

AMENDED IN ASSEMBLY MAY 30, 2017  
AMENDED IN ASSEMBLY APRIL 20, 2017  
AMENDED IN ASSEMBLY APRIL 6, 2017  
AMENDED IN ASSEMBLY MARCH 30, 2017  
CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

**ASSEMBLY BILL**

**No. 889**

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**Introduced by Assembly Member Mark Stone**

February 16, 2017

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An act to amend Section 1002 of, and to add Section 1002.5 to, the Code of Civil Procedure, relating to secrecy agreements.

LEGISLATIVE COUNSEL'S DIGEST

AB 889, as amended, Mark Stone. Secrecy agreements.

Existing law specifies that certain types of confidential or privileged information shall not be introduced as evidence in a court action. Existing law generally permits the parties to a civil action to include, as a condition to a settlement, a provision requiring that information about the settlement or the underlying dispute be kept confidential; however, existing law prohibits a confidential settlement agreement in a civil action with a factual foundation establishing a cause of action for civil damages for an act that may be prosecuted as a felony sex offense. Existing law also establishes that flouting this prohibition is grounds for professional discipline for an attorney, and it requires the State Bar of California to investigate and take appropriate action in any case brought to its attention.

This bill would instead authorize but not require the State Bar to investigate these cases of attorney misconduct. This bill would also

provide that in an action based upon the existence of a danger to the public health or safety, as defined, information relating to the danger that was discovered during the course of litigation shall not be kept secret pursuant to an agreement of the parties or a court order, except pursuant to a court order based upon ~~independent findings, as specified, and specified findings.~~ *This bill would permit affected persons to contest in court a confidentiality provision in a final order, judgment, or written settlement agreement that violates this prohibition. The bill would similarly establish that flouting this prohibition is grounds for professional discipline for an attorney.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
 State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. It is the intent of the Legislature to better protect
- 2 Californians from death or substantial injury caused by any danger
- 3 to the public health or safety, including defective products and
- 4 environmental hazards, by creating a presumption against secrecy
- 5 that protects the openness of information acquired through
- 6 discovery. This presumption is to apply to settlement and
- 7 confidentiality agreements, whether or not filed with the court,
- 8 and to all stipulations for protective orders that would limit the
- 9 disclosure of information acquired through discovery.
- 10 SEC. 2. Section 1002 of the Code of Civil Procedure is
- 11 amended to read:
- 12 1002. (a) Notwithstanding any other law, a provision within
- 13 a settlement agreement that prevents the disclosure of factual
- 14 information related to the action is prohibited in any civil action
- 15 the factual foundation for which establishes a cause of action for
- 16 civil damages for any of the following:
- 17 (1) An act that may be prosecuted as a felony sex offense.
- 18 (2) An act of childhood sexual abuse, as defined in Section
- 19 340.1.
- 20 (3) An act of sexual exploitation of a minor, as defined in
- 21 Section 11165.1 of the Penal Code, or conduct prohibited with
- 22 respect to a minor pursuant to Section 311.1, 311.5, or 311.6 of
- 23 the Penal Code.
- 24 (4) An act of sexual assault, as defined in paragraphs (1) to (9),
- 25 inclusive, of subdivision (e) of Section 15610.63 of the Welfare

1 and Institutions Code, against an elder or dependent adult, as  
2 defined in Sections 15610.23 and 15610.27 of the Welfare and  
3 Institutions Code.

4 (b) Notwithstanding any other law, in a civil action described  
5 in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall  
6 not enter, by stipulation or otherwise, an order that restricts the  
7 disclosure of information in a manner that conflicts with  
8 subdivision (a).

9 (c) Subdivisions (a) and (b) do not preclude an agreement  
10 preventing the disclosure of any medical information or personal  
11 identifying information, as defined in subdivision (b) of Section  
12 530.55 of the Penal Code, regarding the victim of the offense listed  
13 in subdivision (a) or of any information revealing the nature of the  
14 relationship between the victim and the defendant. This subdivision  
15 shall not be construed to limit the right of a crime victim to disclose  
16 this information.

