



ZUCKERMAN SPAEDER LLP

Tivo v. Echostar
Contempt and Ethics:
Risk for Lawyers

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Tivo v. Echostar

Summary

- The ethics of contempt
- The reach of the Tivo v. Echostar injunction
- Risk for lawyers

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The ethics of contempt

- ABA Model Rule of Professional Conduct 3.4(c) states that a “lawyer shall not . . . Knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based upon an assertion that no valid obligation exists.”

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The ethics of contempt

- ABA Rule 3.4 (c) has been interpreted to prohibit lawyers from violating court orders. Annotated Model Rules of Professional Conduct 344(7th ed. 2011)(“subsection (c) prohibits lawyers from disobeying . . . Court orders”).

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The ethics of contempt

- NY Rule of Professional Conduct 3.4(c) also prohibits lawyers from disregarding “a standing rule of a tribunal or a rules of a tribunal made in the course of a proceeding.”



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The ethics of contempt

- The ABA and NY Rules also prohibit a lawyer from advising a client to disobey a court order. See NY Rule 3.4(c) (prohibiting “advis[ing] a client to disregard a standing rule of a tribunal or a ruling of a tribunal . . .”); Annotated ABA Model Rules (“Subsection (c) prohibits lawyers from . . . advising to disobey . . . court orders.”)



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- Under the en banc ruling in Tivo v. Echostar, a client cannot wait to “collaterally attack a district court’s injunction” but must assert challenges to the breadth or clarity of the injunction on direct appeal. 646 F.3d at 886.



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Risks for Lawyers

- Post-Tivo v. Echostar, can a lawyer ethically advise a client to disregard a court order? On overbreadth or vagueness grounds?

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Risks for Lawyers

- No, not on the hope of a later collateral attack under Tivo v. Echostar.
- No, not under ABA Rule 3.4(c) or NY Rule 3.4(c).

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Risks for Lawyers

- NB: The ethics rules that apply to litigation are typically those of the jurisdiction where the court sits or those specifically adopted by the court. ABA Model Rule 8.5(b)(1). However, there is not a lot of variation among the different versions of Rule 3.4(c).

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Risks for Lawyers

- Also noteworthy that the injunction in *Tivo v. Echostar* covered the lawyers directly: “Each Defendant, its officers . . . and attorneys . . . are hereby restrained and enjoined” The court could have held the lawyers in contempt on the same theory that it held Echostar in contempt.

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Thank You!

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