

# D R A F T

## SUMMARY

Requires party in criminal case to provide hard copy or electronic copy of discovery material to adverse party unless copy cannot reasonably be provided.

Requires district attorney to disclose prior conviction record of all persons associated with investigation. Expands statutory obligation of district attorney to disclose exculpatory evidence and impeachment evidence. Modifies timing of disclosures.

Provides that remedy for violation of discovery obligation may be dismissal of charges, or dismissal of charges with prejudice if violation concerned exculpatory evidence or impeachment evidence.

Establishes procedures for taking of depositions in criminal cases.

## A BILL FOR AN ACT

1  
2 Relating to pretrial discovery; creating new provisions; and amending ORS  
3 135.805, 135.815, 135.845 and 135.865.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 135.805 is amended to read:

6 135.805. (1) The provisions of ORS 135.805 to 135.873 are applicable to all  
7 criminal prosecutions in which the charging instrument has been brought in  
8 a court of record.

9 (2) As used in ORS 135.805 to 135.873, “disclose” means to **provide a hard**  
10 **copy or an electronic copy of discovery material to the adverse party**  
11 **or, if the nature of the material is such that a hard copy or electronic**  
12 **copy cannot reasonably be provided, to** afford the adverse party an op-  
13 portunity to inspect or copy the material.

14 **SECTION 2.** ORS 135.815 is amended to read:

15 135.815. (1) Except as otherwise provided in ORS 135.855 and 135.873, the

1 district attorney shall disclose to a represented defendant the following ma-  
2 terial and information within the possession or control of the district attor-  
3 ney:

4 (a) The names and addresses of persons whom the district attorney in-  
5 tends to call as witnesses at any stage of the trial, together with their rele-  
6 vant written or recorded statements or memoranda of any oral statements  
7 of such persons.

8 (b) Any written or recorded statements or memoranda of any oral state-  
9 ments made by the defendant, or made by a codefendant if the trial is to be  
10 a joint one.

11 (c) Any reports or statements of experts, made in connection with the  
12 particular case, including results of physical or mental examinations and of  
13 scientific tests, experiments or comparisons which the district attorney in-  
14 tends to offer in evidence at the trial.

15 (d) Any books, papers, documents, photographs or tangible objects:

16 (A) Which the district attorney intends to offer in evidence at the trial;  
17 or

18 (B) Which were obtained from or belong to the defendant.

19 (e) [*If actually known to the district attorney,*] Any record of prior criminal  
20 convictions of **all** persons [*whom the district attorney intends to call as wit-*  
21 *nesses at the trial;*] **associated with the investigation**, and the district at-  
22 torney shall make a good faith effort to determine if such convictions have  
23 occurred.

24 (f) All prior convictions of the defendant known to the state that would  
25 affect the determination of the defendant's criminal history for sentencing  
26 under rules of the Oregon Criminal Justice Commission.

27 (g) Any material or information that tends to:

28 (A) Exculpate the defendant, **including evidence tending to support**  
29 **an affirmative defense;**

30 (B) Negate or mitigate the defendant's guilt or punishment; or

31 (C) Impeach a person the district attorney intends to call as a witness

1 at the trial, **including prior inconsistent statements of the witness, the**  
2 **failure of the witness to identify the defendant, inducements or**  
3 **promises made to the witness in exchange for testimony, and any**  
4 **other information tending to negatively affect the credibility of the**  
5 **witness.**

6 (2)(a) The disclosure required by subsection (1)(g) of this section shall  
7 occur without delay [*after arraignment and prior to the entry of any guilty*  
8 *plea pursuant to an agreement with the state*], **and no later than at the**  
9 **time of the initial appearance of the defendant.** If the existence of the  
10 material or information is not known at that time, the disclosure shall be  
11 made upon discovery without regard to whether the represented defendant  
12 has entered or agreed to enter a guilty plea.

