

Information Regarding Peer Support and CRS 13-90-107(m) (2017)
State of Colorado

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Information* - CRS 13-90-107(m):

(1) CRS 13-90-107(m) (2017). House Bill 17-1032 was signed into law on March 16, 2017. This bill deleted the “individual” interactions provision of CRS 13-90-107(m). Peer support team members may now provide peer support to more than one person at the same time and retain the protection of the statute. The bill did not expand the confidentiality privilege. It extended the privilege to include group peer support. The *recipient* privilege specified in the statute remains unchanged...“nor shall a recipient of peer support services be examined as to any such communication without the recipient's consent” ((l)(l.5)).

(2) Recipients of group peer support. “Group peer support” means a peer support interaction that is comprised of at least one PST member and more than one recipient of peer support. If a PST member is providing peer support to more than one person at the same time, none of the recipients could be made to testify without their consent, provided that the provisions of the statute are met and none of the exemptions apply. Remember, qualifying agency PST members still need to be functioning in their official PST capacity and within the written guidelines of their agency.

(3) Recipient volunteer disclosure. As it stands, CRS 13-90-107(m) does not explicitly prohibit a recipient of group peer support from voluntarily testifying about information presented or discussed by other persons involved in group peer support, including the peer support team member(s). In this regard, participants in group peer support interactions are not held to the confidentiality standard of persons that engage in group therapy with licensed psychotherapists (see paragraphs 7 and 8). Notwithstanding a convoluted argument to the contrary that is not likely to prevail, and in the absence of relevant peer support case law, it is best for peer support teams to work from the premise that peer support group interactions are subject to volunteer disclosure by any recipient of group peer support without the consent of any other person in the group. Peer support teams should contact their agency attorneys for a more informed opinion on this matter.

(4) PST members in group peer support. PST members involved in statute-compliant peer support interactions with more than one person cannot be compelled to testify without consent, thanks to the 2017 amendment. This is because every participant in group peer support, other than the PST-member(s), is a recipient of peer support. If a recipient or recipients of group peer support provide consent, the PST member(s) identified in the waiver may only testify about the information pertaining to the person or persons that have waived their confidentiality privilege.

(5) Multiple peer support team members. Multiple PST members may now support more than one person without the loss of confidentiality provided in CRS 13-90-107(m). Multiple PST members may now support a single person without the loss of confidentiality provided in CRS 13-90-107(m).

(6) Peer support is not psychotherapy. Peer support is not psychotherapy as defined by statute. Therefore, the confidentiality provisions for peer support will *always* differ from that of licensed psychotherapists and others specified by statute. This is especially important to remember in cases involving other state statutes, federal code, and administrative regulations. In short, peer support team members must play by a different set of rules than licensed psychotherapists. PST members must direct persons seeking peer support to more confidential support services if they wish a more protected interaction than that afforded in peer support.

(7) Confidentiality responsibility of persons in professional group therapy. What are the confidentiality responsibilities for participants in professional therapy involving more than one person? The responsibility of persons involved in professional group “psychotherapy” or “therapy” is specified in two statutes:

CRS 13-90-107(g) "Who may not testify without consent" states in part: "nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates."

CRS 12-43-218 "Disclosure of confidential communications" states in part: "Any person who has participated in any therapy conducted under the supervision of a licensee, registrant, or certificate holder, including group therapy sessions, shall not disclose any knowledge gained during the course of such therapy without the consent of the person to whom the knowledge relates."

The term "under the supervision" used in both statutes does not include the "supervision" or oversight established in the Supervisor or Advisor Model of peer support teams.

(8) Another legislative effort. An interested party could take on another legislative effort to again amend CRS 13-90-107(m) to add something like "recipients of group peer support shall not be examined as to any knowledge gained during the course of such peer support without the consent of the person to whom the knowledge relates." The definition of “group peer support” could also be added. I am uncertain how much support such a bill would garner or if it would make it through the legislature, but it is an option. I chose not to include this statement or any other issue in HB 17-1032 because any additional alteration would have diminished the probability of passage. The priority of this bill was to extend PST member coverage beyond individual interactions.

