LEAD ARTICLE

SHAM SUBPOENAS AND PROSECUTORIAL ETHICS

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ABSTRACT

Prosecutors are given broad freedom to conduct their investigations throughout the grand jury process; their power is not without legal and ethical limits, however. For example, courts have discretion to quash subpoenas that have been issued without a proper purpose.

Unlike law enforcement officials who may use deceptive tactics throughout an investigation, prosecutors are subject to professional rules of responsibility. All lawyers are subject to some variation of Rule 4.2 of the Model Rules of Professional Responsibility—the No-Contact Rule—which prohibits a lawyer from communicating with a represented individual. Prosecutors, however, have escaped the Rule's reach by communicating with represented individuals through the use of undercover informants.

Moreover, some prosecutors have abused the grand jury process by creating sham subpoena documents that have targeted witnesses and victims of crime. This practice was recently uncovered in the following jurisdictions: New Orleans and Gretna, Louisiana, and Nassau County, New York. Such a deceptive practice is particularly troublesome because it implicates the rights of unrepresented individuals.

To assess the ethical implications, courts employ a case-by-case adjudication to analyze whether sham subpoenas constitute prosecutorial misconduct. Such a totality-of-the-circumstances approach creates an unpredictable legal framework that recklessly disregards the legal rights of individuals and undermines the integrity of the court. Given the significance of the legal rights at stake, a bright line rule is necessary to protect the rights of individuals from such an abusive tactic and to ensure the integrity of the criminal justice system.

Both the motion-to-quash remedy and the discrepancy in legal tests that courts employ when analyzing the applicability of Rule 4.2 provide inadequate protection for individuals challenging sham subpoenas. Accordingly,

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this Article recommends a model rule, which the states or the ABA should adopt, that specifically addresses prosecutors' fraudulent and misleading use of sham court documents.

INTRODUCTION

Prosecutors can be described as the "chief law enforcement officer[s]" of their jurisdiction, and they are afforded extremely broad discretion to conduct investigations and bring prosecutions.[1] To a large extent, this "discretion is unbridled," and in deciding to pursue criminal charges, a prosecutor's "decision is unassailable."[2] Prosecutors may also be active participants in coordinating police investigations—especially in large cities.[3] In conducting investigations, there are many creative and atypical ways that prosecutors obtain the evidence necessary to make their case, from supplying ingredients for drug operations,[4] to using docking facilities to catch those involved in smuggling operations.[5]

Taking their creativity to a new level, some prosecutors began using sham subpoenas—subpoenas that have no legal foundation—as another tool to gather evidence in their investigations.[6] Prosecutors started using these sham subpoenas by giving them to undercover informants who would then show them to the targets of ongoing investigations in order to elicit incriminating responses from the targets.[7] Similarly, prosecutors use sham subpoenas as tools to maintain informants' cover.[8]

In 2017, the press uncovered sham subpoena use in New Orleans, Louisiana; Gretna, Louisiana; and Nassau County, New York.[9] The publications alleged that

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1. JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS §§ 1.09, 1.14 (4th ed. 2019).

2. *Id.*

3. *Id.* § 1.13 (describing the role that prosecutors should have in helping to coordinate police investigations).

4. *See* United States v. Russell, 411 U.S. 423, 431–32 (1973) (holding that an undercover agent supplying suspected drug manufacturers with phenyl-2-propanone, an essential ingredient of methamphetamine, did not violate the Due Process Clause of the Fifth Amendment).

5. *See* United States v. Ward, 793 F.2d 551, 552–53 (3d Cir. 1986) (determining that the Drug Enforcement Administration's ("DEA") involvement in an undercover operation involving drug manufacturing and distribution, which included the DEA selling the drugs to the defendants, did not violate fundamental fairness or due process).

6. *See* United States v. Martino, 825 F.2d 754, 760 (3d Cir. 1987) (discussing whether the prosecutor issued a "sham subpoena" to an undercover informant when he issued a subpoena under the informant's pseudonym). The word "sham" is defined as "[a] false pretense or fraudulent show," or "[s]omething that is not what it seems." *Sham*, BLACK'S LAW DICTIONARY (11th ed. 2019). The way that courts have identified and labeled subpoenas as "sham" aligns with the *Black's Law Dictionary* definition; however, the Third Circuit explained that using the word "sham" to describe a subpoena does not necessarily bear weight in analysis of a prosecutor's actions, especially in the undercover informant context. *See Martino*, 825 F.2d at 760 (explaining that a subpoena under an informant's pseudonym "[is] 'sham' in the same sense that any undercover agent using a false name or purporting to be someone s/he is not is 'sham,'" and thus, characterizing a subpoena as "'sham' does not aid in the analysis of its propriety").

7. *See, e.g.*, United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988) (concluding that the federal prosecutors violated New York's ethical rule when they gave a "sham subpoena" to an undercover informant to show to a target of an investigation, who was represented by counsel in the matter).

8. *See* United States v. Ryans, 903 F.2d 731, 735–39 (10th Cir. 1990) (analyzing whether prosecutors violated Oklahoma's ethical rule when they issued a subpoena to an undercover agent's alias).

9. Charles Maldonado, *Jefferson Parish Prosecutors Used Fake Subpoenas Similar to Those in New Orleans*, THE LENS (Apr. 27, 2017) [hereinafter Maldonado, *Jefferson Parish*], https://thelensnola.org/2017/04/27/prosecutors-in-jefferson-parish-have-used-fake-subpoenas-similar-to-those-in-new-orleans/; Charles Maldonado, *Orleans Parish Prosecutors are Using Fake Subpoenas to Pressure Witnesses to Talk to Them*, THE LENS (Apr. 26, 2017) [hereinafter Maldonado, *Orleans Parish*], https://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-

the prosecutors in those jurisdictions had sent fraudulent documents resembling legally valid subpoenas to victims and witnesses of criminal investigations in an effort to compel private meetings[10] or testimony before a grand jury.[11] While courts have addressed the use of sham subpoenas in the undercover informant context,[12] the New Orleans, Gretna, and Nassau County practices present distinguishable circumstances: the ethical and legal legitimacy of sham subpoenas targeting unrepresented crime victims and witnesses is uncharted territory for courts.[13] Applicable legal remedies and ethics code provisions provide unrepresented persons with little or no protection from abusive prosecutorial investigatory techniques,[14] making these individuals especially vulnerable to coercive tactics.[15] Thus, although the press has heavily scrutinized the New Orleans sham subpoena practice in particular, the legal implications of the general practice as yet remain unclear.[16] The American Civil Liberties Union ("ACLU") and the Civil Rights Corps, on behalf of the individuals targeted by sham subpoenas in New Orleans, filed a lawsuit in federal court challenging the practices and policies employed by the Orleans Parish District Attorney's ("DA") office.[17] Each plaintiff received a sham subpoena from the DA's office, and some even faced an arrest warrant or actual jail time when they refused to comply.[18] In response, the Orleans Parish DA's office filed a motion to dismiss against all claims.[19] Some of the plaintiffs' claims have survived the motion to dismiss stage,[20] but the uncertainty of the trial's

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using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/; Pei-Sze Cheng, *I-Team: Nassau DA Accused of Using 'Fake Grand Jury Subpoena'*, NBC (Jan. 23, 2018), https://www.nbcnewyork.com/news/local/Nassau-County-District-Attorney-Accused-Fake-Subpoena-I-Team-470798983.html.

10. Maldonado, *Orleans Parish*, *supra* note 9.

11. Cheng, *supra* note 9.

12. *See infra* Section II.B (discussing the cases that deal with sham subpoenas in the undercover informant context).

13. Sham subpoenas raise a host of issues, some of which have been addressed in the case involving the Orleans Parish District Attorney's office. The issues raised by the plaintiffs do not address the ethical duties of prosecutors. *See* Order and Reasons at 2, Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM-JVM (E.D. La. Feb. 28, 2019). Moreover, the plaintiffs did not pursue any preventive legal measures, such as a motion to quash. Rather, this litigation focuses on issues such as whether the sham subpoenas violated constitutional rights, as well as whether prosecutors enjoy absolute or qualified immunity from civil claims. *See id*. This Article addresses only the ethical implications of the sham subpoena practice.

14. *See infra* Section I.B (explaining current controls on prosecutorial conduct).

15. *See* Complaint and Jury Demand at 3, Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM-JVM (E.D. La. Oct. 17, 2017) (alleging that the prosecutors' sham subpoena practice "create[s] a culture of fear and intimidation that chills crime victims and witnesses from asserting their constitutional rights").

16. *See* Maldonado, *Orleans Parish*, *supra* note 9 (discussing possible legal issues associated with sham subpoenas in New Orleans); Cheng, *supra* note 9 (reporting that the judge who was considering a sanctions motion stated the practice was "legally questionable").

17. *See* Complaint, *supra* note 15, at 2; *see also* Second Amended Complaint and Jury Demand at 2, Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM-JVM (E.D. La. Jan. 25, 2018).

18. Second Amended Complaint, *supra* note 17, at 2.

19. Defendants' Joint Motion to Dismiss at 1, Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM-JVM (E.D. La. Mar. 1, 2018).

20. Order and Reasons, *supra* note 13, at 51–52; *see also* Transcript of Motion Hearing, Singleton v. Cannizzaro, No. 2:17-cv-10721-JTM-JVM (E.D. La. May 31, 2018). In the most recent judicial opinion in the

ultimate outcome establishes a pressing need for the legal community to take a stance on sham subpoena practices.

This Article contends that it is unethical for prosecutors to use sham or fake subpoenas as investigatory tools.[21] Part I examines the current legal and ethical controls on prosecutorial conduct. Section I.A provides background on the traditional use of grand jury subpoenas and the prosecutor's role in the grand jury process. Section I.B describes the two different standards that courts currently apply when examining whether a grand jury subpoena has been issued for a proper purpose. Further, Section I.B details the existing controls on prosecutorial behavior through ethics opinions and state ethical rules. Part II looks at prosecutors' use of sham subpoenas as an investigatory tactic. Section II.A highlights the recent sham subpoena use that has been uncovered in the United States. Section II.B focuses on the current jurisprudence surrounding the use of sham subpoenas.

Part III asserts that any sham subpoena practice is unethical and is generally an unchecked prosecutorial tactic. Section III.A discusses how current legal limitations are insufficient to protect individuals from the use of sham subpoenas. Section III.B posits that the current legal controls that exist for targeted individuals to challenge a sham subpoena are ineffective. Section III.C contends that the current gap in case law examining the use of sham subpoenas has created an unpredictable and unworkable application of ethical rules. The Article concludes by asserting that both states and the American Bar Association ("ABA") should adopt a new rule for the Modern Rules of Professional Conduct that specifically prohibits the use of sham subpoenas.

I. CURRENT LEGAL AND ETHICAL CONTROLS ON PROSECUTORIAL MISCONDUCT

A. Grand Jury Subpoenas and the Role of the Prosecutor

The grand jury performs an essential function in the criminal justice system as a "referee between the Government and the people."[22] Under Rule 6(a)(1) of the Federal Rules of Criminal Procedure, a grand jury must consist of at least sixteen persons drawn "at random" from a "fair cross section" of the community where the grand jury sits.[23] Once a grand jury has been selected, the Assistant United States Attorney ("AUSA") "directs the grand jury proceedings, introduces the witnesses, asks most of the questions[,] and presents the case."[24] Accordingly, a prosecutor's

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case, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's denial of defendant prosecutors' motion to dismiss based on absolute immunity, but left open the question whether the defendants may satisfy their burden of showing absolute immunity at the summary judgment stage. Singleton v. Cannizzaro, 956 F.3d 773, 784 (5th Cir. 2020).

21. This Article uses the word "sham" to refer to subpoenas; however, certain courts have characterized them as "fake." Accordingly, for this Article, the two words are used interchangeably.

22. *In re* Impounded, 241 F.3d 308, 312 (3d Cir. 2001) (citation omitted).

23. LAW JOURNAL PRESS, GRAND JURY PRACTICE § 3.02 (2015) (footnote omitted).

24. *Id.* § 3.04.

role in the grand jury process is expansive;[25] however, when it comes time for the grand jury to perform "its ultimate function" of deciding whether to indict, the prosecutor must leave the jurors to reach their decision independently.[26] A major tool of the grand jury's investigatory function rests with its power to subpoena witnesses or compel evidence based "upon the mere suspicion that a crime has occurred, or even 'just because it wants assurance that [one has] not.'"[27] A subpoena is a court-ordered document that can be used to compel an individual to produce documents or to appear and give testimony in court.[28] Grand jury subpoenas are governed by Rule 17 of the Federal Rules of Criminal Procedure.[29] Under Rule 17, prosecutors have the power to issue two types of grand jury subpoenas[30]: subpoenas *ad testificandum*, governing witnesses' testimony, and subpoenas *duces tecum*, concerning the production of documents.[31] A legally authorized subpoena must contain all of the following information: the court's name, the name of the proceeding, a seal of the court, and a written order that tells the witness that she must testify at a specific time and place.[32]

To serve a subpoena on an individual, Rule 17 requires a clerk of the court to "issue a blank subpoena."[33] The party who has requested the subpoena must then "fill in the blanks" by writing the name of the witness who will be ordered to appear before the court.[34] For grand jury subpoenas, prosecutors are entrusted to fill in those blanks[35] and generally operate independently because there is not a

25. *Id.* § 4.02 (explaining the enormous control prosecutors wield when they conduct an investigation by considering "what subjects should be investigated" and if subpoenas should be served without consulting the grand jury).

26. *Id.* § 3.04.

27. *Id.* (quoting United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991)) ("The grand jury has broad reaching investigatory powers and may generally compel the testimony of all witnesses and the production of all evidence it considers appropriate.").

28. *What Is a Subpoena?*, FINDLAW (Jan. 17, 2018), https://litigation.findlaw.com/going-to-court/what-is-a-subpoena.html (defining a "subpoena").

29. *See generally* FED. R. CRIM. P. 17 (detailing the requirements of issuing a subpoena); *see also* SUSAN W. BRENNER & LORI E. SHAW, 1 FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 8:2 (2d ed. Supp. 2019). Generally, a prosecutor does not have subpoena power independent of the grand jury. This Article focuses primarily on grand jury subpoenas.

30. In special circumstances, a third kind of subpoena is available to the grand jury known as a "forthwith" subpoena, which is a subpoena that requires immediate compliance and is only used in rare circumstances. *See* 1 FEDERAL CRIMINAL PRACTICE: A SECOND CIRCUIT HANDBOOK § 45-3 (2020); U.S. DEP'T OF JUST., JUSTICE MANUAL 9-11.140 (2020) (explaining that "forthwith" subpoenas should only be sought when justified and when the U.S. Attorney has given approval).

31. BRENNER & SHAW, *supra* note 29; *see* FED. R. CRIM. P. 17(a) (describing a subpoena *ad testificandum* as a subpoena that compels an individual to "attend and testify"); *Subpoena ad testificandum*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a traditional subpoena). A subpoena *duces tecum* compels a witness to produce documents or other physical evidence. FED. R. CRIM. P. 17(c).

32. FED. R. CRIM. P. 17(a).

33. *Id.*

34. *Id.*

35. *See id.* ("The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.").

judicial officer overseeing grand jury proceedings.[36] Accordingly, in many federal jurisdictions, prosecutors are responsible for giving legal advice to the grand jury and for trying the government's case.[37] Although prosecutors "should give due deference to the grand jury as an independent legal body," prosecutors act as advisors to the jury, "explain[ing] the law and . . . express[ing] an opinion on the legal significance of the evidence."[38] As such, prosecutors serve a unique role in the grand jury process and are afforded broad discretion in issuing grand jury subpoenas.

