

Advocate Privilege and Confidentiality

Jain Walsh, Staff Attorney –
Montana Legal Services
Association

Revised 07/6/22

This project is supported by Grant No. 2020-V3-GX-K021, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S.

Department of Justice. The opinions, findings, conclusions or recommendations expressed in this Project are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.



Road map

Yes

Advocate Privilege

Confidential Criminal Justice Inform

Mandatory Reporting

Brady Violations

No

Other Privileges

Other confidentiality consideratio



Advocate Privilege vs Confidential Criminal Justice Information?

Who?

Why?

What?

How?

When?

Exceptions?



Advocate Privilege



Who has Advocate Privilege?



Who?

Applies to any “advocate”—employee or volunteer of a domestic violence shelter, crisis line, or victim services provider;

Who provides services for victims of sexual assault, stalking, or Partner Family Member Assault. Mont. Code Ann. § 26-1-812(3)(a).

Typically community based advocates



What Is Advocate Privilege?



What?

Cannot release information about a client that was obtained while providing **shelter, counseling, or crisis services**.

Advocate cannot disclose records kept about a client.

At what time does Advocate Privilege apply?



When?

Anytime, **unless:**

Client expressly waives the privilege;

Privilege is implicitly waived;

The client is deceased; or

At what time does Advocate Privilege apply?



When?

Anytime, **unless:**

Advocate is a **mandatory** (more on this later) child abuse reporter under Montana law, in which case the advocate may be required to release information about child abuse.

Why Is Advocate Privilege Important?



- Safety
- Protects against further bad experiences
- Dignity
- Clients feel comfortable sharing knowing it is confidential
- Funding
- It is the law
 - Note: This is not a criminal statute. There is no criminal or licensing penalty for violating advocate privilege. No Montana case law exists addressing the potential civil liability of an advocate who violates privilege.

Advocate Privilege

- Privilege is the client's, not the advocate's
- Privilege applies even if the client is not available
- Privilege continues even if a client is a party in divorce or custody proceedings
- Privilege applies against law enforcement, attorneys, judges
 - Until there is a court order (currently untested in Montana)

Ways to protect Advocate Privilege

- Remember – Advocate Privilege **always** applies
- First response – “I have no information for you”
- Unless there is a written court order signed by a judge that says the advocate *MUST* share the information, an advocate cannot give out information without a client’s informed authorization
- File motions to quash subpoenas asking for client information
- Do not allow officers into a shelter unless they have warrants
 - A search warrant for something
 - A search warrant and/or arrest warrant for someone

Protecting Advocate Privilege, cont.

- Do not include 3rd parties – it may result in an implicit waiver of advocate privilege that could lead to disclosure of information
 - This includes friends and relatives of the client
- 3rd parties who are necessary: doctors, interpreters, others who **must** help in the situation likely do not waive privilege
- If a 3rd party must be included, have them sign a confidentiality agreement
 - Have the client sign an authorization for release of information specific to the purpose of that 3rd party

How to be proactive

- Have written, easy-to-understand policies/protocols about confidentiality and advocate privilege
- Hold periodic trainings for staff and **always** for new hires
- Meet and greet with local law enforcement, county attorneys, Child and Family Service.
 - Show them your policies/protocols and discuss the issue of your confidentiality duties before an issue arises

More ways to be proactive

- At the start of service: explain the duty or privilege to the client
 - Explain that an advocate cannot acknowledge that they are working with a client to anyone without a signed release from the client
 - If the client is a minor – explain that an exception to advocate privilege applies if the advocate is a mandatory child abuse reporter. That means if the advocate suspects or knows about child abuse, they will **HAVE** to report it.

Remember!

- Always claim Advocate Privilege if asked for a client's information
- Only give out information if the client gives permission or an exception to the rule applies (e.g. signed court order)
- Releasing only a little bit of information may become an unintentional waiver of a release of **all** information

Criminal Justice Information





Criminal Justice Information



Who? Mont. Code Ann. Section 44-5-103 (7)

"Criminal justice agency" means:

- (a) any court with criminal jurisdiction;
- (b) any federal, state, or local government agency designated by statute or by a governor's executive order to perform as its **principal function the administration of criminal justice**, including a governmental fire agency organized under Title 7, chapter 33, or a fire marshal who conducts criminal investigations of fires;



Criminal Justice Information



"Criminal justice agency" means:

- (c) any local government agency not included under subsection (7)(b) that performs as its **principal function the administration of criminal justice** pursuant to an ordinance or local executive order; or
- (d) any agency of a foreign nation that has been designated by that nation's law or chief executive officer to perform as its principal function the administration of criminal justice and that has been approved for the receipt of criminal justice information by the Montana attorney general, who may consult with the United States department of justice.