(9) Policy-based PST confidentiality. Why do we continue to need a policy-based PST confidentiality statement for administrative investigations, supervisory inquiries, and PST debriefings? Policy-based confidentiality statements for administrative proceedings have been and continue to be needed because of Title 13, C.R.S. (TITLE 13. COURTS AND COURT PROCEDURE). Title 13 protects all of the identified relationships specified in CRS 13-90-107 in court proceedings, not in general. This is why psychotherapists also rely upon CRS 12-43-218. For PST confidentiality within the department, we need policy. This is not the case in some states with a PST confidentiality statute, but it is reality in Colorado.

(10) PST members, federal code, and state statute. Federal code and state statute supersede department policy and guidelines. Therefore, PST policy/guidelines that provide confidentiality for PST members in administrative investigations may be limited or overridden in circumstances involving U.S. code or statute-based administrative rules and regulations. Due to federal law regulating the confidentiality of medical information, peer support team clinical supervisors and peer support team members must be familiar and remain in compliance with the Health Insurance Portability & Accountability Act of 1996 (HIPPA). There are significant penalties associated with violations of HIPPA.

(11) Supervisors, peer support, and sexual and other harassment. “Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990”...“Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment” (EEOC.gov).

Employers are liable for workplace harassment. In an effort to prevent and address harassment in the workplace, jurisdictions have developed administrative policy prohibiting harassment and requiring supervisors to report it. Here is the text of one such policy...“Supervisors must immediately report to (Human Resources) all complaints, observed incidents or suspected incidents of harassment in violation of this policy.” Every jurisdiction that I am familiar with has a similar jurisdiction-wide (state/county/city) policy or regulation.

The issue for peer support is “must peer support team members that are supervisors report previously unreported incidents of harassment as required by administrative policy if the information comes to them in a peer support interaction? This question leads to a wider issue...can a department (police) within a jurisdiction (city) write a policy that exempts a specially designated group (supervisors on the PST) from a jurisdiction-wide (city) policy?”

CRS 13-90-107(m) has no standing here because supervisors are not being asked to testify without consent in a court proceeding. My take on it: I do not think that departments within a jurisdiction can “opt out” of a jurisdiction-wide administrative regulation. Department PST confidentiality policy cannot and does not override an administrative regulation based in federal law. Therefore, PST members that are supervisors must report previously unreported incidents of harassment as required, even if the information comes to them within a peer support interaction. PST members that are supervisors should include this exemption in their peer support "limits of confidentiality" disclosure prior to engaging in peer support.

The requirement to report sexual and other harassment does not apply to non-supervisor members of the peer support team.

Peer support teams can easily manage this mandatory reporting requirement of supervisors by immediately educating department personnel. The responsibilities of agency supervisors, even if on the peer support team, must be made clear. Then, if a person would like to discuss a circumstance of possible or actual harassment within a peer support setting before deciding on a course of action, they would know to contact a PST member that is not a supervisor. They should also be informed that they could contact the department’s mental health professional, EAP, or another privileged support resource without the loss of confidentiality.

(12) Workers compensation, supervisors, and peer support. The Workers Compensation law (Title 8, CRS) in Colorado is complex. CRS 8-43-102 states in part: “Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence of the injury.” CRS 8-43-103 states in part: “Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury, and, in case of the death of any employee resulting from any such injury or any accident in which three or more employees are injured, the employer shall give immediate notice thereof to the director...”

Most jurisdictions specify these requirements in a work-related-injury administrative policy or regulation. Here is actual text of one such policy: “Any employee who is injured on the job must, by law, notify his/her employer in writing within four working days of an injury, even if the employee has advised the employer verbally.”

Jurisdictions often specify the responsibilities of supervisors in work-related injury: "Upon learning of an employee's injury, the supervisor or the person in charge shall report the injury by the next business day to Risk (Management) regardless of whether or not medical treatment was sought."

The issues for peer support team members: (1) What are the support options for peer support team members if an employee discloses in a peer support interaction that he or she was injured on the job and does not intend to report it? (2) Must PST-member supervisors report previously unreported incidents of employee injury as required by administrative regulation if the information was received in a peer support interaction? (3) What is the relationship between department peer support confidentiality policies and administrative regulations that mandate reporting? As in the case of harassment, CRS 13-90-107(m) has no standing in these circumstances and non-supervisor PST members are not required to report.

