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## Mini-Trial: Misunderstanding and Miscommunication May Short-Circuit Its Effective Use in Settlements - Lightwave Technologies, Inc. v. Corning Glass Works, The

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## NOTES

# THE MINI-TRIAL: MISUNDERSTANDING AND MISCOMMUNICATION MAY SHORT-CIRCUIT ITS EFFECTIVE USE IN SETTLEMENTS

*Lightwave Technologies, Inc. v. Corning Glass Works*<sup>1</sup>

### I. INTRODUCTION

In recent years, attorneys have employed alternative types of dispute resolution to help clients resolve their cases. Two major reasons for the move to alternative dispute resolution (hereinafter ADR) have been the substantial savings in money and time. One of the greatest advantages of ADR is that the attorney can tailor the process to fit the client's needs and desires. One such technique which has emerged from this tailor-made process is the mini-trial. It takes the legal issues of a lawsuit and puts them back into the hands of litigants.<sup>2</sup> The mini-trial combines aspects of mediation, arbitration and negotiation with classic adjudication. Because of its novelty and hybrid nature, however, clients seem to have very little understanding as to what a mini-trial is and how it works.

This Casenote will discuss the basic elements and appropriate uses of the mini-trial. It will also compare the mini-trial with other ADR processes and evaluate the advantages and disadvantages of using the mini-trial. Finally, this Casenote will analyze how the parties and their attorneys in the present case wrestled with an alleged agreement to settle their dispute through a mini-trial. Because one of the parties was never fully apprised of how the mini-trial would proceed, the process was aborted and settlement negotiations broke down.

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1. 725 F. Supp. 198 (S.D.N.Y. 1989).

2. Davis & Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 WILLAMETTE L. REV. 531, 532 (1985).

## II. THE CASE

In early 1986, Lightwave Technologies (hereinafter Lightwave) filed suit against Corning Glass Works (hereinafter Corning)<sup>3</sup> for an antitrust violation.<sup>4</sup> In response, Corning counterclaimed for patent infringement.<sup>5</sup> In the fall of 1988, the parties finally seemed to be on their way to settling the case.<sup>6</sup> The parties' attorneys, Joseph M. Alioto for Lightwave, and Alfred L. Michaelsen for Corning, deliberated over using a mini-trial to settle their case. They considered such aspects as how to select a judge, who should attend the proceedings, how to maintain confidentiality at the mini-trial, whether to present the judge with written interrogatories, and/or have him draft a decision.<sup>7</sup>

In late December of 1988, Alioto and Michaelsen reached consensus on most of the issues surrounding the mini-trial process.<sup>8</sup> The mini-trial was to center upon "Lightwave's anti-trust claims, with Lightwave's recovery limited by a fixed ceiling and floor."<sup>9</sup> A retired federal judge would preside over the five-day proceedings.<sup>10</sup>

On January 11, 1989, Alioto sent a letter and a copy of the proposed Agreement to his client, Franklin W. Dabby, Lightwave's founder, President, Chairman of the Board, and Chief Executive Officer (hereinafter CEO).<sup>11</sup> Alioto advised Dabby to sign the Agreement, although Alioto had altered two parts of the proposal without notifying Corning or seeking its approval.<sup>12</sup> Dabby, after conferring with other Lightwave board members, refused the proposal for a mini-trial.<sup>13</sup> Corning was shocked to learn that Lightwave had notified the trial court that negotiations had fallen through.<sup>14</sup> Corning then filed a motion with the trial court to enforce the Agreement.<sup>15</sup> On November 15, 1989, the United States District Court for the Southern District of New York held an evidentiary hearing

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3. At the time of the trial court's decision, Corning Glass Works had since become Corning, Inc. *Lightwave Technologies v. Corning Glass Works*, 725 F. Supp. at 198.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 199.

8. *Id.*

9. *Id.* at 198-99.

10. *Id.*

11. Concurrently, Alioto also sent a copy of the proposed Agreement to one of Lightwave's major, though not majority, shareholders. *Id.* at 199.

