

March 24, 2021

To: Chair Prozanski and Members of the Committee on Judiciary and
Ballot Measure 110 Implementation

From: Alexis Fisher
Lewis & Clark Northwestern School of Law
J.D. Candidate 2021
Law Clerk at Brindle McCormack, P.C.

Re: SB 751

I give this statement in support of SB 751. Over the past 2 years I have conducted a survey of all of the county district attorney offices in the state to determine whether each office has a formal written discovery policy and, if so, what that discovery policy was and how the office interpreted their duties and obligations under ORS 135.805, 135.815, 135.845, and 135.865. I also conducted research of the discovery statutes in other states in order to inform suggestions to improve Oregon's discovery statutes. The survey yielded results showing vast differences between the counties in regards to their discovery policies and interpretation of a prosecutor's duty and obligations therein. Clarity is required in Oregon's discovery statutes to ensure that the implementation of discovery is consistent, predictable, and efficient.

SB 751 addresses many of the issues with Oregon's current discovery statutes. It is currently not clear as to how the discovery should be disclosed and what is meant by the term "disclose," when discovery should be disclosed, nor is it clear as to what information and discovery should be disclosed. SB 751 addresses these issues in the current statutes by: defining "disclose" in ORS 135.085 to mean "provide a hard copy or an electronic copy of discovery" unless it cannot be reasonably provided, deleting "as soon as practicable" from ORS 135.845 and inserting an initial disclosure "immediately, and no later than the time of the initial appearance..." and continuing disclosure obligations to disclose discovery within seven days of the information becoming known to a party, and clearly defining what discovery should be provided with emphasis on *Brady* materials which may support an affirmative defense or may be used to impeach a witness in ORS 135.815 and deleting the provision which limited expansion of disclosure to law enforcement files.

These changes will create clarity in discovery procedure. The specification of the method of disclosure and what is meant by "disclose" will help to avoid individual interpretation of

“disclose” justifying delay of disclosure or withholding of copies. The mandatory initial disclosures occurring immediately after the initial appearance and with supplemental disclosures occurring within seven days of the material becoming known to the party is a burden, but it is a way to keep both parties apprised of the information in a case so both parties can make informed decisions. This will reduce the risks under the current ORS 135.845 which requires disclosure after arraignment or before a plea is entered which may leave defense counsel uninformed during plea negotiations. Lastly, the clarity as to the materials which will be included in the mandatory disclosure will take out ambiguity as to what the prosecution should disclose.

To increase clarity and decrease risk of ambiguity, I would further suggest: requirement of written procedure in each district attorney office, requirement of a explaining the nature of materials which cannot be reasonably be provided under ORS 135.805 such as those “materials of an intangible nature,” define “possession or control of the district attorney” under ORS 135.815 to include agencies associated with the investigation and delete “a person the district attorney intends to call as a witness at trial,” for impeachment material.

The further additions of deposition of witnesses and the dismissal remedy for violation of discovery obligations will add to the efficiency of Oregon’s discovery process. These additions will provide additional information for all parties involved to make informed decisions, and the proposed remedy will provide an incentive to make timely disclosures and cooperate with opposing counsel regarding discovery obligations. This cooperation and increased information will lead to less required court involvement due to adequate discovery and informed negotiations and decisions leading to trial.

SB 751 will provide increased clarity and efficiency for discovery procedure. These proposals will also create a more fair and just criminal justice system with procedures allowing for greater truth-finding functions. Oregon needs to eliminate misinterpretations and ambiguities in the discovery process. With this bill, Oregon is on the way.