B. Controls on Prosecutorial Misconduct

Throughout the grand jury process, prosecutors face competing interests.[39] Even at an investigation's earliest stages, prosecutors must continuously balance their desire to obtain an indictment with their more neutral role as legal advisor to the grand jury.[40] As prosecutors work to secure an indictment, they must simultaneously remain grounded in their neutral duties,[41] which include instructing the grand jury on relevant case law, how the law applies, and how it should be applied to evidence.[42] While prosecutors possess expansive investigatory freedom, especially in their broad discretion to issue subpoenas,[43] prosecutors' decisions on behalf of grand juries are not without legal and ethical parameters.[44] What this Article refers

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36. *See* SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, GRAND JURY LAW AND PRACTICE § 4.15 (2d ed. Supp. 2019); *see also* United States v. Ciambrone, 601 F.2d 616, 628–29 (2d Cir. 1979) (Friendly, J., dissenting) (discussing the ex parte nature of grand jury proceedings and the prosecutor's "dual role of pressing for an indictment and of being the grand jury's adviser").

37. *See* BEALE ET AL., *supra* note 36, § 4:15.

38. ABA CRIM. JUST. STANDARDS FOR THE PROSECUTION AND DEF. FUNCTIONS § 3-4.5(b) (AM. BAR ASS'N, 4th ed. 2015) [hereinafter ABA STANDARDS].

39. *See Ciambrone*, 601 F.2d at 628.

40. *Id.*

41. *See id.* at 628–29 ("The Ex parte character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

42. *See* ABA STANDARDS, *supra* note 38, § 3-4.5(b).

43. *See* United States v. Tropp, 725 F. Supp. 482, 486 (D. Wyo. 1989) ("[I]t is commonplace for a United States Attorney to obtain a blank grand jury subpoena and fill it out without actual prior grand jury authorization.").

44. LAWLESS, *supra* note 1, § 2.62. Notably, the investigatory freedom enjoyed by police officers is distinguishable from that of prosecutors. Though police officers and prosecutors often work in close proximity throughout the course of an investigation, courts have time and time again held that police officers enjoy a higher level of immunity than prosecutors do, and thus, police can engage in investigatory conduct that prosecutors simply may not. *See* Whalen v. McMullen, 907 F.3d 1139, 1143 (9th Cir. 2018) (holding that although a police officer violated the plaintiff's Fourth and Fourteenth Amendment rights by secretly videotaping the plaintiff outside and inside her home, the police officer maintained qualified immunity from the suit because such conduct passed the reasonable officer test); *see also* Malley v. Briggs, 475 U.S. 335, 335–36 (1986) (explaining that "qualified immunity provides ample protection to all [police officers] but the plainly incompetent or those who knowingly violate the law," and the inquiry is "whether a reasonably well-trained officer" in the position under review would have known they were violating the law); ABA STANDARDS, *supra* note 38, § 3-3.2 (discussing prosecutors' relationships with law enforcement). For example, police can employ interrogation practices that

to as "controls on prosecutorial misconduct" includes both remedial and preventative measures that individuals and the judiciary may employ to maintain the integrity of the grand jury process.[45] These measures include traditional legal recourse options, such as motions to quash subpoenas issued for improper purposes,[46] as well as the ability to challenge a subpoena under the Rules of Professional Conduct that have been implemented by states to provide attorneys with guidelines for ethically sound conduct.[47]

1. Legal Controls on Grand Jury Subpoenas

Rarely do courts elect to interfere with the grand jury's investigatory process.[48] Despite this reluctance to interfere, when a subpoena has been issued for an improper purpose, courts may, in their discretion, quash the subpoena.[49] Motions to quash offer potential legal recourse to defendants or suspects of an investigation who have received improperly issued subpoenas, but success on such a motion is not without its challenges.[50] Namely, grand jury subpoenas maintain a strong presumption of regularity in the eyes of the court.[51] To overcome this presumption, most courts require that a defendant demonstrate that the improper purpose rose to such an "arbitrary and capricious" level of abuse that it was "violative of due

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rely heavily on deception. *See* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1160–61 (2017) (describing the practice known as the "Reid technique" to deal with recalcitrant subjects):

> These practices almost all rely on some form of deception and can be categorized as follows: (1) "impersonation"; (2) "rationalization"; (3) "evidence fabrication" (e.g., false statements that a codefendant has inculpated the suspect, that the suspect's fingerprints were found at the scene of the crime, and other means of insisting the suspect is guilty).

Id. (cleaned up). Meanwhile, prosecutors are subject to a set of ethical standards that is often more stringent. *See* ABA STANDARDS, *supra* note 38, § 3-4.1 (explaining that a prosecutor "should research and know the law in this regard before acting, understanding that in some circumstances a prosecutor's ethical obligations may be different from those of other lawyers"). For example, the ABA has published guidelines on how prosecutors should interact with witnesses and victims of crime. *Id.* § 3-3.4. The ABA provides that:

> In communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons. . . . The prosecutor should not use means . . . that violate legal rights. The prosecutor and prosecution agents should not misrepresent their status, identity[,] or interests when communicating with a witness.

Id.

45. *See* ABA STANDARDS, *supra* note 38, § 3-4.5.

46. *See infra* Section I.B.1.

47. *See infra* Section I.B.2.

48. LAWLESS, *supra* note 1, § 2.62 (stating that "courts tend to refrain from interfering with the grand jury process").

49. *Id.*

50. *Id.*

51. *See generally In re* Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980) (describing the presumption of regularity and what a defendant must do to overcome it).

process,"[52] a standard which this Article refers to as the demonstrable abuse standard. While a majority of circuits apply the demonstrable abuse standard, the U.S. Court of Appeals for the Third Circuit uniquely applies what this Article refers to as the *Schofield* rule, a standard derived from the case, *In re Grand Jury Proceedings* (*Schofield I*).[53]

In *Schofield I*, the appellant, Mrs. Schofield, received a subpoena "for the purpose of testifying in a grand jury investigation."[54] When she arrived to testify, however, she was instead directed to meet with the U.S. Attorney rather than the grand jury.[55] When Mrs. Schofield refused to follow the government's request, the government filed a motion in the U.S. District Court for the Eastern District of Pennsylvania to force her compliance.[56] In response, Mrs. Schofield "urged that before she be required to comply with the [g]overnment's requests," the government must "state the purpose and necessity for requesting [her] handwriting exemplars, fingerprints[,] and photographs."[57] The district court rejected the request and held Mrs. Schofield in civil contempt.[58] On appeal, the U.S. Court of Appeals for the Third Circuit disagreed and reasoned that placing an affidavit requirement on the government was entirely appropriate.[59] Accordingly, the *Schofield* rule begins with the same presumption of regularity as the demonstrable abuse standard,[60] but also requires that the government "make a minimal showing by affidavit of the existence of a proper purpose for the subpoena."[61]

a. Demonstrable Abuse Standard and Proper Purpose

Under the demonstrable abuse standard, a moving party must first demonstrate that a subpoena's improper purpose was the dominant or sole purpose behind the subpoena's issuance before a court may quash it.[62] Following this standard, a court "will not interfere with the [prosecutor's] discretion unless it is abused to such an

52. United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979) (quoting United States v. Welch, 572 F.2d 1359, 1360 (9th Cir. 1978)).

53. 486 F.2d 85, 93 (3d Cir. 1973).

54. *Id.* at 87.

55. *Id.* (noting that she was "directed by the United States Attorney (1) to submit handwriting exemplars, and (2) to allow her fingerprints and photograph to be taken").

56. *Id.*

57. *Id.* at 88.

58. *Id.* at 88–89.

59. *Id.* at 93 (reasoning that the *Schofield* affidavit requirement is supported by the "federal courts' supervisory power over grand juries").

60. *Id.* at 92.

61. LAWLESS, *supra* note 1, § 2.62; *see infra* Section I.B.1.b and accompanying text.

62. *See In re* Grand Jury Subpoena, 175 F.3d 332, 340 (4th Cir. 1999) (finding that a grand jury subpoena used in a criminal investigation "to obtain documents for use in [a] civil action" amounted to an illegitimate purpose that was not relevant to the grand jury investigation); United States v. Under Seal (*In re* Antitrust Grand Jury Investigation), 714 F.2d 347, 350 (4th Cir. 1983).

extent as to be arbitrary and capricious and violative of due process."[63] The improper motive must rise to a level of such "[c]areless prosecutorial methods [that it] . . . prejudice[s] a defendant's rights."[64] Alternatively, if the moving party alleges "repeated prosecutorial abuses so extreme that it biased the grand jury against the defendant and intruded upon the grand jury's independence," a court may be compelled to raise "a sword and a shield of justice"[65] and quash the subpoena.

In jurisdictions that apply the demonstrable abuse standard, courts have found grand jury subpoenas to be issued with a proper purpose when (1) the subpoena aided in the investigation, and the witness likely had "relevant and material evidence to present to the [g]rand [j]ury";[66] (2) the government offered affirmations of good faith supporting the grand jury subpoena issuance;[67] (3) the defendant did not make a factual showing strong enough to overcome the presumption of "lawfulness and regularity" courts afford subpoenas;[68] or (4) the prosecutor's procedure for issuing the subpoena rose to the level of a common practice.[69]

Looking to the first example of proper purpose—when the subpoena aids in the investigation—the U.S. Court of Appeals for the Fourth Circuit in *In re Antitrust Grand Jury Investigation* reviewed a subpoena connected to an investigation of "bid rigging in the road building industry in Virginia."[70] The subject of the investigation, the appellee, refused to testify "on the basis of his privilege against self-incrimination," so the Assistant Attorney General of the United States "authorized an application to compel his testimony."[71] Subsequently, the appellee made an offer to "accept pleas of guilty in exchange for excus[al] from testifying," but when the offer was not accepted, the "appellee moved to quash the subpoena."[72] Despite finding that "enforcement of the subpoena would aid the grand jury in its investigation," the U.S. District Court for the Eastern District of Virginia granted

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63. United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979) (quoting United States v. Welch, 572 F.2d 1359, 1360 (9th Cir. 1978)).

64. United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 525 (E.D.N.Y. 1974).

65. LAWLESS, *supra* note 1, § 2.60; *Kleen*, 381 F. Supp. at 525 (internal quotation marks omitted); *see* United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) (explaining that a court should exercise its supervisory power "to correct flagrant or persistent abuse, despite the absence of prejudice to the defendant"); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (holding that the government's repeated "reliance on hearsay before the grand jury" could not be properly punished with "another admonition," and that the court thus must step in with its supervisory powers).

66. *In re Antitrust Grand Jury Investigation*, 714 F.2d at 350.

67. *See In re* Grand Jury Subpoenas, 581 F.2d 1103, 1108, 1110 (4th Cir. 1978) (inquiring "whether it is sufficient . . . to rely on the government's own affirmations of good faith" and finding that because the petitioner had not alleged sufficient evidence to the contrary, relying on the government's affirmation was enough to show proper purpose).

68. *In re* Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980).

69. *See Kleen Laundry*, 381 F. Supp. at 523 (citing to similar decisions in the Northern District of California, the District of Maryland, and the Second Circuit).

70. 714 F.2d at 348.

71. *Id.*

72. *Id.* at 348–49.

the motion to quash because "the prosecutor improperly sought . . . to compel [the appellee] to testify in order to coerce a plea bargain from a relative of the witness."[73] Upon review, the U.S. Court of Appeals for the Fourth Circuit reversed the district court's motion, explaining that "[o]nce it is shown that a subpoena might aid the grand jury in its investigation, it is generally recognized that the subpoena should issue."[74] Thus, the Fourth Circuit reasoned that once the district court found "that it was likely that the petitioner 'had relevant and material evidence to present to the [g]rand [j]ury,'" its proper purpose inquiry should have come to a halt, and the subpoena should have issued without challenge.[75]

Moreover, courts find a proper purpose when the government offers an affirmation of good faith. For example, the U.S. Court of Appeals for the Fourth Circuit in *In re Grand Jury Subpoenas* held that the government's affirmations were sufficient to support proper purpose.[76] In that case, a corporation under investigation for federal income tax violations by a federal grand jury appealed from a district court order "denying its motion to quash eight grand jury subpoenas."[77] On appeal, the corporation argued that the "government was improperly using the broad powers of the grand jury to obtain documents and records, otherwise unobtainable through the [designated IRS] administrative process."[78] In response, the government offered a "sworn affidavit attesting to the government's good faith in conducting the grand jury investigation,"[79] which included a statement by the Department of Justice—the investigating agency—affirming under oath that "[t]he grand jury [was] engaged solely in the investigation of criminal matters and [was] not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever."[80] Accordingly, the Fourth Circuit allowed "the grand jury process [to] continue unimpeded" with a proper purpose finding based on the government's good faith affirmations.[81]

Third, courts have found a proper purpose when a defendant fails to allege facts sufficient to overcome the presumption of regularity that attaches to subpoenas. For example, the U.S. Court of Appeals for the Third Circuit in *In re Grand Jury Proceedings* found that where the defendant did not allege facts sufficient to overcome the presumption of "lawfulness and regularity," the subpoena was issued with a proper purpose.[82] In that case, the U.S. District Court for the Eastern District

73. *Id*. at 348.
74. *Id*. at 350.
75. *Id*.
76. 581 F.2d 1103, 1110 (4th Cir. 1978).
77. *Id*. at 1105.
78. *Id*. at 1106.
79. *Id*.
80. *Id*. at 1106 n.5.
81. *Id*. at 1110.
82. 632 F.2d 1033, 1041 (3d Cir. 1980). Although the Third Circuit generally applies the *Schofield* rule and requires a *Schofield* affidavit, the court reasoned that "absent a factual showing of irregularity beyond mere suspicion the prosecutor need not submit an affidavit affirming the grand jury seeks the documents in aid of its

of Pennsylvania "selectively quashed [a] subpoena" on Fifth Amendment grounds, and the government appealed.[83] The Third Circuit reversed, finding that such an "avenue of resisting compliance with the grand jury subpoena is unavailable to [the appellant] because the burden is his to demonstrate that the sole or dominant purpose of seeking the evidence . . . is to prepare for [a] pending trial," and he had made no such showing.[84] Accordingly, "[i]n the absence of a contrary factual showing, the grand jury proceedings are entitled to a presumption of lawfulness and regularity."[85]

Finally, if the prosecutorial tactic behind a subpoena issuance is deemed "common" prosecutorial conduct, a court is substantially more likely to find that the subpoena had a proper purpose.[86] For example, in *United States v. Kleen Laundry & Cleaners, Inc*., the U.S. District Court for the Eastern District of New York, applying the demonstrable abuse standard, determined that the use of evidence obtained from one grand jury, and then used in another, separate proceeding, is of "little import" because the "procedure is common."[87] Accordingly, courts have held that this type of conduct does not cause a court to initiate proper purpose scrutiny; the subpoena in question thus maintains its presumption of proper purpose.[88]

Conversely, courts have found grand jury subpoenas to be issued with an improper purpose under the demonstrable abuse standard when the prosecutor used the subpoena to harass or intimidate witnesses.[89] The U.S. Court of Appeals for the Fifth Circuit, in *Ealy v. Littlejohn*, confronted this issue.[90] In that case, the grand jury had initially closed its investigation regarding the death of a black youth in Byhalia, Mississippi, but later reconvened for the purpose of investigating "the origin of [a] leaflet" distributed by a group known as the United League.[91] The leaflet openly criticized the lead defense attorney and the grand jury for the case, causing the grand jury to issue subpoenas to the group.[92] In response, the United

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investigation of other persons." *Id*. Accordingly, because there was not a sufficient factual showing that "the grand jury's sole or dominant purpose for seeking enforcement of the subpoena [was] to continue, unlawfully, to investigate [the defendant] subsequent to his indictment," the court applied the demonstrable abuse standard. *Id*.

83. *Id*. at 1040.

84. *Id*. at 1041.

85. *Id*.

86. *See* United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 523 (E.D.N.Y. 1974).

87. *Id*.; *see* United States v. Owens-Corning Fiberglas Corp., 271 F. Supp. 561, 566 (N.D. Cal. 1967) (rejecting the defendant's argument that the grand jury did not have jurisdiction over the investigation); United States v. Culver, 224 F. Supp. 419, 432 (D. Md. 1963) ("The fact that the grand jury for which the documents were originally subpoenaed was discharged . . . did not prevent a subsequent grand jury from considering the same subject . . . ."); *see also* United States v. Thompson, 251 U.S. 407, 415 (1920) (explaining that allowing a court to find improper purpose in this type of situation would undermine "the spirit and purpose underlying the admitted principles as to the power of grand juries[] and the right of the [g]overnment to initiate prosecutions for crime").

