What Every Construction Lawyer Should Know about Mandatory Mediation Under SB 440

ADR Services, Inc. Construction Powerhouse Seminar

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John Hanover, Esq. & Ted Levin, P.E., Esq.

I. Introduction and Framing

Why This Statute Matters Now

- Persistent payment disputes in private construction
- Cost and delay of lien litigation

Legislative Response

Creation of a **structured pre-litigation claims resolution process** to address the growing burden of payment disputes before they escalate to full litigation.

Key Takeaway

This is a **procedural tool**, not a replacement for traditional remedies. It supplements existing rights and provides a structured pathway to early resolution.

II. Statutory Overview

Civil Code § 8850 — Substance

Establishes a **claims resolution / meet-and-confer process** and **mediation process** for private works of improvement. Governs **payment-related disputes** between parties in the construction payment chain.

Civil Code § 8851 — Sunset

The statute **repeals January 1, 2030**, functioning as a **legislative trial period**. This experimental structure allows the Legislature to evaluate effectiveness before making the process permanent.

III. Legislative Purpose and Policy Goals

Early Resolution

Encourage early, informal resolution and payment to reduce friction in the construction payment chain.

Economic Stability

Promotes economic stability in the construction industry by reducing the financial burden of prolonged disputes.

Reduce Filings

Reduce mechanics lien filings and litigation costs by resolving disputes before they reach the courthouse.

Improve Cash Flow

Improve cash flow in construction projects and communication among all project participants.

IV. Scope of § 8850

A. Covered Parties

- Direct contractors
- Subcontractors
- Other claimants in the payment chain

B. Covered Disputes

- Progress payments
- Retention
- Change orders
- Time-related claims
- Other compensation disputes tied to work performed

C. Projects Covered

Private works only – contracts executed after **January 1, 2026**

Does **not** apply to residential projects unless mixed-use or greater than 4 stories

Does **not** apply to public works – separate statutory schemes govern those projects

V. Structure of the Claims Resolution Process

A. Initiation of Claim

Written Claim Requirement

- Amount claimed
- Description of work performed
- Basis for entitlement

Strategic Considerations

- Level of detail included in the claim
- Supporting "reasonable" documentation to substantiate the claim

A well-drafted initial claim sets the tone for the entire resolution process. Invest time in precision and documentation from the outset.

B. Service of Claim

Required Recipients

- Owner
- Direct contractor (if applicable)

Method of Service

Practical considerations apply to the method of service. Proper service is essential to trigger the statutory timeline and preserve all rights under the process.

⚠ Improper service may undermine the effectiveness of the claim and create procedural vulnerabilities. Confirm service method complies with statutory requirements.

C. Response Obligations

Written Reply

Respond in writing within 30 days

Itemize Amounts

Identify disputed and undisputed amounts

Pay Undisputed

Pay within 60 days or accrue 2% monthly

The responding party must reply in writing within **30 days** (or longer by mutual written agreement). Timely and substantive engagement is critical – the response must identify both disputed and undisputed amounts owed. Undisputed amounts must be paid within **60 days** after the date of response to the claim, or interest accrues at **2% per month**.

