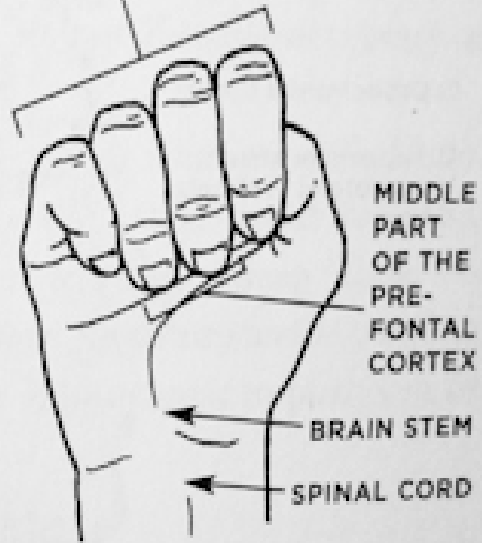
- (3) The following warning signs demand immediate attention:
  - (a) Threats to hurt or kill oneself or talking about wanting to hurt or kill oneself
  - (b) Talking about writing about suicide or death, especially when these actions are out of character for the person
  - (c) Obtaining or looking for ways to kill oneself
  - (d) Giving away prized possessions and other personal belongings or putting affairs in order
  
- e) Recommended response: You need to ask your client the following questions:
  - (1) Are you having thoughts of suicide? / Are you thinking about killing yourself?
    - (a) If client answers yes, you need to ask these three questions:
    - (b) Have you decided how you would kill yourself?
    - (c) Have you decided when you would do it?
    - (d) Have you taken any steps to secure the things you would need to carry out your plan?
  - (2) Has the client been using alcohol or other drugs? A/D use can make a person more susceptible to acting on impulse.
  - (3) Has the client made a suicide attempt in the past? A previous attempt is a risk factor that a person is more likely to try again or complete suicide.
  
- f) If possible do not leave them alone if they have a plan and a means to carry out the plan
- g) Urge them to seek help
- h) Doctor/therapist
- i) Emergency room or 911
- j) Utilize support system if possible
- k) Call the OAAP for resources
  - (1) Help them eliminate access to firearms or other means, including unsupervised access to medications.
  - (2) National Hotline: 1-800-273-TALK (8255)
  - (3) Toll-free number
  - (4) Available 24 hours a day, every day

MIDDLE PREFONTAL CORTEX



Place your thumb in the middle of your palm as in this figure.

CEREBRAL CORTEX



Now fold your fingers over your thumb as the cortex is folded over the limbic areas of the brain.

# How You Can Use the NVC Process



Clearly expressing  
how **I am**  
without blaming  
or criticizing

Empathically receiving  
how **you are**  
without hearing  
blame or criticism

## OBSERVATIONS

1. What I observe (*see, hear, remember, imagine, free from my evaluations*) that does or does not contribute to my well-being:

"When I (*see, hear*) . . . "

1. What you observe (*see, hear, remember, imagine, free from your evaluations*) that does or does not contribute to your well-being:

"When you *see/hear* . . . "

*(Sometimes unspoken when offering empathy)*

## FEELINGS

2. How I feel (*emotion or sensation rather than thought*) in relation to what I observe:

"I feel . . . "

2. How you feel (*emotion or sensation rather than thought*) in relation to what you observe:

"You feel . . . "

## NEEDS

3. What I need or value (*rather than a preference, or a specific action*) that causes my feelings:

". . . because I need/value . . . "

3. What you need or value (*rather than a preference, or a specific action*) that causes your feelings:

". . . because you need/value . . . "

Clearly requesting that  
which would enrich **my**  
life without demanding

Empathically receiving that  
which would enrich **your** life  
without hearing any demand

## REQUESTS

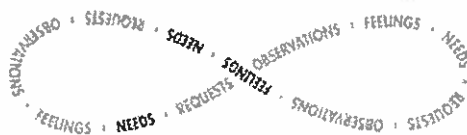
4. The concrete actions I would like taken:

"Would you be willing to . . . ?"

4. The concrete actions you would like taken:

"Would you like . . . ?"

*(Sometimes unspoken when offering empathy)*



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"When I ( see, hear, or notice) \_\_\_\_\_, I feel \_\_\_\_\_ because I need (because what's important to me is, because I value) \_\_\_\_\_.  
 Would you be willing to \_\_\_\_\_?"

