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Introduction

Welcome to our Guide to Getting the Most Out of Backchannel!

We designed this Guide to help you get comfortable with Backchannel and masterfully use it to achieve your clients' goals. The Guide is written by legal practitioners for legal practitioners.

Every attorney will approach Backchannel differently. That is ok. This Guide will share some best practices for using Backchannel, but they are only suggestions. You may even want to come up with your own guidebook for using Backchannel at your firm.

Overview

Backchannel is the premier tool for resolving disputes efficiently and effectively.

At its core, Backchannel uses a secure system to allow parties to place “Backchannel Bids”—the confidential amount a party is willing to settle for. Backchannel checks the Bids for matches or overlaps, all without a human needing to oversee the process. This means that you get a chance to resolve a dispute without risking your settlement position.

The beauty of Backchannel is that no one—not the other side, not a mediator, not a court—knows your Bid. Unless, of course, the numbers match, and you have a deal.

With Backchannel, you can avoid all the bluster, the wasted time, and the offers and demands designed to “send a message.” Backchannel can be used without mediation, but it can also be used to enhance a mediation and improve your chances of reaching a resolution. Backchannel allows you to get right to real numbers without worrying that they will be used against you in the negotiation.

Parties using Backchannel are not punished for being reasonable—something common in traditional negotiations and mediations. In fact, Backchannel rewards parties who use reasonable and realistic settlement numbers.

Backchannel Rules

To get the most out of Backchannel, you need to understand the rules and how it works. From there, you can develop your strategy to achieve your clients' goals.

The basic rules of Backchannel are set forth in boxes below. Comments, suggestions, and thoughts are below each box.

Backchannel's process has three steps: Set the Terms, First Bids, and Live Bidding.

Step 1: Set the Terms

After you create a matter and your counterparty joins, Backchannel will ask you and/or your counterparty to upload the non-monetary terms that will apply to a deal reached through Backchannel. You and your counterparty can also agree to skip this step.

Before you start Backchanneling, you should determine what you are negotiating (in other words, the non-monetary terms of a deal). Backchannel will allow you to either upload deal terms or skip this step.

We suggest that the parties come to an agreement on non-monetary terms or create a Memorandum of Understanding (an MOU). Deal terms can take any form that the parties wish: everything from a full settlement agreement to a short MOU. If a deal is reached, the terms will clarify the parties' non-monetary obligations and avoid any confusion later.

Practice Tip: We believe the best practice is to use a full settlement agreement prior to Backchanneling so that all the deal terms are clear. A settlement agreement (without the settlement number, of course) helps both sides fully evaluate what they are negotiating. This is especially true in complex cases like class and collective actions where the deal terms greatly affect how to value the case. By way of example, it greatly matters whether a settlement is a "claims made" class settlement or one where the entire settlement fund is to be paid.

Backchannel Rules

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We understand that litigators often want to negotiate a number first and then iron out the details later. Although we don't recommend skipping Set the Terms, Backchannel allows you to do so and go right to numbers.

Step 2: First Bids

In Step 2, each party has 48 hours to submit their first Backchannel Bid. You can submit your number at any point during the 48-hour period, and you can change your number as often as you wish during the 48-hour period. At the conclusion of the 48 hours, Backchannel will check the last-submitted Bids for a match or an overlap.

Once you and your counterparty have worked out any deal terms or agreed to skip that step, Backchannelling begins. You might think of this step as a setup phase, where each party has 48 hours to submit their initial Bid.

At the end of the 48-hour period, Backchannel begins checking for a match or overlap. If there is a match or overlap with the first Bids, Backchannel ends with a deal immediately. Otherwise, the parties can modify their Bids to try to trigger a match.

Several points are important.

First, your counterparty will not see your Bid, and you will not see their Bid.

Second, you can change your Bid at any point during the 48-hour period. Backchannel will only use your most recent number.

Third, Backchannel will only check for a match or overlap at the end of the 48-hour period. If there is a match or overlap, Backchannel will notify the parties that there is a deal and at what number. If there is no match or overlap, then Backchannel moves to Step 3: Live Bidding.

Backchannel Rules

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Practice Tip: When coming up with your number, make sure your client understands that your Backchannel Bid is not like an offer or demand you might convey in a mediation or letter. It does not “send a message” or act as a as a proposal that the other side might accept. Unless there is a match, your counterparty will not know your number. Because neither party will know the other’s position unless a match is made, it doesn’t benefit you to “start high” if you are demanding money or “start low” if you are offering money. Doing so will decrease your odds of success.

Step 3: Live Bidding

If the parties’ First Bids do not match or overlap, Live Bidding begins. For 28 days, each party can change their Bid as many times as they wish. Backchannel will check for a match every time that a party changes their Bid.

