Analyzing Legal Ethics for Municipal Attorneys in the Wake of *Kelo v. City of New London*

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I. INTRODUCTION

Municipalities turn to municipal attorneys to enforce and exercise eminent domain powers.[1] Municipal attorneys as used in this paper includes those who handle all litigation related to land use and zoning for a municipality; condemning private property through eminent domain powers; drafting land use and zoning ordinances for a municipality; and serving as advisors for planning and zoning boards or planning commissions in a municipality.[2] These attorneys ensure that urban renewal policies are both beneficial to the citizens of the municipality as well as the municipality as a whole. Thus, they serve various different parties in their role as advocates for public benefit. As this paper will show, however, these parties do not all have the same goals as each other, resulting in municipal attorneys having to make ethically difficult decisions on the outcome of each condemned property.

Since the 1950s, municipalities across the United States ("U.S.") have been promoting policies of urban renewal to attract new residents to their respective cities.[3] These policies, created to improve the revenues and tax base of a municipality,[4] often target areas where low-

[1] *See* Am. Jur. Legal Forms 2d § 97:1 ("eminent domain is defined as the power of a governmental entity to take or authorize the taking of property for a public use without the owner's consent.").
[2] *See, e.g.*, *Practice Areas: Zoning, Land Use & Environment*, MIAMI-DADE COUNTY ATTORNEYS OFFICE, http://www.miamidade.gov/attorney/practice.asp?practice=%2711%27 (last visited Jan. 24, 2016).
[3] *See* Wendell E. Pritchett, *The "Public Menace" Of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 30 (2003) (stating that cities are able to attract middle-income individuals to cities by advertising a city's wealth of amenities). *See generally*, Dr. Stacy A. Sutton, Urban Revitalization in the United States: Policies and Practices 27-38 (June 25, 2008) (unpublished Final Report) (on file with the Graduate School of Architecture, Planning and Preservation, Columbia University) (detailing the history of urban renewal across the United States' largest cities such as New York City, Pittsburgh, and Boston).
[4] *See* George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 436-37 (2011) (demonstrating how Tax Increment Financing is used in all states, with the exception of Arizona, to encourage urban redevelopment).

income minority citizens live and work.[5] To accomplish these urban renewal policies, municipalities endow municipal attorneys with the power to use eminent domain to take land from existing property owners and transfer it to developers.[6]

Condemnation of private property is permissible if it does not violate either the U.S. Constitution's Fifth Amendment Due Process Clause and the Fourteenth Amendment Takings Clause.[7] These Amendments create a check on the power of municipalities acting through municipal attorneys by dictating that "no individual shall be deprived of … property, without due process of law,"[8] "nor shall private property be taken for public use without just compensation."[9] As a result, municipal attorneys are challenged ethically and professionally daily to determine whether a municipal government condemning private property falls under the rubric of "public use." In addition to citing the relevant Model Rules of Professional Conduct ("MRPC"), this paper will demonstrate how *Kelo v. City of New London* ("*Kelo*") significantly changed how municipal attorneys are bound under the MRPC.[10]

A question of ethics arises for municipal attorneys when they have multiple clients due to the possibility that a conflict of interest may arise between the parties. To contextualize this question, in Part II this paper presents a hypothetical of a typical eminent domain taking that may occur in any U.S. municipality. Within this hypothetical two municipalities are examined to demonstrate how municipal attorneys work with different regulations, or none at all, that were

[5] *See* Chinese Staff and Workers Ass'n v. City of New York, 502 N.E.2d 176, 177, 180 (N.Y. 1986) (examining a proposed luxury high-rise development in a residential sector of Chinatown in New York City. The project was not permitted because of its potential effect on the "character or quality of the existing community."); *see also* Pritchett, *supra* note 3, at 1 (citing Berman v. Parker, 348 U.S. 26, 31 (1954) (discussing that the area in which the property owner's worked was not considered "blight")).
[6] *See generally* Pritchett, *supra* note 3, at 1-2 (discussing how the District of Columbia Government in Berman v. Parker intended to take the property and then transfer it to a developer).
[7] U.S. Const. amend. V; U.S. Const. amend XIV. Each state also has constitutional amendments that follow the text of the fifth and fourteenth amendments of the U.S. Constitution.
[8] U.S. Const. amend. V.
[9] U.S. Const. amend XIV.
[10] *See* Kelo v. City of New London, 545 U.S. 469 (2005).

enacted as a result of *Kelo*. Municipality A has established stringent private property protection regulations post-*Kelo* to limit the takings a municipality can exercise through its municipal attorneys, while Municipality B has enacted either weak private property protection regulations or follows the decision in *Kelo* as its model. To answer this hypothetical an understanding of both the MRPC and eminent domain laws post-*Kelo* are explored. Part III discusses the MRPC, specifically the rules on identifying a client for municipal attorneys, and whether municipal attorneys can represent multiple clients. Furthermore, this section will determine whether a conflict of interest arises in the event a municipal attorney represents two clients simultaneously in an eminent domain case.