Criminal Justice Information



What?

The Criminal Justice Information Act (1979) was created to address the competing interests of the public's right to know and the right to privacy.

There are two kinds of CJI:

1. Public Criminal Justice Information (CJI); and
2. Confidential Criminal Justice Information (CCJI).



Criminal Justice Information



“Criminal justice information” means information relating to criminal justice collected, processed, or preserved by a criminal justice agency.

Mont. Code Ann. Section 44-5-103 (8)(a)



Public Criminal Justice Information includes



Information made public by law;
Jail rosters;
Court records and court proceedings;
Initial offense reports;
Initial arrest records;
Convictions and sentences;
Post-conviction offender status
Statistical information; and
Information needed to secure assistance in the apprehension
of a suspect.

Mont. Code Ann. Section 44-5-103 (13)



How do you obtain **Public CJI**?



There are no restrictions on the dissemination of public criminal justice information.

Public criminal justice information is available from the department or agency that is the source of the original documents and that is authorized to maintain the documents.

Documents must be open and available during normal business hours. The department or agency may charge a reasonable fee for providing copies.

Mont. Code Ann. Section 44-5-301



Confidential Criminal Justice Information



What is it?

Criminal investigative information;

Criminal intelligence information;

Fingerprints and photographs;

Criminal justice information or records made confidential by law;

and

Any other information not clearly defined as public criminal justice information.

Mont. Code Ann. Section 44-5-103 (3)



Confidential Criminal Justice Information



How do you obtain CCJI?

Dissemination of CCJI is **restricted to criminal justice agencies**, to those authorized by law to receive it

or

There is a written district court order finding that the demands of individual privacy do not clearly exceed the merits of public disclosure.

Mont. Code Ann. Section 44-5-303



Confidential Criminal Justice Information



When?

CCJI is related to criminal investigations and prosecutions. When an investigation or case is “ongoing” the information is more likely to be protected as its dissemination may disrupt criminal proceedings. When a case is closed, the scales may tip in favor of the information being released.

This is for a prosecutor or a judge to determine.



Confidential Criminal Justice Information



What about victim access to CCJI?

If the prosecutor determines that dissemination of confidential criminal justice information would not jeopardize a pending investigation or other criminal proceeding, the information may be disseminated to a victim of the offense by the prosecutor or by the investigation law enforcement agency after consultation with the prosecutor.

Mont. Code Ann. Section 44-5-303



Nondisclosure of information about victims



If a victim requests confidentiality, an agency may not disseminate, except to another criminal justice agency,

Address;

Telephone number;

Place of employment

Of the victim or member of the victim's family.

Disclosure of the location of the crime may be allowed.

Mont. Code Ann. Section 44-5-311



Nondisclosure of Identifying information



A criminal justice agency may not disseminate to the public and information directly or indirectly identifying the victim of certain crimes.

Sexual Assault, SWIC, Indecent Exposure, Incest, Trafficking of Persons, Involuntary Servitude, Sexual Servitude, Patronizing Victim of Sexual Servitude.

