

**CRIMINAL SEXUAL ACT THIRD DEGREE  
(E Felony)  
(Incapacity to Consent by Person  
Subject to Care and Custody)  
PENAL LAW 130.40(1)  
(Committed on or after Nov. 1, 2003)**

The \_\_\_\_\_ count is Criminal Sexual Act in the Third Degree.

Under our law, a person is guilty of Criminal Sexual Act in the Third Degree when he or she engages in

*Select applicable alternative(s):*

oral sexual conduct [or]  
anal sexual conduct

with another person who is incapable of consent.<sup>1</sup>

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms:

*Select applicable alternative(s):*

“oral sexual conduct” [or]  
“anal sexual conduct,”

and “incapable of consent.”

[ORAL SEXUAL CONDUCT means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.<sup>2</sup>]

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<sup>1</sup> At this point, the statutory definition continues: “by reason of some factor other than being less than seventeen years old.” Penal Law §130.40(1). That portion of the statute has been omitted here. Instead, those factors are set forth below in the definition of the term “incapable of consent.”

<sup>2</sup> Penal Law § 130.00(2)(a).

[ANAL SEXUAL CONDUCT means conduct between persons consisting of contact between the penis and anus.<sup>3</sup>]

It is an element of this crime that the [oral (or) anal] sexual conduct takes place without consent.<sup>4</sup> [Oral (or) anal] sexual conduct takes place without a person's consent when that person is deemed incapable of consent.

Under our law, a person is deemed INCAPABLE OF CONSENTING to [oral (or) anal] sexual conduct when he or she is:

*[NOTE: Select appropriate alternative <sup>5</sup>:*

committed to the care and custody of the state department of correctional services or a hospital,<sup>6</sup> and the actor is an employee,<sup>7</sup> not married to such person,<sup>8</sup> who knows or reasonably should know that such person is committed to

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<sup>3</sup> Penal Law § 130.00(2)(b).

<sup>4</sup> See Penal Law § 130.05(1).

<sup>5</sup> “Mentally disabled” and “mentally incapacitated” have been omitted here because they are also separately included in the crime of Criminal Sexual Act in the Second Degree [Penal Law § 130.45(2)]. Thus, if necessary, the charge for Criminal Sexual Act in the Second Degree can be modified to charge the instant crime as applied to a person who is “mentally disabled” or “mentally incapacitated.” Likewise, “physically helpless” has been omitted here because it is also separately included in the crime of Criminal Sexual Act in the First Degree [Penal Law § 130.50(2)]. Thus, if necessary, the charge for Criminal Sexual Act in the First Degree can be modified to charge the instant crime as applied to a person who is “physically helpless.”

<sup>6</sup> If in issue, the definition of “hospital” is set forth in Correction Law §400(2).

<sup>7</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(e).

<sup>8</sup> If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

the care and custody of such department or hospital.<sup>9</sup>

*or*

committed to the care of a local correctional facility,<sup>10</sup> and the actor is an employee,<sup>11</sup> not married to such person,<sup>12</sup> who knows or reasonably should know that such person is committed to the care and custody of such facility.<sup>13</sup>

*or*

committed to or placed with the office of children and family services and in residential care, and the actor is an employee,<sup>14</sup> not married to such person,<sup>15</sup> who knows or reasonably should know that such person is committed to or placed with the office of children and family services and in residential care.<sup>16</sup>

*or*

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<sup>9</sup> Penal Law §130.05(3)(e).

<sup>10</sup> If in issue, the definition of “local correctional facility” is set forth in Correction Law §40(2).

<sup>11</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(f).

<sup>12</sup> If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

<sup>13</sup> Penal Law §130.05(3)(f).

<sup>14</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(g).

<sup>15</sup> If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

<sup>16</sup> Penal Law §130.05(3)(g).

a client or patient and the actor is a health care provider<sup>17</sup> or mental health care provider<sup>18</sup> and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination,<sup>19</sup> and, such conduct was not performed for a valid medical or mental health care purpose.<sup>20</sup>

*[Add it applicable:*

It is a defense to this charge that the defendant was married to the victim. "Married" means the existence of the relationship between the defendant and the complainant as spouses which was recognized by law at the time of the alleged commission of this charge crime.<sup>21</sup>]

*NOTE: This is the end of definitions and the resumption of the charge:*

Thus, oral or anal sexual conduct with such a person is always deemed to be without that person's consent, even if in fact that person did consent.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following (two/three) elements:

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<sup>17</sup> If in issue, the definition of "health care provider" is set forth in Penal Law §130.00(12).

<sup>18</sup> If in issue, the definition of "mental health care provider" is set forth in Penal Law §130.00(13).

<sup>19</sup> Penal Law §130.05(3)(h).

<sup>20</sup> Penal Law § 130.10(2).

<sup>21</sup> See Penal Law § 130.00(4).

1. That on or about (*date*), in the county of (*county*) the defendant (*defendant's name*), engaged in

*Select applicable alternative(s):*

oral sexual conduct [or]

anal sexual conduct

with (*complainant's name*); [and]

2. That (*complainant's name*) was incapable of consent [and]

*[Add if applicable:*

3. That the defendant was not married to (*name of complainant*).]

Therefore, if you find that the People have proven beyond a reasonable doubt, (both/each) of those elements, you must find the defendant guilty of the crime of Criminal Sexual Act in the Third Degree as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt (either one or both / any one or more) of those elements, you must find the defendant not guilty of the crime of Criminal Sexual Act in the Third Degree as charged in the \_\_\_\_\_ count.

*NOTE: If the affirmative defense set forth in Penal Law § 130.10 (1) or (3) applies, omit the final two paragraphs of the above charge, and substitute the applicable "additional charge" from the end of this article.*