

SEXUAL ABUSE FIRST DEGREE
(D Felony)
(Physical Helplessness)
PENAL LAW 130.65(2)
(Committed on or after Oct. 13, 2010 ¹)

The _____ count is Sexual Abuse in the First Degree.

Under our law, a person is guilty of Sexual Abuse in the First Degree when he or she subjects another person to sexual contact when the other person is incapable of consent by reason of being physically helpless.

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," "incapable of consent," and "physically helpless."

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.²

A person is **INCAPABLE OF CONSENT** when that person is physically helpless.³

¹ 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 Nov. 1, 2003.

² 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."

³ Penal Law § 130.05(3)(d).

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.⁴

Thus, sexual contact with such a person is always, under our law, deemed to be without that person's 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 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 (name of complainant) was incapable of consent by reason of being physically helpless.

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 First 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 First 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.

⁴ Penal Law § 130.00(7).