12. *Id.* Alioto had added provisions agreeing to non-disclosure of the proceedings and allowing Corning to hold Lightwave CEO Dabby personally liable in the dispute for up to \$25,000. *Id.* at 199-200.

13. *Id.*

14. *Id.*

15. *Id.* at 198.

to determine the parties' intentions concerning the binding effect of the agreement.<sup>16</sup>

Corning gave two reasons why it should be entitled to enforce the Agreement: (1) it contended Alioto, Lightwave's attorney, had actual authority to bind Lightwave, and (2) it claimed that Alioto did in fact agree to bind Lightwave to the mini-trial agreement without needing the signature of Lightwave's CEO, Dabby.<sup>17</sup>

### A. Actual Authority to Bind Lightwave

Corning claimed that Alioto, Lightwave's attorney, had Lightwave's authority to settle the case.<sup>18</sup> Corning's attorney, Michaelson, alleged that in July of 1988, Alioto had informed him that he (Alioto) would have "written authority to settle the case through a mini-trial, with a cap on Lightwave's potential recovery," contingent upon a certain unidentified event failing to occur.<sup>19</sup> Alioto then called Michaelson on September 1, 1988, and manifested that he was ready to go forward "with negotiations on the mini-trial proposal."<sup>20</sup>

Relying on Lightwave attorney Alioto's representations, Corning apparently did not expect Lightwave to be able to reject Alioto's negotiated agreement.<sup>21</sup> Corning attorney Michaelson based this belief on the fact that Alioto had "never expressed any limitation on his authority to enter into an agreement which would bind Lightwave, provided that Corning would agree to the outline of the terms that [Alioto] proposed."<sup>22</sup> Corning also based its position upon two letters Alioto wrote to Lightwave CEO Dabby, dated July 1, 1988 and January 11, 1989, which evidenced that "Alioto was 'authorized to attempt to settle the case . . . by way of a mini trial with a maximum recovery.'"<sup>23</sup> At the evidentiary hearing Lightwave offered evidence refuting Corning's claim that Lightwave had given its attorney, Alioto, actual authority to bind Lightwave to a mini-trial.<sup>24</sup> For instance, Lightwave CEO Dabby testified that he had not understood that a mini-trial was a trial without a jury.<sup>25</sup> Second, Dabby had not anticipated having to select a retired judge from a list of five judges supplied by Corning, as called for in the

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16. *Id.* at 198. The hearing was conducted in camera, with all relevant papers filed under seal to maintain Corning's confidentiality interest. *Id.* at 198 n.1.

17. *Id.* at 199.

18. *Id.*

19. The unidentified event Alioto mentioned was later disclosed as being "the payment by Lightwave of all outstanding out-of-pocket expenses incurred by Alioto and the funding of all future out-of-pocket expenses incurred by Alioto in the prosecution of the lawsuit." *Id.* at 199 n.2.

20. *Id.* at 199.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

projected Agreement.<sup>26</sup> Third, Dabby had previously rejected provisions in the proposal which called for non-disclosure of any settlement and Dabby's own personal liability in the suit.<sup>27</sup> Finally, Dabby testified that he had continually insisted that "he would not accept a mini-trial proposal unless Lightwave also received a [patent] license from Corning."<sup>28</sup>

### B. Alioto's Alleged Agreement to Bind Lightwave

Corning also claimed that Lightwave attorney Alioto had in fact agreed to bind Lightwave to the proposed Agreement for mini-trial, even though Lightwave CEO Dabby had not signed the Agreement.<sup>29</sup> Corning argued that the Agreement qualified as an agreement to arbitrate, which, according to New York law, does not require a signature in order to be enforceable, provided "there is other proof that the parties actually agreed on it."<sup>30</sup>

However, Alioto testified for Lightwave that he informed Corning's attorney, Michaelsen, on numerous occasions, that he (Alioto) intended to have Lightwave sign the proposed Agreement.<sup>31</sup> There was also evidence that both Lightwave and Alioto "were expected to sign a stipulation of dismissal, according to the explicit terms of the Agreement," but apparently, neither had signed such a document.<sup>32</sup>

Adopting Lightwave's position, the court denied Corning's motion to enforce the proposed Agreement for a mini-trial.<sup>33</sup> It refused to apply New York arbitration law to a mini-trial setting. The court held that, when there are "significant ambiguities as to the meaning of the mini-trial concept and limitations on the scope of [the attorney's] authority" during settlement negotiations, the attorney does not have the authority to bind the client to a proposed settlement agreement.<sup>34</sup> Further, the court held that a party moving to enforce an alleged settlement agreement has the burden of "showing that the parties intended to bind

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26. *Id.*

27. *Id.* at 199-200.