D. Meet-and-Confer Conference

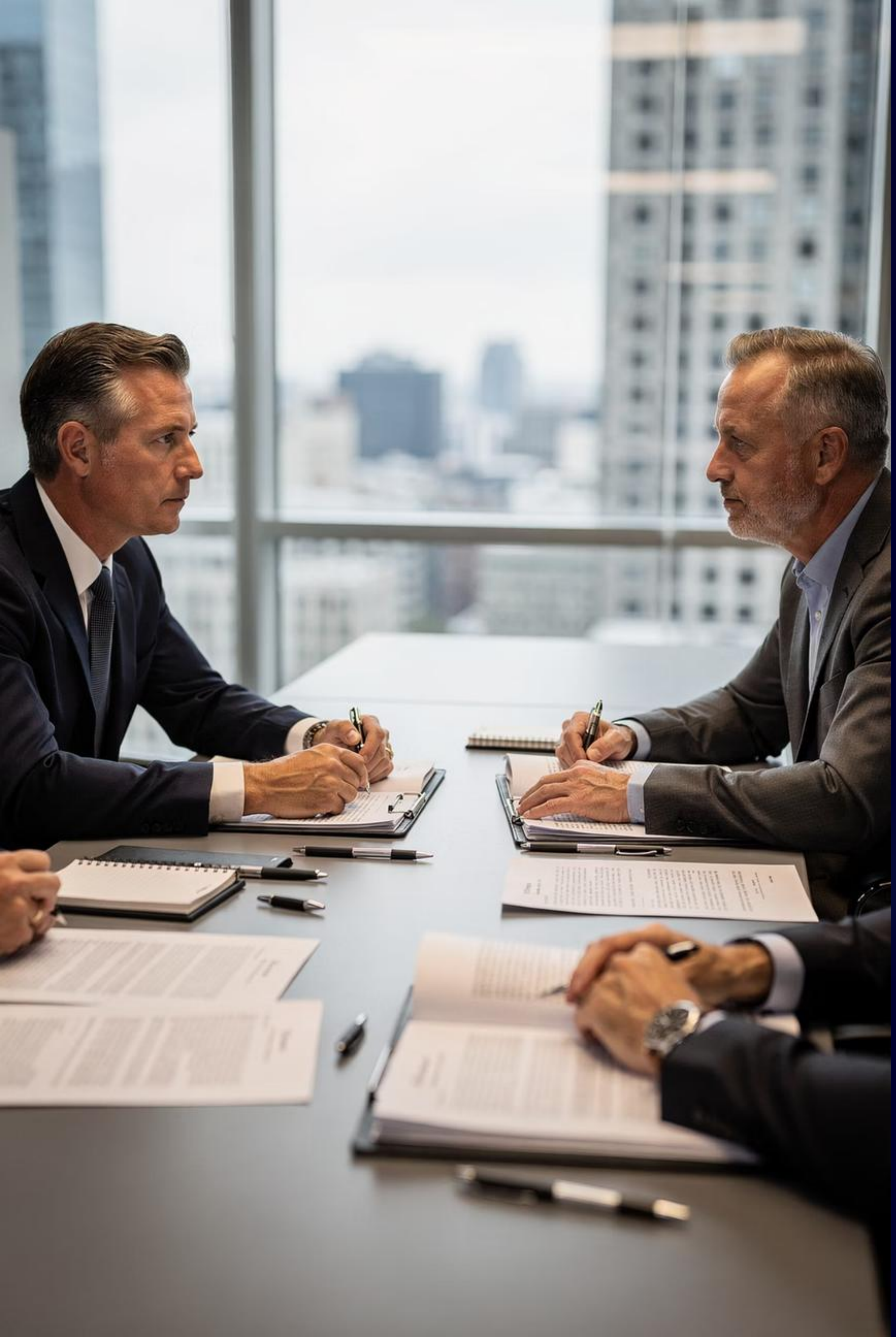
1 **Written Demand**
Party issues written demand for informal meet-and-confer conference

2 **Within 30 Days**
Required informal meet-and-confer conference must occur – **good faith participation** is mandatory

3 **Within 10 Days After**
Owner's written response identifying remaining disputed and undisputed claims

4 **Within 60 Days**
Payment of undisputed amounts following written response

The meet-and-confer conference is the **core of the statute**. Good faith participation is not optional – it is a statutory requirement with real consequences for non-compliance.



E. Mandatory Mediation — Contractor Claims

01

Disputed Claims Remain

If disputed claims remain after the informal conference, parties **shall** submit to nonbinding mediation.

02

Agree on Mediator

Parties must mutually agree to a mediator within **10 days** after disputed claims are identified. If no agreement, the contractor may select the mediator.

03

Share Costs Equally

Parties equally share in the expense of mediation.

04

Outcome

If mediation is unsuccessful, any amounts later determined to be owed shall bear interest at **2% per month** from the date they would have been due. Parties may agree in writing to waive procedures if proceeding to arbitration or civil action.

