

5 COMMENT: GENDER-NEUTRAL LANGUAGE

This is intended to explain the Committee's approach to the use of gender-neutral language in the Wis JI-Civil and to provide references for users who wish to use gender-neutral language in revising or supplementing the published instructions.

Substantive Gender Bias

The Committee attempts to prepare instructions that are free from substantive gender bias. By substantive bias, we mean statements that indicate that one gender is to be treated differently from the other in applying the law as described in the instructions. An example would be indicating that a witness was less likely to be credible because of gender.¹

Pronouns

Originally, some instructions adhered to the conventional grammar and statutory drafting norms of the time, employing masculine pronouns to refer to antecedents of mixed or unknown gender.² However, starting in 1991, all Wisconsin jury instructions have been drafted or revised to avoid using the masculine form. This has been achieved using several different techniques.³

The Committee's current drafting format requires that all new instructions use gender-neutral language.⁴ Where a party's name is not appropriate, instructions include reference to "he or she" and "him or her." However, there are exceptions where this format might not be suitable, especially if removing a pronoun changes the specific substantive meaning of the relevant statute.⁵

The Committee has always assumed that the published instructions will be tailored to the facts of each case. This includes modifying all pronouns to match their antecedents, as failure to do so may confuse the jury. See the dissenting opinion in Betchkal v. Willis, 127 Wis.2d 177, 190, 378 N.W.2d 684 (1985). The Committee's current drafting format provides both "he" and "she" pronouns when referring to the specific party. Although this format does not include the singular "they," the Committee acknowledges that trial courts have the discretion to use "they" or "their" in place of "he" or "she" when referring to a single person.⁶

Where users encounter an instruction that has not yet been revised in accordance with these principles, some of the techniques described in the notes below may help with any revision that may be required.⁷

COMMENT

Wis JI-Civil 5 was approved by the Committee in January 2024.

This instruction aims to provide insight into the Committee's drafting guidelines regarding adhering to scholarly consensus and style guides. It also aims to provide techniques for modifying the model instructions to incorporate gender-neutral language.

The 1991 recommendations for revising the uniform jury instructions were made by the Civil Law Subcommittee of the Wisconsin Equal Justice Task Force.

1. No instances of explicit substantive gender bias have been brought to the Committee's attention. To confront the danger of implicit gender bias, the Committee has published Wis JI-Civil 50, which, in giving the jury general instruction on its duties, includes the following statement:

People make assumptions and form opinions from their own personal backgrounds and experiences. Generally, we are aware of these things, but you should consider the possibility that you have biases of which you may not be aware which can affect how you evaluate information and make decisions.

2. Wis. Stat. Section 990.001(2) provides: "Words importing one gender extend and may be applied to any gender."

3. Some of the common techniques are:

- rewriting to avoid the problem. Often, the pronoun or the phrase in which it appears can simply be dropped. Or the sentence can easily be rewritten to make the pronoun unnecessary.
- substituting nouns for pronouns. The instructions often suggest using the name or title of a person; repeating the name or title avoids use of a pronoun and adds clarity as well.
- substituting plural pronouns for a singular pronoun. Using "witnesses . . . their" in place of "witness . . . his" usually works well.
- substituting a gender-neutral pronoun. Using "one" in place of "his" or "her" is grammatically correct but often increases the complexity of an instruction, making it more difficult to understand.
- using gender-neutral terms. The instructions typically use "police officer" instead of "policeman," "firefighter" instead of "fireman," etc.

For a summarization of these and other techniques, see Garner, *A Dictionary of Modern Legal Usage*, p. 499 (Oxford, 1987) and Melinkoff, *Legal Writing: Sense and Nonsense*, pp. 48-51 (West, 1982). Several other guides are also available. It has been the Committee's experience that rewriting can virtually always increase gender neutrality and clarity at the same time.

4. The Committee believes it is following the view of most of the commentators on current usage

in general and the law in particular. While the rules of grammar on the pronoun issue are described as unsettled, there is consensus that it is best to avoid the problem where it is possible to do so. See, for example, Garner, *A Dictionary of Modern Legal Usage*, p. 499 (Oxford, 1987); Melinkoff, *Legal Writing: Sense and Nonsense*, pp. 48-51 (West, 1982).

5. Changes in meaning can result if pronouns are changed without a careful eye on the substantive effect. For example, a criminal statute was revised several years ago to substitute “in personal possession” for “in his possession.” See § 943.12, *Possession of Burglariou Tools*. One could argue that “personal possession” has a specific substantive meaning that changed the statute.

6. The use of singular “they.”

The singular “they” is a generic third-person singular pronoun in English. In the past, formal writing and style guides, including the APA Publication Manual, the MLA Handbook, and the AP Stylebook, did not endorse the use of “they” as a singular third-person pronoun. However, most guides now wholly support the use of “they” or accept its use in limited cases as a singular and-or gender-neutral pronoun. Still, others, like the Chicago Manual of Style, take a stronger stance, deeming it too informal and ungrammatical, and recommend avoiding its use. Nevertheless, such a position is a recommendation, not a prohibition, and allows writers to make the final determination.

The Committee recognizes that such usage continues gaining scholarly acceptance and believes that it is wise to make an effort to determine what is appropriate for a particular situation. Additionally, the Committee believes that it is acceptable to use “they” or “their” instead of “he” or “she” when referring to a single person unless doing so would create undue confusion.

7. See note 3, supra.