Part IV of this paper will provide a background on *Kelo* and how its legacy has impacted eminent domain laws and regulations across the nation for non-blighted property.[11] Part V will apply the MRPC and the ruling in *Kelo* to the hypothetical municipalities from Part II. This section will focus on how regulations and *Kelo* create a shifting relationship between municipal attorneys and the clients they represent. Ultimately, this paper argues that municipal attorneys after *Kelo* are more likely to face conflicts of interest because of the decision's addition of "economic development" as a public purpose in municipalities. As a result, Part VI discusses some of the reforms that should be considered in states and municipalities that abuse the eminent domain privilege to ensure municipal attorneys reduce the likelihood of encountering conflicts of interest that violate the MRPC, while still ensuring that communities can prosper economically.

II. EMINENT DOMAIN IN PRACTICE

[11] The Supreme Court of the United States has determined that condemnation of blighted property is almost always for the public good. *See, e.g.*, Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp., 771 F.2d 44 (2d Cir. 1985) (holding a dilapidated building, that although structurally sound, in a deteriorating neighborhood was an authorized use of eminent domain).

Below is a hypothetical of a standard eminent domain case a municipal lawyer may encounter during his service. Since *Kelo*, the Castle Coalition, an organization that documents unlawful eminent domain takings, has documented that among the forty two states that passed legislation to protect against abusive use of eminent domain, only three states have a passing grade of an A for the protection of private property rights; two states have a passing grade of an A-; eight states have a passing grade of a B+; five states have a passing grade of a B; and three states have a passing grade of a B-.[12] The remaining states, including those that have not enacted any legislation and the District of Columbia scored a C+ or below.[13] The first sub-hypothetical will focus on whether municipal attorneys, acting as agents of the municipality, are able to condemn non-blighted property in a municipality that graded higher in its ability to deal with eminent domain. The second sub-hypothetical will focus on whether municipal attorneys are able to condemn non-blighted property in municipality that graded lower in its ability to deal with eminent domain. Section V of this this paper applies the MRPC and jurisprudence to determine who the clients of municipal attorneys are in each municipality and whether there is a conflict of interest between the multiple clients.

a. Context For The Taking

There are ten property owners living in a low-income, but not blighted neighborhood, in both Municipality A and Municipality B respectively. Surrounding these residential areas in both municipalities are developing downtown districts with cafés, hotels, restaurants, offices, and other trendy amenities. Municipality A and Municipality B are considering exercising their eminent domain powers to take the property of the landowners to continue development of the downtown area in each respective municipality. The municipal attorneys representing each

[12] *See* CASTLE COALITION, 50 STATE REPORT CARD TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO 55-56 (2007), *available at* http://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf.
[13] *See id.*

municipality need to determine who it represents and whether its can represent these "clients" without incurring a conflict of interest.

i. Municipality A (Eminent Domain Protection Grade: A)

Municipality A enacted strict legislation that requires municipal attorneys to reject takings that are done for economic development in order to fully protect landowners' rights. Municipal attorneys are aware that economic development is a restricted category, but that certain projects such as installing public utilities that benefit the greater municipality are permitted.

ii. Municipality B (Eminent Domain Protection Grade: F)

Municipality B enacted no legislation post-*Kelo*. As a result, Municipality B allows its municipal attorneys to exercise the ability to condemn property for "economic development" or other public purposes on its behalf. Municipal attorneys are encouraged to condemn private non-blighted property for economic development in order to help raise revenue and taxes to improve Municipality B's financial standing.

III. HOW THE MODEL RULES OF PROFESSIONAL CONDUCT SHAPE THE DUTY OF MUNICIPAL ATTORNEYS

The MRPC, adopted in some form by all fifty states and the District of Columbia, [14] dictates the duty an attorney has to his or her client.[15] While some attorneys have a clear cut understanding of who the client is, municipal attorneys face the challenge of determining who they represent on a daily basis.[16] Especially troublesome is cases of eminent domain, where

[14] *See generally Charts Comparing Professional Conduct Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/charts.html (last visited December 23, 2015).
[15] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT Preface cmt. [1]; [2] (discussing how attorneys play various roles in their legal duties); and [4] (noting that attorneys must competently represent their clients).
[16] *See generally* Adam Edris, *Issues of Client Identification for Municipal Attorneys: An Agency and Public Interest Approach*, 24 GEO. J. LEGAL ETHICS 517 (2011).

municipal attorneys must consider whether a taking creates a significant conflict of interest amongst their clients, thus violating the MRPC. While it is impossible to satisfy the requests of every private property owner, municipal attorneys must strive to create as balanced of a representation as possible. As a result, municipal attorneys are left with the task of determining whether they represent just one entity or multiple parties, and if they represent multiple parties, does a conflict of interest arise between the parties? In examining the MRPC, Restatements of Law, and scholarly articles, this paper finds that municipal attorneys can represent multiple clients, but depending on the regulations in certain states, sometimes a conflict of interest may arise in representing multiple clients.

