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Why the Dobbs Draft Release Makes It Tougher to Teach Legal Ethics

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ARTICLE

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Why the *Dobbs* Draft Release
Makes It Tougher to Teach Legal Ethics

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I. INTRODUCTION

Did you know there is a website to report bad lawyers,¹ and a television show called *Bad Judge*?² These mediums almost make teaching legal ethics easy by vividly demonstrating what *not* to do. But what about when someone at the highest court in the land leaks a draft opinion to the press? Might this make legal ethics instruction just a little bit tougher?

Bad lawyer ethics may provide entertainment for Americans who are unlikely to rank lawyers as a highly virtuous or ethical group. Yet the ethics of lawyering is highest on the priority list of legal organizations and law schools.³ State bars require Continuing Legal Education (“CLE”) in ethics, and every American Bar Association accredited law school is required to teach a course in legal ethics, titled “Professional Responsibility.”⁴ Legal ethics is a top priority, not because participants find it highly enjoyable,⁵ but rather due to the necessity of better legal ethics for lawyers and judges. This has never been more apparent than in the aftermath of the Supreme Court’s *Dobbs* draft opinion leak.⁶

1. *Report a Bad Lawyer*, BADLAWYER, <https://www.badlawyer.org/report.php> [https://perma.cc/6HXL-CBG4] (last visited Jan. 14, 2023).

2. *See Bad Judge*, NBC, <https://www.nbc.com/bad-judge/about> [https://perma.cc/WA6S-CJK2] (last visited Jan. 14, 2023) (providing a brief synopsis of the television comedy, where the judge is well-respected in the courtroom, but behaves poorly in her personal life); *see also id.* (noting “[e]pisodes are currently unavailable”).

3. *See* STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. Standard 301(a) (AM. BAR ASS’N 2022) (“A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”).

4. *Id.* at Standard 303(a)(1) (“A law school shall offer a curriculum that requires each student to satisfactorily complete. . . one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members.”).

5. “If a medievalist were drawing a map of contemporary debates on legal scholarship, ‘professionalism’ would be at the edge of the earth, marked off with lions and tigers and warnings to venture no further.” DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (Oxford Univ. Press 2000).

6. *See* James D. Zirin, *What Happened to the Investigation into the Dobbs Draft Leak?* THE HILL (Dec. 3, 2022), <https://thehill.com/opinion/judiciary/3759810-what-happened-to-the-investigation-into-the-dobbs-draft-leak/> [https://perma.cc/TGZ6-BE9N] (arguing the need for public update on the investigation into this shocking and unprecedented betrayal by someone who had access to the opinion).

Reactions to the leak from the Justices themselves have included statements such as: “a grave betrayal of trust by somebody” from Justice Alito,⁷ “terrible” and “horrible” from Justice Kagan,⁸ “tremendously bad” and “an infidelity” from Justice Thomas,⁹ and according to Chief Justice Roberts “absolutely appalling.”¹⁰ Leaking the draft certainly violated the traditions of the Court.¹¹ More importantly, it likely constitutes misappropriation of intellectual property and obstruction of justice, both federal criminal offenses.¹² Thus, the behavior surrounding the leak is anything but ethical.

In an effort to keep student interest while teaching our Professional Responsibility (“PR”) course, the Author has included a segment the class endearingly calls “PR in the News,” where students research and share a recent news story of lawyers behaving badly. As one can imagine, there is never a lack of these stories. The students report the facts, analyze what ethics rules were violated, and draw conclusions about their own future decision making. In August, the Author asked her class to consider reporting stories about the *Dobbs* leak. At the end of the course in December, no one shared any such story, largely because many did not exist. There was virtually no reporting of the *Dobbs* leak from May 2022, when the leak first occurred and the Chief Justice opened an investigation, until the

7. HERITAGE FOUND., *LIVE Q&A with Justice Alito at The Heritage Foundation*, YOUTUBE, at 01:11 (Oct. 25, 2022), <https://youtu.be/WzRqIcXPmKw?t=4284>.

8. See Ariane de Vogue, *SCOTUS Maintains Public Silence on Dobbs Opinion Leak Investigation*, CNN (Oct. 21, 2022), <https://www.cnn.com/2022/10/21/politics/supreme-court-leak-investigation> [<https://perma.cc/UZN9-A6U2>] (providing Justice Kagan further stated the leak was an “obvious, blatant violation of the court’s rules”).

9. Robert Barnes, *Clarence Thomas Says Supreme Court Leak Has Eroded Trust in Institution*, WASH. POST (May 14, 2022), <https://www.washingtonpost.com/politics/2022/05/14/clarence-thomas-supreme-court-leak-roe-trust/> [<https://perma.cc/2DPZ-V7SL>].