88. *Kleen Laundry*, 381 F. Supp. at 523.

89. Ealy v. Littlejohn, 569 F.2d 219, 226–27 (5th Cir. 1978).

90. *Id*.

91. *Id*. at 222–23.

92. *Id*.

League members filed suit in the U.S. District Court for the Northern District of Mississippi seeking injunctive relief, alleging that "the issuance of the subpoenas and the grand jury inquiries . . . were carried out in bad faith with the purpose of harassing and intimidating the plaintiffs in violation of their First Amendment rights."[93] The district court granted the plaintiffs no relief, but the Fifth Circuit disagreed, finding not only that the information sought by the grand jury in the United League leaflet bore "not the remotest relationship to th[e] tragic event and its investigation," but also that the grand jury's questions were "posed in bad faith for the purpose of harassing those who, in the exercise of their First Amendment rights, had criticized [the] defendant . . . and called the grand jury proceeding a farce."[94]

Likewise, courts have found an improper purpose when prosecutors issue subpoenas as an improper discovery tactic. When a subpoena was used as a discovery tool to prepare for an already pending trial, for example, the U.S. District Court for the Northern District of Ohio held that the subpoena was issued with improper purpose.[95] In that case, there was also an ongoing grand jury trial in the U.S. District Court for the Southern District of New York, where an indictment against the defendant and "some 90 other defendants ha[d] already been presented and [was] pending and awaiting trial."[96] Upon review of the Ohio-based grand jury subpoenas, the district court reasoned that the grand jury's only objective was to examine witnesses in advance of trial and "to procure evidence for use in the trial . . . pending in the Southern [D]istrict of New York."[97] Accordingly, such conduct made the subpoenas "insufficient and invalid" under the demonstrable abuse standard.[98]

b. *Schofield* Rule and Proper Purpose

Whether a court applies the *Schofield* rule or the demonstrable abuse standard, a court's goal in resolving a motion to quash is to determine whether the information sought by the grand jury subpoena is supported by a proper purpose. Unlike the demonstrable abuse standard, the *Schofield* rule requires the government to submit an affidavit that asserts that the information sought by the subpoena was "(1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose."[99] For example, if a court concludes that a

93. *Id*. at 223.

94. *Id*. at 229–30.

95. *See In re* Nat'l Window Glass Workers, 287 F. 219, 227–28 (N.D. Ohio 1922) ("It is also shown that the dominating . . . object of the present investigation is to examine witnesses in advance of trial, find out what their testimony is to be, so as to use it in that trial, and to obtain the possession and production of documents for that purpose. . . . [Therefore,] th[ose] outstanding subpoenas should be vacated and set aside."); *see also* United States v. Doe (*In re* Application of Ellsberg), 455 F.2d 1270, 1273–74 (1st Cir. 1972) (reasoning that using a grand jury subpoena to prepare for an already pending trial was an improper use).

96. *In re Nat'l Window Glass Workers*, 287 F. at 221.

97. *Id*.

98. *Id*.

99. *In re* Grand Jury Proceedings (*Schofield II*), 507 F.2d 963, 966 (3d Cir. 1975).

subpoena's issuance suggests an improper purpose, like harassing witnesses in bad faith or using the subpoenas as preparation for an already pending trial,[100] a *Schofield* court will invalidate it not only because it fails to meet the relevancy prong, but also because it fails under the "not sought primarily for another purpose" prong.[101] In contrast, the demonstrable abuse standard places a slightly higher bar on the party moving to quash the subpoena by requiring that the party demonstrate that the subpoena's dominant purpose was improper.[102]

The first prong of the *Schofield* rule examines whether information sought by a grand jury subpoena is "relevant to [the] investigation."[103] In its *Schofield* affidavit, the government must connect the information sought by the challenged subpoena to the investigation at hand.[104] Whether the relevancy asserted by the government passes muster requires an additional analysis.

In both *Schofield* and demonstrable abuse jurisdictions, if the government makes a preliminary showing or a good faith averment sufficient to demonstrate that the information sought by a subpoena reasonably relates to the grand jury investigation, the subpoena is deemed relevant.[105] The Supreme Court has held that subpoenas cannot be quashed for irrelevance if there is any reasonable possibility that the materials sought by the government will produce information relevant to the grand jury investigation.[106] However, "practices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden."[107] The court in *In re Grand Jury Proceedings* (*Schofield II*) applied the following definition of relevancy: "[r]elevancy, in the context of a [g]rand [j]ury proceeding is not a probative relevancy, for it cannot be known in advance whether the document produced will actually advance the investigation. It is rather a relevancy to the subject matter of the investigation."[108] In *Schofield II*, the U.S. District Court for the

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100. *See supra* Section I.B.1.a.

101. *See* United States v. Jeter, No. CCB-14-0121, 2015 WL 114118, at *3 (D. Md. Jan. 7, 2015) (holding that a subpoena used in an effort to stay a parallel civil action, as opposed to bolstering the grand jury investigation, was issued for an improper purpose).

102. *See In re* Grand Jury Subpoena, 175 F.3d 332, 340 (4th Cir. 1999) ("A subpoena should . . . only be quashed when the illegitimate purpose is the 'sole or dominant purpose of seeking the evidence.'" (quoting *In re* Antitrust Grand Jury Investigation, 714 F.2d 347, 350 (4th Cir. 1983))).

103. *In re* Grand Jury Proceedings (*Schofield I*), 486 F.2d 85, 93 (3d Cir. 1973).

104. *Id.* ("[W]e think it reasonable that the [g]overnment be required to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury . . . .").

105. LAWLESS, *supra* note 1, § 2.62 (citing United States v. R. Enters., Inc., 498 U.S. 292 (1991)). *Compare Schofield I*, 486 F.2d at 92, *with* Brown v. United States, 245 F.2d 549, 554–55 (8th Cir. 1957) ("[T]he purpose of extracting testimony . . . with a view to prosecuting [the witness] for perjury . . . does not come within the competency of the grand jury," and demonstrably overcomes any presumption of regularity), *and In re Antitrust Grand Jury Investigation*, 714 F.2d at 350 (explaining that "a court should not intervene in the grand jury process absent a compelling reason").

106. *R. Enters., Inc.*, 498 U.S. at 301.

107. *In re Antitrust Grand Jury Investigation*, 714 F.2d at 349 ("[Improper purpose] includes use of the grand jury by the prosecutor to harass witnesses or as a means of civil or criminal discovery.").

108. 507 F.2d 963, 967 n.4 (3d Cir. 1975) (referring to the definition of relevancy outlined in *In re* Morgan, 377 F. Supp. 281, 285 (S.D.N.Y. 1974)).

Eastern District of Pennsylvania found that the government had sufficiently "complied with the *Schofield I* three-pronged affidavit requirement," and the U.S. Court of Appeals for the Third Circuit agreed.[109] Addressing the relevancy requirement of the affidavit, the government stated that the grand jury had "conduct[ed] investigations of various alleged illegal activities in the said District" and the "investigations involve[d] possible violations of federal criminal statutes."[110] Further, to connect the investigation directly to the appellant, Mrs. Schofield, the government stated that she "ha[d] been subpoenaed by the said [g]rand [j]ury and ha[d] been fully advised that she [was] a potential defendant in its investigation."[111] The Third Circuit found that the statement in the government's affidavit that "the grand jury was investigating violations of criminal statutes and that the witness was a potential defendant . . . clearly satisf[ied] the requirement that the items be relevant to the grand jury investigation and properly within the grand jury's jurisdiction."[112]

Accordingly, the *Schofield* rule's relevancy prong does not place a heavy burden of production on the government, only requiring a rational connection between the information sought by the subpoena and the subject matter of the grand jury's investigation.[113] In *In re Grand Jury Applicants*, the Third Circuit determined that the government's relevancy portion of the affidavit was sufficient.[114] In that case, the government produced affidavits "disclosing the sections of the United States Code pertinent to the grand jury investigation and the reason why each witness' testimony was relevant to the investigation and not primarily for another purpose."[115] The defendant claimed that the grand jury was not "investigating violations of federal law," but rather, "attempting to harass" the company.[116] Consequently, the government furnished an affidavit identifying the possible U.S. Code violations and explaining that the subpoenaed employees "worked in areas of the [company] that made it likely for them to possess knowledge on the methods used," which would aid and inform the grand jury's decision to indict.[117] The court found that the amount of information in the affidavit was sufficiently clear to establish relevance, eliminating the defendant's improper purpose claim.[118]

Whether the government's affidavit provides enough information to demonstrate the subpoena's relevancy also requires the court to determine "how far the [g]overnment must go in a showing of relevancy to sustain [a subpoena]."[119] For example, in *In re Morgan*, the U.S. District Court for the Southern District of New

109. *Id.* at 966–68.
110. *Id.* at 966–67.
111. *Id.* at 967.
112. *Id.*
113. *Id.* at 966.
114. 619 F.2d 1022, 1024 (3d Cir. 1980).
115. *Id.*
116. *Id.* at 1027.
117. *Id.* at 1024.
118. *Id.* at 1027–28.
119. *In re* Morgan, 377 F. Supp. 281, 284 (S.D.N.Y. 1974).

York held that "where [a] subpoena calls for an indiscriminate production of uncategorized documents . . . [a] [d]istrict [c]ourt must determine which are potentially relevant."[120] According to the court, "[t]he question [should not be] whether the prosecutor must show how each new tile fits the tiles already in place [because a grand jury] could not function as a body engaged in secret investigation if that were the test."[121] Instead, the scale must "tip in favor of the duty of [a grand jury] 'to inquire into offenses against the criminal laws of the United States,'"[122] and the grand jury's duty is "usually paramount over any private interest which may be affected."[123] While a court must determine "how far the [g]overnment must go in a showing of relevancy,"[124] the burden of rebutting the presumption of lawfulness that attaches to grand jury subpoenas ultimately remains with the defendant.[125]

Just as a court requires a more detailed showing of relevancy when a subpoena requests an "indiscriminate production of documents," a court may also "require something more" when approval of a request would create challenges to the court's credibility or if a witness "has made some colorable challenge to the [government's] affidavits."[126] However, before requiring more information from the government, a court must weigh "the limited scope of the inquiry into abuse of the subpoena process, the potential for delay, and any need for additional information that might cast doubt upon the accuracy of the government's representations."[127] Accordingly, absent a "showing of harassment or bad faith sufficient to warrant rejection of the *Schofield* affidavits," a district court has discretion to "rely upon the affidavits and averments of the government" as the sole demonstration of relevancy and proper purpose.[128]

Overall, a court does not apply a bright-line test when determining whether information sought by a subpoena is relevant to an investigation. As the U.S. Court of Appeals for the Ninth Circuit in *United States v. Chanen* noted, "[a]lmost every court dealing with the issue [of prosecutorial misconduct] . . . has confronted a novel set of facts. The range of prosecutorial conduct capable of . . . unfairness appears unlimited."[129] "Nevertheless, a review of the cases, with particular regard for their facts, serves to define the line between prosecutorial conduct which is inimical to 'the integrity of the judicial process' and conduct" that should be left untouched by the court's overseeing authority.[130]

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120. *Id.*
121. *Id.* at 285.
122. *Id.* (citing 18 U.S.C. § 3332).
123. *Id.* (citing McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937)).
124. *Id.* at 284.
125. *See* United States v. Brothers Constr. Co., 219 F.3d 300, 314 (4th Cir. 2000).
126. *In re* Impounded, 178 F.3d 150, 158–59 (3d Cir. 1999) (quoting *Schofield II*, 507 F.2d 963, 964–65 (3d Cir. 1975)).
127. *Id.* at 159.
128. *Id.* at 160.
129. 549 F.2d 1306, 1309 (9th Cir. 1977).
130. *Id.*

Ultimately, "[o]nce it is shown that a subpoena might aid the grand jury in its investigation, it is generally recognized that the subpoena should issue even though there is also a possibility that the prosecutor will use it for some purpose other than obtaining evidence for the grand jury."[131] While affirming the principle that grand juries are "not meant to be the private tool of the prosecutor,"[132] the court in *In re Antitrust Grand Jury Investigation* explained that if the "United States Attorney aver[red] that [the subpoena was] sought in good faith to aid the grand jury's investigation even though circumstances suggest that it might also be used [for another purpose]," the averment supported a finding that the information sought was sufficiently relevant, and the subpoena thus had a proper purpose.[133] Conversely, if the prosecutor manipulates the subpoena process in bad faith, courts have found that the subpoena is both irrelevant and improper.[134]

2. Ethical Controls on Prosecutors: Model Rule 4.2—the "No-Contact Rule"

Another control on prosecutorial conduct rests with the American Bar Association's ("ABA") Model Rule of Professional Conduct 4.2: Communication with Person Represented by Counsel, referred to as the "No-Contact Rule," which details when an attorney may communicate with a represented individual involved in an ongoing matter or investigation. Although the Rule extends to prosecutors, it does not restrict them from communicating with unrepresented persons.[135] While jurisdictions across the United States have adopted variations of the No-Contact Rule,[136] the ABA Model Rule provides the following language:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[137]

While the current version of the Rule states that a lawyer is prohibited from making contact with "a person," the No-Contact Rule was originally adopted with the

131. *In re* Antitrust Grand Jury Investigation, 714 F.2d 347, 350 (4th Cir. 1983).

132. *Id*. at 349 (citing United States v. Fisher, 455 F.2d 1101, 1105 (2d Cir. 1972)).

133. *Id*. at 350.

134. *See* United States v. Jeter, No. CCB-14-0121, 2015 WL 114118, at *3 (D. Md. Jan. 7, 2015) (finding that the last-minute issuance of a pre-indictment subpoena could indicate a bad-faith attempt to improperly use the grand jury, which would warrant quashing the subpoena). The court's reasoning in *Jeter*, however, focuses less on a discussion of the subpoena's relevance and more on the prosecutor's conduct in determining whether there was a proper purpose. *Id*. Thus, a prosecutor's conduct is likely a focal point in a court's relevancy determination. *Id*.; *see also In re* Grand Jury Subpoena, 175 F.3d 332, 340 (4th Cir. 1999) (finding that a grand jury subpoena used in a criminal investigation "to obtain documents for use in [a] civil action" amounted to an illegitimate purpose that was not relevant to the grand jury investigation).

135. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR. ASS'N 2020).

136. *See generally* ABA CPR Pol'y Implementation Comm., Variations of the ABA Model Rules of Professional Conduct (Dec. 11, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.pdf (outlining and comparing the jurisdictions that have adopted Model Rule 4.2).

137. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR. ASS'N 2020).

word "party."[138] The Rule was amended in August 1995 to replace "party" with "person," to address case law that "limited the application of [the Rule] in the context of pre-indictment, non-custodial contacts" that were mainly by undercover informants.[139] This change was met with disagreement.[140] Opposition to the word change focused on how it "might affect law enforcement investigations" and "restrict prosecutors' ability to contact persons prior to formal proceedings, i.e., prior to their becoming a 'party.'"[141]

This Rule is not absolute, however, as it contains a built-in-exception that permits lawyers to contact represented persons if they are "authorized by law to do so."[142] Through this exception, an attorney can contact a represented individual when there is a statute, court order, or case law that permits the contact.[143] As discussed below,[144] in certain circumstances, courts have used the authorized-by-law exception to permit prosecutors to use undercover agents to make contact with represented suspects.[145]

II. PROSECUTORS' USE OF SHAM SUBPOENAS AS AN INVESTIGATORY TOOL

A. Sham Subpoena Use in New Orleans, Gretna, and Nassau County

In April 2017, a local New Orleans publication, *The Lens*, exposed the Orleans Parish DA's Office's extensive use of sham, or "fake subpoenas," in the course of criminal investigations.[146] The DA's office referred to these documents internally as "DA subpoenas."[147] The documents included the word "SUBPOENA" printed at the top of the paper as well as the statement: "A FINE AND IMPRISONMENT

138. ABA CENTER FOR PRO. RESP., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 556 (Art Garwin ed., 2013) (noting Model Rule 4.2 was originally enacted with the word "party" at the 1982 ABA Annual Meeting).