a. Establishing Who The "Client" Is Under MRPC Rule 1.13

According to MRPC Rule 1.13(a), "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[17] While the language of this rule appears to relate to businesses or other similar organizations, comment [9] of the rule, [18] in addition to section 97 of the Restatement (Third) of the Law Governing Lawyers ("Restatement"), creates a special category for government lawyers.[19] In developing a more broad definition of "client" when applied to municipal attorneys, the Restatement dictates that it is nearly impossible to pinpoint who exactly a client is, as the circumstances of each case municipal attorneys are assigned to differ.[20] However, the one constant amongst all "clients" is that municipal attorneys carry out their duties for the benefit of the public.[21] In an effort to further refine the different representations municipal attorneys undertake, the Harvard Law

[17] MODEL RULES OF PROF'L CONDUCT R. 1.13(a).
[18] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 CMT. [9].
[19] RESTATEMENT (THIRD) OF THE RULES GOVERNING LAWYERS: REPRESENTING A GOVERNMENTAL CLIENT § 97 (2000) ("a lawyer representing a governmental client must proceed in the representation as stated in § 96 [Representing an Organization as Client]).
[20] RESTATEMENT (THIRD) OF THE RULES GOVERNING LAWYERS: REPRESENTING A GOVERNMENTAL CLIENT § 97 cmt. c. IDENTITY OF A GOVERNMENTAL CLIENT (2000).
[21] *See id.*

Review noted that municipal attorneys typically have four categories of clients: municipal attorneys' supervisor, municipal attorneys' agency, municipal attorneys' respective government, and/or the citizens of the specific municipality.[22]

b. Representation Of Multiple Clients And Concerns For A Conflict Of Interest

Rule 1.7 of the MRPC outlines the limits a lawyer has to his or her client when representing multiple clients.[23] First, Rule 1.7(a) dictates that a lawyer cannot represent multiple clients if one of them creates a conflict of interest with another one.[24] Second, Rule 1.7(a) restricts representing a client when the goals of the client are "directly averse" to another client,[25] or that the responsibility to one client will be impacted because of the attorney's obligations to another client.[26] Thus, while a lawyer is permitted to represent multiple clients, he or she must ensure that the goals of each party do not conflict with one another, something easier said than done.

IV. A BRIEF HISTORY OF EMINENT DOMAIN IN THE UNITED STATES

Historically, municipal attorneys exercise of eminent domain for the purpose of public use fell into three broad categories: (1) a taking and transfer of private property to a public entity for public ownership, such as a taking to develop a hospital;[27] (2) a taking and transfer of private property to a private party, such as a utilities company that endows the greater community with a benefit;[28] or (3) a taking and transfer of private property to another private owner that meets

[22] *See Developments in the Law--Conflicts of Interest in the Legal Profession: VI. Conflicts Of Interest And Government Attorneys*, 94 HARV. L. REV. 1413, 1414 (1981) [hereinafter *Conflicts of Interest and Government Attorneys*].
[23] *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7.
[24] *See id.* R. 1.7(a).
[25] *See id.* R. 1.7(a)(1).
[26] *See id.* R. 1.7(a)(2).
[27] *See* Kelo v. City of New London, 545 U.S. 469, 497-98 (2005) (O'Connor, J., dissenting) (citing Old Dominion Land Co. v. United States, 269 U.S. 55 (1925)).
[28] *See id.* at 498 (citing Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916)).

certain circumstances, such as blighted property wherein the new owner is required to ensure that the new development creates jobs while reducing crime in the immediate neighborhood.[29]

With municipal attorneys defining "public use" differently, the results led to both liberal and conservative readings of the fifth and fourteenth amendment.[30] In an attempt to clarify the definition of public use with respect to eminent domain, in 2005, the United States Supreme Court ("Court") heard *Kelo.*[31] In *Kelo*, the City of New London, Connecticut wished to condemn the properties of various landowners and transfer the properties to Pfizer, a pharmaceutical company, to help rejuvenate the declining city by creating a new downtown area.[32] Ruling in favor of the City of New London, the Court held that the use of eminent domain to take property from private owners and transfer it to a developer in an area zoned for development, but not blighted,[33] satisfied the "public use" criteria due to Court's conclusion that "economic development" is public use.[34]

The decision in *Kelo* is notable for the power municipal attorneys acting as agents for municipalities now have to condemn property in pursuit of improving its economic status. Relying on precedent such as *Berman v. Parker,*[35] the Court in *Kelo* strongly advocated that once

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[29] *See id.* at 498 (citing Berman v. Parker 348 U.S. 26 (1954)).

[30] *Compare* Goldstein v. Pataki, 488 F. Supp. 2d 254, 256, 286-87 (E.D.N.Y. 2007) (holding that the use of eminent domain to take land from existing landowners in non-blighted neighborhoods to develop a mixed use structure including a basketball stadium complies with the definition of public use), *with* Karesh v. City Counsel of City of Charleston, 247 S.E.2d 342, 344-45 (S.C. 1976) (holding that the transfer of property from the city to a developer to construct a parking lot and convention center did not fit the definition of public use. The court indicated that the city would "join hands" with a developer implying that such a public use taints the legitimacy of a government's responsibility to its citizens.).