My take on it: PST members that are supervisors must report employee injury as required by jurisdiction-wide administrative regulation. Again, this requirement can be easily managed by PST member supervisors by including it in a disclosure statement prior to engaging in peer support. Again, educating department personnel is warranted. However, to best answer these questions, and for clarification of the harassment issue, I recommend that peer support teams seek the advice and counsel of their jurisdiction attorneys. Relevant peer support team guidelines based on their advice and professional opinion could then be developed.

(13) Duty to warn. "Duty to warn" is unaffected by confidentiality statutes. "Threatening communications made to a mental health provider that trigger the "duty to warn" statute are not confidential as a matter of law. Therefore, when the mental health provider discharges his or her duty to warn based on those communications, the threatening communications are not protected by the psychologist-patient privilege, and the therapist may testify to those threatening communications. *People v. Kailey*, 2014 CO 50, 333 P.3d 89." A viable threat to harm someone is a criminal offense and not confidential in a peer support interaction. Any threats made by a recipient of peer support that reach the threshold of "duty of warn" should be managed as necessary and reported to the PST clinical supervisor immediately. The duty to warn, as it is defined and as it affects peer support team members should be an ongoing in-service PST training topic. PST clinical supervisors must develop a PST "duty to warn" protocol and train PST members in threat assessment and the "duty to warn" protocol.

(14) PST confidentiality in federal court. State confidentiality laws may not or may not always apply in the Federal courts. For the issue of courtroom confidentiality, federal courts use a "common law" standard unless there is a Constitutional mandate, pertinent federal law, or Supreme Court decision. There is no common law confidentiality provision, Constitutional mandate, federal law, or Supreme Court decision for peer support team member confidentiality. Do state statutes that specify some confidentiality privilege for PST members apply in the federal courts? Much depends on the individual case, the issue involved, and how it relates to the Federal courts under Federal Rule of Evidence 501, *Privilege in General*. Rule 501 states in part "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." So, state law would govern confidentiality in a federal civil case if state law provides the rule of decision. What does this mean? After the lawyers make their arguments for PST member confidentiality, state-established peer support team member confidentiality may or may not prevail. Bottom line, if a PST member is ordered to disclose information discussed in a peer support interaction in a federal court civil proceeding, the PST member will have to disclose the information. As for peer support interactions in federal court criminal cases, there is no confidentiality protection for PST members. Peer support team member confidentiality in federal criminal cases cannot even be argued because every state that has a peer support team

confidentiality statute exempts information pertaining to criminal conduct. For these reasons, I continue to advocate that law enforcement PST members should support directly-involved officers in force-related critical incidents without discussing the incident. Firefighter and EMS peer support team members are much less likely than law enforcement PST members to confront the issue of PST confidentiality, violation of civil rights, and force-related issues in the federal court system. Consequently, they may be more flexible about discussing work-related critical incidents. However, PST members of all peer support teams must exercise judgement in this area based upon their training, experience, knowledge of law, and common sense.

(15) Discussing a critical incident. Is it ever appropriate for law enforcement peer support team members to discuss a critical incident with involved officers? Yes. Critical incidents wherein officers' actions are unlikely to initiate a criminal investigation and/or are unlikely to end up in the federal court system can be safely discussed. For example, it is entirely appropriate for police peer support team members to discuss the actions and experiences of officers that responded to and investigated a fatal car crash or a particularly distressing suicide.

The conception of PST-member confidentiality is still in its infancy. PST-member confidentiality does not have the years of case law that has developed around psychologist-client and other mental health professional confidentiality.

If PST members continue to practice exemplary peer support, there will be little need for PST member confidentiality case law. Nonetheless, challenges, while not inevitable, are always possible.