28. *Id.* at 200.

29. *Id.* at 199.

30. *Id.* at 200. Corning relied on N.Y. CIV. PRAC. L. & R. 7501 (McKinny 1980), which provides in pertinent part, "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. . . ." In *Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 35 N.Y.2d 291, 361 N.Y.S.2d 140, 319 N.E.2d 408 (N.Y. 1974), the court interpreted this statute to mean that a written agreement to arbitrate need not be signed to be enforceable "so long as there is other proof that the parties actually agreed on it." *Id.* at 299, 361 N.Y.S.2d at 146, 319 N.E.2d at 412 (citation omitted).

31. *Lightwave Technologies*, 725 F. Supp. at 200.

32. *Id.*

33. *Id.* at 198, 200.

34. *Id.* at 199.

themselves to the Agreement without obtaining the signatures and approval of the principals."<sup>35</sup>

### III. LEGAL BACKGROUND

#### A. Description of the Mini-Trial

The term "mini-trial" is a misnomer, as it is not a trial, mini or otherwise.<sup>36</sup> Rather, it is a private, non-binding settlement technique<sup>37</sup> used most frequently in disputes between corporations.<sup>38</sup> The mini-trial is described as a "hybrid" since it combines traditional settlement processes to form a distinct, innovative technique.<sup>39</sup> The key characteristic of the mini-trial is its ability to provide information directly to the parties so that they can evaluate relative strengths and weaknesses of each side and enter into well-informed, focused settlement discussions.<sup>40</sup> Professor Eric D. Green developed the mini-trial in 1977 while representing a corporation deadlocked in patent litigation with another corporation.<sup>41</sup>

Although the parties may adapt the mini-trial in various ways to accommodate their desires, most mini-trials share some common characteristics:

(1) The parties voluntarily agree to hold a mini-trial.<sup>42</sup> "There is no statutory, regulatory or (usually) contractual obligation to participate . . ."<sup>43</sup> At any time, either party may terminate the process.<sup>44</sup>

(2) The parties make an agreement setting the rules and obligations for the mini-trial procedure.<sup>45</sup> The agreement delineates such issues as the parties' right

35. *Id.* at 200.

36. W. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 54 (1988). The mini-trial derived its name from a headline in a 1978 New York Times article reporting on the original mini-trial. CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM *MINI-TRIAL WORKBOOK* 1 (E. Fine, ed. 1985) [hereinafter *MINI-TRIAL WORKBOOK*]. For a full treatment of the mini-trial, see *id.*; W. BRAZIL at 54-63; S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 271-79 (1985) [hereinafter *DISPUTE RESOLUTION*].

37. *MINI-TRIAL WORKBOOK*, *supra* note 36, at 1. Some commentators indicate that if the parties agree to a mini-trial, it will be enforceable as a contract. *DISPUTE RESOLUTION*, *supra* note 36, at 9. However, it is not clear whether this means that a party is bound by the result reached through the mini-trial, or bound by the agreement to simply participate in the process.

38. *DISPUTE RESOLUTION*, *supra* note 36, at 271-72.

39. *Id.* at 7, 10.

40. W. BRAZIL, *supra* note 36, at 54.

41. *First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 100 F.R.D. 499, 514 (May 20, 1983) [hereinafter *First Annual Judicial Conference*]. Professor Green was practicing law in a Los Angeles law firm in 1977. He currently teaches at Boston University Law School. *Id.* at 513-14.

42. *DISPUTE RESOLUTION*, *supra* note 36, at 272.