10. Greg Farrell & Greg Stohr, *Chief Justice Says Supreme Court Leak ‘Absolutely Appalling’ (1)*, BLOOMBERG L. (May 5, 2022), <https://news.bloomberglaw.com/us-law-week/roberts-calls-supreme-court-opinion-leak-absolutely-appalling> [<https://perma.cc/9XFQ-4WHF>].

11. See *The Court and its Traditions*, U.S., <https://www.supremecourt.gov/about/traditions.aspx> [<https://perma.cc/9TJJ-B5HU>] (last visited Jan. 14, 2023); *Opinions of the Court—2022*, U.S., <https://www.supremecourt.gov/opinions/slipopinion/22> [<https://perma.cc/Y2RG-V5H4>] (last visited Jan. 14, 2023).

12. See Zirin, *supra* note 6 (observing the decision of the Chief Justice in delegating the investigation to the High Court’s marshal, rather than requesting an FBI investigation, despite these likely offenses).

January 2023 report announcing the investigation's failure to identify the leaker.¹³

How does this reflect on the High Court? How does this reflect on justice throughout the nation? And significantly for this Article, how does this impact the professionalism of lawyers and judges in the United States? The leak itself and the Court's response to it makes teaching ethics to the next generation of lawyers more challenging than ever. Indeed, a primary goal of any course on lawyer ethics is to help lawyers and law students "develop gut instincts about what to do in dangerous situations" and to know "points in practice where they should instinctively 'stop' before a possibly irrevocable step is taken."¹⁴ Making the decision to leak the *Dobbs* draft opinion to the press was an irrevocable step, but someone at the highest court of the United States did not have the gut instinct to stop. Even if the leaker thought he or she was somehow promoting justice, his or her judgment was clearly clouded by zeal.¹⁵ This Article reviews three reasons why the *Dobbs* draft leak was harmful to lawyer ethics—the leak (1) disregarded the Rule of Law, (2) breached confidentiality, and (3) violated the Judicial Code of Conduct.

II. RULE OF LAW

The "Rule of Law" is the political philosophy principle providing sovereign rule is based on a set of (often transcendent) principles, which ensure an orderly society.¹⁶ Under the Rule of Law, "everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent

13. See SUP. CT. U.S., STATEMENT OF THE COURT CONCERNING THE LEAK INVESTIGATION (Jan. 19, 2023); see also Brianna Herlihy, *Five Months Later, Supreme Court Still Investigating who Leaked the Abortion Case*, FOX NEWS (Oct. 3, 2022), <https://www.foxnews.com/politics/five-months-later-supreme-court-still-investigating-who-leaked-abortion-case> [https://perma.cc/6DG7-TEPX].

14. Leah Wortham, *Teaching Professional Responsibility in Law School*, 11 DEL. LAW 18, 19 (1993).

15. Perhaps, Professor Wortham considers the leaker a "selfish lawyer" as she writes: "I worry not only about the PR problems of the selfish lawyer, but the hot water into which selfless lawyers can get when sympathy or zeal for clients clouds their judgment." *Id.*

16. See *Rule of Law*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/resources/rule-of-law/ [https://perma.cc/Q4TM-ECKT] (last visited Jan. 14, 2023).

judiciary, and human rights are guaranteed for all.”¹⁷ Aristotle articulated the notion as, “it is more proper that law should govern than any one of the citizens.”¹⁸ The Rule of Law simply implies no one is above the law. The Framers of the Constitution intended the laws of the nation to bind even those serving in the judiciary and legislatures.¹⁹

The American Bar Association (“ABA”) has established the Model Rules of Professional Conduct (“MRPC”) for all lawyers and judges in America. State jurisdictions adopt their own rules, largely modeled after the MRPC.²⁰ The Model Rules set forth the minimum standards for these responsibilities, and paramount among those rules is the duty to promote the Rule of Law.²¹ It is also among the highest priority for the judiciary, as “the judiciary plays a central role in preserving the principles of justice and the rule of law.”²² Judges are bound by both their jurisdiction’s Model Rules and the Judicial Canons of Conduct.²³ Those governed by these rules—i.e., lawyers, judges, and their staffs—must “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information” surrounding the case.²⁴

These rules matter. The Rule of Law undergirds everything that judges do. The quality of justice is diminished if the High Court cannot control its own work product. Releasing the *Dobbs* draft undercut and denied the Rule of Law. The leaker essentially placed themselves above the law. When judges do not defend the rule of law, other judges and lawyers may take that as a repudiation of the rule of law. If the rule of law does not apply to judges

17. *See id.*; *see also What is the Rule of Law?*, UNITED NATIONS & RULE OF L., <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> [https://perma.cc/LV8Q-WULK] (last visited Jan. 14, 2023) (“[R]ule of [L]aw is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated.”).