[31] Kelo, 545 U.S. at 469.

[32] *See id.* at 474-75.

[33] For the purposes of this paper, the definition of blight is a neighborhood where there is an "under-utilization of property in the area, high vacancy rates above the ground floor, . . . dilapidated store fronts, [a] number of lots in tax arrears, dirty and unsafe street conditions, and a high crime rate which requires increased allocation of police service to the area." *See* Natural Res. Def. Council, Inc. v. City of New York, 672 F.2d 292 (2d Cir. 1982).

[34] *See* Kelo, 545 U.S. at 475, 483-84 (giving merit to the City's argument that the implementation of a comprehensive plan to improve the City's economy by attracting pharmaceutical company Pfizer was beneficial for public purposes because it would create jobs and spur development of a downtown area).

[35] Berman v. Parker, 348 U.S. 26 (1954).

a municipality establishes a need for a taking in a target area, it is irrelevant to a court the "amount and characteristic of the land to be taken" so long as said land will have a "public purpose." [36] Notably, the Court interpreted "public purpose" to include "economic development," a planning criteria which permits greater flexibility in the kinds of property that can be condemned to improve city revenues and taxes at the cost of housing for private property owners in non-blighted neighborhoods.[37]

However, in Justice O'Connor's dissent, she pointed out that the majority overstepped its power to permit such an extensive definition of eminent domain to be lawful, thus not acting in the interest of the public to serve as a check on legislative power.[38] First, Justice O'Connor points out that the majority created a new and overly broad definition of "public purpose", that while beneficial to cities in an economic sense, opens the floodgates for legislatures to abuse eminent domain powers to take properties within development areas that are not blighted.[39] As a result of this, it is inferable that attorney-client relationships may start to waver and municipal attorneys may begin to struggle with ensuring they are able to represent all "clients" equally.[40] Second, Justice O'Connor emphasizes that the majority sidesteps its duty as a tribunal from checking and balancing a legislature to use eminent domain powers as it pleases.[41] In presenting this argument, Justice O'Connor notes that the cases the majority cites clearly dictate that courts must intervene and review the decisions of a legislature to protect the rights of private property

[36] *See* Kelo, 545 U.S. at 488-89 (citing Berman v. Parker, 348 U.S. at 35-36).
[37] *See id.* at 482-84.
[38] See *id.* at 497.
[39] *See id.* at 501 (O'Connor, J., dissenting) ("if predicted…positive side effects are enough to render transfer from one private party to another constitutional, then the words for public use do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.") (internal quotations omitted).
[40] *See Conflicts Of Interest And Government Attorneys, supra* note 22 (identifying the four types of clients municipal attorneys may represent).
[41] *See* Kelo, 545 U.S. at at 500.

owners.[42] This again highlights that because municipal attorneys serve multiple clients, a conflict of interest is more likely to occur if a municipality favors and requires municipal attorneys to pursue the goals of one "client" over another.

The decision thus places trust in the hands of state legislatures and newly enacted state regulations that create some additional restrictions to eminent domain powers.[43] It should be noted that not all states have instituted these checks on the powers of legislatures, nor does it mean that these eminent domain laws have been successful in preventing predatory use of eminent domain powers.[44] For example, municipal attorneys have favored economic development at the cost of displacing hundreds of residents in large cities such as New York City[45] and Chicago[46] as well as in suburban cities like Kearny, New Jersey.[47] While legislation

[42] *See id.* at 500 (citing Midkiff, 467 U.S. at 240 ("To protect [the public purpose], those [eminent domain] decisions reserved a role for courts to play in reviewing a legislature's judgment of what constitutes a public use.")) (internal quotations omitted).
[43] *See id.* at 489-90.
[44] *See* Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J., 657, 659-61 (2007); *see also*, CASTLE COALITION, *supra* note 12, at 25, 34, 36 (notable states that have not passed legislation include those with the most populous cities such as Massachusetts, New Jersey, and New York); *see* CASTLE COALITION, *supra* note 12, at 9, 17, 39, 46 (demonstrating that even though California, Illinois, Ohio, and Tennessee have passed reforms protecting private citizens from eminent domain, these reforms have not fared well). *But see* CASTLE COALITION, *supra* note 12, at 7, 13, 14, 26, 32, 35, 44 (Arizona, Florida, Georgia, Michigan, Nevada, New Mexico, and South Carolina all have ratings of B+ and above, signifying that reforms to control eminent domain are working).
[45] *See* Robert H. Thomas, *Recent Developments in Challenging the Right to Take in Eminent Domain*, 42 URB. LAW. 693, 696-97, 699 (discussing Goldstein v. New York State Urban Development Corp., 921 N.E.2d 164 (N.Y. 2009), The article notes that the use of eminent domain to take property, which was not per se blighted, and redevelop it into a sports arena met the public use requirement established in *Kelo*. The article notes that Article XVIII of the New York Constitution allows legislatures to characterize blighted areas very broadly, while courts have close to no power to reject legislative action.); *see also id.* at 700-01 (using Kaur v. New York State Urban Development Corp., 933 N.E.2d 721 (N.Y. 2010) as another example of the limitless power of eminent domain in New York where New York University, a private institution, was able to condemn "blighted" property to develop into a new student campus).
[46] *See, e.g.*, City of Chicago v. Eyechaner, 26 N.E.3d 501, 504, 520-21(Ill. App. Ct. 2015) (authorizing a taking of vacant private property to be transferred to chocolatier for the purpose of: (a) developing a chocolate factory; (b) preventing continued residential encroachment into the area; (c) improving the city's tax base; and (d) preventing potential future blight from occurring).
[47] *See, e.g.*, RLR Investments, LLC v. Town of Kearney, 386 F. App'x 84, 85, 88 (3d Cir. 2010) (holding that the taking of a non-blighted and economically productive property was valid under the Fifth Amendment of the United States Constitution. The redevelopment of this property into a home improvement store and general retail area met the public purpose test, albeit being profitable, because the Town of Kearney deemed it was "'in need of redevelopment.'" This holding creates a slippery slope argument when the court emphasized in § III.A. of its