43. *Id.*

44. *Id.*

45. *Id.*; *MINI-TRIAL WORKBOOK*, *supra* note 36, at 2; W. BRAZIL, *supra* note 36, at 55.

to terminate the proceedings<sup>46</sup> and the formality of the proceedings, such as whether rules of evidence will apply, or cross-examination will be permitted during presentations.<sup>47</sup> The agreement also acknowledges the legal ramifications of the process, including confidentiality during the proceedings and what effect the mini-trial would have on any future or pending litigation.<sup>48</sup>

(3) The parties engage in a limited period of case preparation, which often includes some discovery.<sup>49</sup> Each side "informally exchanges key documents, exhibits, summaries of witnesses' testimony, and short introductory statements in the nature of briefs."<sup>50</sup>

(4) Each party sends one of its top executives with settlement authority to the mini-trial proceeding.<sup>51</sup> These decision-makers hear presentations of each side of the case, usually by the attorneys.<sup>52</sup> The length and style of the presentations vary depending upon what the attorneys have agreed, but they usually last a half a day to three or four days<sup>53</sup> and are informal in terms of procedure and evidence.<sup>54</sup>

After the presentations, the decision-makers retire to privately conduct settlement negotiations.<sup>55</sup> The underlying theory "is that the party representatives, armed with a crash course on the merits of the dispute . . . will be better able than the advocates or lower-level party representatives to appraise their positions and negotiate a mutually beneficial settlement."<sup>56</sup>

(5) The parties hire a mutually agreed upon neutral advisor to sit at the proceedings.<sup>57</sup> This advisor is usually a former judge, but may also be a lawyer or law professor with legal expertise in the particular subject matter at hand, or even a non-legal expert such as a business person or engineer.<sup>58</sup> Neutral advisors

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46. DISPUTE RESOLUTION, *supra* note 36, at 272.

47. W. BRAZIL, *supra* note 36, at 55.

48. DISPUTE RESOLUTION, *supra* note 36, at 272.

49. MINI-TRIAL WORKBOOK, *supra* note 36, at 2. If the parties are well into protracted litigation, they may have already conducted the amount of discovery necessary for the mini-trial proceedings. See DISPUTE RESOLUTION, *supra* note 36, at 275. Any discovery made during the mini-trial preparation will not prejudice the parties' rights to engage in full discovery later, should the mini-trial fail to settle the case. *Id.*

50. DISPUTE RESOLUTION, *supra* note 36, at 272.

51. MINI-TRIAL WORKBOOK, *supra* note 36, at 1; DISPUTE RESOLUTION, *supra* note 36, at 274.

52. See DISPUTE RESOLUTION, *supra* note 36, at 273; W. BRAZIL, *supra* note 36, at 55.

53. DISPUTE RESOLUTION, *supra* note 36, at 273.

54. The attorneys may call certain lay or expert witnesses, and allow some form of cross-examination. They may also use multi-media, graphics, charts, and other creative devices to aid in their presentations. See DISPUTE RESOLUTION, *supra* note 36, at 273-74; W. BRAZIL, *supra* note 36, at 55.

55. DISPUTE RESOLUTION, *supra* note 36, at 274; W. BRAZIL, *supra* note 36, at 56.

56. DISPUTE RESOLUTION, *supra* note 36, at 274.

57. W. BRAZIL, *supra* note 36, at 54; MINI-TRIAL WORKBOOK, *supra* note 36, at 1.

58. DISPUTE RESOLUTION, *supra* note 36, at 272; W. BRAZIL, *supra* note 36, at 54. See also L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 29 (1985). In some situations the parties do not use a neutral advisor at all, but instead allow the business representatives to preside over the proceedings. DISPUTE RESOLUTION, *supra* note 36, at 272-73.

do not play the role of traditional arbitrators or judges.<sup>59</sup> They do not have the authority to make a binding decision.<sup>60</sup> Neither do they control the order and style of the proceedings nor decide how or what evidence is produced.<sup>61</sup> The neutral may be permitted to ask questions to "probe the strengths and weaknesses of each parties' case"<sup>62</sup> and ensure that the parties' decision-makers hear the necessary information to conduct well-informed negotiations after the mini-trial.<sup>63</sup>

(6) The parties may invite the neutral advisor into the post-presentation negotiations between the corporate decision-makers.<sup>64</sup> They may ask the neutral to predict what the likely outcome would be if the case were to go to trial on the merits.<sup>65</sup> Or, the parties may request that the neutral suggest a settlement package.<sup>66</sup> At other times, the neutral advisor may simply act as a mediator in a typical dispute resolution setting.<sup>67</sup> Because the mini-trial is so flexible, the parties have the freedom to choose exactly the type of role they want the neutral advisor to play.

