

## 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.<sup>1</sup>

### **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.<sup>2</sup> While such usage is still defended by some as proper under the rules of grammar,<sup>3</sup> the Committee is aware that general use of the masculine form of pronouns is perceived as gender bias by some and therefore should be avoided.<sup>4</sup> The Committee is working to avoid use of the masculine form by redrafting, using one of several different techniques.<sup>5</sup>

All of the general instructions commonly used in most cases have been reviewed to eliminate the masculine form of pronouns and are republished in Release No. 28 (December 1991). Every other instruction that comes before the Committee is also being reviewed. The Committee has found that it is necessary to review each instruction individually to assure that no substantive change results from the change or elimination of a pronoun.<sup>6</sup>

### **References to the Defendant**

The Wis JI-Criminal continue to use masculine pronouns to refer to the criminal defendant. This is not believed to implicate concerns of gender neutrality because it is expected that all such references will be changed when the case involves a female defendant. It has always been assumed by the Committee that the published instructions would be tailored to the facts of each case, including the modification of all pronouns to match their antecedents. 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 instructions continue to use the masculine form to refer to the defendant solely for practical reasons: to avoid the clutter, confusion, and added length involved in using "he or

she," "(he) (she)," or similar conventions throughout the instructions. It is beyond dispute that the overwhelming majority of criminal defendants are men. Using masculine pronouns in the published instruction allows using the instructions without change in most cases. This is believed to be a substantial advantage because using "(he) (she)" or a similar approach would require changing the published instruction in every case. With each change comes the opportunity for error or inadvertent mistake.

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.<sup>7</sup>

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Wis JI-Criminal 5 was approved by the Committee in December 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 recently published Wis JI-Criminal 50 which, in giving the jury general instruction on its duties, includes the following statement: "Do not let any personal feelings of bias or prejudice about such things as race, religion, national origin, sex, or age affect your deliberations." This was adapted from a recommendation found in Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts, 1989.

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

3. See, for example, Younger, "The English Language Is Sex-Neutral," 72 ABA Journal 89 (1986). The author states that English grammar treats one word in every word-couple as the "unmarked usage" — the word that is used to refer to both sexes. With English pronouns, states Younger, this is the masculine form, the use of which does not raise concerns of sexism; it is "an aspect of the internal economy of English, nothing more."

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 ©1991, Regents, Univ. of Wis. (Rel. No. 28—12/91)

Nonsense, pp. 48-51 (West, 1982).

5. 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.

— substitute 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. The Committee does not believe it is grammatically correct to use the plural form where there is a singular antecedent, although such usage appears to be coming to be recognized as standard.

— 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.

These and other techniques are summarized by Garner and Melinkoff in the texts cited in note 4, supra. 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.

6. 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.

7. See note 5, supra.