<u>Feelings</u>		<u>Feelings</u>		<u>Needs</u>	
<b>Delighted</b>	<b>Relaxed</b>	<b>Scared</b>	<b>*Angry</b>	<b>Intimacy</b>	<b>Purpose</b>
Joyful	Relieved	Apprehensive	*Furious	Empathy	Competence
Happy	Rested	Dread	*Rage	Connection	Contribution
Amused	Mellow	Worried	*Irate	Affection	Efficiency
Adventurous	At ease	Panicky	*Resentful	Warmth	Growth
Blissful	Light	Frightened	Irritated	Love	Learning
Elated		Vulnerable		Understanding	Challenge
		Defensive	<b>Frustrated</b>	Acceptance	Discovery
<b>Thankful</b>	<b>Content</b>	<b>Nervous</b>	Disappointed	Caring	<b>Order</b>
Appreciative	Cheerful	Anxious	Discouraged	Bonding	Structure
Moved	Glad	Restless	Disheartened	Compassion	Clarity
Touched	Comfortable	Jittery	Impatient	Communion	Focus
Tender	Pleased			Spirituality	Information
Expansive		<b>Tense</b>	<b>Shocked</b>	Sexuality	
Grateful	<b>Friendly</b>	Cranky	Disturbed	<b>Autonomy</b>	<b>Celebration</b>
	Affectionate	Stiff	Stunned	Choice	Mourning
<b>Excited</b>	Loving	Stressed	Alarmed	Freedom	Aliveness
Enthusiastic	Passionate	Overwhelmed	Appalled	Spontaneity	Humor
Overjoyed		Agitated	Concerned	Independence	Beauty
Fervent	<b>Energetic</b>	Aggravated	Horried	Respect	Play
Giddy	Exhilarated			Honor	Joy
Eager	Exuberant	<b>Hurt</b>	<b>Sad</b>		
Ecstatic	Vigorous	Pain	Grief	<b>Security</b>	
Thrilled		Agony	Despair	Predictability	<b>Honesty</b>
	<b>Alert</b>	Anguish	Regretful	Consistency	Integrity
<b>Satisfied</b>	Focused	Heartbroken	Sullen	Stability	Authenticity
Fulfilled	Awake	Lonely	Downhearted	Trust	Wholeness
Gratified	Clearheaded		Hopeless	Reassurance	Fairness
		<b>*Depressed</b>	<b>Torn</b>		Expression
<b>Interested</b>	<b>Peaceful</b>	Disconnected	Ambivalent	<b>Partnership</b>	Creativity
Curious	Tranquil	Detached	Confused	Family	
Absorbed	Serene	Despondent	Puzzled	Mutuality	<b>Peace</b>
	Calm	Dejected		Friendship	Groundedness
<b>Healthy</b>		Bored	<b>Jealous</b>	Companionship	Hope
Empowered	<b>Confident</b>		Envious	Support	Healing
Alive	Secure	<b>Tired</b>	*Bitter	Collaboration	Harmony
Robust	Safe	Burnt Out		Consideration	Ease /Comfort
	Hopeful	Exhausted	<b>Embarrassed</b>	Seen/heard	<b>Nurturing</b>
		Lethargic	*Ashamed	Acknowledgmnt	Food/Water
			Contrite	Belonging	Rest/Sleep
			*Guilty	Community	Safety / Health
				Appreciation	Shelter

\*These are alarm feelings letting you know that your thoughts contain judgments and "shoulds" and you are disconnected from needs.

\*\*Bolded words are a part of the list and not just headings.

# Self-Care Inventory

How frequently do I do the following?

<b>0</b>	<b>1</b>	<b>2</b>	<b>3</b>
<b>Never</b>	<b>Rarely</b>	<b>Sometimes</b>	<b>Often</b>

## Physical Self-Care

- Eat regularly (e.g., breakfast, lunch, & dinner)
- Eat healthy foods
- Exercise regularly (3 times per week)
- Get enough sleep
- Preventative medical care
- Medical care when needed
- Take time off work when sick
- Get massages
- Dance, swim, walk, run, play sports, sing, or do other physical activity you enjoy
- Take time to be sexual
- Take vacations

## Psychological Self-Care

- Decrease stress in your life
- Make time away from demands
- Write in a journal
- Read literature that is unrelated to work
- Do something at which you are not an expert or in charge
- Let others know different aspects of you
- Be curious
- Say no to extra responsibilities

## Emotional Self Care

- Connect with others whose company you enjoy
- Stay in contact with the people that matter in your life
- Love yourself
- Laugh
- Cry
- Play with animals
- Play with children
- Identify comforting activities, objects, people, relationships, places and seek them

## Spiritual Self-Care

- Spend time in nature
- Find spiritual connection or community
- Cherish optimism and hope
- Be open to not knowing
- Sing

- \_\_\_\_\_ Pray
- \_\_\_\_\_ Spend time with children
- \_\_\_\_\_ Be open to inspiration
- \_\_\_\_\_ Have gratitude
- \_\_\_\_\_ Meditate
- \_\_\_\_\_ Listen to music
- \_\_\_\_\_ Engage in artistic activity
- \_\_\_\_\_ Yoga
- \_\_\_\_\_ Have experiences of awe
- \_\_\_\_\_ Be mindful of what is happening in your body and around you
- \_\_\_\_\_ Make meanings from the difficult periods
- \_\_\_\_\_ Seek truth

### **Workplace or Professional Self-Care**

- \_\_\_\_\_ Take time to eat lunch
- \_\_\_\_\_ Take time to connect with co-workers
- \_\_\_\_\_ Make quiet time to complete tasks
- \_\_\_\_\_ Identify projects or tasks that are exciting/rewarding
- \_\_\_\_\_ Set limits with clients and colleagues
- \_\_\_\_\_ Balance your workload so that you are not "overwhelmed"
- \_\_\_\_\_ Arrange your workspace so that it is comfortable and comforting
- \_\_\_\_\_ Get regular supervision and consultation
- \_\_\_\_\_ Negotiate for your needs (benefits, pay raise)
- \_\_\_\_\_ Have a peer support group

*Adapted from "Compassion Fatigue Prevention and Resiliency," J. Eric Gentry, PhD, LHC, and from "Risking Connection: A Training Curriculum for Working with Survivors of Childhood Sexual Abuse," Saakvitne, K.W., Gamble, S., Pearlman, L.A., Lev, B.T. (2000). Baltimore, MD: Sidran Press.*