

Opinion 21-09

January 28, 2021

Digest: Where a party or attorney has advised the court that their preferred gender pronoun is “they,” a judge may not require them to instead use “he” or “she.”

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(B)(4)-(5); Opinion 19-50.

Opinion:

A judge asks if they may “require a singular pronoun be used for a singular person” in order to “keep order in the courtroom, and to have a clear record.” That is, when a party expresses a preference for gender-neutral plural pronouns (they/them), the judge wishes to require them to instead choose a singular pronoun, he/him or she/her. The judge is concerned that the use of “they” could create confusion in the record as to the number of persons to whom a speaker is referring.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner to promote public confidence in the judiciary’s integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must “perform judicial duties without bias or prejudice against or in favor of any person” (22 NYCRR 100.3[B][4]). For example, a judge must not, “by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon ... sexual orientation, gender identity [or] gender expression” (*id.*). A judge “shall require staff, court officials and others subject to the judge’s direction and control to refrain from such words or conduct” (*id.*). The judge’s responsibility for curbing such manifestations of bias and prejudice in the courtroom even extends to “lawyers in proceedings before the judge” (22 NYCRR 100.3[B][5]).

The “courthouse and courtroom must convey to the public that everyone who appears before the court will be treated fairly and impartially” (Opinion 19-50). While a judge may take reasonable steps to ensure the clarity of the record, including courteously referring to an individual by surname and/or their role in the proceeding as appropriate, a judge must be careful to avoid any appearance of hostility to an individual’s gender identity or gender expression. We can see no reason for a judge to pre-emptively adopt a policy barring all court participants, in all circumstances, from being referred to by singular “they,” which is one of three personal pronouns in the

English language. That is, “they” has been recognized as a grammatically correct use for an individual (see e.g. Merriam-Webster, 2019 *Word of the Year: They*, <https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they/they>).

Adopting and announcing the sort of rigid policy proposed here could result in transgender, nonbinary or genderfluid individuals feeling pressured to choose between the ill-fitting gender pronouns of “he” or “she.” This could not only make them feel unwelcome but also distract from the adjudicative process. Thus, as an ethical matter, we believe the described policy, if adopted, could undermine public confidence in the judiciary’s impartiality.

In sum, we conclude that, where a person before the court has advised the court that their preferred gender pronoun is “they,” the inquiring judge may not require them to use instead “he” or “she” in the proceeding. We trust judges to handle an expressed preference for the use of singular “they” on a case-by-case basis, adopting reasonable procedures in their discretion to ensure the clarity of the record as needed. We also note that there is no ethical impropriety in making adjustments over the course of a proceeding, if a judge finds that an initial approach was unsuccessful or confusing.

¹ Of course, the rule “does not preclude legitimate advocacy” by attorneys when sexual orientation or other similar factors “are issues in the proceeding” (22 NYCRR 100.3[B][5]).