in above-named cities raises significant concerns about the abuse of eminent domain, other state regulations, such as section 1-219.1 of the Virginia Code, set limits to municipal attorneys' eminent domain powers and serve as a positive response to *Kelo*.[48] In turn, municipal attorneys are subjected to difficult laws they must carefully apply to ensure compliance with the MRPC and reduce the possibility of encountering a conflict of interest.

V. APPLICATION

a. Municipality A

Applying MRPC 1.13(a), municipal attorneys in Municipality A will identify their "clients" as the government and the citizens of the community as a whole. The municipal attorneys will not specifically represent the landowners whose property is being condemned because although they have a duty to represent the citizenry, they cannot represent each and every citizen.[49] In identifying the two parties the municipal attorney will represent in this hypothetical, it is crucial to determine if there is ultimately a conflict of interest.

To determine whether there is a MRPC Rule 1.7 conflict of interest in this situation, the municipal attorneys must examine whether the goals of one party are adverse to the goals of the other party.[50] In this situation, the government as an entity wishes to take the property of individual landowners to develop into commercial properties to continue its growing downtown area. The individual landowners on the other hand wish to remain in their homes. While the goals of each party are clearly at odds, the individual landowners have the advantage in this situation due to the implementation of various laws and regulations in Municipality A. These

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holding that an area within a larger "blight" region may be ripe for taking based on the "public purpose" rationale even if there is no need to do so.).

[48] *See* VA. CODE ANN. § 1-219.1.A., C. (2007) (noting that "no more private property may be taken than that which is necessary to achieve the public use); *see also* PKO Ventures, LLC v. Norfolk Redevelopment and Hous. Auth., 747 S.E.2d 826, 829, 830 (Va. 2013) (asserting that the taking of non-blighted property for the purpose of redeveloping the area does not meet the threshold of "public use" as defined in VA. CODE ANN. § 1-219.1.A.).

[49] *See generally* Edris, *supra* note 16 at 524-25 (noting the "public-interest-as-a-client-model").

[50] *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7, *supra* note 23.

regulations prohibit a government from taking private property that is not blighted for "economic development" purposes.[51] The impact of these laws is noteworthy as they ensure a balance between both the wishes of government, to increase revenue and taxes, and the wishes of private property owners to not have their property unlawfully taken.

The municipal attorneys in Municipality A will not have a conflict of interest due to the laws put in place that restrict predatory takings claims. The municipal attorneys in this situation will understand and inform the government office they work for, that although the government wants to improve its financial wherewithal, it conflicts with the MRPC and causes a conflict of interest for the attorneys. While not represented by the municipal attorneys directly, the municipal attorneys look out for the interests of the private property owners in this situation to maintain the emphasis on public interest in the community, as well as preventing a significant conflict of interest from occurring. As a result, the municipal attorneys in this situation are influenced through the MRPC and state enacted regulations to create a balanced representation between clients, and not one that may lead to a Rule 1.7 conflict of interest.

b. Municipality B

Similar to Municipality A, under Rule 1.13, the "clients" the municipal attorneys in Municipality B represents include the government and the citizens of the community.[52] However, unlike Municipality A, which has laws and regulations preventing eminent domain of non-blighted areas for economic development purposes, Municipality B's reliance on *Kelo* or weak regulations may permit this form of taking to occur. As a result, it is necessary to determine whether there is a conflict of interest between the clients of Municipality B's municipal attorneys.

[51] *See generally* FLA. STAT. §§ 73.013(1)(a)-(h) (2006), *infra* note, 77 (providing an example of regulations that limit the power of eminent domain).
[52] *See* Section V. a.

Unlike Municipality A where laws were enacted to prevent personal decision-making, the municipal attorneys in Municipality B have to take a completely moral decision on whether they advise the municipality to use its eminent domain powers, or if the representation will become unbalanced in favor of the government and lead to a conflict of interest.[53] Applying Rule 1.13 to Municipality B,[54] the municipal attorneys here may be influenced to see their "client" as the municipality more so than the actual citizens.[55] These attorneys will argue that economic development will benefit the whole community in the long run.