Mont. Code Ann. Section 44-5-311



How to be proactive



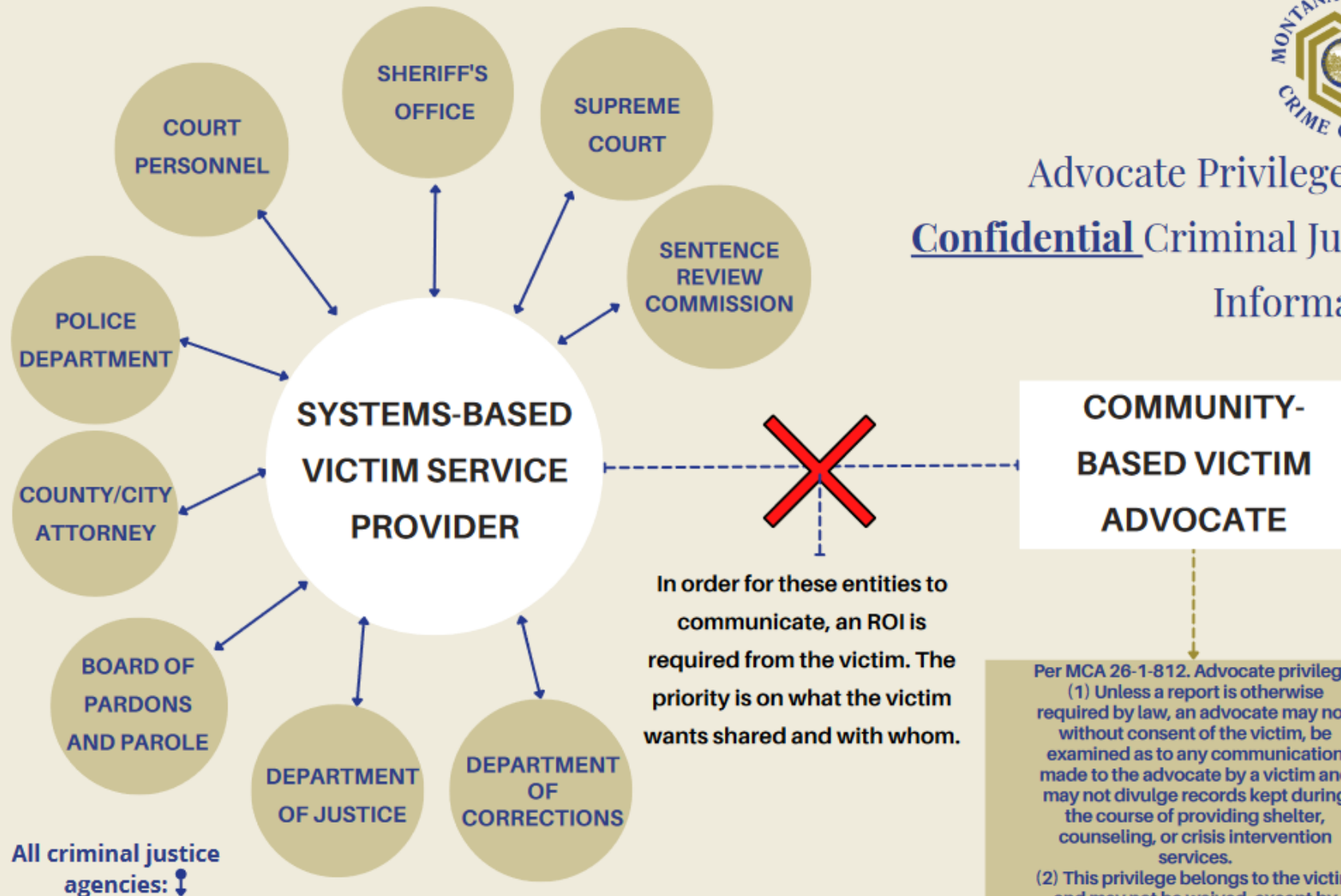
Inform victims about their rights, specifically the right to request confidentiality.

Have victims request confidentiality **in writing**.

Provide the request to all criminal justice agencies working the case.



Advocate Privilege and Confidential Criminal Justice Information



Per MCA 44-5-303. Dissemination of Confidential Criminal Justice Information - Procedure for Dissemination through Court - Notice and Objection to Disclosure. (1) Except as provided in subsections (2) through (4), dissemination of confidential criminal justice information is restricted to criminal justice agencies, and to those authorized by law to receive it, and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure.

Per MCA 26-1-812. Advocate privilege.

(1) Unless a report is otherwise required by law, an advocate may not, without consent of the victim, be examined as to any communication made to the advocate by a victim and may not divulge records kept during the course of providing shelter, counseling, or crisis intervention services.

(2) This privilege belongs to the victim and may not be waived, except by express consent. This privilege continues even if the victim is unreachable. Consent may not be implied because a victim is a party to a divorce or custody proceeding. The privilege terminates upon the death of the victim.

Systems-Based

Good morning, is your program working with Mary Sue?

Community-Based

We can neither confirm nor deny that information.

Oh, thank you for reminding me. In that case, there is an initial appearance for Derek Sue next Tuesday.

Thank you for that information.

Would you be able to send over any of the public criminal justice information related to Derek Sue and his upcoming initial appearance please?

Of course, I'll send it over to the email address I have on file for you!

Advocate Privilege and Public Criminal Justice Information



**SYSTEMS-BASED
VICTIM SERVICE
PROVIDER**

**COMMUNITY-BASED
VICTIM ADVOCATE**

Public Criminal Justice Information can be shared with agencies and individuals other than criminal justice agencies. This can include the confirmation of the existence or nonexistence of criminal justice information. (MCA 44-5-103 (11))

Per MCA 44-5-303 (13)

"Public criminal justice information" means:

- (a) information made public by law;
- (b) information of court records and proceedings;
- (c) information of convictions, deferred sentences, and deferred prosecutions;
- (d) information of postconviction proceedings and status;
- (e) information originated by a criminal justice agency, including:
 - (i) initial offense reports;
 - (ii) initial arrest records, including booking photographs;
 - (iii) bail records; and
 - (iv) daily jail occupancy rosters;

Thank You!

Jain Walsh, Staff Attorney –
Jwalsh@mtlsa.org