13 **(b) The disclosure required by subsection (1)(g) of this section shall**  
14 **occur regardless of whether the material or information is written or**  
15 **recorded, and the district attorney has an affirmative duty to deter-**  
16 **mine whether such material or information exists.**

17 [(b)] (c) Nothing in subsection (1)(g) of this section[:]

18 [(A) *Expands any obligation under a statutory provision or the Oregon or*  
19 *United States Constitution to disclose, or right to disclosure of, personnel or*  
20 *internal affairs files of law enforcement officers.*]

21 [(B)] imposes any obligation on the district attorney to provide material  
22 or information beyond the obligation imposed by the Oregon and United  
23 States Constitutions.

24 (3) Except as otherwise provided in ORS 135.855 and 135.873, in prose-  
25 cutions for violation of ORS 813.010 in which an instrument was used to test  
26 a person's breath, blood or urine to determine the alcoholic content of the  
27 person's blood the district attorney shall disclose to a represented defendant  
28 at least the following material and information within the possession or  
29 control of the district attorney:

30 (a) Any report prepared by a police officer relating to field tests, inter-  
31 views, observations and other information relating to the charged offense;

1 (b) Any report relating to the test results;

2 (c) A copy of the form provided to the defendant under ORS 813.100 (2)(b);

3 and

4 (d) Any checklist prepared by the operator of the instrument for the test.

5 (4)(a) If a defendant is not represented by a lawyer, the district attorney  
6 shall disclose to the defendant all of the information described in subsections  
7 (1) and (3) of this section except for the personal identifiers of the victim and  
8 any witnesses.

9 (b) Notwithstanding paragraph (a) of this subsection, the district attorney  
10 shall disclose the personal identifiers of the victim and any witnesses if the  
11 trial court orders the disclosure. A trial court shall order the district at-  
12 torney to disclose the personal identifiers of the victim and any witnesses  
13 if the trial court finds that:

14 (A) The defendant has requested the information; and

15 (B)(i) The victim or witness is a business or institution and disclosure of  
16 the information would not represent a risk of harm to the victim or witness;  
17 or

18 (ii) The need for the information cannot reasonably be met by other  
19 means.

20 (5)(a) Unless authorized by the trial court to disclose the information, a  
21 lawyer representing a defendant, or a representative of the lawyer, may not  
22 disclose to the defendant personal identifiers of a victim or witness obtained  
23 under subsections (1) and (3) of this section.

24 (b) The trial court shall order the lawyer, or representative of the lawyer,  
25 to disclose to the defendant the personal identifiers of a victim or witness  
26 if the court finds that:

27 (A) The defendant's lawyer has requested the district attorney to disclose  
28 the information to the defendant;

29 (B) The district attorney has refused to disclose the information to the  
30 defendant; and

31 (C) The need for the information cannot reasonably be met by other

1 means.

2 (6) As used in this section:

3 (a) “Personal identifiers” means:

4 (A) In relation to a witness, the witness’s address, telephone number, So-  
5 cial Security number and date of birth and the identifying number of the  
6 witness’s depository account at a financial institution, as defined in ORS  
7 706.008, or credit card account.

8 (B) In relation to a victim, the victim’s address, electronic mail address,  
9 telephone number, Social Security number, date of birth, any user names or  
10 other identifying information associated with the victim’s social media ac-  
11 counts and the identifying number of the victim’s depository account at a  
12 financial institution, as defined in ORS 706.008, or credit card account.

13 (b) “Representative of the lawyer” has the meaning given that term in  
14 ORS 40.225.

15 (c) “Represented defendant” means a defendant who is represented by a  
16 lawyer in a criminal action.

17 (d) “Social media” has the meaning given that term in ORS 659A.330.

