



**MONTANA STATE COUNCIL 9, AFL-CIO**  
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES  
PO Box 5356 \* Helena, MT 59604 \* (406) 442-1192

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September 14, 2010

Katie Barber, Attorney at Law  
2722 Third Avenue North  
Suite 400  
Billings Montana 59101

Re: OPD Contract Attorneys Unionizing

Dear Katie Barber:

I am writing in response to your letter dated September 11, 2010 detailing some concerns you have regarding the contract attorneys forming a Union. In looking at your comments it appears there may be some confusion as to the process and the benefits of joining AFSCME.

Prior to moving forward we thoroughly researched any conflicts that may present themselves. When you speak of the conflict of AFSCME representing both staff and contract attorneys you may be assuming you would both be in the same Local as the OPD staff attorneys. This is not the case. AFSCME is fully aware that the interests of OPD contract attorneys are separate and distinct from interests of OPD staff attorneys.

By joining AFSCME you would have your own Local comprised of only contract attorneys. Your Local would be assigned an AFSCME Staff Representative and you would elect your own Executive Board, Commission Liaison, and Local Union Officers. The contract attorneys would then have the opportunity to actually fight for and protect their interest through bargaining with the state regarding some of the very issues you highlight, such as how conflicts are identified within OPD and then referred out to contract attorneys. This process will help, not hurt contract attorneys and their ability to have conflict cases properly identified and then fairly referred out and assigned.

You state that a good example of a conflict would be that staff attorneys want more cases kept in house while contract attorneys want more cases referred out. As you know, cases are supposed to be referred out to contract attorneys due to conflict within OPD and the staff attorneys desire to retain more work should not be considered in determining which cases are referred to contract attorneys. By having representation through AFSCME, the contract attorneys can ensure that this is happening properly.

You also state that clients are concerned that contract attorneys being paid by OPD could be a conflict if OPD staff attorneys represent a co-defendant, saying State v. St. Dennis involves this very issue. In fact, State v. St. Dennis does not involve this issue but rather involves the potential conflict of OPD staff attorneys from different regions representing co-defendants. Contract attorneys were not utilized, though they likely should have been, and are not at issue in that case. St. Dennis actually highlights why contract attorneys need a unified voice to bargain with OPD so the potential conflict of staff attorneys from different regions representing co-defendants does not happen in the future.

Regarding your concern that a firm would be created by AFSCME representing staff attorneys and contract attorneys this is not the case as contract attorneys and staff attorney would be in separate and districted Locals representing just that Local's interest. Yes, you would both be AFSCME members, but you would have your own Local, separate from the staff attorneys with a separate contract and by-laws governing your Local. Your relationship with the OPD and liabilities would remain status quo. The only change would be an agreement that protects your wages, case assignments, benefits and working conditions.

Lastly, I wanted to address your insurance concern. Joining a Union comprised of fellow contract attorneys does not expose you to the potential wrongdoings of other attorneys. You will continue to work independently and there would be no vicarious liability unless you are working directly with others on a case. As I stated earlier, your services, exposure and any liabilities would remain status quo.

Joining a Union, which would work to protect your rights as a contract attorney separately from the interests of the staff attorneys, does nothing but give you the opportunity to safeguard your interests and relationship with the OPD. I have enclosed a recent document that was mailed to all contract attorneys detailing the process and benefits of AFSCME membership. Number 5 in the document addresses some of the issues regarding conflicts.

Thank you for your comments and I invite you to contact me to discuss this unprecedented opportunity to collectively improve your relationship with the State OPD.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timm Twardoski', with a long horizontal flourish extending to the right.

Timm Twardoski, Executive Director  
AFSCME Montana Council 9

Cc: OPD Commission



# Questions and Answers for the Office of Public Defenders Contract Attorneys

## **1. Who is AFSCME?**

AFSCME is the American Federation of State, County, and Municipal Employees, an affiliate of the national AFL-CIO. We have over 1700 members serving Montana and 1.7 million across the United States, this makes AFSCME the largest labor union in the states. For more information, please visit [www.mtafscme.com](http://www.mtafscme.com) and [www.afscme.org](http://www.afscme.org).

Montana Council 9 is the Montana affiliate of AFSCME and consists of 55 member locals in Montana who are employed throughout Montana in the public sector and health care. These locals meet semi-annually at a state convention to elect an executive board. This executive board consists of actual union members throughout Montana who serve as the officers to run Montana Council 9 as well as direct the staff and legal counsel who are the employees of Montana Council 9. The OPD Contract Attorneys would be organizing a local union within Montana AFSCME Council 9.