### B. Goals and Purposes of the Mini-Trial

Professor Green created the mini-trial to convert a complex legal dispute back into a business problem which corporate executives could solve.<sup>68</sup> The mini-trial allows business litigants with decision-making authority to listen, observe, and ask questions to clarify points, so that they can "assess realistically the strengths and weaknesses of each side's position, often for the first time."<sup>69</sup> This evaluation process takes place in a relatively short time,<sup>70</sup> saving the parties substantial time and money by avoiding litigation. Moreover, the corporate executives may create more innovative solutions than their attorneys, who lack the expertise and unique business knowledge of their clients.<sup>71</sup>

Another principal goal of the mini-trial participants, if they are not able to obtain an agreeable settlement, is to convince the neutral advisor to counsel the opponent that it would be smarter to settle than to go to trial.<sup>72</sup> And finally,

59. DISPUTE RESOLUTION, *supra* note 36, at 272.

60. *Id.* at 272.

61. *Id.*; W. BRAZIL, *supra* note 36, at 54-55.

62. DISPUTE RESOLUTION, *supra* note 36, at 272.

63. W. BRAZIL, *supra* note 36, at 55.

64. L. KANOWITZ, *supra* note 58, at 29.

65. DISPUTE RESOLUTION, *supra* note 36, at 273.

66. W. BRAZIL, *supra* note 36, at 57.

67. DISPUTE RESOLUTION, *supra* note 36, at 273.

68. See *First Annual Judicial Conference*, *supra* note 41, at 515; Davis & Omlie, *supra* note 2, at 531-32.

69. MINI-TRIAL WORKBOOK, *supra* note 36, at 1.

70. DISPUTE RESOLUTION, *supra* note 36, at 274.

71. MINI-TRIAL WORKBOOK, *supra* note 36, at 3.

72. DISPUTE RESOLUTION, *supra* note 36, at 273.



many clients desire a mini-trial atmosphere because they can "avoid the resentment and defensiveness that the rules that typically govern the trial process can create."<sup>73</sup>

### *C. Comparison of the Mini-Trial With Other ADR Techniques*

The mini-trial has been described as "an adjudication-like presentation of proofs and arguments . . . combined with negotiation . . ."<sup>74</sup> As in litigation, attorneys present arguments and evidence of the case. But unlike litigation, businesspeople, rather than a judge or jury, sit as the decision-makers.<sup>75</sup> Like mediation, the mini-trial usually involves the principals, or parties, in the dispute, and is a shorter, more informal process than adjudication.<sup>76</sup> Unlike mediation, however, the mini-trial itself is not the arena for settlement, but rather serves as a springboard for negotiations after the proceeding concludes.<sup>77</sup>

Unlike arbitration, which is binding with few exceptions, the mini-trial is always nonbinding.<sup>78</sup> Parties using arbitration agree to submit their dispute to a neutral party whom they have selected to make a decision.<sup>79</sup> In binding arbitration, the arbitrator's decision is final, and enforceable by court process.<sup>80</sup> Furthermore, the parties' decision to enter into an arbitration agreement may be enforceable by the court. New York courts will enforce these agreements without party signatures, as long as there is other proof that the parties intended to be bound to arbitrate.<sup>81</sup> On the other hand, the mini-trial is a voluntary process which either party may terminate at any time.<sup>82</sup> However, one commentator notes that a mini-trial agreement can be enforced as a contract.<sup>83</sup> It is uncertain whether the commentator means that the agreement will force a party to participate in a mini-trial, or to reach a settlement through a mini-trial.