Olive Branch Bonus: In this step, Backchannel will adjust the final number by 5% in favor of the party who submits a Bid that is subsequently matched or overlapped by the other party.

Live Bidding starts if the parties’ First Bids did not match or overlap. From here, the parties will have 28 days to modify their numbers to try to trigger a match. You don’t have to adjust your numbers if you don’t want to. You are in total control.

During Live Bidding, two things change.

First, Backchannel will check for a match each time either party modifies their number. If Backchannel calculates a match, it will notify the parties as soon as it happens.

Second, Backchannel adjusts the settlement number by 5% in favor of the party that submitted a Bid that is subsequently matched or overlapped by the other party. This means that it is to your benefit to get to your best number as soon as possible.

Backchannel Rules

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For example, assume the plaintiff demands \$50,000 as their First Bid. The defendant offers \$20,000. No match is made at Step 2. During Live Bidding, the defendant reevaluates his position and increases his offer to \$25,000. Nothing happens because there is no match. Later in the week, the plaintiff changes his demand to \$25,000. A match is triggered. The defendant was the first one to the matching number so receives the 5% bonus in his favor. Accordingly, Backchannel will inform the parties that the deal is reached at \$23,750.

Practice Tip: Backchannel is designed to get the parties together as soon as possible. At this stage, however, you know that your initial number did not trigger a match. This is a good time to do three things:

First, consider sending additional information to your counterparty. Although you need not reveal your true Backchannel number, you could consider giving a sense of where you value the case. You can also send information that might help your counterparty value the case: legal authorities, arguments, documents, etc.

Second, consider adjusting your own side's number. Revisit with your client what their true top or bottom lines are and why. Go through the risks, rewards, and costs involved. Are you considering the time value of money, upcoming legal fees, the risk of unresolved legal or factual issues? Ask your client to consider what it would mean to get a deal done today.

Third, consider supplementing Backchannel with formal mediation. Because you are already Backchanneling, a mediation may help push the parties far enough to reach a deal. Often, courts can assist in setting up a mediation.

Backchannel Rules

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Matching + Overlap Rules

Matching: If one party offers the same amount that their counterparty demands, this is a “Match.”

Overlap: If one party offers more money than their counterparty demands, this results in an overlap.

The goal of using Backchannel is to reach a deal on a number. Sometimes, a deal is reached when the parties’ numbers match exactly. Other times, it is because the parties’ numbers overlap in a way that allows for a range of acceptable settlement numbers.

A match is straightforward: if the parties input an offer and demand that are the same number, then that becomes the dealmaking number.

Overlaps are handled differently than matches. Overlaps create a range in which a deal can be made. For example, if a party demands \$5,000 and their counterparty offers \$10,000, a deal could be made between \$5,000 and \$10,000. Backchannel selects a random number within the overlap range as the dealmaking number. This is done to mask the parties’ offers and demands. That number is then rounded, according to Backchannel’s internal, neutral rounding rules. This means that the final number could be better than your Backchannel Bid.

Practice Tip: Because Backchannel will select a random number within an overlap range, you might initially think that you could skew results in your favor by using a better number than you might accept. We don’t recommend doing so because it will decrease the likelihood of any match being made. If no match is made, you will never know how close you were to a deal.

Backchannel Rules

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“Zero” Offers and Demands

In rare cases, a party might consider offering or demanding zero. For example, a plaintiff may “demand” \$0 to resolve a case that poses some risk to the plaintiff. Likewise, parties suing each other might also both demand \$0 as a “walk away.”

Backchannel handles “zeroes” as follows:

- If a party demands zero and the counterparty offers at least zero, there is a match.
- If a party offers zero and the counterparty demands anything greater than zero, there is no match.
- If both parties demand zero, then there is a match at zero.
- If both parties offer zero, then there is a match at zero.

Because entering a zero can result in a match, if you do not want to trigger a match and, rather, want no active offer or demand, Backchannel allows you to withdraw all your outstanding Bids. In that case, no match will be made.

When to Use Backchannel

Backchannel is designed to be used at any point in a legal dispute, including pre-filing. Because Backchannel protects your settlement position, you can use Backchannel even when you might hesitate to otherwise start settlement discussions.

Backchannel's secret and secure Bid system removes many of the barriers to resolving a case. This means that you can confidently use Backchannel at any point in the case to see if there is a deal.

You don't need to reveal to the other side where your real settlement number is, and you don't need to engage in lengthy sessions of exchanging settlement position statements. You can safely and securely see if there is a deal, and at low cost.

Great times to use Backchannel are:

- **Pre-filing**
- **Before an initial conference, like a Rule 26f conference**
- **Before you start discovery**
- **Midway through discovery or after a key deposition/document exchange**
- **Near or at the conclusion of discovery**
- **Just prior to or immediately after summary judgment filings**
- **Pretrial**
- **Post-trial, pre-verdict**

You can use Backchannel a dispute at multiple points in a case if needed. Backchannel is perfect to use throughout a case as the situation changes.