18 **SECTION 3.** ORS 135.845 is amended to read:

19 135.845. (1)(a) The *[obligations to disclose]* **disclosures required by ORS**  
20 **135.815** shall be performed *[as soon as practicable following the filing of an*  
21 *indictment or information in the circuit court or the filing of a complaint or*  
22 *information charging a misdemeanor or violation of a city ordinance]* **imme-**  
23 **diately, and no later than at the time of the initial appearance of the**  
24 **defendant, for any material and information in the possession or con-**  
25 **trol of the district attorney at the time of the appearance.**

26 (b) **After the initial disclosure by the district attorney under para-**  
27 **graph (a) of this subsection, all further disclosures required by ORS**  
28 **135.805 to 135.873 shall be performed within seven days of the material**  
29 **or information becoming known to a party.**

30 (c) The court may supervise the exercise of discovery to the extent nec-  
31 essary to *[insure]* **ensure** that it proceeds properly and expeditiously.

1 (2) If, after complying with the provisions of ORS 135.805 to 135.873 and  
2 135.970, a party finds, either before or during trial, additional material or  
3 information which is subject to or covered by these provisions, the party  
4 must promptly notify the other party of the additional material or informa-  
5 tion.

6 **SECTION 4.** ORS 135.865 is amended to read:

7 135.865. (1) Upon being apprised of any breach of the duty imposed by the  
8 provisions of ORS 135.805 to 135.873 and 135.970, the court may order the  
9 violating party to permit inspection of the material, or grant a continuance,  
10 or refuse to permit the witness to testify, or refuse to receive in evidence the  
11 material not disclosed, or **order a dismissal of the charges, or** enter such  
12 other order as it considers appropriate.

13 **(2) Notwithstanding subsection (1) of this section, if the breach is**  
14 **of the duty imposed by ORS 135.815 (1)(g), the court shall grant the**  
15 **defendant's motion for dismissal of the charges with prejudice or, if**  
16 **the court is apprised of the breach of duty during trial, grant the**  
17 **defendant's motion for mistrial and order dismissal of the charges**  
18 **with prejudice.**

19 **(3) When a breach of the duty imposed by ORS 135.805 to 135.873**  
20 **delays the trial of a defendant in custody pending trial, upon the re-**  
21 **quest of the defendant the court shall order the release of the de-**  
22 **fendant.**

23 **SECTION 5.** Section 6 of this 2021 Act is added to and made a part  
24 of ORS 135.805 to 135.873.

25 **SECTION 6.** (1)(a) The court may, at any time after arraignment,  
26 upon motion of a party and notice to the adverse party, order a depo-  
27 sition when:

28 **(A) The court finds that a prospective witness may be unable to**  
29 **attend or prevented from attending a trial or hearing;**

30 **(B) A witness refuses to discuss the case with either the district**  
31 **attorney or defense counsel, and the witness's testimony is material**

1 and necessary; or

2 (C) There is good cause shown to take the deposition.

3 (b) The court may require that any witness subject to a deposition  
4 under this section produce any designated books, papers, documents  
5 or tangible objects, not privileged, at the same time and place as the  
6 deposition.

7 (c) A person named as a victim in the charging instrument may  
8 refuse to be deposed.

9 (2) The party at whose request the deposition is to be taken shall  
10 give to the adverse party reasonable written notice of the time and  
11 place for taking the deposition. The notice shall state the name and  
12 address of each person to be examined. On motion of a party upon  
13 whom the notice is served, the court for cause shown may extend or  
14 shorten the time and may change the place of taking.

15 (3) A deposition shall be taken in the manner provided in civil  
16 actions. A deposition may not be used in evidence against any de-  
17 fendant who has not had notice of, and an opportunity to participate  
18 in or be present at, the taking of the deposition.

19 (4) Any deposition may be used by any party for the purpose of  
20 contradicting or impeaching the testimony of the deponent as witness,  
21 or as substantive evidence as permitted under the Oregon Evidence  
22 Code.

23 (5) Objections to receiving in evidence a deposition or part thereof  
24 may be made as provided in civil actions.

25 SECTION 7. Sections 5 and 6 of this 2021 Act and the amendments  
26 to ORS 135.805, 135.815, 135.845 and 135.865 by sections 1 to 4 of this 2021  
27 Act apply to offenses alleged to have occurred on or after the effective  
28 date of this 2021 Act.

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