### *D. Disadvantages of the Mini-Trial*

A potential disadvantage of the mini-trial is that attorneys may be forced to disclose part of the trial strategy they would use should the parties end up going to trial.<sup>84</sup> While information exchanged during settlement negotiations is not

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73. W. BRAZIL, *supra* note 36, at 56.

74. DISPUTE RESOLUTION, *supra* note 36, at 10.

75. Davis & Omlie, *supra* note 2, at 532.

76. N. ROGERS & C. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 11 (1989).

77. *Id.*

78. Davis & Omlie, *supra* note 2, at 533.

79. L. RISKIN & J. WESTBROOKE, *DISPUTE RESOLUTION AND LAWYERS* 3 (1987).

80. Davis & Omlie, *supra* note 2, at 533.

81. *Crawford v. Merrill Lynch*, 35 N.Y.2d 291, 319 N.E.2d 408, 361 N.Y.S.2d 140.

82. DISPUTE RESOLUTION, *supra* note 36, at 272.

83. *Id.* at 9.

84. W. BRAZIL, *supra* note 36, at 60.

admissible as evidence at a subsequent trial,<sup>85</sup> each party has had a preview of how its opponent plans to litigate its case. However, this is a common disadvantage of nearly every ADR technique which fails to produce settlement before trial.

One commentator cautions that the mini-trial may "present a risk of failing to adequately inform the parties of details that are essential to an intelligent resolution of their dispute."<sup>86</sup> The attorneys may attempt to simplify the issues too much in order to present an abbreviated case to the corporate decision-makers. However, this danger may not be too great, since top executives hearing the case are experts in the subject matter and the nature of the dispute.

Finally, the attorneys need to be aware of the potential antitrust exposure in a mini-trial. If the parties are competitors in the same industry, the normal dangers regarding discussions with competitors apply, and it may be wise for each party to have its attorney attend the settlement talks with the corporate decision-makers.<sup>87</sup>

#### IV. THE INSTANT DECISION

Noting the ambiguities and misunderstandings which surrounded the negotiations, the district court refused to enforce the Agreement because it was unwilling to conclude that Lightwave attorney Alioto had actual authority to bind Lightwave to the proposal.<sup>88</sup> Dabby, Lightwave's CEO, never understood that he would be waiving his right to a jury trial by consenting to the Agreement.<sup>89</sup> The court found it even more important that Dabby never consented to personal liability or any provision for confidentiality of the proceedings.<sup>90</sup> It notes that the provisions of the Agreement which (1) imposed \$25,000 of personal liability upon Dabby and (2) permanently prevented Lightwave from disclosing the results of the settlement, even if it won the case, were "wholly collateral to whatever initial authority Lightwave gave Alioto."<sup>91</sup> Therefore, Lightwave was entitled to refuse to sign any proposal including such collateral provisions.<sup>92</sup> The court found it most significant, however, that Dabby told Alioto in a letter that Corning must agree to license Lightwave to certain patents for which Lightwave had filed and issued to Corning.<sup>93</sup> Because of this, the court found that "Alioto was not acting within the scope of his actual, written authority when he negotiated an agreement that did not provide for a license."<sup>94</sup> The court found it irrelevant whether or not Corning's attorney, Michaelsen, had been led to believe that Alioto

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85. FED. R. EVID. 408.

86. L. KANOWITZ, *supra* note 58, at 133.

87. MINI-TRIAL WORKBOOK, *supra* note 36, at 6.

88. *Lightwave Technologies*, 725 F. Supp. at 200.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

had binding written authority to settle the case, since the language in Dabby's letter was unambiguous.<sup>95</sup>

The court further held that Corning failed to meet its burden of proving that the parties intended to be bound by the Agreement without procuring the signatures and approval of the principals, namely, Dabby for Lightwave and an official for Corning.<sup>96</sup> Relying on *International Telemeter Corp. v. Teleprompter Corp.*,<sup>97</sup> the court states that "[w]hether or not the parties have manifested an intent to be bound must depend in each case on all the circumstances."<sup>98</sup>

