Courtney A. Szuta
Clerk of Circuit Court
(715) 479-3632

Michelle Livingston
Court Reporter
(715) 479-3638

VILAS COUNTY CIRCUIT COURT

330 Court Street
Eagle River, WI 54521

Neal A. Nielsen III
Circuit Court Judge
(715) 479-3638
FAX (715) 479-3740

Dawn Halvorson
Register in Probate
(715) 479-3642

Kim McCallum
Judicial Assistant
(715) 479-3638

April 13, 2017

Chief Justice Patience D. Roggensack
Associate Justices of the Wisconsin Supreme Court
Supreme Court of Wisconsin
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: Rule Petition 16-09; In the Matter of the Petition to Amend SCR 40.05

Dear Chief Justice Roggensack and Associate Justices:

On behalf of the Wisconsin State-Tribal Justice Forum, I write to support Rule Petition 16-09.

This matter is before the Court as a rule petition. Although there is undoubtedly a specific fact situation that prompted the Stockbridge-Munsee Community to file the petition, those facts are unknown to the Forum.

Apparently, the Board of Bar Examiners (BBE) has expansively interpreted language from *In re Admission of Helgemo*, 2002 WI 57, to prohibit "counting" time spent practicing as a tribal attorney for purposes of admission to the Wisconsin bar under the proof of practice rules in SCR 40.05. The Forum believes this issue needs clarification that the proposed amendment would provide.

Language in the *Helgemo* decision may have unintended consequences. Wendy Helgemo graduated from University of Colorado School of Law in May of 1995. She worked as a law clerk for the Prairie Island Indian Community in Minnesota until she was admitted to the Minnesota bar in late October of 1995. She continued working for Prairie Island as a tribal attorney for another year before taking a position as Deputy Solicitor General (later Acting Solicitor General) for the Mille Lacs Band of Ojibwa, also in Minnesota. In March of 2000, Ms. Helgemo began working as a tribal attorney for the Ho-Chunk Nation in Wisconsin, and she applied for admission to our bar in November of that year.

By reciprocity requirements, Helgemo needed to establish that she had engaged in the active practice of law for five of the last seven years. The BBE determined that she was not entitled to credit for time spent as a law clerk before admission to the Minnesota bar. It further determined that she was not entitled to credit for the time spent as an attorney for the Ho-Chunk Nation within Wisconsin while she was unlicensed here. However, the BBE *did* count the period from late October of 1995 through February of 2000 as the active practice of law in Minnesota, about four years and four months, which did not satisfy the five-year reciprocity requirement. Helgemo appealed.

This Court upheld the BBE's decision to deny Helgemo's admission to the Wisconsin bar. In doing so, however, it expressed no quarrel whatsoever with how the BBE reached its determination. Specifically, the Court took no exception to the BBE awarding Helgemo credit for the four year and four month period when she was employed as a tribal attorney while licensed in Minnesota. Rather, this Court's decision was premised solely on the fact that her later work for the Ho-Chunk Nation was conducted in a state in which she was not admitted (Wisconsin), and that her practice was before the courts of the Ho-Chunk Nation.

This is the language in *Helgemo* that seems to be causing the problem:

> As presently drafted, SCR 40.05(1)(b) is clear. It requires "[p]roof that the applicant has been primarily engaged in the active practice of law in the courts of the United States or another state or territory or the District of Columbia." Although Indian tribal courts may be located within the geographic or geopolitical boundaries of a state, they are not state courts; they are courts of separate sovereign nations. (citation omitted) As such, while practice before a tribal court may certainly constitute the active practice of law, it is not the active practice of law "in the courts of the United States or another state or territory or the District of Columbia." *Helgemo*, Par. 13

If the BBE is relying on that language today, it is probably doing so incorrectly, because the language of SCR 40.05(1)(b) was subsequently amended by Sup. Ct. Order 08-07, 2009 WI 3. Subsection (1)(b), at the time of the *Helgemo* decision, required that the applicant has been "*primarily engaged in the active practice of law in the courts of the United States or another state...*" The current version requires that the applicant has been "*substantially engaged in the practice of law in a state...*" (emphasis supplied)

This Court stated in *Helgemo* that "practice before a tribal court may certainly constitute the practice of law." It then follows that a person in Ms. Helgemo's position under the current version of the rule "has been substantially engaged in the practice of law in a state" (at least for that four year and four month period while licensed in Minnesota). The change in language in SCR 40.05(1)(b) reflects the reality that for many attorneys who are "substantially engaged in the practice of law," the last time they may actually enter a courtroom is the day they take their

oath and become admitted to the bar. This change in language eliminated the reference to practice "*in the courts*," which in turn renders *Helgemo* moot on this point. Corporate counsel, government attorneys, attorneys with solely transactional practices, *and tribal attorneys* should now all stand in the same position under 40.05.

Regardless of how this Court reviews the intent or effect of its language in *Helgemo*, or the effect of the 2009 revision to SCR 40.05(1)(b), it should grant this petition of the Stockbridge-Munsee Community.

This Court knows from its own experience the level of sophistication and scholarship brought to bear in Indian law matters. Determining tribal court subject matter jurisdiction and personal jurisdiction (particularly over non-tribal members or entities) is a complex undertaking dealing with federal statutes and treaties, and case law of the U.S. Supreme Court and federal Courts of Appeal. Representing tribal interests in property law and easement matters requires knowledge of B.I.A. regulations as well as state property law. Representing tribal interests in negotiations with state and local governments, and representing tribal interests in contracts, leasing, banking and borrowing, and business development matters requires a high degree of sophistication. And even representing tribes as attorneys whose role may be limited to appearing in tribal courts requires the same ability to apply facts to precedent and to tribal codes or ordinances (which often adopt substantial portions of state statutes), and requires the same need to exercise advocacy skills and ethics that are used by attorneys practicing in state courts.

There is no basis today (if there ever was) for determining that the provision of legal services to a tribe as an attorney does not constitute the practice of law. If that practice meets the other requirements of SCR 40.05 it should without question be counted for purposes of admission to the Wisconsin bar.

Respectfully Submitted,

Neal A. Nielsen III, Chair
Wisconsin State-Tribal Justice Forum

NAN:km

cc: Julie Ann Rich, Supreme Court Commissioner
Shannon Holsey, President, Stockbridge-Munsee Community
Jacquelyn B. Rothstein, Director, Board of Bar Examiners
Ann Olson, Wisconsin Court Operations