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September 2, 2020

Ms. Nancy K. Lynch
Associate Vice Chancellor for Legal Affairs
Office of Legal Affairs
University of Wisconsin—Madison
361 Bascom Hall
500 Lincoln Drive
Madison, WI 53706

Dear Ms. Lynch:

Thank you for your kind letter of September 1. I am delighted that the University of Wisconsin will continue to assist the Wisconsin Judicial Conference in the creation of the Wisconsin Jury Instructions and would be happy to wait until February 1, 2021 as you work through this transition.

Public Resource already has scanned the jury instructions, including the latest supplement to the Criminal Instructions. We have long experience in preparing government materials for publication, including converting materials to more useful online formats and working with agencies at the federal and state level. If we can be of any help as CLEW assists the Wisconsin Judicial Conference in making the materials available to the public and the bar, please don't hesitate to reach out to me.

I am glad you found the Georgia decision by Chief Justice Roberts to be instructive. I'm not a lawyer, but I've spent over a decade learning about the edicts of government doctrine and working with legal teams that have prepared cases on behalf of Public Resource in the U.S., Europe, and India.

The Georgia case did not turn on the issue of work for hire or assignment of copyright. The crux of the case was the fact that the edicts were issued by the state and, in particular, a law-making entity of the state. When legal materials are issued by lawmakers, these materials are in the name of the state and thus are not eligible for copyright.

We realize that the University of Wisconsin has ably assisted the Wisconsin Judicial Conference and this required considerable effort. However, the authors are the committees of judges, all acting in their official capacity. This was clearly set out by Professor Schultz, which I set out in my June 1 letter to the Wisconsin Judicial Conference:

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*The voting members of the committees are all sitting judges appointed by the Judicial Conference. The judges take primary responsibility for the program “because the giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience.” Associate Dean David E. Schultz, “History of the Wisconsin Criminal Jury Instructions,” Gargoyle (Alumni Magazine for U. of Wisconsin Law School), Vol. 22, No. 1, Summer 1991, p. 3. As Professor Schultz has said, an “important aspect of the project’s trial judge orientation is that the instructions are not approved by anyone other than the committee of trial judges.” *ibid*, page 7.*

Letter of June 1 to the Wisconsin Judicial Conference and CLEW

The Supreme Court opinion makes clear that the work-for-hire issue was not part of their analysis. The edicts of government doctrine applies to any materials issued by lawmakers (especially judges) acting in their official capacity, even if the source of the words are a work-for-hire contract by Lexis-Nexis, editorial assistance by a leading national law school like the University of Wisconsin, or the words of a K Street Lobbyist who pens a model bill in the hope that is adopted by a legislature.

The doctrine is especially clear when it comes to judges working in their official capacity, an issue addressed squarely in a long line of Supreme Court cases. That is the case with the Wisconsin Jury Instructions, which fall squarely within the boundaries of the edicts of government doctrine.

Public Resource has subscribed since our founding to a “California Idea” that our mission as a non-profit organization is to help make government function more effectively and to help it serve the citizenry, who must know their rights and obligations in order for our democracy to function. While sometimes that involves confronting the present in order to make the future better, we are always delighted when we can work in harmony with our fellow public servants, be they government officials or the staff and faculty of the University of Wisconsin as they continue to pursue the “Wisconsin Idea.”

I look forward to the outcome of your efforts and to ensuring that all people have ready access to these essential legal materials.

Please do not hesitate to let us know if we can be of assistance and thank you again for your letter.

Respectfully yours,

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Carl Malamud, President
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