In applying the concept of "public purpose" to MRPC Rule 1.7, the most apparent conflict of interest arises between a municipal government wishing to exercise a taking of an area,[56] and the citizens who fall within the targeted taking area.[57] On one hand, Municipality B's municipal attorneys have a duty to advocate for the public interest and long-term benefits that a municipality may experience if redevelopment occurs,[58] while on the other hand, the municipal attorneys must consider the individuals and established businesses that would be forced to leave if eminent domain is used.[59] Assuming an "agency-as-the-client" model,[60] the municipal

[53] Albeit not being a representation of all municipal attorneys in this situation, because Municipality B is graded as one of the worst abusers of eminent domain rights, in this paper it is assumed that the legislation significantly exacerbates the possibility that the municipal attorneys are faced with a lopsided client relationship.
[54] *See* MODEL RULES OF PROF'L CONDUCT R. 1.13, *supra* note 17.
[55] *Cf.* RESTATEMENT (THIRD) OF THE RULES GOVERNING LAWYERS: REPRESENTING AN ORGANIZATION AS A CLIENT § 96 cmt. b. Rationable: an organization as client (2000) ("[b]y representing the organization, a lawyer does not thereby also form a client-lawyer relation with all or any individuals…who have…beneficial interest in it…").
[56] *See* Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 909-10 (2006) (noting that cities turn to eminent domain as a means of increasing revenues. Once a taking is completed, the city is able to sell off old buildings to developers who construct new and attractive residential communities).
[57] *See id.* at 912 (emphasizing that often the victims of eminent domain are the citizens with historical roots in a community).
[58] *See* Blais, *supra* note 44, at 681-82 (commenting on the trend of the repopulation and renaissance of inner city living. The result of this trend has rejuvenated planning departments in cities to create attractive communities with ample amenities, to increase the likelihood of individuals and businesses to migrate and increase city revenues.).
[59] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 S. CT. ECON. REV. 183, 216-17 (2007) (noting that takings affect both the loss of businesses in an area, but also the citizens in the community as they are the ones who must fund a taking to occur, and very rarely see any economic return on the investment).

attorneys of Municipality B will zealously advocate the desires and decisions the municipality as an entity wishes to pursue, thus undermining their duties to the citizens and creating a conflict of interest.[61]

Without the implementation of a law like the one in Municipality A, it is unlikely that the municipal attorneys for Municipality B will maintain a balanced relationship between the municipality as a client and the citizens as client, thus causing a conflict of interest. The decision in *Kelo* not only gives Municipality B leeway in abusing the power of eminent domain, but it also creates a safety net on which the municipal attorneys representing it can fall back on if suspected of violating Rule 1.7.[62] The Court, in affirming precedent[63] that defined "public use", grants too much flexibility to municipal attorneys representing Municipality B to pick and choose the properties that best fit the needs of a project the municipality and developers have in mind, even if the property is not blighted.[64] The effect of the unbalanced representation of the government as an entity materially affects the rights the public citizenry have as clients, and leads to a violation of MRPC Rule 1.7(a)(1) and (a)(2).[65]

The comparison between Municipality A and B demonstrates the impact a good law can have on the possibility of a conflict of interest. When compared to Municipality A, Municipality

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[60] *See* Edris, *supra* note 16, at 525-26 (stating that under the agency-as-the-client model, a municipal attorney serves the same purpose as a corporate attorney does. Here, the municipal attorney has a very clearly defined objective in that he or she does not take into consideration the individual desires of each officer or shareholder, and operates solely for the benefit of organization.).

[61] *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (serving to personify the interests of a city as a client).

[62] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, *supra* note 23.

[63] *See* Kelo v. City of New London, 545 U.S. 469, 481-82 (citing Berman v. Parker and Hawaii Hous. Auth. v. Midkiff).

[64] *See* Anastasia C. Sheffler-Wood, *Where do we go from here? States Revise Eminent Domain Legislation in Response to Kelo*, 79 TEMP. L. REV. 617, 624 (2006) (highlighting that the Court's definition of public use does not take into consideration different kinds of economic development. Furthermore, in refusing to closely scrutinize the actions of legislatures, the Court opens the floodgate for use of eminent domain in non-blighted properties so long as a legislature makes even a remotely substantial argument that there is a need for redevelopment.).

[65] In allowing a legislature to exercise its eminent domain power at will there is a directly adverse effect between the developers and city that experience economic benefits at the significant cost of the multitude of condemned property owners. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1)-(2).

