Picture It Settled® Provides Rackspace with Highly Accurate Predictive Analytics to Help Settle High-Value Longshot Mediation

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In my current role as VP and Associate General Counsel for Rackspace, and previously as Deputy GC at Akin Gump and Associate GC at Clear Channel Communications, I have come to realize that our in-house clients, the business decision makers, want predictability in litigation. As in-house lawyers, we conduct thorough and early case evaluations, negotiate budgets, research comparable disputes, and look for other markers that add something to the valuation and predictability mix. Early resolution is often a good outcome for everyone involved in a dispute. Depending on the case, it can be a tremendous cost-saving strategy, not only in external counsel costs but also time and distraction within the business. A negotiated outcome also gives the business an opportunity to take some control over the dispute and drive the issues toward a strategic business objective. How can an in-house lawyer best position a case for a strategic win in the negotiations? Consider the case for taking for a more data-driven approach.

There is a built-in tension between risk assessment from outside counsel and what our internal clients need to run the business and make financial forecasts. Naturally, external litigators are unwilling to guarantee results. Litigation is inherently unpredictable. Sometimes, though, external lawyers are reluctant to handicap the likelihood of various potential outcomes. "What are our chances of success?" asks the business executive. "It depends," says the lawyer. This challenge is compounded when it's time to negotiate a case, either directly or with the help of a mediator. How do we plan a negotiation strategy that will help us arrive at an optimal settlement? The answer to that challenge has been a series of books and courses on negotiation that provide great theory but don't always provide the structure and predictability that could help determine how to advance a mediation toward a desired end-game. We are increasingly looking for data-driven metrics – similar to what our clients use on the operations side of running the business.

As a technology company, we are early adopters of software and other technology tools. So when I learned that there was a predictive analytics program that uses the intelligence gathered from tens of thousands of negotiating rounds to predict the course of future negotiations, I was very intrigued.

Picture It Settled®, a productive analytics tool developed by San Antonio lawyer-mediator Don Philbin, is like Moneyball for negotiation. Like Moneyball, Picture It Settled helps in-house lawyers (and others) plan a negotiation strategy that is calculated to induce cooperative behavior, which results in more settlements at optimum numbers.

Let's face it. Despite all the books and classes we may have consumed on the art of negotiating, too often we rely largely on educated guesses and gut instinct to dictate our strategy and negotiation tactics in the past. "Where will they go if we move to X?" "How can we send the message that they have to make the next big move?" Our experiences and intuition are tremendously valuable, but guesswork makes our business colleagues a bit nervous, and we also run the risk of sending the wrong signal to the other side. Since our cases are often large and complex, we want tools that will help us increase the predictability of a settlement on favorable terms.

The rise of big data and predictive analytics is now part of practicing law. And in-house counsel are early adopters because these technologies are already being used on the business side of our companies. There are now technologies that help us estimate costs in a given matter, plumb intellectual property data sets for valuation markers, and now predict the course of negotiations and formulate strategies around those forecasts.

When I first heard about Picture It Settled, I was excited because I believed it would be incredibly helpful to us in building predictability into an uncertain, often volatile process. Picture It Settled has gained its intelligence by ingesting outcomes from 10,000+ successfully settled cases from across the U.S. Don Philbin developed the tool because he believed there was "music in the noise" of negotiation – patterns of human behavior that could be predicted – and he was right. People can be irrational and seemingly erratic in litigation, but it turns out that they are predictably so. There are predictable patterns to negotiation. As you enter in

your negotiation details and moves into the game-like Picture It Settled interface, the technology searches for patterns and offers a prediction of what might happen next.

We recently had occasion to apply this technology to a high-value mediation, and the results were quite amazing.

The mediation in question was a longshot to settle at all, but like many courts' scheduling orders, we were required to give it a shot. The parties had been to the mediation table once before and we had ended up more than $10 million apart. This commercial dispute had actually resulted in some emotional bad blood, and each side had dug its heels in. Still, we went forth to round two with an open mind. This time around, we had Picture It Settled on our side, and it definitely played a pivotal role in helping the case settle.

Once we entered the case's demands and offers into the system, we began to see that there was a chance for settlement. Our outside counsel input the details of the case (jurisdiction, net worth of the parties, type of case, etc.) and Picture It Settled began to create a visual representation of the negotiation. As negotiation moves were made and the amounts and times of offers were typed in, the software created a graphical representation of where the negotiation was going, with one party's trajectory marked in red and the other's in blue.

As the moves progressed over time, we began to see that the graphs began to overlap, indicating to us that settlement was increasingly likely. Picture It Settled illustrated the projections probabilistically like "hurricane graphs". With every new offer, those projections became more precise. We could also run "what-if" analyses and move the target settlement to optimum, but still likely outcomes. This data-driven tool was incredibly valuable.

Picture It Settled predicted the settlement's final outcome within **6.6%** accuracy after just two moves per side. This improved to **3%** accuracy after round three. Even the estimates of the next moves by both sides in dollars and time were very precise. In fact, the individual dollar move projections for plaintiff and Rackspace both were on average within **3.5%** of the actual moves, except for one opening offer by our side and the wind-up offers.

The results produced by Picture It Settled were extraordinary, providing clear evidence that metrics and analytics can be extremely accurate and predictive as a complement to experience, instinct and intuition which are usually a litigator's primary tools. Frankly, the fact that Picture It Settled showed a reasonable chance of settlement kept us at the negotiation table longer. The analytics and graphs it produced gave us a reason to believe it was worth staying the course; it kept us in the game. We ended up closing a case that we thought had a very low chance of being resolved by agreement.

Picture It Settled provided predictability and also gave us confidence that we were steering the negotiation process in the right direction toward an acceptable range of outcomes. Even before the mediation began, we knew more about how we could get to our preferred outcome – or something close to it. Picture It Settled offered us more control and insight into the path the negotiation could take based on results from thousands of successful settlements.

My plan is to use Picture It Settled for many of my upcoming cases. The degree of predictability and accuracy the analytics provide is impressive and gives me real metrics to bring to my internal clients on the business side to talk about desired outcomes and strategies to achieve them. I predict that any GC's office that discovers this technology will recognize its unique value and will find it to be a great tool to assist us in evaluating cases, and planning and executing negotiation strategies. It doesn't replace well-honed intuition, experience and gut reactions. But it does allow us a data-driven way to test our intuitions against thousands of historical cases. This tool is worth a test-drive on your next case.