

**AGGRAVATED SEXUAL ABUSE
FOURTH DEGREE
(E Felony)
(Inserts a Foreign Object;
Incapacity to Consent Other than Age)
PENAL LAW 130.65-a (1)(a)
(Committed on or after Nov. 1, 2003)**

The _____ count is Aggravated Sexual Abuse in the Fourth Degree.

Under our law, a person is guilty of Aggravated Sexual Abuse in the Fourth Degree when he or she inserts a foreign object in the vagina [*or urethra*] [*or penis*] [*or rectum*] of another person and that person is incapable of consent.¹

Conduct performed for a valid medical purpose does not violate the provisions of this law.²

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: “foreign object” and “incapable of consent.”

FOREIGN OBJECT means any instrument or article which, when inserted in the vagina [*or urethra*] [*or penis*] [*or rectum*], is capable of causing physical injury.³ PHYSICAL INJURY means impairment of physical condition or substantial pain.⁴

It is an element of this crime that the insertion of a foreign

¹ At this point, the statutory definition continues: “by reason of some factor other than being less than seventeen years old.” Penal Law §130.65-a(1)(a). 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 Penal Law § 130.65-a(2).

³ Penal Law §130.00(9).

⁴ Penal Law §10.00(9).

object take place without consent.⁵ Such insertion 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 the insertion of a foreign object when he or she is:

[NOTE: Select appropriate alternative:

mentally disabled.⁶

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

[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.⁸] or

mentally incapacitated.⁹

MENTALLY INCAPACITATED means that a person is rendered temporarily incapable of appraising or controlling his or her conduct owing to the influence of

⁵ See Penal Law § 130.05(1).

⁶Penal Law 130.05(3)(b).

⁷Penal Law §130.00(5).

⁸ See Penal Law § 130.00(4). See Domestic Relations Law § § 15 and 15-a.

⁹Penal Law §130.05(3)(c).

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).¹⁰

or

physically helpless.¹¹

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.¹²

or

committed to the care and custody of the state department of correctional services or a hospital,¹³ and the actor is an employee,¹⁴ not married to such person,¹⁵ who knows or reasonably should know that such person is committed to the care and custody of such department or hospital.¹⁶

or

¹⁰Penal Law §130.00(6).

¹¹Penal Law §130.05(3)(d).

¹²Penal Law §130.00(7).

¹³If in issue, the definition of “hospital” is set forth in Correction Law §400(2).

¹⁴If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(e).

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

¹⁶Penal Law §130.05(3)(e).

committed to the care of a local correctional facility,¹⁷ and the actor is an employee,¹⁸ not married to such person,¹⁹ who knows or reasonably should know that such person is committed to the care and custody of such facility.²⁰

or

committed to or placed with the office of children and family services and in residential care, and the actor is an employee,²¹ not married to such person,²² who knows or reasonably should know that such person is committed to or placed with the office of children and family services and residential care.²³

or

a client or patient and the actor is a health care provider²⁴ or mental health care provider²⁵ and the act of sexual conduct occurs during a treatment session, consultation,

¹⁷If in issue, the definition of “local correctional facility” is set forth in Correction Law §40(2).

¹⁸If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(f).

¹⁹If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

²⁰Penal Law §130.05(f).

²¹If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(g).

²²If in issue, the definition of “married” is set forth in Penal Law §130.00(4).

²³Penal Law §130.05(3)(g).

²⁴ If in issue, the definition of “health care provider” is set forth in Penal Law §130.00(12).

²⁵ If in issue, the definition of “mental health care provider” is set forth in Penal Law §130.00(13).

interview, or examination,²⁶ and, such conduct was not performed for a valid medical or mental health care purpose.²⁷]

[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.²⁸]

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

Thus, insertion of a foreign object in the vagina [*or urethra*] [*or penis*] [*or rectum*] of 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), without a valid medical purpose, inserted a foreign object into the vagina [*or urethra*] [*or penis*] [*or rectum*] of (complainant's name);

²⁶Penal Law §130.05(3)(h).

²⁷ Penal Law § 130.10(2).

²⁸ See Penal Law § 130.00(4). See Domestic Relations Law § § 15 and 15-a.

[and]

2. That (complainant's name) was incapable of consenting to the insertion [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 Aggravated Sexual Abuse in the Fourth 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 Aggravated Sexual Abuse in the Fourth Degree as charged in the _____ count.

NOTE: If the affirmative defense set forth in Penal Law §130.10(1) or (2) applies, omit the final two paragraphs of the above charge, and substitute the applicable charges 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.