Peer support team members must stay conscientious and continue to provide peer support within a best-practice standard. Best-practice peer support means that PST members remain committed to consulting with their clinical supervisor when there is any question about anything relevant to peer support. It also means that PST members must consistently: (1) bring their peer support interactions under supervision, (2) attend regularly scheduled PST meetings and training, (3) remain in compliance with the PST Code of Ethical Conduct, and (4) stay current and in compliance with administrative regulations, state and federal law, department policy, and PST operational guidelines.

If PST members do these things, then the mental health professionals that clinically supervise peer support teams will have a basis for argument in the event the confidentiality of a peer support interaction is challenged. If PST members do not follow these basic principles, they leave little for their clinical supervisors to defend. If PST members do not follow these basic principles, the entire peer support concept and the work that has been done to get us where we are may be put at risk.

* The information provided in this document represents the personal opinions of Jack A. Digliani, PhD, EdD. Law enforcement and other agencies with peer support teams should consult their jurisdiction attorneys for more informed opinions pertaining to legal issues or questions involving peer support, CRS 13-90-107(m), other state statutes, and federal law.

Colorado Revised Statutes (C.R.S.) 13-90-107(m) (2017)
Who may not testify without consent

Paragraph (m) of C.R.S. 13-90-107 *Who may not testify without consent* was enacted into law in 2005. C.R.S. 13-90-107(m) was amended to include "emergency medical service provider or rescue unit peer support team member" in 2013. In 2017, it was again amended to remove the "individual" interactions provision.

C.R.S. 13-90-107(m):

(1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(m) (I) A law enforcement or firefighter peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subsection (1) (m) (III) of this section; nor shall a recipient of peer support services be examined as to any such communication without the recipient's consent.

(I.5) An emergency medical service provider or rescue unit peer support team member shall not be examined without the consent of the person to whom peer support services have been provided as to any communication made by the person to the peer support team member under the circumstances described in subsection (1) (m) (III) of this section; nor shall a recipient of peer support services be examined as to any such communication without the recipient's consent.

(II) For purposes of this paragraph (m):

(A) "Communication" means an oral statement, written statement, note, record, report, or document, made during, or arising out of, a meeting with a peer support team member.

(A.5) "Emergency medical service provider or rescue unit peer support team member" means an emergency medical service provider, as defined in Section 25-3.5-103 (8), C.R.S., a regular or volunteer member of a rescue unit, as defined in Section 25-3.5-103 (11), C.R.S., or other person who has been trained in peer support skills and who is officially designated by the supervisor of an emergency medical service agency as defined in Section 25-3.5-103 (11.5), C.R.S., or a chief of a rescue unit as a member of an emergency medical service provider's peer support team or rescue unit's peer support team.

(B) "Law enforcement or firefighter peer support team member" means a peace officer, civilian employee, or volunteer member of a law enforcement agency or a regular or volunteer member of a fire department or other person who has been trained in peer support skills and who is officially designated by a police chief, the chief of the Colorado state patrol, a sheriff, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team.

(III) The provisions of this subsection (1) (m) shall apply only to communications made during interactions conducted by a peer support team member:

(A) Acting in the person's official capacity as a law enforcement or firefighter peer support team member or an emergency medical service provider or rescue unit peer support team member; and

(B) Functioning within the written peer support guidelines that are in effect for the person's respective law enforcement agency, fire department, emergency medical service agency, or rescue unit.

(IV) This subsection (1) (m) does not apply in cases in which:

(A) A law enforcement or firefighter peer support team member or emergency medical service provider or rescue unit peer support team member was a witness or a party to an incident which prompted the delivery of peer support services;

(B) Information received by a peer support team member is indicative of actual or suspected child abuse, as described in [section 18-6-401](#), actual or suspected child neglect, as described in [section 19-3-102](#), or actual or suspected crimes against at-risk persons, as described in section 18-6.5-103;

(C) Due to alcohol or other substance intoxication or abuse, as described in [sections 27-81-111](#) and [27-82-107](#), C.R.S., the person receiving peer support is a clear and immediate danger to the person's self or others;

(D) There is reasonable cause to believe that the person receiving peer support has a mental illness and, due to the mental illness, is an imminent threat to himself or herself or others or is gravely disabled as defined in [section 27-65-102](#), C.R.S.;

or (E) There is information indicative of any criminal conduct.