F. Subcontractor Claims

Contractor Presents Claim
After request, contractor shall present subcontractor or lower-tier subcontractors' claims to the owner.

30-Day Notification
Within 30 days after subcontractor request, contractor must notify subcontractor whether claim has been submitted and, if not, why not.

Documentation Required
Subcontractor must provide timely and reasonable documentation of the claim to support the contractor's presentation.

Participation Mandatory
Subcontractor shall participate in informal conference, mediation, and dispute resolution process.

Written Approval Required
Contractor must obtain **written approval** before settling any claim of a subcontractor.

Lien Rights Preserved
This process does **not** preclude subcontractors' exercise of mechanics lien or stop notice rights. Those remedies remain fully available in parallel.

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G. Right to Suspend Work

⚠ The right to suspend work is a powerful remedy – but it must be exercised precisely according to statutory procedures to avoid penalty.

1

Step 1: Written Notice

Owner is informed by **registered or certified mail, return receipt requested**, that payment is due.

2

Step 2: Wait 30 Days

At least **30 days** must pass following the written notice of payment due before the next step.

3

Step 3: 10-Day Stop Work Notice

Contractor or subcontractor must serve a **10-day notice of intent to stop work**.

Both contractors and subcontractors have the right to suspend work **without penalty** until payment is received, provided they follow these statutory procedures precisely.

H. Conclusion of the Process

Settlement Reached

The parties reach a mutually acceptable resolution and document the agreement in writing, concluding the statutory process.

Impasse Declared

The parties reach an impasse after good-faith efforts, formally concluding the pre-litigation process without resolution.

Proceed to Dispute Resolution

Parties proceed to contractually prescribed dispute resolution process or litigation, armed with a clearer record of the dispute.

VI. Legal Effect of the Process

What the Process Is

- **Nonbinding** unless a settlement agreement is reached
- A structured opportunity to narrow issues
- A concurrent settlement track alongside litigation
- A mechanism to establish a record for later proceedings

What the Process Is Not

- Does **not** automatically adjudicate rights
- Does **not** replace litigation or arbitration
- Does **not** toll statutory deadlines unless otherwise agreed

The process may narrow issues and discovery scope, potentially reducing the cost and complexity of any subsequent litigation.

VII. Interaction with Other Remedies

A. Mechanics Liens

Critical Issue: Mechanics lien deadlines likely continue running during the claims resolution process. Strategic coordination is required to avoid inadvertently losing lien rights while pursuing the statutory process.

Deadline Awareness

Track all mechanics lien recording deadlines independently of the § 8850 process. Do not assume the process tolls any statutory period.

Strategic Coordination

Coordinate the claims resolution process with lien strategy. Consider recording a lien as a protective measure while simultaneously pursuing the statutory process.

B. Stop Payment Notices

Parallel Proceedings

Stop payment notices can proceed **in parallel** with the § 8850 claims resolution process. The two remedies are not mutually exclusive and may be pursued simultaneously for maximum leverage.

Strategic Value

Maintaining a stop payment notice while engaging in the claims resolution process preserves the claimant's position and creates additional pressure for timely resolution.

C. Litigation / Arbitration

Precede Filing

The § 8850 process may precede the filing of a civil action or arbitration demand, potentially resolving the dispute before formal proceedings begin.

Influence Pleadings

The record developed during the claims resolution process may influence pleadings and defenses in subsequent litigation, shaping the contours of the dispute.

Waiver by Agreement

Parties may agree in writing to waive the statutory procedures if they are proceeding directly to arbitration or commencement of a civil action.

VIII. Strategic Use in Practice

A. For Claimants

Opportunities

- Use as an **early payment pressure mechanism**
- Opportunity to test defenses before full litigation
- Set up recovery of pre-judgment interest at **2% per month**

Risks to Manage

- Delay without resolution if the process is used as a stalling tactic
- Missing critical lien deadlines while engaged in the process

⚠ Always track lien deadlines independently – the process does not automatically toll them.

