

Information Regarding Peer Support and Colorado Revised Statutes (CRS) 13-90-107(m)

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Information* - CRS 13-90-107(m) - Considerations with the 2017 and 2024 amendments:

Subsection (m) of CRS 13-90-107, *Who may not testify without consent* was enacted into law in 2005. It has been amended several times since. Four major amendments: two amendments (2013 and 2022) involved the addition of designated peer support teams. Two others, comprised of House Bill 17-1032 (2017) and Senate Bill 24-063 (2024), addressed the issues of “individual interactions” and group peer support.

(1) CRS 13-90-107(m) (2017). House Bill 17-1032 was signed into law on March 16, 2017 and took effect following the signing. This bill deleted the “individual interactions” provision of CRS 13-90-107(m). Following this amendment, peer support team members could provide peer support to more than one person at the same time without the loss of statutory standing.

(2) CRS 13-90-107(m) (2024). Senate Bill 24-063 was signed into law on March 22, 2024. It goes into effect August 2024. This bill consolidated the sections of the specified peer support teams, clarified the privacy expectations between and among recipients of group peer support, and defined group peer support services:

Recipients of group peer support services must not be examined as to any knowledge gained from other recipients of group peer support services without the consent of the person to whom the knowledge relates.

“Group peer support services” means peer support interactions comprised of at least one peer support member and more than one recipient of group peer support services, and includes any group meeting conducted or facilitated by one or more peer support team members for the purpose of peer support or incident debriefing.

(3) Recipient volunteer disclosure. Nothing in C.R.S. 13-90-107(m) prohibits recipients of individual or group peer support from voluntarily testifying about their experience during any peer support interaction. Recipients of peer support may also discuss the actions of PST members. This is because it is the recipients of peer support that hold the privilege of confidentiality. In other words, a recipient of peer support does not need the consent of the PST member to disclose any information discussed in peer support interactions, including what the PST member did or said.

(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 provided consent.

(5) Multiple peer support team members. Multiple PST members may support more than one person, and multiple PST members may support a single person, without loss of CRS 13-90-107(m) standing.

(6) Peer support is not psychotherapy. Peer support is not psychotherapy as defined by Colorado 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 provide support by a different set of rules than licensed psychotherapists. PST members must direct persons seeking peer support to more confidential support services if more protected interactions are desired.

(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” in Colorado 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 12-245-220 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 (Digliani, 1986).

(8) Policy-based PST confidentiality. Why do we continue to need a policy-based PST confidentiality statement for administrative investigations and supervisory inquiries? 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 those involved in the specified relationships from being compelled to testify without consent in *court proceedings*, not in general. For greater confidentiality protection, psychotherapists and other authorized persons rely upon subsection (1) of CRS 12-245-220:

(1) A licensee, registrant, or certificate holder shall not disclose, without the consent of the client, any confidential communications made by the client, or advice given to the client, in the course of professional employment.

In CRS 12-245-220 (1) the terms “licensee, registrant, or certificate holder” do not include peer support team members. Therefore, PST confidentiality outside of court proceedings must be established in policy. This is not the case in some states with a PST confidentiality statute, but it is a reality in Colorado. To date, there has not been a legal challenge to policy-established PST confidentiality. To avoid such a challenge, a legislative effort is currently underway (2024) to include members of peer support teams specified in CRS 13-90-107(m) within CRS 12-245-220.

(9) PST members, federal code, state statute, and administrative investigations/regulations. 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.

(10) PST members and HIPPA. 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, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).” “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, many jurisdictions have developed administrative regulations or policy that prohibit harassment and require supervisors to report it. Here is the actual text of one such policy... “Supervisors (managers) must immediately report to (Human Resources) all complaints, observed incidents or suspected incidents of harassment in violation of this policy.”

A question for peer support is “must peer support team members that are supervisors report previously unreported incidents of harassment if required by jurisdiction-wide administrative regulation or policy, and the information comes to them in a peer support interaction?”

PST members that are supervisors must remain in compliance with policy and regulations that are based upon federal or state law. Therefore, unless specifically exempted, supervisors that are members of peer support teams must report previously unreported incidents of harassment if required by jurisdiction-wide policy or regulation, even if the information comes to them within a peer support interaction.

Peer support teams can easily manage this mandatory reporting requirement of supervisors by including this exemption in their peer support "limits of confidentiality" disclosure prior to engaging in peer support. The responsibilities of agency supervisors, even if a member of the peer support team providing peer support, must be made clear.