B is more likely to present a conflict of interest problem for the municipal attorneys due in part to the leeway *Kelo* allows.[66] Municipality A creates a multi-layered process to determine the legality of an eminent domain taking and violation of the MRPC: (a) is there a law in effect that protects the rights of property owners from takings in non-blighted areas for economic development purposes; (b) does the municipal attorney have multiple "clients" to represent in this matter; and (c) does the multi-client relationship create a conflict of interest wherein one party gains a significant advantage over the other? In contrast, Municipality B has only a one step process to determine whether the taking is legal: is the taking for the purpose of "economic development"? Thus, while the relationship between eminent domain and municipal lawyers is not often a large topic, its impact is easily visible when non-blighted neighborhoods lose their identity to massive downtown renovation projects. The effect of one law not only protects the rights of thousands of private property owners,[67] but it also keeps municipal attorneys from engaging in a conflict of interest that violates the MRPC.

VI. 'TAKING' THE INITIATIVE: HOW MUNICIPAL LAWYERS CAN REDUCE ABUSIVE EMINENT DOMAIN AND REVERT TO A BALANCED RELATIONSHIP BETWEEN CLIENTS

With cities looking for ways to continue attracting populations through spacious housing, jobs, and amenities, municipal attorneys exercise of eminent domain has grown popular.[68] Governments are now partnering with private developers through "public-private partnerships" to encourage development.[69] These partnerships work exactly as the majority in *Kelo* intended, transferring private property from one private owner to another private owner/developer to

[66] *See* Kelo, 545 U.S., at 482-84 (2005) (discussing "economic development" as a tool to take property).
[67] *See generally* FLA. STAT. §§ 73.013(1)(a)-(h) (2006), *infra* note 77.
[68] *See* Dana Berliner, *Eminent Domain Abusers Are Making a Comeback*, THE WALL STREET JOURNAL (May 16, 2014, 6:06 PM), http://www.wsj.com/articles/SB10001424052702303701304579547603224974692.
[69] *See* Patience A. Crowder, *"Ain't No Sunshine": Examining Information and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 630 (2007) (providing the definition of public-private partnerships).

jumpstart a municipality in need of revitalization.[70] While some cities are enjoying the fruits of these partnerships, it leaves municipal attorneys with a conflict of interest, specifically for citizens whose property is not blighted but being condemned. The result of this is apparent when the Institute for Justice compiled a list of over ten-thousand cases of eminent domain in our court system between 1998 through 2002, and over five thousand cases since the *Kelo* decision in 2005.[71] States and their municipalities must consider enacting new legislations and regulations to enforce the Fifth and Fourteenth Amendments, which simultaneously reduce the possibility that municipal attorneys encounter conflicts of interest between their clients.

a. Apply Successful State Models That Balance The Interests Of The Community With Private Organizations

Although the effects of *Kelo* are more worrisome in the states that have not implemented any legislation to protect the rights of owners or have implemented weak legislation,[72] working with other state legislatures and municipal attorneys can help improve the lopsided use of eminent domain in states that disregard the rights of its citizens. The State of Florida's reforms, amongst others,[73] can serve as a beacon of light for all states when it passed House Bill 1567 in 2006, which added language and made amendments to various statutes.[74] Florida's blend of

[70] *Cf.* Michael R. McCormick, *Kelo Confined--Colorado Safeguards Against Condemnation for Public--Private Transportation Projects*, 37 COLO. LAW. 39, 47 (2008) (using Colorado as an example of a state that encourages eminent domain through public-private partnership solely where there is a clear public benefit as the end goal).
[71] *See* CASTLE COALITION, MYTHS AND REALITIES OF EMINENT DOMAIN ABUSES 6 (2006), *available at* http://castlecoalition.org/pdf/publications/CC_Myths_Reality%20Final.pdf.
[72] *See* discussion in Section III.b.i.
[73] *See, e.g.*, M.C.L.A. CONST. ART. X, § 2 (amended 2006) ("Public use does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.") (internal quotations omitted).
[74] *See* H.B. 1567, 108th Leg., Reg. Sess. (Fla. 2006) (passing §§ FLA. STAT. 73.013 and 73.014 to conform to the three original permitted uses of eminent domain Justice O'Connor mentioned in her dissenting opinion in *Kelo*).

small[75] and large cities[76] can be applied to other states that wish to protect the rights of private owners from eminent domain abuse.

Under Section 73.013 of the Florida Statues, Florida does not consider *Kelo*'s "economic development" standard as a reason for use of eminent domain and maintains the three eminent domain criteria Justice O'Connor described in her dissent.[77] Furthermore, under 73.013(2), condemned property may not be transferred unless ten years have elapsed since the taking,[78] or the previous owner waives his or her rights to the property.[79] Regarding blight, Florida has eliminated all possibility of municipal attorneys using eminent domain to take property that is or may become blighted, or considered a public nuisance.[80] While these statutes give landowners a greater sense of security in their property, critics of the statute note that instead of creating a balanced approach to eminent domain, municipal attorneys and the municipality are left with very little power to improve the health and safety of a municipality as well as creating a slow bureaucratic process.[81]

Applying MRPC Rule 1.7, reforms such as Florida's ensure municipal attorneys create a balance between their clients to ensure that eminent domain takings are lawful and are not the result of a conflict of interest. In addition to ensuring private property owners greater property rights, it also ensures that municipal attorneys do not over step the ethical boundaries of multiple party representations they must abide by. More states should consider adopting Florida's