B. For Owners

Opportunities

- Resolve disputes early before they escalate to costly litigation
- Avoid escalation and the reputational damage of prolonged disputes
- Maintain project momentum and relationships

Risks

- Risk of appearing noncooperative if participation is inadequate or in bad faith
- Delaying work by failing to resolve payment disputes promptly
- Exposure to 2% monthly interest on undisputed amounts not timely paid

C. For Counsel

1

Integrate into Pre-Litigation Strategy

Incorporate § 8850 procedures into pre-litigation planning and case development from the earliest stages of a dispute.

2

Initiate vs. Bypass

Consider carefully whether to initiate the statutory process or bypass it — each choice has strategic implications for the client's position.

3

Nonwaivable Provisions

Provisions of the statute are **nonwaivable**. Counsel must advise clients accordingly and ensure contracts do not purport to waive statutory rights.

IX. Procedural and Practical Pitfalls

Incomplete Claims

Incomplete or vague claims fail to trigger the process properly and may undermine the claimant's position.

Failure to Respond

Failure to respond within statutory deadlines creates exposure to interest liability and adverse inferences.

Lack of Documentation

Insufficient documentation weakens claims and responses alike, reducing the effectiveness of the process.

Mandatory Participation

Misunderstanding whether participation is mandatory can lead to waiver of rights or procedural default.

Statutory Deadlines

Confusion over the impact on statutory deadlines — particularly mechanics lien periods — can result in permanent loss of rights.

Stop Work Risks

Rushed timelines for significant claims and use of stop work as a draconian remedy for small claims can backfire strategically.

X. Drafting and Contractual Considerations

Consider Including

- Reference to § 8850 in contracts to align expectations
- Internal dispute procedures aligned with the statute
- Clear attorney's fees provisions that account for the process

Avoid

- Provisions that conflict with statutory rights – these create ambiguity and potential unenforceability
- Waiver language that purports to eliminate nonwaivable statutory protections

Strategic Impact

Thoughtful contract drafting that aligns with § 8850 can:

- Strengthen attorney's fees arguments
- Improve settlement posture
- Reduce ambiguity in dispute resolution clauses
- Signal good faith to counterparties and courts

XII. Civil Code § 8851 — Sunset Analysis

2030

Repeal Date

January 1, 2030 – the statute automatically repeals unless the Legislature acts to extend or make it permanent.

4

Years Remaining

Approximately four years of operation remain under the current sunset provision.

Experimental / Pilot Nature

The sunset provision signals that § 8850 is a legislative experiment. The Legislature will evaluate its effectiveness before deciding whether to extend, amend, or allow it to expire.

Possible Amendment or Extension

Legislative amendment or extension is possible – and perhaps likely – if the process proves effective in reducing lien filings and litigation costs.

⚠ **Practice Impact:** Monitor legislative updates closely. Be cautious in long-term contract planning that relies on the continued existence of this process beyond January 1, 2030.

XIII. Hypotheticals / Case Studies

Scenario 1

Subcontractor Unpaid Progress Billing

A subcontractor completes a phase of work but receives no payment. How does § 8850 apply? What are the timing requirements, documentation needs, and strategic options?

Scenario 2

Retention Dispute at Project Completion

Owner withholds retention citing alleged deficiencies. Contractor disputes the basis. How does the meet-and-confer process unfold, and what leverage does each party hold?

Scenario 3

Change Order Disagreement Escalates

A disputed change order grows into a significant claim. How does the statutory process interact with the contract's change order provisions and dispute resolution clause?

Scenario 4

Party Refuses to Participate

One party refuses to engage in the meet-and-confer or mediation. What are the consequences? What remedies are available to the participating party?

XV. Q&A / Discussion Topics & Speaker Contact Information

John Hanover

jhanover@adrservices.com

Case Manager: eveteam@adrservices.com

Ted Levin

tlevin@adrservices.com

Case Manager: eveteam@adrservices.com

Discussion Topics

- How does your firm currently handle pre-litigation payment disputes?
- What documentation practices should change in light of § 8850?
- How will you integrate this process into your standard contract templates?
- What are the biggest risks for your clients under this new framework?
- How do you coordinate § 8850 with mechanics lien strategy?