18. ARISTOTLE, A TREATISE ON GOVERNMENT 117 (William Ellis, trans., George Routledge & Sons 1888).

19. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 57 (1996).

20. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2023).

21. *See id.* at pmb1, cmts. 1–2, 6.

22. MODEL CODE OF JUDICIAL CONDUCT, pmb1. cmt. 1 (AM. BAR ASS'N 2020).

23. *See id.* at Application; *see also* MODEL RULES OF PROF'L CONDUCT, pmb1. cmt. 1 (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

24. MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

and lawyers, asking law students or other citizens to hold to it is not only unreasonable, but absurd.

III. CONFIDENTIALITY

One of the first things learned by every lawyer, law clerk, intern, employee in the legal field, judge, judicial administrative official, court worker, and law student, is the vital importance of confidentiality. Indeed, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted” by an exception contained in Model Rule 1.6.²⁵ Confidentiality is central to the justice process.²⁶ This confidentiality applies to transmitting a communication that includes information relating to the representation of a client, as the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.²⁷

By its nature, any judicial opinion is going to be public. All of the information in the opinion is arguably *already* public knowledge as it is the product of public hearings—this is certainly true of *Dobbs*. Furthermore, in *Dobbs*, the Supreme Court did not represent any parties, so there was no information related to the representation of a client. However, that does not mean a public trust of confidential information is thereby waived because of the public nature of the judicial process. These rules, as previously noted, apply to the Justices at the Supreme Court of the United States, and all who serve there. Confidentiality rules also apply to judicial employees who must avoid making public comment on the merits of a

25. MODEL RULES OF PROF'L CONDUCT R. 1. Exceptions include: “to prevent reasonably certain death,” “to prevent the client from committing a crime or fraud” that will result in financial loss, to prevent “substantial injury to the financial interests. . . that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud,” “to secure legal advice about the lawyer’s compliance” with the rules, “to establish a claim or defense on behalf of the lawyer,” “to comply with a court order,” or “to detect or resolve conflicts of interest.” Notably, none of these exceptions apply to the leak of the *Dobbs* draft opinion.

26. “A fundamental principle in the client-lawyer relationship is that in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” *Id.* at R. 1.6 cmt. 2.

27. *Id.* at R. 1.6 cmt. 19.

pending action.²⁸ While the Justices and their staff do not represent a client, leaking a draft opinion to the press is a betrayal of confidential information of the case, a betrayal of the parties to the case, and a betrayal of each other. If the highest court in the United States cannot be trusted to maintain confidentiality, who can? Why would a new lawyer or law student want to follow rules of confidentiality if the Supreme Court does not do so? Everyone at the high court was not only prohibited from leaking the draft opinion but were also required to work to prevent its unauthorized disclosure.

IV. JUDICIAL CODE OF CONDUCT

The ABA Model Code of Judicial Conduct “establishes standards for the ethical conduct of judges and judicial candidates.”²⁹ While not exhaustive, it is intended to provide guidance for judges to maintain “the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.”³⁰ This code consists of four Canons, each with comments that provide additional guidance. Furthermore, portions of the Code of Judicial Conduct apply to judicial law clerks as well.³¹

“There are a few provisions of the ABA Model Code of Judicial Conduct that explicitly apply to law clerks (as well as other court staff). Rules 2.3(B), 2.8(B), 2.9(D), and 2.10(C)³² require judicial staff to not manifest bias or prejudice; be patient, courteous, and dignified; avoid *ex parte* communications; and refrain from making public statements that may affect the fairness of a pending ruling.”³³

28. *Code of Conduct for Judicial Employees*, in ETHICS AND JUDICIAL CONDUCT (U.S. COURTS 2022), <https://www.uscourts.gov/sites/default/files/guide-vol02a-ch03.pdf> [<https://perma.cc/ZY5Q-4EFE>].

29. MODEL CODE OF JUDICIAL CONDUCT, pmbl. cmt. 3 (AM. BAR ASS'N 2020).

30. *Id.*

31. MODEL CODE OF JUDICIAL CONDUCT R. 2.12; *see also id.* R. 1.12(b), cmts. 1–2.

32. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B), 2.8(B), 2.9(D), 2.10(C).

33. Marla N. Greenstein, *Judicial Ethics and Law Clerks*, AM. BAR ASS'N (July 1, 2022), https://www.americanbar.org/groups/judicial/publications/judges_journal/2022/summer/judicial-ethics-and-law-clerks/ [<https://perma.cc/V8DA-Y4VT>].