139. *Id*. at 558–59.

140. *See id*. at 559; *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995) (dissenting) (arguing against the Committee's opinion that the word "party" in the Rule included all persons and not only parties to an adversarial proceeding). Notably, this disagreement over the operation and scope of the word "party" in the original Rule 4.2 existed since its enactment in 1983 because the official comments accompanying the Rule clarified that "[t]his [R]ule also covers any person, whether or not a party to a formal proceeding." MODEL CODE OF PRO. CONDUCT. r. 4.2, cmt. (AM. BAR ASS'N 1983); *see also* ABA CENTER FOR PRO. RESP., *supra* note 138, at 555–59.

141. ABA CENTER FOR PRO. RESP., *supra* note 138, at 559.

142. *Id*. at 558.

143. MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 5 (AM. BAR. ASS'N 2020).

144. *See infra* Section II.B.1.

145. *See infra* Section II.B; United States v. Carona, 660 F.3d 360, 365–66 (9th Cir. 2011) (finding that a prosecutor was permitted to give his undercover informant a sham subpoena to elicit incriminating information from a suspect under the authorized-by-law exception).

146. *See* Maldonado, *Orleans Parish*, *supra* note 9 (discussing possible legal issues associated with the sham subpoenas in New Orleans).

147. Charles Maldonado, *New Orleans District Attorney Unearths 249 'DA Subpoenas' Issued Over Three Years*, THE LENS (July 9, 2018) [hereinafter Maldonado, *249 DA Subpoenas*], https://thelensnola.org/2018/07/09/new-orleans-district-attorney-unearths-249-da-subpoenas-issued-over-three-years/.

MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE."[148] Though the subpoenas presented as valid and enforceable, the documents had no spaces on them for a signature from a judge or clerk of the court.[149] DA Leon Cannizzaro denied any legal issues associated with this practice, though his office has since removed the word "SUBPOENA" from its notices.[150] As the article gained traction in the public eye, the DA's office further instructed its prosecutors to stop using the documents and revoked the use of the forms or any other "self[-]created or modified notice[s]."[151] According to *The Lens*, 249 DA subpoenas had been issued by the DA's office between the years 2014 and 2016.[152] Another article from *The Lens* highlighted ethical problems associated with this type of prosecutorial conduct, especially when the conduct is used to compel private meetings with unrepresented victims and witnesses connected to criminal investigations.[153]

On October 17, 2017, a civil suit was filed in the U.S. District Court for the Eastern District of Louisiana challenging the Orleans Parish DA's Office's aggressive and coercive tactics and alleging constitutional violations.[154] The plaintiffs include victims and witnesses who received fraudulent subpoenas from the DA's office; some of the plaintiffs were even jailed for failing to comply with the fake documents.[155] The amended complaint alleged that the DA's subpoenas took at least three forms: "standardized pre-printed 'subpoena' forms, unauthorized forms from the electronic 'CourtNotify' system, and individualized 'subpoena' forms," none of which were reviewed or approved by a court.[156] The amended complaint further alleged that the prosecutors' conduct not only implicated the plaintiffs' constitutional rights, but also had a "chilling effect" on the public's exercise of the constitutional right to decline questioning outside a formal legal proceeding.[157] In response, the DA's office filed a motion to dismiss,[158] and the overseeing court held a motion hearing on May 9, 2018.[159] On February 28, 2019, the court published an order granting the DA's office's motion in part and denying it in part.[160] The court permitted some of the plaintiffs' claims to move forward, including claims related to the creation and use of the sham subpoenas; the case only addresses federal and state civil claims, however, and not potential ethical violations by the DA's office.[161] Notably, the court expressed concern over the

148. Maldonado, *Orleans Parish*, *supra* note 9.
149. Second Amended Complaint, *supra* note 17, at 12.
150. *Id*. at 17–18; Maldonado, *Orleans Parish*, *supra* note 9.
151. Second Amended Complaint, *supra* note 17, at 18.
152. Maldonado, *249 DA Subpoenas*, *supra* note 147.
153. Maldonado, *Orleans Parish*, *supra* note 9.
154. Complaint, *supra* note 15, at 2.
155. Second Amended Complaint, *supra* note 17, at 10.
156. *Id*. at 11.
157. *Id*. at 34.
158. Defendants' Joint Motion to Dismiss, *supra* note 19, at 1.
159. Transcript of Motion Hearing, *supra* note 20.
160. Order and Reasons, *supra* note 13, at 1.
161. *Id*. at 51–52.

prosecutorial misconduct, stating that such a practice would "grant prosecutors a license to bypass the most basic legal checks on their authority."[162]

In addition to the Orleans Parish DA's office, *The Lens* also reported that the North Shore DA, Warren Montgomery, "revealed [that] his staff employed a similar tactic," and "handed over copies of 33 notices sent since 2015."[163] Unlike the Orleans Parish DA's office's subpoenas, the North Shore District notices did not say "subpoena," but did bear a strong resemblance to formal subpoena documents.[164] The North Shore DA also acknowledged that the notices were "misleading."[165] The Jefferson Parish DA's office in Gretna, Louisiana likewise admitted to using sham subpoenas "after *The Lens* informed the office that it was about to publish a story reporting that legal experts said the practice is unethical, if not illegal."[166]

In January 2017, a possible sham subpoena practice was uncovered in another area of the United States: Nassau County, New York.[167] The Nassau County DA's office was accused of using a "fake grand jury subpoena," which ordered a witness to appear before the grand jury.[168] The defense attorney in the matter, Stephen Raiser, moved for sanctions based on this prosecutorial conduct, but the judge said that while the practice was "legally questionable," it did not rise to the level of sanctions because "it didn't seem to scare the witness from testifying."[169] There have been no additional reports of the practice in Nassau County since the January 2017 allegations.

B. Undercover Informants and the No-Contact Rule Dicta Split[170]

One of the first instances in which a federal court analyzed the use of "sham subpoenas" by prosecutors with an undercover agent was in *United States v.*

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162. *Id.* at 12–13 (describing the practice to be an "usurpation of the power of another branch of government").

163. Charles Maldonado, *Notices Sent to Witnesses on North Shore Weren't Called Subpoenas, but They Looked Real Enough*, THE LENS (May 19, 2017), https://thelensnola.org/2017/05/19/notices-sent-to-witnesses-on-north-shore-werent-called-subpoenas-but-they-looked-real-enough/.

164. *Id.* (noting that the subpoenas included the following information: "Criminal District Court for the Parish of St. Tammany" printed near the top of the document; the name of the clerk of the court; and notice that people "were 'hereby notified' to come to the DA's office to 'testify.'").

165. *Id.*

166. Maldonado, *Jefferson Parish*, *supra* note 9.

167. Cheng, *supra* note 9.

168. *Id.*

169. *Id.*

170. A traditional circuit split occurs "[w]hen two or more circuits in the United States court of appeals reach opposite interpretations of federal law." *Circuit Split*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/circuit_split (last visited July 17, 2019). Within the context of sham subpoenas and undercover informants, however, it is arguable whether a true circuit split actually exists. Both the Second Circuit in *United States v. Hammad* and the Ninth Circuit in *United States v. Carona* examined similar factual situations involving the use of sham subpoenas and undercover informants, and both circuits determined that a "case-by-case adjudication" was the appropriate analytical framework. United States v. Carona, 660 F.3d 360, 364 (9th Cir. 2011); United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988). Despite being faced with almost identical factual scenarios,

Martino.[171] In *Martino*, federal prosecutors had been using an undercover FBI agent to investigate two Pennsylvania state representatives over the course of five years.[172] The prosecutors suspected that the state representatives were lying to the undercover agent, so the prosecutors issued grand jury subpoenas to the two representatives and to the undercover agent under the agent's pseudonym.[173] The agent showed the subpoena to the representatives and, unbeknownst to the representatives, recorded their conversations.[174]

During their conversations, the representatives coached the agent on what to say when he testified before the grand jury.[175] The representatives were later indicted on charges of conspiracy to commit perjury for testifying falsely before the grand jury and for encouraging an agent to testify falsely before the grand jury.[176] The district court dismissed "two counts of the indictment on the ground that issuance of the subpoena in the pseudonym 'Wayne Hess' was prosecutorial misconduct which reflects upon the integrity of the judicial process."[177]

The government appealed to the U.S. Court of Appeals for the Third Circuit, challenging the district court's findings.[178] The representatives contended that the use of fake subpoenas constituted prosecutorial misconduct and violated the target's due process rights.[179] In considering the prosecutorial misconduct argument, the Third Circuit examined whether "the prosecutors' actions . . . were intended to or did raise the possibility of prejudicing the defendants before the grand jury."[180] The court first noted "that prosecutorial misconduct encompasses at a minimum improper conduct by a prosecutor both at trial . . . and in connection with grand jury proceedings."[181] In an attempt to delineate what constitutes prosecutorial

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the circuits reached opposite conclusions. *Compare Carona*, 660 F.3d at 365–66 (concluding that the prosecutors did not violate California's No-Contact Rule when they issued sham subpoenas to an undercover informant to elicit incriminating information from a target), *with Hammad*, 858 F.2d at 839–40 (holding that prosecutors violated New York's No-Contact Rule when they gave sham subpoenas to an undercover informant to elicit incriminating responses from a suspect). Because two or more courts of appeals have reached opposing conclusions on a similar question of law, there is arguably a circuit split. Although courts have reached opposite conclusions in similar factual scenarios, they have agreed on the applicable legal standard. Thus, this Article asserts that this divergence is more appropriately labeled a Dicta Split.

171. 825 F.2d 754 (3d Cir. 1987).

172. *Id*. at 755–56.

173. *Id*. at 756.

174. *Id*.

175. *Id*.

176. *Id*.

177. *Id*. at 757–60 (explaining that the district court "denied the government's motion for reconsideration and consideration of new evidence [for] . . . lack of prejudice . . . , which it stated existed because the subpoena helped maintain the cover and elicit the incriminating statements").

178. *Id*. at 757.

179. *Id*. at 758 (noting that "the only . . . basis for defendants' prosecutorial misconduct and due process challenges was the issuance of . . . the sham grand jury subpoena," which the district court found to be an overreach of the prosecutor's power).

180. *Id*. at 760.

181. *Id*. at 758–59.

misconduct, the court examined cases in which prosecutors had abused their expansive authority.[182]

However, the court found that the representatives were not prejudiced by the prosecutors' actions before the grand jury for the following reasons: (1) "the grand jury was unaware of the 'Hess' subpoena and [thus] could not have been prejudiced by its issuance" and (2) the government's argument that the "purpose of the 'Hess' subpoena was to perpetuate [the undercover informant's] cover" was not in dispute.[183] Further, the government contended that the subpoena was not really a "sham" subpoena in the way that the representatives described because the subpoena was primarily issued to maintain the undercover agent's role in the investigation.[184] The court agreed with the government and found that the subpoenas were not really "sham subpoenas" because the prosecution did not intend to elicit incriminating statements when they issued the subpoenas to the undercover informant.[185] Moreover, the court cautioned that grand jury subpoenas are tools that prosecutors may use to aid them in their investigations, and reviewing courts should not disapprove of a tactic simply because they are "uneas[y]" with how prosecutors utilize their tools.[186] Further, the court emphasized that this was not a case in which the grand jury or the court was misled by the use of the subpoena.[187] Accordingly, the court concluded that the "pseudonymous" subpoena did not constitute prosecutorial misconduct.[188]

Yet just one year later, in *United States v. Hammad*, the U.S. Court of Appeals for the Second Circuit considered whether federal prosecutors could issue "sham subpoenas" to undercover informants to elicit incriminating responses from the targets of an investigation.[189] In *Hammad*, a federal prosecutor was investigating two brothers for Medicaid fraud.[190] After the prosecutor acquired an undercover informant to help him investigate the case, he issued a fake grand jury subpoena to the informant.[191] The prosecutor hoped that showing the fake subpoena to the

182. *Id.* at 759; *see, e.g.*, United States v. Bruzgo, 373 F.2d 383, 384–86 (3d Cir. 1967) (finding that a prosecutor had committed prosecutorial misconduct when he threatened a witness and characterized the witness as a "thief"); United States v. Riccobene, 451 F.2d 586, 587 (3d Cir. 1971) (per curiam) (holding that a prosecutor's conduct was improper when he told the grand jury that the cooperating witness was absent because the defendants were connected to organized crime).

183. *Martino*, 825 F.2d at 760.

184. *See id.* ("The government had stipulated that the subpoena issued to 'Wayne Hess' was a 'sham' in the sense that Vaules' pseudonym was used therein. The subpoena was 'sham' in the same sense that any undercover agent using a false name or purporting to be someone s/he is not is 'sham.'").

185. *See id.* (noting the court's general "reluctance to involve the judiciary in second-guessing the propriety of the executive branch's determination to employ undercover investigative methods, including scams, to ferret out crime").

186. *Id.* at 761.

187. *Id.* at 762.

188. *Id.* (explaining that the case did not involve a subpoena that required action by the defendant, testimony presented by someone pursuant to the subpoena, or any misleading of the grand jury or court by the subpoena).

189. 858 F.2d 834, 836 (2d Cir. 1988).

190. *Id.* at 835–36.

191. *Id.*

brothers might lead them to make incriminating statements to the informant while their conversations were being recorded.[192] At the time that the informant was recording the conversations, the prosecutor was aware that the targets were being represented by counsel in the matter.[193]

During a conversation between one of the brothers and the informant, the brother discussed different ideas with the informant on how the informant should avoid the subpoena, and shortly thereafter, the grand jury returned a forty-five count indictment against the two brothers.[194] The brother moved to suppress the conversation on the ground that the prosecutor violated New York's No-Contact Rule by issuing the fake subpoenas to the informant to elicit incriminating responses from the target.[195] New York's No-Contact Rule prevented a lawyer from communicating with a "party" that the lawyer knew had retained counsel.[196]

The U.S. District Court for the Eastern District of New York granted the target's motion and suppressed the recordings after the court determined that the prosecutor "was clearly aware" that the defendant "had retained counsel in connection with this case" at the time the conversations were recorded.[197] Additionally, the court reasoned that the undercover informant had become the prosecutor's "alter ego" by using the fake subpoena to obtain an incriminating response from the target.[198] On appeal to the U.S. Court of Appeals for the Second Circuit, the government contended that New York's No-Contact Rule does not apply to criminal investigations or, alternatively, that the Rule does not apply until after an individual's Sixth Amendment rights have attached.[199] The court rejected the government's first argument because it determined that the Circuit had already answered whether

192. *Id.*

193. *Id.* at 836–37 (explaining that the district court found the government "failed to present any evidence" that "at the time he directed Goldstein to approach [Hammad], the prosecutor" did not know he was represented by counsel).

194. *Id.* at 836.

195. *Id.* New York's No-Contact Rule at the time of *Hammad* provided the following:

> A. During the course of his representation of a client a lawyer shall not: 1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id. at 837. New York's No-Contact Rule has since been amended:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

22 N.Y. COMP. CODES, R. & REGS. § 1200.4.2 (2020).

196. *Hammad*, 858 F.2d at 836.

197. *Id.* at 837.