17 (d) Except as authorized by subdivision (c), a provision within  
18 a settlement agreement that prevents the disclosure of factual  
19 information related to the action described in subdivision (a) that  
20 is entered into on or after January 1, 2017, is void as a matter of  
21 law and against public policy.

22 (e) An attorney's failure to comply with the requirements of  
23 this section by demanding that a provision be included in a  
24 settlement agreement that prevents the disclosure of factual  
25 information related to the action described in subdivision (a) that  
26 is not otherwise authorized by subdivision (c) as a condition of  
27 settlement, or advising a client to sign an agreement that includes  
28 such a provision, may be grounds for professional discipline and  
29 the State Bar of California may investigate and take appropriate  
30 action in any such case brought to its attention.

31 SEC. 3. Section 1002.5 is added to the Code of Civil Procedure,  
32 to read:

33 1002.5. (a) As used in this section, the following terms have  
34 the following meanings:

35 (1) "Danger to the public health or safety" means a defective  
36 product or environmental hazard that has caused or is likely to  
37 cause repeated significant or substantial bodily injury or death.

38 (2) "Defective product" means a product that may be defective  
39 because of a defect in manufacturing, or design, or a failure to  
40 adequately warn the consumer of a hazard involved in the

1 foreseeable use of the product, where the defect may result in  
2 bodily injury or death to one or more persons.

3 (3) “Environmental hazard” means a release of a hazardous  
4 substance that poses a threat to public health or safety involving  
5 danger of death, bodily injury, or health disability to human beings  
6 exposed to hazardous substance release.

7 (4) “Independent finding” means a finding by the court based  
8 solely on the court’s review of the law as applied to the facts of  
9 the case, and not based in whole or in part on a stipulation of the  
10 parties to keep information secret or arguments in support of a  
11 stipulation to keep information secret.

12 (5) “Personally identifiable information” includes the following:

13 (A) The identity of, or personal information about, victims of  
14 harm, including children and victims of abuse.

15 (B) Personal contact information of corporate officers or board  
16 members, or information relating to any individual’s finances,  
17 medical history, health, or similar information.

18 (b) Notwithstanding any other law, in any civil action in which  
19 the pleadings state facts relevant to the existence of a danger to  
20 the public health or safety, an agreement between the parties that  
21 restricts the disclosure of information relating to that danger shall  
22 be void as contrary to public policy and shall not be enforced by  
23 a court or tribunal unless the agreement is entered by the court  
24 pursuant to paragraph (2) of subdivision (c). This subdivision does  
25 not prohibit parties from keeping confidential the settlement  
26 amount.

27 (c) (1) Except as provided in paragraph (2), in any civil action  
28 in which the pleadings state facts relevant to the existence of a  
29 danger to the public health or safety, ~~a court shall not enter, by~~  
30 ~~stipulation or otherwise, an order that does any of the following:~~  
31 *safety caused by a defective product or environmental hazard,*  
32 *there shall be a presumption that disclosure of information relating*  
33 *to that danger shall not be restricted, and a court shall not enter,*  
34 *by stipulation or otherwise, an order that does any of the following:*

35 (A) Restricts the disclosure of information about the danger.

36 (B) Approves a settlement agreement that would restrict the  
37 disclosure of information about the danger.

38 (C) Restricts access to court records containing information  
39 about the danger.