Preparing to Backchannel

Once you and your counterparty have agreed to Backchannel your clients' dispute, there are some things to do to get the most out of Backchannel and increase your odds of a good resolution.

Set your client's expectations.

As a litigator, you know that your client relies upon you to guide them through the litigation process. Backchannel is no different. You need to advise your client about how to achieve their goals through Backchannel.

Backchannel works best when both sides are prepared and present their real settlement numbers. There is nothing to be gained by using "negotiating numbers" in Backchannel because no one will see those numbers, and using those numbers decreases your odds of getting a deal done.

For that reason, it is important for you to help your client understand the process and what you are trying to accomplish. You need to work with your client to soberly assess the case's strengths, weaknesses, and realistic settlement value. Help your client understand the costs of going forward and the risks and rewards. You should also discuss any other factors that weigh in favor of or against settlement. Is your client concerned about information that might come out or how a certain witness might present? Does your client need money now? Are there other business interests that are affected by the pending litigation or that would be affected by a settlement?

Often, asking a client an abstract question like "what would you be willing to settle for?" is less useful than concrete phrasing like "if the other side were to offer X today, would you be willing to settle at that number?" By drilling down on your clients' goals before starting Backchannelling, you will put your client in the best position to get a deal done.

This can be a difficult conversation because you must operate more as an advisor than an advocate. After this conversation, you should know what your client would be willing to settle for as a top or bottom line.

Preparing to Backchannel

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Use the right level of communication with your counterparty.

In some cases, you will not need much communication with your counterparty prior to Backchanneling the dispute. This is often true in cases with an established value range or a course of conduct between you and the other side. Therefore, exchanging offer/demand letters ahead of time may be of little value.

In other cases, it is helpful to instruct your counterparty about your theory of the case and your evaluation. Sometimes even an initial offer/demand exchange can be useful. Although, because you will be Backchanneling the dispute, you should gauge whether presenting these kind of numbers would help or hurt your chances. Sometimes, it is better to simply discuss best and worst-case scenarios so that each side is informed as to the outside ranges of settlements.

If there is important information or documents that would help your counterparty understand your position and adjust their case valuation, you should consider sending those prior to Backchanneling. It is not going to do you much good to withhold a document that would impact the other side's settlement position.

Pick your start time.

Backchanneling can start at any time, when both parties are ready. That said, we have some general suggestions.

First: Be aware of the calendar. Unless both sides intend to be working over a weekend, it is generally best to not start Backchanneling on a Friday.

Second: Consider whether to start Backchanneling before or after exchanging information. Although it often makes sense to exchange position statements prior to starting, sometimes it does not. For example, you could go through the First Bids step to quickly and easily see if there is a deal. If the case does not resolve at First Bids, the parties could then exchange position statements and engage in additional negotiations to help move the Bids closer.

Preparing to Backchannel

continued

Third: If you are combining Backchannel with a mediation, be thoughtful about which Backchanneling step the mediation will occur in. Generally, it is best to conduct mediation during Live Bidding so that a match can be made instantly.

Handling a No-Match Session

Sometimes, Backchanneling results in no match. This likely means that the parties' expectations are still apart. Sometimes additional information needs exchanged or something needs to happen in the case (a specific deposition, a key ruling, etc.).

Even a no-match session provides useful information to you. You now know that your counterparty will not accept your best number. And, you get this information without having to reveal what that number is.

At this point, you should explore with your counterparty several questions:

What might change one of the parties' settlement position? If it is in the parties' control (exchange documents, schedule a deposition), it is worth doing those things and then Backchanneling again. If it is not in the parties' control (a court ruling), you could agree to start Backchanneling when that event occurs.

Consider whether it is worth formally mediating the matter while also Backchanneling. Backchannel is designed to enhance mediation, with the two complimenting each other.

Final Thoughts

As practitioners, we all know the frustrations and difficulties associated with traditional legal negotiations. Backchannel cuts through the noise and lets you get right to business.

To use it effectively, you will need to help your client think a little differently: what would it really take to resolve this case versus what do you hope to achieve on a good day? Legal negotiations often focus on the second question and treat the former as an afterthought to consider at 4:00 PM on mediation day. Backchannel's secret bidding system allows you to focus on the first question, which is the key question to getting deals done.

Although Backchannel can greatly facilitate resolutions, it is not a replacement for traditional forms of negotiation or mediation. You certainly can use Backchannel as your sole means of resolving cases. But there is still a place for a well-thought-out demand letter or a day of mediation. Adding Backchannel to your practice, however, can help you get more done, quicker, and on your terms.

We hope you find Backchannel to be a key component of your legal and negotiating toolbox.

Happy Backchanneling!