198. *Id.*

199. *Id.*

the Rule applies to criminal investigations.[200] The court found that based on *United States v. Jamil*, the Circuit had "conclusively established" that New York's No-Contact Rule applies in "criminal cases . . . to government attorneys . . . [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors."[201]

However, the court grappled with the second question: at what point in a criminal investigation does the No-Contact Rule prevent prosecutors from using undercover informants to communicate with represented individuals?[202] In evaluating this question, the court considered whether the government was correct in asserting that the No-Contact Rule does not apply until the Sixth Amendment has attached.[203] The court ultimately rejected the government's argument and noted that "[t]he Constitution defines only the 'minimal historic safeguards' which defendants must receive . . . . In other words, the Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise."[204] Moreover, the court reviewed the lower court's conclusion that the No-Contact Rule prohibits communications in "instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact."[205] The court noted that although this rule would allow prosecutors to use informants to communicate with any target who was unaware that he or she was a suspect in the matter, the Rule would be too restrictive on prosecutors in some cases, particularly "where a career criminal . . . retained 'house counsel' to represent him in connection with an ongoing fraud or criminal enterprise."[206]

Accordingly, the court declined to develop a "bright-line" rule that would delineate when prosecutors could violate the No-Contact Rule during an ongoing investigation; rather, the court determined that it was best to evaluate each question with a "case-by-case" analysis.[207] Further, the court concluded that the No-Contact Rule's "authorized by law" exception would generally allow prosecutors to use "legitimate investigative techniques," such as employing undercover informants.[208] Thus, the court held that "the use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that

200. *Id.* at 837–38 (explaining that even "courts restricting the rule's ambit have suggested that, in appropriate circumstances, [New York's No-Contact Rule] would apply to criminal prosecutions," citing Second, Ninth, and D.C. Circuits).

201. *Id.* (quoting United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983)).

202. *See id.* at 838–40 (analyzing whether New York's No-Contact rule applies before indictments).

203. *Id.* (examining cases in which the courts found that the No-Contact Rule is coextensive with the Sixth Amendment).

204. *Id.* at 839 (quoting McNabb v. United States, 318 U.S. 332, 340 (1943)).

205. *Id.*

206. *Id.* ("While it may be true that this limitation will not unduly hamper the government's ability to conduct effective criminal investigations in a majority of instances, we nevertheless believe that it *is* unduly restrictive in that small but persistent number of cases.").

207. *Id.* at 840 (explaining that when ethical standards are involved, case-by-case adjudication is preferred).

208. *Id.* at 839.

occurred in this case, will generally fall within the 'authorized by law' exception to [the No-Contact Rule] and therefore will not be subject to sanctions."[209] Notwithstanding this holding, however, the court determined that there are some occasions in which prosecutors can "overstep the already broad powers of [their] office."[210] The court found that based on the facts of the case, the prosecutor had violated these broad powers by creating a fake subpoena to give to an informant with the purpose of eliciting incriminating conversations.[211] Consequently, the court determined that the prosecutor's conduct caused the undercover informant to become his "alter ego," thus violating the No-Contact Rule.[212]

1. The Aftermath of *Martino* and *Hammad*

Although *Hammad* seemed to signal that prosecutors could use many "legitimate investigative techniques," but could not use "sham subpoenas," other circuits quickly weighed in on the issue.[213] For example, in *United States v. Carona*, two California prosecutors began investigating a sheriff and his associates for bribery.[214] One of the associates admitted to his own involvement in the matter, and as part of his plea agreement, he agreed to help the prosecutors investigate the sheriff further.[215] After two meetings between the associate and the sheriff, the prosecutors concluded that they did not have enough evidence to move forward with the indictment.[216] The prosecutors therefore supplied the cooperating witness with two fake subpoena attachments to show to the sheriff at the next meeting to induce him into making incriminating statements.[217] When the sheriff saw the attachments, he asked his associate to lie to the grand jury, and he revealed that he had accepted certain bribes.[218] While this conversation was being recorded, the prosecutors were aware that the sheriff had retained counsel to represent him in the matter.[219] The sheriff was later indicted for witness tampering and moved to suppress the conversation on the ground that the prosecutors had violated California's No-Contact Rule.[220]

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209. *Id.* at 840.

210. *Id.*

211. *Id.* at 838–40.

212. *Id.* (finding that "issu[ing] a subpoena . . . to create a pretense that might help the informant elicit admissions from a represented suspect" is a technique that contributes to the "informant's becoming t[he] alter ego of the prosecutor," which violates the No-Contact Rule in this instance).

213. *Id.* at 838–40 (concluding that a prosecutor had overstepped his powers by issuing a sham subpoena to an undercover informant).

214. 660 F.3d 360, 363 (9th Cir. 2011).

215. *Id.*

216. *Id.*

217. *Id.* ("These documents referred to cash payments [that the undercover informant] provided to [the suspect] . . . .").

218. *Id.*

219. *Id.*

220. *Id.* California's No-Contact Rule, Rule 2-100 of the California Rules of Professional Conduct ("Communication With a Represented Party"), prevented attorneys from communicating with parties that they

Although the U.S. District Court for the Central District of California agreed with the sheriff that the prosecutors had violated California's No-Contact Rule, the court refused to suppress the conversations because it determined that the proper remedy was to discipline the prosecutors through a disciplinary proceeding.[221] The jury acquitted the sheriff on every count in the indictment except for the witness tampering that was related to the conversation he had with his associate.[222] The sheriff appealed the decision to the U.S. Court of Appeals for the Ninth Circuit on the ground that the district court erred by failing to award him any of the requested remedies for the prosecutor's violation of the No-Contact Rule.[223]

The Ninth Circuit reviewed the district court's decision *de novo* and first examined whether the prosecutors had violated California's No-Contact Rule.[224] To help inform its analysis, the court analyzed the Second Circuit's decision in *Hammad*.[225] Although the court adopted a similar "case-by-case" approach, it rejected the holding in *Hammad* that a prosecutor violates the No-Contact Rule when he issues a "sham subpoena" to an undercover informant to elicit an incriminating response.[226] Specifically, the court took issue with *Hammad*'s "alter ego" theory.[227] The court found that "[t]he use of a false subpoena attachment did not cause the cooperating witness . . . to be any more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor."[228] The court rejected the district court's concern that these props could trick a target into revealing confidences because it is well-established that prosecutors can use deception in their investigations.[229] Accordingly, the court determined that prosecutors can issue "sham subpoenas" to undercover informants to prompt a represented target to reveal incriminating information.[230]

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know are represented by counsel. *See* CAL. RULES OF PRO. CONDUCT r. 2-100(A) (2009) ("While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."). California's No-Contact Rule has since been amended. *See* CAL. RULES OF PRO. CONDUCT r. 4.2 (a) (2020) ("In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.").

221. *Carona*, 660 F.3d at 364.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 364–65 (citing United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988)).

226. *Id.* at 365 ("While in *Talao* we held *Hammad*'s 'case-by-case' approach to be the proper one, . . . *Talao* did not involve the use of a fake subpoena or any other falsified documents, and we did not adopt *Hammad*'s holding on that subject." (citing United States v. Talao, 222 F.3d 1133, 1139 (9th Cir. 2000))).

227. *Id.*

228. *Id.* (emphasizing that the "false documents were props used by government to bolster the ability of the cooperating witness").

229. *Id.* at 365–66.

230. *Id.* at 366 ("It would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel.").

2. When Does the No-Contact Rule Apply?

Other courts disagreed with *Hammad* on when the No-Contact Rule applies in criminal investigations.[231] For example, in *United States v. Ryans*, a federal prosecutor used an undercover FBI agent to help gather additional evidence for an investigation.[232] The prosecutor issued a subpoena to the agent under the agent's pseudonym, and the agent discussed the subpoena with the target of the investigation.[233] The agent recorded the conversations, and at the time that the conversations were being recorded, the prosecutor was already aware that the target had retained counsel to represent him in the matter.[234]

After the target was indicted, he moved to suppress the conversations on the ground that the prosecutor violated Oklahoma's No-Contact Rule.[235] On appeal to the U.S. Court of Appeals for the Tenth Circuit, the court considered whether the No-Contact Rule applies to "non-custodial" investigations that take place before the target is indicted.[236] To decide the question, the court examined the Second Circuit's reasoning in *Hammad*.[237] The Tenth Circuit rejected the *Hammad* court's holding that the No-Contact Rule applies to non-custodial investigations.[238] The court reasoned that the *Hammad* court's interpretation of the No-Contact Rule's language was incomplete because it failed to distinguish between the use of the word "party" as opposed to "person."[239] The court highlighted that in contrast to one part of the No-Contact Rule, "which prohibits a lawyer representing a client from giving advice to a 'person' who is not represented by counsel," the second

231. Some courts have found that the No-Contact Rule is coextensive with an individual's Sixth Amendment rights. *See, e.g.*, United States v. Lopez, 4 F.3d 1455, 1460 (9th Cir. 1993) ("The prosecutor's ethical duty to refrain from contacting represented defendants entifies upon indictment for the same reasons that the Sixth Amendment right to counsel attaches . . . ."); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981) (finding that the No-Contact Rule does not apply until a "charge, arrest, or indictment"); *see also* United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) (noting that many courts have held that the No-Contact Rule is not applicable during the investigatory stages of a case); United States v. Sutton, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) (concluding that the No-Contact Rule did not apply because there was no commencement of formal proceedings). An individual's Sixth Amendment rights attach only after (1) the formal commencement of adversarial proceedings and (2) the government begins to elicit incriminating responses from the suspect. *See* Massiah v. United States, 377 U.S. 201, 206–07 (1964). Other courts have determined that the No-Contact Rule may apply in custodial, pre-indictment circumstances. *See, e.g.*, United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981) (concluding that the No-Contact Rule may apply in a custodial, pre-indictment interview); United States v. Durham, 475 F.2d 208, 211 (7th Cir. 1973) (same); United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973) (same).

232. 903 F.2d 731, 733 (10th Cir. 1990).

233. *Id.*

234. *Id.* at 733–34.

235. *Id.* at 734.

236. *Id.* at 734–36.

237. *Id.* at 736–39 (noting that *Hammad* is the only court that has found that the No-Contact Rule may apply in the "non-custodial, pre-indictment setting").

238. *Id.* at 739.

239. *Id.*

part specifically "prohibits communications with a 'party.'"[240] Under the *Black's Law Dictionary* definition of "party," the court concluded that the Rule "contemplate[s] an adversarial relationship between litigants, whether in a criminal or a civil setting."[241]

With this consideration, the court determined that the Rule does not apply until the target of the investigation has been "charged, arrested[,] or indicted, or otherwise 'faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"[242] The court reasoned that prosecutors should not be hampered in their investigations simply because a suspect has retained counsel.[243] The court determined that "countervailing policies" require the court to construe the No-Contact Rule narrowly.[244] Thus, the court concluded that the Rule's "proscriptions do not attach during the investigative process before the initiation of criminal proceedings."[245]

3. What is a Sham Subpoena?

Other courts, including the Second Circuit, have rejected *Hammad* on the ground that alleged "sham subpoenas" were not actually fake subpoenas. For example, in *United States v. Ram*, an AUSA began investigating a doctor when he suspected that the doctor set fire to his own medical practice after he increased

240. *Id.*

241. *Id.* In a Florida ethics opinion, the Committee compared Florida's No-Contact Rule to the "corresponding ABA Model Rule," distinguishing between the use of the word "person" in its own rule versus the use of the word "party" in the ABA Model Rule. *See* Fla. State Bar Ass'n Comm. on Pro. Ethics, Op. 4 (1990). The Committee noted that the change from "party" to "person" in Florida's Rule "was a deliberate one, designed to broaden the scope of the rule." *Id.* Additionally, the Utah State Bar issued an opinion that discussed the scope of the term "party" in Utah's No-Contact Rule. Utah State Bar Ethics Advisory Op. Comm., Op. 05 (1996). The Bar stated that the word "party" in the Rule "means a 'party to the matter' for which legal representation has been obtained." *Id.*

242. *Ryans*, 903 F.2d at 740 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)); *see also* United States v. Mullins, 613 F.3d 1273, 1289 (10th Cir. 2010) (accepting the person/party distinction discussed in *Ryans* and concluding that the No-Contact Rule only applies "once adversary criminal proceedings have commenced"); United States v. Koerber, 966 F. Supp. 2d 1207, 1230–31 (D. Utah 2013) (noting that the person/party distinction is "meaningful," but concluding that the word "party" in Utah's No-Contact Rule means party to a matter and not party to a legal proceeding); Weider Sports Equip. Co. v. Fitness First, Inc., 912 F. Supp. 502, 507 (D. Utah 1996) (following *Ryans* and concluding that in a civil case, the "[N]o[-C]ontact [R]ule does not apply until there is a 'party' status and adversarial proceedings have been commenced"). *But see* Alafair S.R. Burke, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1642–43 (1994) (rejecting *Ryans* and contending that the language of the No-Contact Rule "weighs against" a finding that the word "party" demands that an adversarial relationship exist between litigants).

243. *Ryans*, 903 F.2d at 740; *see also* United States v. Lopez, 4 F.3d 1455, 1460 (9th Cir. 1993) (noting cases that have determined that the No-Contact Rule does not apply until after indictment because "criminal suspects should not be permitted to insulate themselves from investigation simply by retaining counsel" (citing *Ryans*, 903 F.2d at 740; United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981))); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 701 (1992) (concluding that a "broad interpretation of the [N]o-[C]ontact [R]ule" would encourage criminals to seek counsel to avoid any "effective law enforcement techniques").

244. *Ryans*, 903 F.2d at 739.

245. *Id.* at 740.

insurance policy limits.[246] One of the Bureau of Alcohol, Tobacco, and Firearms ("ATF")[247] agents who was also assigned to the case asked the AUSA to "give [the ATF agent] a grand jury subpoena that wasn't real, [so] that [he] could hopefully in the future give [it] to our cooperating witness so that the cooperating witness could meet Dr. Ram and wave the subpoena in Dr. Ram's face."[248] The AUSA allegedly told the ATF agent that "he could not issue 'sham subpoenas.'"[249]

Later in the investigation, however, the AUSA issued a grand jury subpoena to one of the doctor's employees, and the employee agreed to be a cooperating witness for the government.[250] The ATF agent gave the grand jury subpoena to the cooperating witness to show to the doctor, instructing the cooperating witness to lie by telling the doctor that she had already testified before the grand jury and that she was going to continue to testify the next day.[251] The cooperating witness recorded the conversation, and the doctor encouraged the cooperating witness to lie to the grand jury by asking her to "maintain" what she had been saying during the investigation.[252]

Additionally, the ATF agent served another one of the doctor's employees with a grand jury subpoena.[253] After this employee confessed that she had also participated in the scheme, she agreed to record a conversation between herself and the doctor.[254] The ATF agent asked the employee to show the grand jury subpoena to the doctor and to lie by saying that she was going to testify on a certain date.[255] During the recorded conversation, the doctor told the employee to lie before the grand jury and to destroy evidence.[256] Several months later, both cooperating witnesses testified before the grand jury.[257]

The doctor was later indicted and charged with attempted witness tampering, mail fraud, and arson.[258] Before the trial, the doctor moved to suppress the conversations between the cooperating witnesses and himself on the ground that the AUSA issued "sham subpoenas" to elicit incriminating statements from the doctor.[259] The U.S. District Court for the Eastern District of New York denied the

246. No. 94-1583, 1996 WL 107261, at *1 (2d Cir. Mar. 8, 1996).

247. The Bureau's name has since been changed to the Bureau of Alcohol, Tobacco, Firearms and Explosives. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111, 116 Stat. 2135, 2274–75 (2002).

248. *Ram*, 1996 WL 107261, at *1.

249. *Id.*

250. *Id.* at *2.

251. *Id.* (using the fake subpoena "as proof that she had testified before a grand jury that morning").

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* (instructing the witness to destroy the vacuum cleaner that should have been destroyed in the supposed fire).