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[75] *See, e.g., Leesburg (city), Florida*, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/12/1239875.html (last visited Dec. 26, 2015) (noting a population of 21,524).
[76] *See, e.g., Miami (city), Florida*, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/12/1245000.html (last visited Dec. 26, 2015) (noting a population of 430,332).
[77] *See generally* FLA. STAT. §§ 73.013(1)(a)-(h) (2006); *see supra* text accompanying note 27-29.
[78] *See* FLA. STAT. § 73.013(2)(a).
[79] *See id.* at § 73.013(2)(b)1.
[80] *See* FLA. STAT. § 73.014(1)-(2) (2006).
[81] *See* Scott J. Kennelly, *Florida's Eminent Domain Overhaul: Creating More Problems Than it Solved*, 60 FLA. L. REV. 471, 482-83 (2012).

approach to eminent domain, taking into consideration each state's unique circumstances such as geography and socio-economic backgrounds of its residents, to ensure a balanced use of eminent domain. By adopting regulations similar to those of Florida's, municipal attorneys will have a more clear understanding of the ethical boundaries they must follow when applying the new standard of "economic development" that *Kelo* established.[82]

b. Work Closely With Municipal Community And Economic Development Attorneys

In an effort not to discredit the difficult work municipal land use and zoning attorneys perform, the decision in *Kelo* created significant pressure on municipal attorneys to meet the needs of government and the community at the same time.[83] To better focus on a single aspect of the eminent domain, land use and zoning attorneys can work hand in hand with divisions within their own offices that focus on community and economic development.[84] For example, the Social Services & Public Health Trust division of the Miami-Dade County Attorney's Office specializes in various key facets of community development such as affordable housing, homeless assistance programs, and transactional work with the thirteen Community Redevelopment Areas of the Miami-Dade County to improve the conditions in low-income areas.[85] These Community and Economic Development attorneys have experience working directly with low-income communities and may better understand the needs of these neighborhoods than land use and zoning attorneys to ensure that if eminent domain is used, the citizens are endowed with the same benefits the government will have.

[82] *See supra* text accompanying note 37.
[83] *See generally* section III, b. i. discussing the conflict of interest municipal attorneys have in representing governments and citizens after *Kelo*.
[84] *See, e.g.*, *Practice Areas: Zoning, Land Use & Environment*, MIAMI-DADE COUNTY ATTORNEYS OFFICE, http://www.miamidade.gov/attorney/practice.asp?practice=%276%27 (last visited Dec. 26, 2015).
[85] *See id.*

In pursuing these strategies, municipal land use and zoning attorneys can dutifully carry out their responsibilities to the government as well as the citizen population dictated in MRPC Rule 1.7 without bringing doubts as to whether they are able to properly represent both parties.[86] In promoting these policies, cities are able to retain their respective charm and characteristics due in part to the diverse group of cultural and racial backgrounds of their residents.

VII. CONCLUSION

Implicated by the decision, municipal attorneys face increased pressure to improve the financial goals of the municipality they represent by exercising eminent domain powers while simultaneously abiding by the MRPC. While just as serious as any other form of an ethics violation, concerns of municipal attorneys employing a municipalities eminent domain powers that creates a conflict of interest with private property owners is often overlooked. The *Kelo* decision was notable for various reasons: (a) the Court added a new interpretation of "public purpose" for eminent domain purposes; (b) the municipal attorneys in states with low and failing grades have begun straying from being able to represent multiple clients responsibly to creating a significant conflict of interest between each respective client; and (c) the status of New London after the decision.

While this was an unforeseeable result to the decision, the reality is that *Kelo* leaves municipal attorneys with a high susceptibility of violating the MRPC when they are encouraged to use eminent domain powers for economic development purposes that benefit private interests more than the public interest. Bringing ethics claims against municipal attorneys is made further difficult when the laws of certain municipalities consider "economic development" as an acceptable reason to condemn private non-blighted property. As a result, municipal attorneys are

[86] *See generally* section III, a.-b. discussing the rules of ethics attorneys must abide by.

afforded significant protection from property owners who believe their property was unlawfully condemned, again raising the question of who really do municipal attorneys represent.

Nine years after the monumental decision, not only has Pfizer backed out of rejuvenating downtown New London, but more importantly, the most sacred space of the seven families who fought the case was taken and now sits vacant with no future of being developed.[87] New London, as it currently exists, should serve as a call to all attorneys and legislatures in states whose grades are low or failing to enact legislation to prevent controversial eminent domain takings. Only through new legislation will municipal attorneys be able to apply the MRPC as they existed prior to *Kelo* to reduce the possibility that a conflict of interest exists between the multiple clients municipal attorneys represent.

[87] *See Seized Property Sits Vacant Nine Years After Landmark Kelo Eminent Domain Case*, FOXNEWS.COM (Mar. 20, 2014), http://www.foxnews.com/politics/2014/03/20/seized-property-sits-vacant-nine-years-after-landmark-eminent-domain-case.html.