AFSCME Montana Council 9 currently represents public defenders employed by the State Office of Public Defender, Local 3448, as well as support staff and the investigators, Local 2176.

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**406-442-1192 \* [www.mtafscme.com](http://www.mtafscme.com)**

## **2. How did the current effort to organize Contract Attorneys working for the OPD come about??**

In 2006, during its efforts to help Public Defenders employed by the Office of Public Defender organize to bargain over their wages and working conditions with the newly established OPD, AFSCME staff and attorneys also came in contact with contract attorneys who, while not employees of the OPD, were also providing important public defender services on behalf of various counties through independent contract arrangements. AFSCME staff and attorneys began talking with contract attorneys at that time but realized that as independent contractors they were not employees as defined by the Public Employee Bargaining Act and did not have a right to organize. During the next few years, several contract attorneys kept in touch with AFSCME and AFSCME continued to explore the various options available to provide contract attorneys a way organize themselves to address their concerns with the OPD.

Most recently, in March and April of 2010, a group of public defenders once again contacted AFSCME and showed renewed interest in organizing into a cohesive group to better promote interests that were unique to contract attorneys, including increasing the hourly reimbursement and office per diem rates as well as working relationship issues, conflict of interest, and case distribution issues.

As a result of these renewed requests, AFSCME engaged in substantial research and communication with its affiliates in other states to find an answer for the Contract Attorney question: *How can we organize as one United group to present our concerns to the OPD?* We determined the best answer was to seek an Executive Order from the Governor recognizing that Contract Attorneys should be entitled to engage in limited scope bargaining with the OPD.

The Executive Order was signed by Governor Schweitzer on September 6, 2010 and now allows all Contract Attorneys to organize and choose an exclusive representative for the purposes of bargaining with the OPD, including reimbursement rates and terms and conditions of their contract services. The Executive Order is clear that any increase in funding must be approved by the legislature, this is a critical step forward allowing the Contract Attorneys, for the first time, to work and speak with one voice for the purpose of improving contract services.

## **3. What are the cost of organizing and joining AFSCME?**

All unions must charge their members' dues to pay for the important services provided. These services include assistance in organizing, negotiating a collective bargaining agreement or contract that covers important issues, such as reimbursement rates and terms and conditions of employment, and providing services to enforce that contract. Dues and fees vary from union to union across the United States.

AFSCME, Montana Council 9, AFL-CIO dues structure is very straightforward and is as follows: The current dues rate is \$37.60 per month which is typically deducted from the member's pay check. This is the total amount of the current dues and includes dues for state, local, and national affiliation, and all membership benefits including a rebate amount, that comes back to the Local.

In your case, AFSCME has agreed to a special arrangement to accommodate the fact that OPD Contract Attorneys are independent contractors and work either as self-employed attorneys or in small firms. Accordingly, AFSCME has agreed to the following dues arrangement:

*\*No dues will be collected until all the following conditions are met:*

- A.** The majority of OPD contract Attorneys agree to AFSCME representation and AFSCME is certified by the Board of Personal Appeals as the exclusive representative for all Contract Attorneys.
- B.** AFSCME has completed negotiations for a collective bargaining agreement setting forth the terms and conditions that can be agreed to with the OPD; and
- C.** A majority of the Contract Attorneys ratifies the contract.

Once these conditions are met, dues will begin to be paid by all OPD contract attorneys who are actually receiving pay. The final condition unique to this situation will be as follows:

*Only OPD Contract Attorneys who have been assigned and are working on a case will be charged dues. Dues will only be collected in those months Contract Attorneys are being paid.*

If an OPD contract attorney is otherwise a member in good standing of AFSCME and has a memorandum of understanding to provide services but is not currently providing services or receiving pay, that member will not be charged dues, however, will still remain a member in good standing. As soon as the member is assigned a case and bills for services, that member will owe monthly dues for the months billed. In this way all OPD contract attorneys will receive the benefit of representation, but will only pay dues in the months they receive work.

#### **4. What will the structure of the organization representing Contract Attorneys look like and how will the Contract Attorneys make decisions?**

AFSCME Montana and its international affiliates are democratically run organizations. The OPD Contract Attorneys will organize themselves into a Local, which will be affiliated with AFSCME Montana Council 9 and the international. As such, the Local union will be governed by the state and international constitutions which can be viewed online at [www.afscme.org](http://www.afscme.org). In short, this structure provides that the Local must have a constitution and bylaws providing that it be democratically run with appropriate officers such as president, secretary, treasurer, and an executive board.