257. *Id.*

258. *Id.*

259. *Id.* (arguing that "because [the prosecutor] had issued 'sham subpoenas' for the purpose of eliciting statements from him, the tape recordings should be suppressed pursuant to th[e] Court's decision in [*Hammad*]").

doctor's motion, but it noted that it would "refer the matter to a disciplinary committee to further investigate [the AUSA's] conduct."[260] Before the district court referred the matter, the Chief AUSA wrote a letter, asking the court to reconsider its decision.[261] The doctor was subsequently convicted on all counts, and he appealed.[262] While the appeal was pending, however, the doctor's counsel discovered the Chief AUSA's letter, and the doctor accordingly moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.[263] The district court denied the motion after it found that the AUSA did not violate New York's No-Contact Rule.[264] The doctor appealed this decision and consolidated it with his initial appeal.[265]

In considering the Rule 33 motion, the U.S. Court of Appeals for the Second Circuit found that the AUSA's conduct was not comparable to the prosecutor's conduct in *Hammad*.[266] The court determined that unlike the prosecutor in *Hammad*, who never intended for the undercover informant to testify, the AUSA in this case intended for the cooperating witnesses to testify before the grand jury.[267] Moreover, the court found that unlike the fake subpoenas used by undercover informants in *Hammad*, the cooperating witnesses in the present case "did not know that the subpoenas would be used to elicit conversations" with the defendant.[268] The court concluded that "[n]o sham subpoenas were issued in this case."[269] Accordingly, the court found that the AUSA did not violate New York's No-Contact Rule, and it denied the doctor's Rule 33 motion for a new trial.[270]

Similarly, in *United States v. Infelise*, a suspect in a criminal investigation informed the AUSAs investigating him that he had retained counsel and that he did not wish to make any statement without his attorney present.[271] Despite this fact, the AUSAs used an undercover informant to arrange meetings between the suspect and another undercover informant.[272] Before one of these arranged meetings, the

260. *Id*. at *1.

261. *Id*. (explaining that the letter also "included an affirmation from [the prosecutor], in which [he] explained the events relating to the issuance of the subpoenas").

262. *Id*.

263. *Id*.; *see also* FED. R. CRIM. P. 33 (detailing the requirements a defendant must satisfy before filing a motion for a new trial).

264. *Ram*, 1996 WL 107261, at *2 (finding that the prosecutor "had [also] not intended to circumvent the 'decision or admonition in the *Hammad* decision'").

265. *Id*.

266. *Id*. at *3 (noting that the prosecutor in the present case (1) intended to have the witnesses testify before the grand jury and (2) did not know that the subpoenas would be used to elicit conversations).

267. *Id*. ("In *Hammad*, the prosecutor never intended to have the subpoenaed witness testify and knew that the subpoena would be used to elicit statements from the target of a government investigation.").

268. *Id*.

269. *Id*. (weighing two factors to determine whether a subpoena should be labeled as sham: (1) the prosecutor's intent to have the witness testify and (2) whether the prosecutor knew the subpoenas would be used to elicit conversations).

270. *Id*. at *2.

271. 773 F. Supp. 93, 94 (N.D. Ill. 1991).

272. *Id*.

AUSAs served grand jury subpoenas to the suspect, and the undercover informant subsequently recorded the meetings.[273] After the suspect was later indicted, he moved to suppress the recordings, arguing that because the government issued "sham subpoenas" to elicit incriminating information from him, the prosecutors had violated Illinois's No-Contact Rule.[274]

The U.S. District Court for the Northern District of Illinois reasoned that although the suspect "rightly argue[d] that *Hammad* support[ed] his position on the applicability of the [No-Contact Rule] . . . , every other circuit which has considered a motion to suppress under similar factual circumstances has found that the rule does not apply to noncustodial, investigative processes that occur before the initiation of criminal proceedings."[275] After considering other cases, such as *Ryans* and *United States v. Sutton*, the court concluded that the No-Contact Rule only prevents a prosecutor from communicating with a represented party after the commencement of criminal proceedings.[276] The court determined that the conversations could not be suppressed because the conversations took place during the "noncustodial investigative" stage of the proceedings.[277]

Moreover, the court found that the grand jury subpoenas were not "sham subpoenas."[278] Rather, the court determined that the subpoenas were issued to the undercover informant under his pseudonym to prevent the suspect from becoming suspicious of the undercover informant.[279] Accordingly, the court held that the subpoena, though "unnecessary," was not "fictitious since it was valid."[280]

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273. *Id.*

274. *Id.* The Illinois No-Contact Rule provided the following:

> During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id. (citing ILL. RULES OF PRO. CONDUCT DR 7-104(A)(1) (1980)). Illinois's No-Contact Rule has since been amended:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ILL. RULES OF PRO. CONDUCT r. 4.2 (2010).

275. *Infelise*, 773 F. Supp. at 95 (relying on United States v. Ryans, 903 F.2d 731, 740 (10th Cir. 1990)).

276. *Id.* (noting that *Ryans* held that the No-Contact Rule's "proscriptions do not attach during the investigative process before the initiation of criminal proceedings" (quoting *Ryans*, 903 F.2d at 740)); *see also* United States v. Sutton, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) (finding that the Sixth Amendment's guarantee of a right to counsel only attaches after the commencement of "adversary judicial criminal proceedings").

277. *Infelise*, 773 F. Supp. at 95.

278. *Id.*

279. *Id.* ("Enforcement of the [undercover informant] subpoenas was not pursued when it was determined that alternative dates and methods for compliance could be agreed upon prior to the indictment in this case.").

280. *Id.*

4. The ABA's Response Regarding the No-Contact Rule's Scope

In 1995, the ABA released Formal Opinion 95-396, which examined—and attempted to resolve—disagreements among the courts regarding the No-Contact Rule's scope.[281] The opinion asserted that the prohibition on contacts with represented persons applies if the communicating attorney knows that the person is represented by counsel, regardless of whether the matter is criminal or civil in nature.[282]

While the Committee was clear that the Rule applied to criminal matters pre-indictment, it acknowledged that the prohibition on contact had been limited by courts in certain circumstances involving criminal investigations prior to arrest or the filing of criminal charges.[283] The opinion also recognized that courts have decided to the contrary, holding that the No-Contact Rule applies if the prosecutor made the communication herself or at her specific direction.[284] Although some courts had held that the Rule did not apply *at all* in the criminal context, the Committee was unequivocal in its response: those decisions "are not sound."[285]

The Committee did recognize that there is a line of jurisprudence in which courts have determined that, in the criminal context, "the public interest in investigating crime may outweigh the interests served by the Rule."[286] This circumstance would arise when: (1) the target of the communications is a represented person who has not been arrested or charged with a crime, and (2) the communications are not made by the government lawyer herself but by undercover agents or informants, so long as the agents are not acting so intimately with the lawyer that they become her "alter ego."[287] Accordingly, the Committee agreed that so long as this body of law remains "good law," then communications that are proper under this

281. ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995).

282. *Id.* (noting further that actual knowledge of the person's representation is required, but that knowledge may be inferred from the circumstances).

283. *Id.* (explaining that some courts have limited the Rule's applicability by "either holding the prohibition wholly inapplicable to all pre-indictment non-custodial contacts, or holding it inapplicable to some such contacts by informants or undercover agents"); *see* United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) (holding that the No-Contact Rule is inapplicable to pre-indictment non-custodial contacts wholesale); United States v. Ryans, 903 F.2d 731, 740 (10th Cir. 1990) (same); s*ee also* United States v. Jamil, 707 F.2d 638, 645–46 (2d Cir. 1983) (holding that pre-indictment non-custodial communications recorded by government investigators did not violate the No-Contact Rule because the prosecutor became aware of the recording after it was made and, thus, the investigators were not acting as the prosecutor's "alter ego"); United States v. Lemonakis, 485 F.2d 941, 954–56 (D.C. Cir. 1973) (holding that pre-indictment non-custodial communications by undercover informants do not violate the No-Contact Rule so long as the informant was not acting as the prosecutor's "alter ego").

284. ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995) (citing United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988)); *see, e.g.*, People v. White, 567 N.E.2d 1368, 1386–87 (Ill. App. Ct. 1991) (holding that prosecutors may violate the No-Contact Rule when they made communications with an undercover informant to the extent it made the informant the prosecutors' "alter ego").

285. ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995).

286. *Id.*

287. *Id. See also* Utah State Bar Ethics Advisory Op. Comm., Op. 05 (1996) ("[W]here the government lawyer is not directing the undercover operation that involves contacts with represented individuals with respect to the matter under investigation, it has been held that the predecessor to Rule 4.2 was not violated.").

line of jurisprudence should be treated as being "'authorized by law' within the meaning of that exception stated in the [No-Contact] Rule."[288]

III. SHAM SUBPOENA PRACTICES ARE AN ABUSIVE, UNETHICAL, AND UNCHECKED PROSECUTORIAL TACTIC

A. Available Legal Controls Are Too Burdensome for Unrepresented Individuals

The conventional legal avenues available for defendants to challenge a legally valid subpoena are unreasonable and ineffectual for individuals who wish to challenge a sham subpoena. Traditionally, a defendant may challenge a subpoena through a motion to quash.[289] Reluctantly, a court will examine whether the prosecutor issued a subpoena for a proper purpose.[290] Under the demonstrable abuse standard, a court will presume that the subpoena was properly issued, and the burden is on the party challenging the subpoena to show that the prosecutor primarily issued the subpoena for an improper purpose.[291] In contrast, under the *Schofield* rule, a prosecutor is required to "make some minimal showing by affidavit of the existence of a proper purpose" for the subpoena; however, a court will still likely find that a sham subpoena was issued for a proper purpose.[292] Accordingly, under both standards, the same presumption of regularity that is afforded to legally valid subpoenas is extended to sham subpoenas, which in turn places an unreasonably heavy burden on any party wishing to challenge a sham subpoena.[293] Though narrow in scope, the common law response to sham subpoenas additionally illustrates how difficult it is to overcome the presumption of regularity.[294] Grappling with this issue, courts have reached conflicting results as to when a plaintiff has sufficiently overcome this presumption.[295]

Accordingly, plaintiffs seeking relief cannot effectively rely on unpredictable precedent. For example, when a prosecutor's only purpose in issuing a sham

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288. ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995).

289. LAWLESS, *supra* note 1, § 2.62.

290. *See id.* (contending that courts cautiously examine whether a prosecutor issued a subpoena for a proper purpose); *see also In re* Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980) (noting that courts presume that subpoenas are issued with a proper purpose).

291. *See, e.g.*, United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979) (noting that the court would "not interfere with the [prosecutor's] discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process").

292. *In re* Grand Jury Proceedings (*Schofield II*), 507 F.2d 963, 964–66 (3d Cir. 1975) (explaining that the government is not required to give a lot of detail and need only show that the issued subpoena reasonably relates to the criminal investigation).

293. *See In re Grand Jury Proceedings*, 632 F.2d at 1041 (observing that courts award a presumption of regularity when analyzing whether a grand jury subpoena was issued for a proper purpose).

294. *See, e.g.*, United States v. Carona, 660 F.3d 360, 365–66 (9th Cir. 2011) ("[I]t has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements.").

295. *Compare* United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988) (finding a sham subpoena invalid), *with Carona*, 660 F.3d 360, 365–66 (9th Cir. 2011) (rejecting *Hammad* and upholding a sham subpoena), *and* United States v. Ryans, 903 F.2d 731, 736–39 (10th Cir. 1990) (same).

subpoena was to elicit incriminating information from an investigatory target, the U.S. Court of Appeals for the Second Circuit, despite finding the subpoena to have an improper purpose, rejected the creation of any bright-line rule and instead applied a totality-of-the-circumstances approach.[296] Without a clearly defined approach, the analytical framework courts employ when examining a motion to quash a sham subpoena is shrouded in unpredictability. Consequently, the motion to quash, as a legal recourse option, has failed to provide a realistic course of action for defendants or known targets of a grand jury investigation who are represented.

Likewise, the motion-to-quash remedy places an unreasonably high burden on a separate category of individuals who wish to challenge sham subpoenas: unrepresented witnesses and victims of crime.[297] Under both the demonstrable abuse standard and the *Schofield* rule, parties challenging a subpoena must be equipped to show not only that the prosecutors issued the subpoenas in bad faith, but also that the information sought by the subpoena was entirely irrelevant to the grand jury's investigation.[298] Ultimately, parties must produce evidence sufficient to overcome the presumption of regularity that attaches to grand jury subpoenas, and overcoming this presumption presents no small feat.[299] Unrepresented witnesses and victims of crime must be prepared to produce enough evidence to articulate how prosecutors acted with an improper purpose, and because courts are typically unwilling to scrutinize the grand jury process, these individuals will likely face insurmountable challenges as they attempt to build their case in chief.[300] Consequently, it is highly unlikely that unrepresented witnesses and victims—like the individuals in New Orleans, Gretna, and Nassau County—will be able to successfully challenge prosecutors' use of sham subpoenas without expending significant time and effort.[301]

Moreover, even in situations where an individual does not face significant time and resource constraints, the likelihood that a court would grant a motion to quash remains slim under current standards of subpoena review. For example, in the New

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296. *See, e.g.*, *Hammad*, 858 F.2d at 838–40 (discussing whether prosecutors may give sham subpoenas to undercover informants to show to suspects solely to elicit incriminating responses).

297. *See In re Grand Jury Proceedings*, 632 F.2d at 1041 (observing that courts award a presumption of regularity when analyzing whether a grand jury subpoena was issued for a proper purpose).

298. *See, e.g.*, *In re* Impounded, 178 F.3d 150, 160 (3d Cir. 1999) (analyzing whether the government's affidavits contained any bad faith); *In re* Grand Jury Subpoenas, 581 F.2d 1103, 1108–10 (4th Cir. 1978) (examining whether prosecutors issued a subpoena in good faith under the demonstrable abuse standard); *In re* Grand Jury Proceedings (*Schofield II*), 507 F.2d 963, 967 (3d Cir. 1975) (explaining that under the *Schofield* rule, the government need only rationally connect the information sought by the subpoena to the subject matter of the grand jury's investigation).

299. *See In re Grand Jury Proceedings*, 632 F.2d at 1041 (noting that courts treat grand jury subpoenas with a presumption of lawfulness and regularity).

300. *See* United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979) (applying the demonstrable abuse standard to consider whether the party challenging a subpoena had overcome the presumption of a proper purpose).

301. Second Amended Complaint, *supra* note 17, at 2 (challenging New Orleans prosecutor's use of sham subpoenas to compel witnesses to appear before a court).

Orleans litigation, although the plaintiffs alleged that the prosecutors' tactics were aggressive and coercive,[302] allegations such as these play only a minor role in proper purpose analysis under both the demonstrable abuse standard and the *Schofield* rule.[303] Aggressive investigatory tactics, albeit ethically questionable, are not recognized reasons to quash a subpoena under the current frameworks, unless the tactics rise to a level of abuse so blatant that they violate an individual's due process rights.[304] Although the plaintiffs in the New Orleans litigation have sufficiently alleged that the prosecutors' extensive sham subpoena practice rose to a level "so extreme that it biased the grand jury against the defendant and intruded upon the grand jury's independence," the New Orleans plaintiffs are not parties to or the subjects of any grand jury investigation.[305] Rather, the plaintiffs are witnesses to and victims of crimes under investigation—as opposed to being actual targets of the investigation, like most individuals in sham subpoena jurisprudence.[306] Additionally, as a consistent overlay to proper purpose analysis, courts remain unwilling to obstruct a grand jury's investigation,[307] and the government would likely be able to maintain the presumption of regularity and lawfulness of the subpoenas simply by providing an averment of good faith or a *Schofield* affidavit.[308]

Although the demonstrable abuse standard of review and the *Schofield* rule are almost identical in how courts apply them, the *Schofield* rule requires an extra step for the government. Even under this standard of review, which is slightly more favorable for plaintiffs, it is still unlikely that a court would scrutinize the grand jury process or grant the motion to quash. Under the *Schofield* rule, if the plaintiffs in the New Orleans lawsuit allege facts sufficient to shine an inquisitive light on the sham subpoena practice, the court would then be more likely to investigate the sham subpoena's legitimacy and apply a proper purpose analysis. However, to pass muster under this framework, the government would only be required to

302. *Id.* at 2–3 (alleging that the prosecutor's sham subpoena practice "create[s] a culture of fear and intimidation").

