

# S.D.N.Y. Bankruptcy Court Declines to Enforce Advance Conflict Waiver Against Winston & Strawn Client, Netflix

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Although the legal community eagerly awaits the California Supreme Court's decision on advance waivers in *Sheppard, Mullin, Richter & Hampton v. J-M Mfg. (Cal. No. S232946)*, a recent decision in the Bankruptcy Court for the Southern District of New York in the case of *In re: Relativity Media, LLC*, has addressed similar issues and provides some guidance.

Relativity Media, LLC ("Relativity") sought court approval of its retention of Winston & Strawn LLP ("Winston") in bankruptcy proceedings. Relativity is a debtor-in-possession engaged in contract disputes with Netflix, Inc. ("Netflix") that are scheduled for trial in the near future. However, Winston had been representing Netflix and an affiliate in a patent dispute in Delaware. Netflix objected to Winston's representation of Relativity in the contract dispute, asserting the representation was a conflict and violated Winston's professional obligations to Netflix.

Winston argued that Netflix had agreed in advance to waive conflicts in 2012 and 2015 in connection with other matters unrelated to the Delaware patent dispute. Netflix's 2012 advance waiver stated that "as a condition to Winston & Strawn LLP's undertaking to represent Netflix, Inc. ...Winston ... could represent other clients in any matter, including but not limited to litigation, directly adverse to Netflix, Inc. which is not the same as or substantially related to this matter." Similarly, the 2015 waiver permitted Winston to represent other clients in litigation or other matters adverse to Netflix in the future.<sup>1</sup>

Winston did not send a new engagement letter to Netflix when it was hired for the patent dispute. The Winston partner in charge of the matter had mentioned sending an addendum to an "engagement letter on file." But that never happened. Winston also sought to rely on an exchange of emails with Netflix at the time Winston was engaged for the patent dispute, stating that the affiliate's engagement of the firm would be on the same terms as Netflix. But the Court held that neither the prior engagement letters, nor the email exchange specifically informed Netflix that it was subject to an advance conflict waiver in connection with the patent matter. Indeed, the court found that the 2012 and 2015 advance waivers expressly applied only to the particular matters that were the subject of those letters and not to any future unspecified matters: "the waiver was obtained with respect to each specific representation and does not constitute a general agreement to be applied to all future work . . . for Netflix."

The holding from *In re: Relativity Media, Inc.* demonstrates that even for sophisticated clients such as Netflix, with ready access to legal advice in-house and otherwise, a law firm should consider formalizing the terms of an advance conflict waiver in writing in specific terms for each new matter. Where a firm seeks to rely on a previously agreed upon advance waiver in connection with new work, reminding the client of previous waiver could go a long way to assuring enforceability of the waiver under the “informed consent” terms of ABA Model Rule 1.7(b) and state equivalents. As explained in Comment 22 to ABA Rule 1.7, the effectiveness of advance waivers is normally determined by the extent to which the client reasonably understands the material risks the waiver entails. The more clarity that can be provided to the client in the waiver’s language, in particular specifying the potential future risks and confirming the term and scope of the waiver, the greater the chance the waiver will be upheld in a court.

If you have a professional liability question or business concern, we invite you to reach out directly to any member of our [Professional Liability Litigation](#) group.

<sup>1</sup> Winston also argued that Netflix was not a current client because Winston had sought to withdraw from its representation of Netflix in the patent matter. However, the court quickly disposed of that argument by invoking the hot potato rule, under which a lawyer cannot solve an existing conflict by withdrawing from one of the conflicting representations in violation of his or her duties to the client.

***\*Mr. White is a summer associate in our corporate group. He attends Boston College Law School and has an anticipated graduation date in 2019.***