Furthermore, there is also a Code of Conduct for judicial employees of all United States courts that “applies to all employees of the judicial branch, including interns, externs, and other volunteer court employees.”³⁴ Canon 2 of the code for employees states that employees “should not engage in any activities that would put into question the propriety of the employee’s conduct in carrying out the duties of the court.” He or she “shall not allow family, social, or other relationships to influence official conduct or judgment” or put into question the propriety of the employee’s conduct.³⁵

Chief among the virtues in the Judicial Code of Conduct are integrity, independence, impartiality, and the avoidance of impropriety in both private and public life.³⁶ These virtues are set forth to promote confidence in the judiciary.³⁷ Confidence in the judiciary is critical to a public sense of authentic justice. This is the burden of public office. A “judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.”³⁸ It is a violation of court rules to leak a draft opinion because it creates the appearance of impropriety in violation of court rules. Doing so was a crystal-clear display of a lack of integrity and respect for the Court. It worked to effectively remove the High Court’s independence by using open media to create public pressure, placing undue influence on the Court’s decision.

It was also unfair to the parties as it strained the Court’s ability to be impartial and maintain an appearance of impartiality.³⁹ Speculation suggested the leak was politically motivated,⁴⁰ showing “bias or prejudice,”

34. *Code of Conduct for Judicial Employees*, *supra* note 28, at § 310.10.

35. *Id.* Canon 2.

36. MODEL CODE OF JUDICIAL CONDUCT, Canon 1 (AM. BAR ASS’N 2020) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

37. *Id.* R. 1.2, cmt. 1 (“Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and person conduct of a judge.”).

38. *Id.* R. 1.2, cmt. 2.

39. *See id.* R. 2.2, cmt. 1 (“To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”); *Id.* R. 2.2, cmt. 2 (“Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”).

40. Melanie Israel, *Here’s What to Watch Following the Dobbs Draft Leak*, HERITAGE FOUND. (May 5, 2022), <https://www.heritage.org/life/commentary/heres-what-watch-following-dobbs-draft->

the opposite of what is expected of a judge.⁴¹ Regardless of a Justice's personal feelings about any issue (it is easy to understand the abortion focus of *Dobbs* can easily solicit strong personal feelings), the "duties of judicial office. . . shall take precedence over all of a judge's personal and extrajudicial activities."⁴²

Finally, the leak also reveals a scary lack of competence on the part of the leaker to do the simple and basic tasks of keeping information confidential and upholding the Rule of Law.⁴³ Consequences of such an action were grave. The Justices received death threats and murderous attempts on their lives because of this serious breach.⁴⁴ The *Dobbs* leak was harmful to legal ethics because it disregarded the Rule of Law, breached confidentiality, and violated the Judicial Code of Conduct.

All of this complicates teaching ethics for numerous reasons. The leak corrupts the image of the highest icons of the profession. It models the poorest conduct imaginable for a profession which holds justice at a premium. Courts may be left open to intimidation by political powers and factions, and this corruption could be contagious, leading to the deconstruction of the American judicial system before our very eyes. Although some may argue, "oh well, it is done now, it does not matter anymore, it is in the past," that argument is not settled professional ethics. It does matter, and it makes a difference for the ethical formation of every lawyer in the country.

Teaching ethics to lawyers and law students is already hard to do.⁴⁵ While some may argue there are no right answers in ethics,⁴⁶ there are clearly

leak [<https://perma.cc/CSF5-47DW>] ("[T]he leak is a nakedly political attempt to get the [J]ustices to back down.").

41. MODEL CODE OF JUDICIAL CONDUCT R. 2.3.

42. *Id.* R. 2.1.

43. *See id.* Canon 2 ("A judge shall perform the duties of judicial office impartially, competently, and diligently."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 (emphasizing the importance of competence and diligence for all lawyers, making this a double duty for any Justice and his or her staff).

44. Matthew Impelli, *Supreme Court Justices Threatened with Murder if Roe Overturned, DHS Warns*, NEWSWEEK (May 18, 2022), <https://www.newsweek.com/supreme-court-justices-threatened-murder-roe-v-wade-overturned-1707869> [<https://perma.cc/HL5D-V99A>].

45. Wortham, *supra* note 14, at 21 (explaining why teaching legal ethics is difficult, and that doing so requires "more unrelenting enthusiasm than most courses and lots of effort to provide real world referents").

46. *See id.* at 22 (noting this is not an uncommon response among students who get frustrated with the flexibility and the tensions built into the Model Rules).

wrong decisions. This leak was one of them. Somehow “the gut instincts for danger” were not “honed and enough . . .” to avert the leaker from this unethical choice.⁴⁷

High Court ethics do and will trickle down to the entire legal system. It is an unfortunate reality to acknowledge that not only lawyers and judges need better ethics, but Justices and their personnel do as well. All are invited to attend the Author’s Professional Responsibility class at any time, especially to report on the leak of the *Dobbs* draft opinion, what would quickly be the ultimate PR in the News. Until then, teaching ethics to lawyers and law students is tougher than ever.

47. *Id.*

