

SEXUAL ABUSE SECOND DEGREE
(A Misdemeanor)
(Incapacity to Consent Other Than By Age)
PENAL LAW 130.60(1)
(Committed on or after Nov. 1, 2003)

The _____ count is Sexual Abuse in the Second Degree.

Under our law, a person is guilty of Sexual Abuse in the Second Degree when he or she subjects another person to sexual contact and when such other person is incapable of consent.¹

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 “incapable of consent.”

SEXUAL CONTACT means any touching of the sexual or other intimate parts of another person, not married to the actor, for the purpose of gratifying the sexual desire of either party. It includes the touching of the actor by that person as well as the touching of that person by the actor, whether directly or through clothing.²

It is an element of this crime that the sexual contact takes place without consent.³ Sexual contact takes place without a person's consent when that person is deemed by law to be **INCAPABLE OF CONSENT**. Under our law, a person is deemed incapable of consenting to sexual contact when he or she is:

¹ At this point, the statutory definition continues: “by reason of some factor other than being less than seventeen years old.” Penal Law § 130.60(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.”

² See Penal Law § 130.00(3). If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

³ See Penal Law § 130.05(1).

[NOTE: Select appropriate alternative:

mentally disabled.⁴

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.⁵

[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.⁶]

or mentally incapacitated.⁷

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.⁸

⁴Penal Law § 130.05(3)(b).

⁵Penal Law § 130.00(5).

⁶ See Penal Law § 130.00(4). See Domestic Relations Law §§ 15 and 15-a.

⁶Penal Law § 130.05(3)(c).

⁷Penal Law § 130.00(6).

or physically helpless.⁹

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.¹⁰

or committed to the care and custody of the state department of correctional services or a hospital,¹¹ and the actor is an employee,¹² not married to such person,¹³ who knows or reasonably should know that such person is committed to the care and custody of such department or hospital.¹⁴

or committed to the care of a local correctional facility,¹⁵ and the actor is an employee,¹⁶ not married to such person,¹⁷ who knows or reasonably should know that such person is committed to the care and custody of such facility.¹⁸

or committed to or placed with the office of children and family

⁸ Penal Law § 130.05(3)(d).

⁹ Penal Law § 130.00(7).

¹¹ If in issue, the definition of “hospital” is set forth in Correction Law §400(2).

¹² If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(e).

¹³ If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

¹⁴ Penal Law §130.05(3)(e).

¹⁵ If in issue, the definition of “local correctional facility” is set forth in Correction Law §40(2).

¹⁶ If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(f).

¹⁷ If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

¹⁸ Penal Law §130.05(3)(f).

services and in residential care, and the actor is an employee,¹⁹ not married to such person,²⁰ 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.²¹]

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

Thus, sexual contact 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:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), subjected (name of complainant) to sexual contact; and
2. That (name of complainant) was incapable of consent.

[Add if applicable:

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

Therefore, if you find that the People have proven beyond

¹⁹ If in issue, the definition of "employee" is set forth in Penal Law §130.05(3)(g).

²⁰ If in issue, the definition of "married" is set forth in Penal Law §130.00(4).

²¹Penal Law §130.05(3)(g).

a reasonable doubt (both/each) of those elements, you must find the defendant guilty of the crime of Sexual Abuse in the Second 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 Sexual Abuse in the Second Degree as charged in the _____ count.

NOTE: If the affirmative defense set forth in Penal Law § 130.10 (1) applies, omit the final two paragraphs of the above charge, and substitute the applicable charge in the “additional charges” section from 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, and that charge is in the “additional charges” section of this article. Penal Law § 130.16.