303. *See, e.g.*, *In re* Grand Jury Subpoena, 175 F.3d 332, 340 (4th Cir. 1999) (applying the demonstrable abuse standard, explaining that the improper motive must be the subpoena's "dominant purpose," and making no mention of coercion as a factor to consider); *In re* Grand Jury Proceedings (*Schofield I*), 486 F.2d 85, 93 (3d Cir. 1973) (applying the *Schofield* rule and making no mention of prosecutorial coercion in its proper purpose analysis).

304. *Samango*, 607 F.2d at 881 (quoting United States v. Welch, 572 F.2d 1359, 1360 (9th Cir. 1978)); *see* Ealy v. Littlejohn, 569 F.2d 219, 226–27 (5th Cir. 1978) (finding an improper purpose where subpoenas were issued in response to the plaintiffs exercising their First Amendment rights).

305. LAWLESS, *supra* note 1, § 2.60.

306. *See* United States v. Ram, No. 94-1583, 1996 WL 107261, at *2 (2d Cir. Mar. 8, 1996) (target of investigation); United States v. Hammad, 858 F.2d 834, 835 (2d Cir. 1988) (same); United States v. Infelise, 773 F. Supp. 93, 94 (N.D. Ill. 1991) (same).

307. *See In re* Morgan, 377 F. Supp. 281, 285 (S.D.N.Y. 1974) (explaining that the scale must "tip in favor of the duty of [a grand jury] 'to inquire into offenses against the criminal laws of the United States'" (quoting 18 U.S.C. § 3332)).

308. *See In re* Grand Jury Subpoenas, 581 F.2d 1103, 1108–10 (4th Cir. 1978); *Schofield I*, 486 F.2d at 93.

provide an affidavit that rationally connects the subpoenaed individuals to the crime under investigation and explain how the individuals might further the investigation.[309] In the New Orleans case, it is likely that the government would satisfy this minimal requirement because the subpoenaed individuals were either witnesses to or victims of the crimes under investigation. Thus, the *Schofield* rule's relevancy prong would be satisfied because the knowledge that the witnesses and victims possess would likely be considered "subject matter" related to the crimes.[310]

In contrast, under the demonstrable abuse standard, a court could simply rely on the government's averment of good faith and uphold the presumption of regularity that attaches to grand jury subpoenas.[311] Moreover, the New Orleans, Gretna, or Nassau County prosecutors did not issue the sham subpoenas "with the purpose of harassing and intimidating the plaintiffs in violation of their First Amendment rights," like the prosecutor did in *Ealy v. Littlejohn*.[312] The prosecutors' decisions to issue sham subpoenas were also not retaliatory in nature. Thus, a court applying the demonstrable abuse standard would be unlikely to view the prosecutors' behavior as so abhorrent to a constitutional right that it would feel comfortable ruling that the subpoenas were issued with an improper purpose. Under a demonstrable abuse standard and the seemingly-more favorable *Schofield* rule, a court is likely to find that even a sham subpoena serves a proper purpose.

Consequently, the proper purpose analysis applied by both the demonstrable abuse standard and the *Schofield* rule has failed to contemplate the lengths to which prosecutors will go to obtain an indictment. The legal controls on prosecutorial misconduct, as they stand, provide insufficient protection to unrepresented witnesses and victims of crime, as well as represented defendants and investigatory targets of a grand jury investigation. The current proper purpose frameworks encourage courts to recuse themselves, leaving many individuals subject to this prosecutorial misconduct and without any legal recourse.[313] Without a realistic remedy available to these groups of individuals, prosecutors may continue this abusive process without any legal ramifications or oversight.

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309. *Schofield I*, 486 F.2d at 93; *see In re* Grand Jury Proceedings (*Schofield II*), 507 F.2d 963, 966–67 (3d Cir. 1975) (explaining how the government sufficiently met the court's imposed *Schofield* affidavit requirement).

310. *Schofield II*, 507 F.2d at 967 n.4 ("Relevancy, in the context of a [g]rand [j]ury proceeding is not a probative relevancy, for it cannot be known in advance whether the document produced will actually advance the investigation. It is rather a relevancy to the subject matter of the investigation." (citing *In re Morgan*, 377 F. Supp. at 285)).

311. *See In re Grand Jury Subpoenas*, 581 F.2d at 1108–10 (inquiring "whether it is sufficient . . . to rely on the government's own affirmations of good faith" and finding that because the petitioner had not alleged sufficient evidence to the contrary, relying on the government's affirmation was enough to show a proper purpose).

312. 569 F.2d 219, 223 (5th Cir. 1978).

313. *See In re Morgan*, 377 F. Supp. at 285 (holding that the grand jury's duty is "usually paramount over any private interest which may be affected" (citing McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937))).

B. Available Legal Controls Fail to Aid Defendants Who Wish to Challenge a Sham Subpoena in the Context of Undercover Informants

Motions to quash likewise provide insufficient legal protection for defendants who were deceived by undercover informants using sham subpoenas. Defendants in this context are manipulated into revealing incriminating information after undercover informants show them sham subpoenas.[314] When a court grants a motion to quash a subpoena, the challenging party no longer has to comply with the demands of the document.[315] Thus, this remedy would realistically be helpful only in a narrow context: either for a party who wishes to avoid testifying before a grand jury, or a party hoping to avoid producing physical evidence.[316]

For most defendants who have been subject to sham subpoenas within the undercover informant context, however, the utility of the motion to quash is limited because prosecutors generally have not issued the sham subpoenas in an effort to coerce a defendant to testify or produce physical evidence.[317] Rather, prosecutors' primary motive in issuing sham subpoenas to undercover informants has been to coerce incriminating information from the target of an investigation.[318] Accordingly, a motion to quash would not afford the defendant in this context any legal protection because the defendant would have already revealed incriminating information that the prosecutors could then use against him in future proceedings. Though the prosecutor's power to use undercover informants in investigations is broad, the power should not be unlimited. Because courts are unwilling to condemn such abusive tactics, often out of deference for the prosecutor's broad role in the criminal justice system, this Article calls for a bright-line rule prohibiting sham subpoena use in any context.[319]

C. The Dicta Split Has Produced an Unpredictable Application of the No-Contact Rule

1. The No-Contact Rule Does Not Apply to Unrepresented Persons

The No-Contact Rule has failed to account for how far prosecutors are willing to go to secure an indictment. Specifically, the No-Contact Rule only applies to

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314. *See, e.g.*, United States v. Carona, 660 F.3d 360, 363 (9th Cir. 2011) (considering the defendant's argument that two California prosecutors issued a sham subpoena to an undercover informant for the sole purpose of eliciting incriminating information from the defendant).

315. *See* LAWLESS, *supra* note 1, § 2.62.

316. *See* LAW JOURNAL PRESS, *supra* note 23, § 3.04 and accompanying text (describing the breadth of power that attaches to different types of grand jury subpoenas).

317. *See Carona*, 660 F.3d at 363–66 (analyzing whether recorded conversations should be suppressed because prosecutors issued a sham subpoena to an undercover informant to show to a target of an investigation); United States v. Hammad, 858 F.2d 834, 836 (2d Cir. 1988) (detailing a situation in which prosecutors supplied an undercover informant with a sham subpoena to show to a target of an ongoing investigation).

318. *See Hammad*, 858 F.2d at 836; United States v. Ram, No. 94-1583, 1996 WL 107261, at *1–2 (2d Cir. Mar. 8, 1996) (finding that the alleged sham subpoenas were not truly sham subpoenas because the prosecutors intended for the undercover informant to testify before the grand jury).

319. *See infra* Part IV.

represented persons.[320] If the target of an investigation is unrepresented in the matter, the No-Contact Rule would not prohibit the prosecutor's use of sham subpoenas.[321] The Rule is designed to prevent a lawyer from communicating with a represented person by circumventing that person's lawyer,[322] and its limited scope leaves unrepresented individuals vulnerable. When subpoenas are issued directly to an unrepresented individual—especially in a situation in which a sham subpoena resembles a valid court document threatening fines and detainment—the unrepresented person undoubtedly would require an attorney to adequately understand the legal implications of such a document and the impact on his or her rights.[323] (Arguably, given the apparent confusion in this area of the law, an attorney, too, might not be entirely certain about the contours of the individual's rights.)

The sham subpoena practices uncovered in New Orleans, Gretna, and Nassau County targeted unrepresented witnesses and victims connected to the prosecutors' investigations.[324] In New Orleans, some individuals were forced to hire attorneys in an effort to understand whether they would face consequences if they failed to comply with the sham subpoenas.[325] Additionally, when some of the individuals did not comply, the Orleans DA's office obtained arrest warrants to further coerce them into compliance.[326] Most horrifically, some individuals were even jailed for their failure to comply with the sham subpoenas.[327] The U.S. District Court for the Eastern District of Louisiana noted that these practices could constitute prosecutorial misconduct and allowed the plaintiffs' civil claims to move forward.[328] Although these civil claims have been permitted to move forward, none of the claims provide a mechanism to challenge the conduct and obtain immediate relief from the abusive practice.[329] Accordingly, unrepresented persons are particularly vulnerable and inadequately protected from the sham subpoena tactic.

320. *See* MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020) (prohibiting a lawyer from communicating with a person the lawyer "knows to be represented").

321. *See id*.

322. *See id*. cmt. 1 ("This Rule . . . protect[s] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship[,] and the uncounselled disclosure of information relating to the representation").

323. *See* Second Amended Complaint, *supra* note 17, at 43.

324. Cheng, *supra* note 9; Maldonado, *Jefferson Parish*, *supra* note 9; Maldonado, *Orleans Parish*, *supra* note 9.

325. Second Amended Complaint, *supra* note 17, at 43.

326. *Id*. at 42.

327. *Id*. at 48, 51.

328. *See* Order and Reasons, *supra* note 13, at 51–52.

329. *See id*.

2. The No-Contact Rule Should Apply Throughout a Prosecutor's Investigation

This Article argues that the integrity of the judiciary and the rights of individuals are negatively implicated by sham subpoenas; therefore, the No-Contact Rule should apply at all stages of the grand jury investigation to sufficiently protect these fundamental interests. Currently, the way in which courts have interpreted and applied the No-Contact Rule undermines one of the Rule's foundational aims: to protect individuals from prosecutorial overreach.[330] When prosecutorial misconduct is alleged, a court first looks to whether the prosecutor has violated an ethical rule or other applicable law.[331] Parties challenging sham subpoenas within the undercover informant context have relied on the No-Contact Rule, arguing that it prohibits the prosecutor or her representatives from communicating with represented individuals.[332] As a threshold matter, the court must first determine whether the individual targeted by the investigation is covered by the No-Contact Rule.[333] To make this determination, two inquiries are relevant: (1) whether the No-

330. ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995) (citing Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 325 (1992)) ("[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel . . . and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.").

331. *See, e.g.*, United States v. Infelise, 773 F. Supp. 93, 94–95 (N.D. Ill. 1991) (evaluating whether the court should grant the defendant's motion to suppress that alleged that the prosecutors used sham subpoenas and an undercover informant to elicit incriminating responses after the prosecutors were aware that the defendant was being represented in the matter); United States v. Martino, 825 F.2d 754, 760 (3d Cir. 1987) (noting the general reluctance courts face when "second-guessing the propriety of the [prosecutor's] determination to employ undercover investigative methods, including scams, to ferret out crime").

332. *See* United States v. Carona, 660 F.3d 360, 364–66 (9th Cir. 2011) (analyzing whether the prosecutors' use of sham subpoenas violated California's No-Contact Rule); United States v. Ryans, 903 F.2d 731, 735 (10th Cir. 1990) (examining a prosecutor's use of a sham subpoena under Oklahoma's No-Contact Rule); United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988) (analyzing the use of sham subpoenas under New York's No-Contact Rule). Although parties within the Dicta Split have used the No-Contact Rule as the primary basis to challenge sham subpoenas as prosecutorial misconduct, another possible avenue to challenge the practice can be found in Rule 4.1 of the Model Rules of Professional Conduct. *See* Maldonado, *Orleans Parish*, *supra* note 9 (citing MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2020)). Rule 4.1 provides: "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N 2020). Additionally, in a New Mexico Ethics Opinion, the New Mexico State Bar examined whether a public-sector lawyer is permitted to use the "form of a subpoena from the Court with case[-]related information typed in and to mail the document to the witness *hoping* it will be honored . . . in lieu of having a subpoena issued by the Court and making service in accordance with New Mexico law." N.M. State Bar Ethics Advisory Comm., Op. 5 (1990) (emphasis added). The Bar determined that this sham subpoena practice would potentially violate several ethics rules. *Id.* (citing several New Mexico ethics rules that govern fairness to opposing parties and counsel, truthfulness in statements to others, and respect for rights of persons). This Article, however, focuses exclusively on the No-Contact Rule and how it has been used to challenge sham subpoenas.

333. *See supra* Section II.B.2 (describing the various times that courts have found the No-Contact Rule applies in a criminal investigation).

Contact Rule applies to "part[ies]" or "person[s]"[334] and (2) at what point in the investigation the contact occurred.

The first consideration—whether the Rule applies specifically to "parties" or to "persons" and how courts interpret these terms of art—has created an interpretative loophole, allowing courts to circumvent the more difficult second inquiry. For example, if a court decides that an individual is not a "party" within the meaning of the No-Contact Rule, it can then decide that the Rule is inapplicable to communications between an unrepresented individual and a prosecutor or her undercover agent. At least one court, the U.S. Court of Appeals for the Tenth Circuit, has highlighted the "person" versus "party" distinction and used it to narrow the scope of the No-Contact Rule.[335] The Tenth Circuit concluded that because the word "party" in the Rule "contemplate[s] an adversarial relationship between litigants," the No-Contact Rule was not intended to apply to pre-indictment settings.[336] Thus, the Tenth Circuit proceeded to the second inquiry, which asks at what point the No-Contact Rule applies, and used the distinction between person and party to create a more limited application of the Rule that only covers individuals who have been indicted by the grand jury. Such a narrow interpretation of the No-Contact Rule allows prosecutors to engage in abusive tactics to elicit incriminating information from suspects, so long as the "contact" is made before the commencement of criminal proceedings.[337]

As more courts attempted to clarify the No-Contact Rule's scope, the ABA issued a formal opinion [338] that included a section on the distinction between the Rule's use of the words "party" versus "person."[339] Although the Rule was amended to replace the word "party" with "person"[340]—which reflected growing jurisprudence holding that the No-Contact Rule applied to all persons and not just parties to an adversarial proceeding—there has still been considerable disagreement over the Rule's amended wording.[341] Further complicating this disagreement,

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334. *See Ryans*, 903 F.2d at 739.

335. *See id.*

336. *Id.*

337. *See id.* (contending that because the No-Contact Rule's use of the word "party" implies an adversarial relationship, the proscriptions of the Rule do not apply until after the criminal proceedings have been initiated).

338. ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995) (taking a broad stance that the No-Contact Rule applies both pre-indictment and post-indictment and that "in criminal cases, Rule 4.2 is not simply coextensive with the Fifth and Sixth Amendments").

339. *See id.* (stating that "[m]uch of the controversy regarding . . . Rule 4.2 has turned on its use of the term 'party'").

340. *See supra* Section I.B.2.

341. *See Ryans*, 903 F.2d at 739 (holding that the No-Contact Rule should not be broadly interpreted to cover all persons because "the rule . . . contemplate[s] an adversarial relationship between litigants"); *but see* United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988) (holding that the No-Contact Rule applies before the commencement of an adversarial proceeding); ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995) (dissenting) (asserting that "[i]f the Committee's expansive reading of 'party' to mean 'person' is correct, there is no need for the House of Delegates . . . to change the text of Model Rule 4.2" and that by deliberately replacing every instance of the word party with person, the House of Delegates "clearly intended a difference in meaning").

some states have not amended their respective rules of professional conduct to reflect the ABA's replacement of the word "party" with "person."[342] The tension between the ABA's formal opinion and how courts define "person" and "party" illustrates a pressing need to clarify whom the No-Contact Rule covers and when its protections are triggered.