The court notes that the circumstances surrounding the instant case demonstrate no intent to be bound without the signatures of the principals.<sup>99</sup> The draft of the agreement that Corning attorney Michaelsen had prepared included signature lines for both principals.<sup>100</sup> However, Michaelsen testified at one point that the lines were intended for Corning, and at another point that they had been placed on the document out of experience, practice, and habit.<sup>101</sup> The court describes Michaelsen's testimony regarding the signature lines as inexplicable.<sup>102</sup> Additionally, the court pointed to the fact that "both Alioto and Lightwave were expected to sign a stipulation of dismissal, according to the explicit terms of the Agreement."<sup>103</sup>

The court also relied on Lightwave attorney Alioto's testimony that he had always intended to have Lightwave sign the Agreement, and that he relayed this to Corning attorney Michaelsen on many occasions.<sup>104</sup> After observing the "forceful, assertive, and in some respects truculent" personality of Dabby at the hearing, the court believed Alioto's testimony that he would not have made the Agreement without Dabby's approval.<sup>105</sup> Finally, the court addressed Corning's claim that the Agreement need not be signed to be enforced, since New York arbitration laws so allowed. Corning's attorney, Michaelsen, testified that he considered arbitration and mini-trials "to be two different 'species' of the 'genus' 'alternative dispute resolution.'"<sup>106</sup> Noting that Michaelsen himself had not thought that he was involved in an arbitration agreement, the court declined to view the mini-trial technique as a type of arbitration, irrespective of the similarities between the two processes.<sup>107</sup> The court therefore failed to make a legal

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95. *Id.*

96. *Id.*

97. 592 F.2d 49, 56 (2d Cir. 1979).

98. *Lightwave Technologies*, 725 F. Supp. at 200.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (emphasis in original).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

determination as to whether arbitration law could actually be applied to a mini-trial procedure.

## V. COMMENT

One unanswered question in this case concerns what expectations each party had concerning the mini-trial agreement. Although the facts reveal that the parties' attorneys discussed "parameters and procedures" for the tentative mini-trial,<sup>108</sup> it is unclear what type of binding effect each party perceived the agreement to have. For instance, it seems Corning expected that the court's enforcement of the agreement would have forced the parties to settle its dispute.<sup>109</sup> However, in light of most commentators' perspectives of the mini-trial, Corning's expectation could not have been realized. As with all other settlement techniques, with the exception of arbitration, the mini-trial is not a binding procedure.<sup>110</sup> Corning could not have forced a resolution upon Lightwave if the two companies' decision-makers had failed to come up with a settlement plan. However, there are two "quasi-binding" effects the proposed agreement could have had upon the parties.

First, enforcement of the agreement would have meant that Lightwave was obligated to go through with the mini-trial process in an attempt to settle the case. Second, the parties could have agreed to put some "teeth" into the mini-trial by stipulating to some type of contingent penalty if one party refused to settle. For example, if the parties had stipulated that, if one party rejected the neutral's advisory opinion and later received an unfavorable opinion in actual trial proceedings, it would be obligated to pay the other parties' fees.<sup>111</sup> Or, the parties could have agreed that, if one party rejected the advisory opinion and refused to settle, the other party would be permitted to produce the advisory decision as inconclusive evidence at a subsequent trial.<sup>112</sup> Aside from these "quasi"-binding ramifications, however, Corning would not have been able to force Lightwave to settle the case even if it could have forced Lightwave to participate in the mini-trial.

What impact did Lightwave expect the agreement to have if the district court would have enforced it? Apparently, Lightwave's CEO, Dabby, feared that he would be waiving his right to a jury trial if he consented to the proposed agreement. This simply would not have been true, since a mini-trial does not prejudice a party's right to resort to litigation after unsuccessful settlement attempts.<sup>113</sup> There were deeper reasons, though, for Dabby's refusal to consent

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108. *Id.* at 199.

109. *See id.*

110. Davis & Omlie, *supra* note 2, at 532.

111. *See* MINI-TRIAL WORKBOOK, *supra* note 36, at 4-5.

112. *See id.* at 5.

