

**SEXUAL ABUSE THIRD DEGREE  
(B Misdemeanor)  
(Incapacity to Consent)  
PENAL LAW 130.55  
(Committed on or after Oct. 13, 2010 <sup>1</sup> )**

The \_\_\_\_\_ count is Sexual Abuse in the Third Degree.

Under our law, a person is guilty of Sexual Abuse in the Third Degree when he or she subjects another person to sexual contact without that person's consent.

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: "sexual contact" and "without a person's consent."

**SEXUAL CONTACT** means any touching of the sexual or other intimate parts of a person for the purpose of gratifying the sexual desire of either party. It includes the touching of the actor by the victim as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.<sup>2</sup>

Sexual contact takes place **WITHOUT A PERSON'S CONSENT** when that person is deemed incapable of consent.<sup>3</sup> Under our law, a person is deemed **INCAPABLE OF CONSENTING** to sexual contact when he or she is:

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<sup>1</sup> Except for the amendment to the definition of "sexual contact," effective October 13, 2010, as explained in the footnote to that definition, this charge is effective for crimes committed on or after Feb. 1, 2001.

<sup>2</sup> Penal Law § 130.00(3), as amended by the L.2010, c. 193, effective October 13, 2010, which struck the phrase "not married to the actor" after the word "person," and added the concluding phrase "as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."

<sup>3</sup> Penal Law § 130.05(2)(b).

[NOTE: Select appropriate alternative:

less than seventeen (17) years old.<sup>4</sup>

It is not a defense to this charge that the actor did not know that the person with whom the actor had sexual contact was less than seventeen (17) years old, or that the actor believed that such person was seventeen (17) years old or more on the date of the crime.<sup>5</sup>

or mentally disabled.<sup>6</sup>

MENTALLY DISABLED means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.<sup>7</sup>

or mentally incapacitated.<sup>8</sup>

MENTALLY INCAPACITATED means that a person is rendered temporarily incapable of appraising or controlling his or her conduct owing to the influence of a narcotic or intoxicating substance administered to him or her without his or her consent (or to any other act committed upon him or her without his or her consent).<sup>9</sup>

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<sup>4</sup> Penal Law § 130.05(3)(a).

<sup>5</sup> Penal Law § 15.20(3).

<sup>6</sup> Penal Law § 130.05(3)(b).

<sup>7</sup> Penal Law § 130.00(5).

<sup>8</sup> Penal Law § 130.05(3)(c).

<sup>9</sup> Penal Law § 130.00(6).

*or* physically helpless.<sup>10</sup>

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.<sup>11</sup>

*or* committed to the care and custody of the state department of correctional services or a hospital,<sup>12</sup> and the actor is an employee,<sup>13</sup> not married to such person,<sup>14</sup> who knows or reasonably should know that such person is committed to the care and custody of such department or hospital.<sup>15</sup>

*or* committed to the care of a local correctional facility,<sup>16</sup> and the actor is an employee,<sup>17</sup> not married to such person,<sup>18</sup> who knows or reasonably should know that such person is committed to the care and custody of such facility.<sup>19</sup>

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<sup>10</sup> Penal Law § 130.05(3)(d).

<sup>11</sup> Penal Law §130.00(7).

<sup>12</sup> If in issue, the definition of “hospital” is set forth in Correction Law §400(2).

<sup>13</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(e).

<sup>14</sup> If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

<sup>15</sup> Penal Law §130.05(3)(e).

<sup>16</sup> If in issue, the definition of “local correctional facility” is set forth in Correction Law §40(2).

<sup>17</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(f).

<sup>18</sup> If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

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

- or* committed to or placed with the office of children and family services and in residential care, and the actor is an employee,<sup>20</sup> not married to such person,<sup>21</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>22</sup>
- or* a client or patient and the actor is a health care provider<sup>23</sup> or mental health care provider<sup>24</sup> and the act of sexual contact occurs during a treatment session, consultation, interview, or examination,<sup>25</sup> and, such conduct was not performed for a valid medical or mental health care purpose.<sup>26]</sup>

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

Thus, sexual contact with such a person is always, under our law, 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

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<sup>20</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(g).

<sup>21</sup> If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

<sup>22</sup> Penal Law §130.05(3)(g).

<sup>23</sup> If in issue, the definition of “health care provider” is set forth in Penal Law §130.00(12).

<sup>24</sup> If in issue, the definition of “mental health care provider” is set forth in Penal Law §130.00(13).

<sup>25</sup> Penal Law §130.05(3)(h).

<sup>26</sup> Penal Law §130.10(2).

case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (name of defendant), subjected (name of complainant) to sexual contact; and
2. That the defendant did so without the consent of (name of complainant) because (name of complainant) was incapable of consent.

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Sexual Abuse 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 of those elements, you must find the defendant not guilty of the crime of Sexual Abuse in the Third Degree as charged in the \_\_\_\_\_ count.

*[NOTE: If the affirmative defense set forth in Penal Law § 130.10 or Penal Law § 130.55 applies, omit the final two paragraphs of the above charge, and substitute the appropriate charge at the end of this article.]*

*[NOTE: Where lack of consent results solely from incapacity to consent because of the alleged victim's mental disability or mental incapacity, a charge on corroboration is required. Penal Law § 130.16. See charge at the end of this article.]*