AFSCME staff and legal counsel work for the union members and do not make decisions for the Local. With AFSCME, the Union members vote and make all important decisions, including choosing their elected representatives and ratifying their contract. Your Local would organize an executive board of eight members, including a president, vice president, secretary, and treasurer. This board in consultation with its members makes decisions on behalf of the local and works with Montana Council 9 staff to service the members, negotiate, and enforce its agreement with the State. The executive board also works with Montana Council 9 and national staff to promote a lobbying effort to secure funding for its collective bargaining agreement.



#### **5. Does AFSCME have a conflict of interest in representing the Contract Attorneys and the OPD attorneys?**

No, not in the traditional sense of 'conflict of interest' as understood by practicing attorneys and as defined by Rule 1.8 Rules of Professional Conduct, as these rules do not apply to this situation.

AFSCME is one of the three Unions who represent State employees, all of whom rely upon legislative funding. AFSCME is aware of the reality that all state employees compete for limited state funding, just as state programs do. This reality does not change regardless which Union represents Contract Attorneys.

Most State employees are unionized and all State employees fight for limited funds from the same pool. Unions have developed a well tested strategy and practice in pre-budget negotiations to gain the best deal possible for all State employees and then engage in a coordinated lobbying strategy to secure the necessary funding from the legislatures to fund the agreed upon State compensation packages.

The OPD Contract Attorneys needs are easily addressed with this same framework. The only difference between the OPD lobbying effort and what they would gain through AFSCME representation, is currently no one speaks on behalf of the OPD contract attorneys in the budgeting process.

Furthermore, each Local is assigned a field representative to assist the Local members with negotiations and enforcing the collecting bargaining agreement.

## **6. What can the Contract Attorney hope to gain from organizing and bargaining with AFSCME?**

AFSCME Montana Council 9 has already accomplished an important goal on behalf of the OPD Contract Attorneys at no expense. Namely, the use of its own resources, attorneys, and staff, AFSCME has obtained an Executive Order giving the Contract Attorneys the right to organize and select an exclusive representative for the purposes of bargaining. AFSCME will provide Contract Attorneys the professional staff and resources to set up a Local union and elect representatives. AFSCME will also provide the staff and labor attorney to assist the OPD contract attorneys to ensure that a collective bargaining agreement is reached addressing as many issues as possible. The collective bargaining process will specifically cover terms and conditions of employment under independent contractor agreements, fair evaluation procedures for attorneys, fair case distribution, hourly contract rates, and reimbursement of costs. It is AFSCME's specific goal to work with contract attorneys to assist them in gaining an enforceable collective bargaining agreement with the State so that OPD contract attorneys can focus on their work in providing quality representation to defendants by having a contract that provides essential job protections and guarantees and the assistance to enforce that contract.



## **7. What is the purpose of the Application for Membership/Authorization for Representation card?**

The application/authorization card is a standard tool used by unions to demonstrate support from the employees to move forward as a representative of the employees in the organizing process. Under the Executive Order, the Board of Personnel Appeals will certify to the State that AFSCME has provided a sufficient number of signed application/authorization cards so that it can either proceed directly to representing OPD Contract Attorneys and begin bargaining on their behalf or call for an election. If a majority of OPD contract attorneys sign an authorization card applying for membership and authorizing immediate representation, AFSCME may be certified as the representative of OPD contract attorneys and begin the process of organizing the local union and bargaining. AFSCME is asking OPD contract attorneys to sign applications for membership and authorization of representation cards now due to the upcoming legislation session. This is necessary because AFSCME needs to begin bargaining as soon as possible if they are to have any chance of being effective in gaining, and lobbying an increase of the hourly reimbursement and per diem rates.



## **8. What if I am not on the official list of Contract Attorneys provided by the OPD?**

The Executive Order requires the OPD to produce a list of current OPD Contract Attorneys. AFSCME has already discovered there may be several attorneys currently representing clients on behalf of OPD that have not signed a current MOU, while others have current MOU's and are not representing clients. It is AFSCME's position that if you are currently working on behalf of OPD, whether you have signed a MOU or not, or if you have signed a MOU but are currently not working a specific client, you are still eligible to be involved in this process and should sign an Application of Membership/Authorization for Representation card if you support AFSCME representation. If you are not currently representing on behalf of OPD and have no intention to do so in the future, you should notify contract administrator, Larry Murphy or Human Resources Director Barb Kain, so you will not be included in the process. If you would like to be involved and have not signed a current MOU, please do so and notify Montana Council 9.