113. Further, Federal Rule of Evidence 408 states that settlement negotiations are not admissible as evidence in subsequent litigation. FED. R. EVID. 408.

to the mini-trial. Lightwave's attorney, Alioto, had failed to put an important provision into the agreement which Dabby had demanded be included, namely, Corning's issuance of a patent license to Lightwave.<sup>114</sup> Alioto had also added provisions to which Dabby had not consented, such as agreements to keep the results of the proceedings confidential, and to hold Dabby personally liable in the suit. Perhaps if the attorneys and their clients could have reached an understanding on these particulars, they could have proceeded with the mini-trial.

In the present case, Lightwave attorney Alioto's faulty communication with CEO Dabby waylaid the opportunity to settle the Corning-Lightwave dispute through a mini-trial. Although the case did not go into great factual detail, it seems evident from the facts given that a mini-trial would have been the ideal process through which the parties could have settled. Professor Green's original mini-trial idea emerged out of a protracted corporate dispute which had become deadlocked.<sup>115</sup> Such was the case here. After three years of litigation, both sides had most likely conducted enough discovery to place the parties in a sufficient posture to hold a mini-trial. However, Lightwave's attorney failed to fully explain to his client what a mini-trial is, how it works, and what the advantages are in using the technique. Had Lightwave's CEO, Dabby, understood that he would have been at the helm of decision-making with Corning's top executive, he might have consented to the mini-trial process.

Corning was also at fault for misconstruing both agency and attorney-client principles. Corning claimed it was led to believe that Alioto was authorized to consent to a binding agreement on behalf of Lightwave.<sup>116</sup> Corning also argued that Alioto even indicated that he was accepting the proposal on behalf of Lightwave.<sup>117</sup> Corning therefore attempted to invoke New York arbitration law to enforce this alleged agreement.<sup>118</sup> While it is true that N.Y. Civil Practice Law and Rules section 7501 does not require a signature to enforce an arbitration agreement, there must still be evidence of the party's intention to be bound. Here, Alioto may have indicated an intent to be bound, but the evidence showed that Lightwave and its CEO Dabby never indicated any intention of consenting to the agreement. Under the principles of the attorney-client relationship, it is the client who decides whether to settle and upon what terms, not the attorney. This principle superseded Corning's reliance on the agency argument that Lightwave was bound by its agent, Alioto. The court found that Alioto never had the actual authority to bind Lightwave to the proposal.<sup>119</sup>

Finally, the court was correct in disallowing Corning from applying New York arbitration law to the mini-trial agreement.<sup>120</sup> As previously noted,

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114. *Lightwave Technologies*, 725 F. Supp. at 200.

115. See generally *First Annual Judicial Conference*, *supra* note 41, at 513-22.

116. *Lightwave Technologies*, 725 F. Supp. at 199.

117. *Id.*

118. *Id.* at 200.

119. *Id.* at 199-200.

120. See *id.* at 200.

Corning could not show that Lightwave had ever intended to be bound to the agreement. But additionally, Corning's own attorney, Michaelson, acknowledged that he did not consider arbitration and mini-trials to be in the same category.<sup>121</sup>

The court did not explicitly state whether it agreed with Michaelson's distinction between the two ADR techniques, but its silence inferred agreement. Therefore, the court wisely refused to allow the parties to apply arbitration law to mini-trial agreements. Because a mini-trial is a more voluntary, consensual process, it should not be classified with arbitration law when analyzing settlement agreements.

## VI. CONCLUSION

The court in *Lightwave Technologies v. Corning Glass Works* found that Lightwave never agreed to settle its dispute with Corning through the use of a mini-trial. Therefore, the court had no choice but to deny Corning's motion to compel enforcement of the alleged agreement between the parties. If Lightwave's attorney had explained to his client the nature and consequences of a mini-trial process, Lightwave may have been more willing to participate in the process. This case demonstrates that, if the mini-trial is to be a useful and successful tool in settling cases, attorneys must fully understand its workings, be aware of its flexibility, and fully disclose to their clients how the process works and what benefits it can produce.

ANNIE BILLINGS

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121. *Id.*