The requirement to report sexual and other harassment does not normally apply to non-supervisor members of the peer support team. Supervisor and non-supervisor PST members must know and remain aware of the harassment policy of their respective jurisdictions and how it may apply to peer support.

(12) Duty to warn – mental health provider and PST members. The duty to warn for mental health providers is established in CRS 13-21-117.

"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."

Peer support team members. A viable threat to harm someone is a criminal offense and is not confidential in a peer support interaction. Any threats made by a recipient of peer support that reach the threshold of “duty of warn” must be managed in the same way as if this information was received in a non-peer support interaction. All “duty to warn” circumstances must be brought under the supervision of 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.

(13) PST confidentiality in federal court. For the issue of federal courtroom confidentiality, federal courts use a "common law" standard unless there is a pertinent Constitutional mandate, federal statute, or Supreme Court decision. There is no common law, Constitutional mandate, federal statute, or Supreme Court decision relative to peer support team member confidentiality in the federal courts.

(14) State law in federal court. Do state statutes that specify confidentiality privileges for recipients of peer support apply in the federal courts? It depends upon the “rule of decision.” Federal Rule of Evidence 501, *Privilege in General*, 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 peer support privileged communication, the federal magistrate within whose court the *civil* case is being heard, will decide if the state-established peer support privilege provides the rule of decision. 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 must disclose the information.

As for peer support interactions in federal court criminal cases, there is no privilege for Colorado PST members. A privilege in federal criminal cases cannot be argued under CRS 13-90-107(m) because the statute exempts “information indicative of any criminal conduct.” Every state that has a peer support team confidentiality statute exempts information related to or admission of criminal conduct.

(15) Federal law enforcement peer support teams and criminal conduct. The Confidentiality Opportunities for Peer Support Counseling Act (Public law 117-60) (2021), also called the COPS Counseling Act, established a confidentiality privilege for federal law enforcement peer support teams. The Act specifically exempts “an admission of criminal conduct.” It also states that the privilege does not apply if “a court of competent jurisdiction issues an order or subpoena requiring the disclosure.” For these reasons, I continue to advocate that all law enforcement PST members should support directly-involved officers in force-related critical incidents without discussing the incident.

Firefighter, medical, and other 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.

(16) Discussing a critical incident. Is it ever appropriate for peer support team members to discuss a critical incident with involved personnel? Yes. Critical incidents wherein personnel actions are unlikely to initiate a criminal investigation and/or are unlikely to end up in any 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.

(17) Discussion. PST-member confidentiality does not have the decades 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 practices” 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 basic principles, the entire peer support concept and the work that has been done to get us where we are is 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.

CRS 13-90-107(m): (2024)

(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 must not be examined as a witness in the following cases:

(m) (I) A law enforcement or firefighter peer support team member, emergency medical service provider or rescue unit peer support team member, or district attorney or public defender peer support team member must 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) (IV) of this section; nor is a recipient of peer support services to be examined as to any such communication without the recipient's consent.

(II) Recipients of group peer support services must not be examined as to any knowledge gained from other recipients of group peer support services without the consent of the person to whom the knowledge relates.

(III) As used in this subsection (1)(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.

(B) "District attorney or public defender peer support team member" means an employee of a district attorney's office or a public defender's office who has been trained in peer support skills and who is officially designated by a district attorney or the state public defender as a member of a district attorney's office peer support team or an office of the state public defender peer support team.

(C) "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, a regular or volunteer member of a rescue unit, as defined in section 25-3.5-103, 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, 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.

(D) "Group peer support services" means peer support interactions comprised of at least one peer support member and more than one recipient of group peer support services, and includes any group meeting conducted or facilitated by one or more peer support team members for the purpose of peer support or incident debriefing.

(E) "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.

(IV) This subsection (1) (m) applies 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, emergency medical service provider or rescue unit peer support team member, or district attorney or public defender 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, rescue unit, district attorney's office, or public defender's office.

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

(A) A law enforcement or firefighter peer support team member, emergency medical service provider, rescue unit peer support team member, or district attorney or public defender 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 intoxication by alcohol, being under the influence of drugs, or incapacitation by substances as described in section 27-81-111, 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 health disorder and, due to the mental health disorder, is an imminent threat to himself or herself or others or is gravely disabled as defined in section 27-65-102; or

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