

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-Criminal 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

The instructions, as originally drafted, followed then-accepted rules of grammar and statutory drafting in using the masculine form of pronouns to refer to antecedents of mixed or unknown gender.² In 1991, the Committee agreed that the general use of the masculine form of pronouns was perceived as gender bias and determined that it should be avoided. The Committee began redrafting the instructions to avoid using the masculine form using several different techniques.³

Beginning with Release No. 28 in December 1991, general instructions commonly used in most cases have been reviewed to eliminate the masculine form of pronouns. Instructions published before Release No. 28 have also been reviewed and modified accordingly. The Committee has found that it is necessary to review each instruction individually to ensure that no substantive changes result from changing or eliminating a pronoun.⁴

The Committee's current drafting format requires that all new instructions use gender neutral language.⁵ Where a defendant or victim's name is not appropriate, instructions include reference to "he or she" and "him or her."

References to the Defendant

The instructions, as originally drafted, used masculine pronouns to refer to the criminal defendant. The Committee did not believe that such a formatting style implicated concerns of gender neutrality because it was expected that all such references would be modified when the case involved a female defendant. 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 criminal defendant.⁶

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

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Wis JI-Criminal 5 was approved by the Committee in December 1991. This revision was approved by the Committee in December 2022; it updated the comment to more accurately reflect the position of scholarly writing and style guides concerning the use of 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. While that subcommittee focused on the Wisconsin Jury Instructions-Civil, one of its recommendations provided as follows:

The Wisconsin Criminal Jury Instructions Committee should review and revise their instructions to remove gendered language and replace it with gender inclusive or gender neutral language and reformat the instructions to allow choices to particularize any instruction for a specific case.

Report of the Wisconsin Equal Justice Task Force, p. 24.

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-Criminal 50 which, in giving the jury general instruction on its duties, includes the following statement:

All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic. 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. 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. 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 Burglarious Tools*. One could argue that “personal possession” has a specific substantive meaning that changed the statute.

5. 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).

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.