1 (2) A court may enter an order otherwise prohibited by this  
2 subdivision if it first makes an independent finding either that the  
3 *finds that either of the following conditions is satisfied:*

4 (A) ~~The order will not restrict the disclosure of information~~  
5 ~~pleadings do not state facts relevant to the protection of existence~~  
6 ~~of a danger to the public health or safety, or that all of the~~  
7 ~~following criteria are met: safety.~~

8 (A)

9 (B) ~~The public interest in the disclosure of the information is~~  
10 ~~The presumption in favor of disclosure of the information is clearly~~  
11 ~~outweighed by a specific and substantial overriding interest in~~  
12 ~~maintaining the confidentiality of the information or records in~~  
13 ~~question, such as state-of-the-art trade secrets or a current~~  
14 ~~proprietary customer list, and the overriding interest supports~~  
15 ~~keeping the information secret. and the order does not restrict any~~  
16 ~~more information than is necessary to protect that interest. A court~~  
17 ~~shall not base this finding on the existence of a stipulation to keep~~  
18 ~~the information secret.~~

19 (B) ~~A substantial probability exists that the specific and~~  
20 ~~substantial interest will be substantially prejudiced if the~~  
21 ~~information is not kept secret.~~

22 (C) ~~The request for an order is no broader than necessary to~~  
23 ~~protect the specific and substantial overriding interest asserted,~~  
24 ~~and the order is narrowly tailored to protect the secrecy only of~~  
25 ~~that information for which an overriding specific and substantial~~  
26 ~~overriding interest exist.~~

27 (D) ~~A less restrictive means to avoid the substantial prejudice~~  
28 ~~to the specific and substantial overriding interest does not exist.~~

29 (E) ~~The information is to be kept secret no longer than necessary~~  
30 ~~to meet the requirements of this paragraph.~~

31 (3) A party who is the proponent for the entry of an order under  
32 paragraph (2) has the burden of proof in obtaining the order. *The*  
33 *proponent, in his or her request for the order, shall set forth with*  
34 *particularity the specific information for which protection is*  
35 *sought, the specific and overriding interest necessitating*  
36 *confidentiality, such as that the information relates to a current*  
37 *proprietary customer list, or that the information is a trade secret*  
38 *that would give the proponent's competitors valuable proprietary*  
39 *information if revealed.*

40 (d) This section does not apply to or affect any of the following:

1 (1) The confidentiality of preagreement negotiations, settlement  
 2 discussions between mediation participants pursuant to Chapter 2  
 3 (commencing with Section 1115) of Division 9 of the Evidence  
 4 Code, or of evidence protected by Section 1153.5 or 1154 of the  
 5 Evidence Code.

6 (2) Actions relating to a business dispute, including actions for  
 7 breach of contract, in which all the parties are business entities.

8 (3) A trade secret, as defined in Section 3426.1 of the Civil  
 9 Code, ~~that is not related to a danger to the public health or safety.~~  
 10 *Code. A “trade secret” does not include information or records*  
 11 *about a product that is defective, hazardous, or unlikely to be used*  
 12 *by a competitor to the proponent’s competitive disadvantage.*

13 (4) Personally identifiable information.

14 (e) An attorney’s failure to comply with the requirements of  
 15 this section by demanding that a provision be included in a  
 16 settlement agreement that violates subdivision (b) may be grounds  
 17 for professional discipline and the State Bar of California may  
 18 investigate and take appropriate action in any such case brought  
 19 to its attention. This section does not prevent an attorney for a  
 20 party from requesting an order under paragraph (2) of subdivision  
 21 (c).

22 (f) This section does not eliminate or supplant existing legal  
 23 standards governing protective orders, the sealing of court records,  
 24 or confidential settlements, but, rather, imposes additional  
 25 requirements that must be independently satisfied.

26 (g) ~~An affected~~A person, including a representative of the news  
 27 media, may bring an action to contest *a confidentiality provision*  
 28 *in* a final order, judgment, or written settlement agreement that  
 29 violates this section in the court in which the case was ~~filed.~~ *filed,*  
 30 *if all of the following conditions are satisfied:*

31 (1) *The person makes a prima facie case that the order or*  
 32 *settlement restricts information concerning a danger to public*  
 33 *health or safety.*

34 (2) *Public knowledge of the information will decrease the*  
 35 *likelihood of harm caused by the danger to public health or safety.*

36 (3) *The action contesting the confidentiality provision will not*  
 37 *delay or prejudice the rights of the parties to the underlying action.*