The second inquiry—at what point in a criminal investigation does the No-Contact Rule apply—has also become a point of contention for courts within the Dicta Split. Although courts have generally agreed that the No-Contact Rule is applicable to criminal investigations,[343] they have struggled to determine when the protections of the No-Contact Rule first attach during a grand jury investigation.[344] Some courts have gone so far as to find that the No-Contact Rule is coextensive with an individual's Sixth Amendment rights because they are concerned that a criminal could easily retain counsel and avoid any further investigation.[345] However, as the court noted in *Hammad*, "[s]uch treatment . . . makes the rule superfluous, and 'is neither apparent nor compelling.' . . . The sixth amendment and the disciplinary rule serve separate, albeit congruent purposes."[346] Accordingly, a limited interpretation of when the No-Contact Rule applies has left individuals subject to aggressive prosecutorial tactics, such as the use of sham subpoenas, without any clear protection or recourse.

Other courts have developed less stringent rules and have determined that the No-Contact Rule may apply in a custodial, pre-indictment setting.[347] Although this interpretation of the No-Contact Rule would shield more individuals from abusive prosecutorial tactics, it still requires a complex analysis, often leading to inconsistent application by courts that undermines the Rule's goal.[348] To simplify this convoluted analysis, courts should adopt a bright-line rule that is similar to the district

342. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 396 (1995) ("That 'party' does not mean 'any person' is demonstrated as well by the understanding of the jurisdictions—now, some 40—which have adopted the Model Rules or variants of them.").

343. *See* United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983) ("As a preliminary matter, we note that [the No-Contact Rule] may be found to apply in criminal cases." (citing United States v. Springer, 460 F.2d 1344, 1354 (7th Cir. 1972))); *see also Springer*, 460 F.2d at 1354 ("We feel that the [No-Contact Rule] should be applied to both civil and criminal cases."); People v. White, 567 N.E.2d 1368, 1386 (Ill. App. Ct. 1991) (stating that the No-Contact Rule applies to "criminal as well as civil cases").

344. *See, e.g.*, *Hammad*, 858 F.2d at 840–41 (struggling to define a precise point at which the No-Contact Rule applies in a criminal investigation).

345. *See supra* note 231 and accompanying text.

346. 858 F.2d at 839.

347. *See* United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973) (finding that the No-Contact Rule may apply to custodial, post-arrest interviews); *see also* United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981) (determining that the No-Contact Rule can apply to custodial, pre-indictment settings); United States v. Durham, 475 F.2d 208, 211 (7th Cir. 1973) (noting that the custodial, pre-indictment interview of a defendant in the absence of retained counsel "raise[d] ethical questions" under the No-Contact Rule).

348. *Compare Thomas*, 474 F.2d at 112 (concluding that a defendant's statement made in a custodial, pre-indictment interview violated the No-Contact Rule but refusing to suppress the statement), *with Killian*, 639 F.2d at 210 (noting that a statement made in a custodial, pre-indictment setting in violation of the No-Contact Rule would have been suppressed had the statement been used at trial).

court's holding in *United States v. Hammad*.[349] This approach would mean that the No-Contact Rule applies throughout the prosecutor's entire investigation, but it would prevent astute suspects from taking advantage of the protections by simply retaining counsel in an effort to shield themselves from the prosecutor's investigatory tactics.[350]

For the No-Contact Rule to apply, the suspect's counsel would have to inform the prosecutor's office that she was representing the suspect in the specific matter for which the prosecutor was investigating.[351] Not only would this clear-cut approach simplify the analysis courts engage in when considering the No-Contact Rule, but it would also strike the appropriate balance between protecting individuals from egregious prosecutorial misconduct and a prosecutor's broad investigatory powers.

3. The No-Contact Rule Should Not Be Analyzed on a Case-By-Case Basis

Leaving the No-Contact Rule's applicability to case-by-case adjudication has resulted in an atmosphere of unpredictability, unreliability, and inefficiency. The impact of an unclear standard extends beyond the rights of individuals targeted by sham subpoena use; it also erodes the pillars upon which the criminal justice system relies. This totality-of-the-circumstances approach has left courts to their own devices in carving out the No-Contact Rule's significance and has left individuals, represented and unrepresented alike, with an unclear sense of their rights in a court of law.

As case law currently stands, whether an individual is protected from coercive and aggressive prosecutorial tactics in the context of sham subpoenas remains uncertain.[352] This uncertainty directly results from courts' blurred and inconsistent approaches to unpacking the No-Contact Rule. Without a clear framework, case-by-case adjudication has allowed courts to carve out arbitrary nuances when attempting to analyze the negative implications of sham subpoena use. There are two components that courts have considered in analyzing whether a sham subpoena constitutes prosecutorial misconduct. First, courts examine what the prosecutor's purpose was behind using the sham subpoena. Second, courts determine whether the sham subpoena use was permitted under the No-Contact Rule's authorized-by-law exception, or whether the undercover informant's use of the

349. 678 F. Supp. 397, 401 (E.D.N.Y. 1987), *rev'd*, 858 F.2d at 838–40 (proposing that the No-Contact Rule only applies in "instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact").

350. *See id.* (noting that "this rule would not apply to the vast majority of undercover investigations where the suspects are unaware of any investigation").

351. *Id.*

352. *Compare Hammad*, 858 F.2d at 838–40 (finding a sham subpoena invalid), *with* United States v. Carona, 660 F.3d 360, 366 (9th Cir. 2011) (rejecting *Hammad* and upholding a sham subpoena), *and* United States v. Ryans, 903 F.2d 731, 736–39 (10th Cir. 1990) (same).

sham subpoena made him the prosecutor's alter ego. The weight that courts attribute to these components has varied drastically and has led to irreconcilable results.

First, courts have developed varied interpretations of what constitutes a sham subpoena, and the ways in which courts define a sham subpoena often turns on an arbitrary analysis.[353] As a preliminary matter, simply labelling a subpoena as a "sham" is not dispositive of whether it constitutes a sham subpoena.[354] Instead, courts look beyond the characterization of the "sham subpoena" and examine whether the prosecutor issued the subpoena for a proper purpose.[355] For example, in *United States v. Ram*, the court found that the AUSA issued subpoenas to the cooperating witnesses because the AUSA intended for them to testify before the grand jury.[356] Consequently, the court concluded that the subpoena was not a "sham" because the AUSA issued the subpoena for a proper purpose, despite the fact that the AUSA elicited incriminating responses from the target after the cooperating witnesses showed him the subpoena.[357]

Somewhat similarly, in *United States v. Infelise*, the court found that the subpoena was not a sham.[358] The court's determination that the subpoena was "valid" turned on the fact that the prosecutor issued the subpoena to maintain the informant's cover.[359] Accordingly, if prosecutors are able to articulate a purpose for using sham subpoenas other than to elicit incriminating information, then courts will likely permit the practice.[360] Such a superficial analysis of what constitutes a sham subpoena allows prosecutors to continue the abusive tactic of using sham subpoenas without any oversight. The fact-specific analysis that courts employ, coupled with the broad investigatory authority that courts generally afford prosecutors, creates an environment of unbridled deference to prosecutors.

Perhaps the most troubling aspect of how courts currently analyze whether a subpoena is a sham is the complexity of the authorized-by-law exception to the No-Contact Rule. A case-by-case inquiry allows courts to arbitrarily decide which type of conduct is covered by the exception and which type of conduct goes too

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353. *Compare* United States v. Ram, No. 94-1583, 1996 WL 107261, at *3 (2d Cir. Mar. 8, 1996) (concluding that a subpoena was not a sham subpoena because the cooperating witness was scheduled to testify), *with* United States v. Infelise, 773 F. Supp. 93, 95 (N.D. Ill. 1991) (noting that a subpoena did not constitute a sham subpoena because it was only intended to maintain an informant's cover).

354. *See, e.g.*, United States v. Martino, 825 F.2d 754, 760 (3d Cir. 1987) (explaining that because "deception is the very essence of an undercover operation . . . repeated characterization of the subpoena as a 'sham' does not aid in the analysis of its propriety").

355. *See* LAWLESS, *supra* note 1, § 2.62 ("[W]here it can be shown that a grand jury subpoena has been utilized for any improper purpose, the court will quash that subpoena.").

356. 1996 WL 107261, at *3 (finding that the cooperating witnesses "did not know that the subpoenas would be used to elicit conversations" with the suspect).

357. *Id.*

358. 773 F. Supp. 93, 95 (N.D. Ill. 1991).

359. *Id.*

360. *See, e.g.*, *Ram*, 1996 WL 107261, at *3 ("However, in the present case, the district court found that [the AUSA] intended to have Persuad and Martin testify before the grand jury, and that [the AUSA] did not know that the subpoenas would be used to elicit conversations with Ram.").

far.[361] While most courts are reluctant to second guess prosecutors' decisions,[362] only one court has been willing to scrutinize a prosecutor's investigatory tactics.[363] The court in *Hammad* found that when the undercover informant used a sham subpoena to elicit an incriminating response from a suspect, he became the alter ego of the prosecutor, thus pushing the prosecutor's conduct outside the realm of the authorized-by-law exception.[364]

In an almost identical case, the court in *Carona* also applied a case-by-case, fact-specific inquiry, but reached a conclusion entirely opposite to the court's conclusion in *Hammad*.[365] The *Carona* court found that an undercover informant's use of a sham subpoena did not cause the informant to become the alter ego of the prosecutor, and the conduct thus remained within the exception's protections.[366] As demonstrated by the blatantly incongruent results in *Hammad* and *Carona*, courts' applications of the case-by-case inquiry permit judges, even when faced with almost identical factual situations, to arbitrarily interpret and decide what type of conduct the authorized-by-law exception should protect. In turn, this analysis creates an unreliable framework for applying the No-Contact Rule.

While this Article agrees that the court in *Hammad* correctly determined that the prosecutor's conduct fell outside the scope of the exception, the case-by-case inquiry employed by *Hammad* and *Carona* is inadequate and has created dissonant case law with unjust implications. Notably, failing to comply with a subpoena can result in grave consequences that significantly implicate an individual's rights. For instance, some of the individuals in New Orleans that were targeted by the sham subpoenas were also placed in jail after they failed to comply with the fake documents.[367] Consequently, innocent witnesses who were not even party to or the subject of an investigation were stripped of their rights.

The integrity of the judiciary is likewise undermined by this abusive practice. As seen again in New Orleans, the sham subpoenas issued by the DA's office intentionally excluded a space for the court's approval.[368] This directly violated

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361. *Compare* United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988) (finding a sham subpoena invalid), *with* United States v. Carona, 660 F.3d 360, 366 (9th Cir. 2011) (rejecting *Hammad* and upholding a sham subpoena), *and* United States v. Ryans, 903 F.2d 731, 736–39 (10th Cir. 1990) (same).

362. *Carona*, 660 F.3d at 366 (holding there was no violation of the No-Contact Rule); *Ryans*, 903 F.2d at 740 (same).

363. *Hammad*, 858 F.2d at 840.

364. *Id.*

365. *Compare Carona*, 660 F.3d at 364–66 (concluding that on the facts of the case, the prosecutors had not violated California's No-Contact Rule by giving sham subpoenas to an undercover informant to elicit incriminating information), *with Hammad*, 858 F.2d at 840 (holding that the prosecutor violated New York's No-Contact Rule by issuing sham subpoenas to an undercover informant, who elicited incriminating information from the target of an investigation).

366. *Carona*, 660 F.3d at 366 (reasoning that the sham subpoena's purpose was mainly to protect the undercover informant's identity).

367. *See* Second Amended Complaint, *supra* note 17, at 48, 51.

368. *Id.* at 12. *See* Cheng, *supra* note 9; Maldonado, *Jefferson Parish*, *supra* note 9; Maldonado, *Orleans Parish*, *supra* note 9.

Rule 17(a) of the Federal Rules of Criminal Procedure, which requires the court's name, as well as a signature and seal of the court.[369] Accordingly, the totality-of-the-circumstances approach employed by courts is insufficient because it does not appropriately balance or account for the legal rights of individuals, and it recklessly disregards notions of judicial integrity and principles of fairness. Although the authorized-by-law exception necessitates that the grand jury be able to investigate freely in many circumstances, the exception is not boundless: the use of sham subpoenas simply goes too far.

IV. A NEW RULE THAT ADDRESSES SHAM SUBPOENAS AND LIKE DOCUMENTS

Courts' consideration and application of the No-Contact Rule has created an unpredictable field of law that is diametrically opposed to principles of reliability and efficiency. Accordingly, states should adopt a new ethical rule that enjoins prosecutors from issuing sham subpoenas or any document that imitates a court-approved document. The recommended Rule is as follows: *A prosecutor shall not serve a document that imitates an official court document, requiring prior court approval on any person, unrepresented or represented.*

This proposed Rule addresses the inefficiencies and incongruencies caused by the No-Contact Rule and sham subpoena jurisprudence outlined in this Article. First, it addresses insufficient legal controls on prosecutorial misconduct. While a motion to quash fails to provide an adequate remedy for individuals targeted by sham subpoenas because a court will likely find that sham subpoenas were issued for a proper purpose, this Rule would expressly prohibit prosecutors from issuing sham subpoenas. This Rule would be particularly helpful for unrepresented individuals who do not have the means to hire attorneys to contest these sham documents. Courts are traditionally reluctant to analyze a prosecutor's decisions; therefore, this Rule additionally allows courts to regulate flagrant prosecutorial misconduct without becoming too intrusive in the grand jury process.

Second, this Rule addresses the complete lack of protection against the use of sham documents in prosecutorial investigations by addressing the insufficient ethical controls and filling the case-law gaps. The proposed Rule transforms and replaces an unreliable case-by-case adjudication approach to sham subpoena analysis with a bright-line rule that excludes and condemns this practice. Finally, such a Rule would remedy the sham subpoena practices uncovered in New Orleans, Gretna, and Nassau County. Most individuals targeted by sham subpoenas in these jurisdictions were unrepresented witnesses and victims of crime. All were left without any protection from the prosecutors' abuse of power and with no clear remedy to challenge the unethical practice. By banning such a practice, this Rule

369. FED. R. CRIM. P. 17(a) (requiring that a legally valid subpoena must contain the court's name, the name of the proceeding, a signature and seal of the court, and a written order that tells the witness that she must testify at a specific time and place).

places a necessary check on prosecutorial misconduct that has blatantly violated individuals' rights, and helps restore the integrity of the criminal justice system.

CONCLUSION

Prosecutors possess broad investigatory freedom in grand jury proceedings. Most notably, this freedom is marked by their broad discretion to issue subpoenas. However, prosecutors' discretion is limited. For example, motions to quash function as a legal control on subpoenas that have been issued without a proper purpose. Thus, an individual who is implicated in a grand jury proceeding may rely on a motion to quash as a potential safeguard against prosecutorial overreach. The Model Rules of Professional Conduct prescribe certain limitations on all attorneys, including prosecutors. In particular, the No-Contact Rule prohibits prosecutors from communicating with represented individuals. Both of the legal and ethical controls on prosecutorial conduct, however, fail to adequately prevent prosecutors from using abusive tactics, such as sham subpoenas.

This Article also examined the Dicta Split that exists among courts that have analyzed the use of sham subpoenas in the undercover informant context. These cases illustrate the inconsistencies courts have created in interpreting and applying the No-Contact Rule and its authorized-by-law exception. As a result of this unpredictable and unreliable framework provided by case law, individuals who are targeted by sham subpoenas are left without recourse to challenge this abusive prosecutorial tactic. Accordingly, this practice continues to go unchecked, and individuals in areas such as New Orleans, Gretna, and Nassau County have suffered.

The rights implicated by a grand jury process are significant and therefore must be appropriately safeguarded. Thus, a new Rule would protect against prosecutorial abuse by prohibiting the sham subpoena practice. This proposed Rule would appropriately balance the rights of individuals as well as the broad discretion that prosecutors have historically been afforded in the grand jury process. Without a new Rule, individuals are left with an insufficient and unpredictable remedy to challenge the use of sham subpoenas. Finally, this Rule would provide a necessary check on overly deceptive practices that can implicate the integrity of the judicial system.