

**AGGRAVATED SEXUAL ABUSE  
FOURTH DEGREE  
(E Felony)  
(Inserts a Finger;  
Incapacity to Consent Other than Age)  
PENAL LAW 130.65-a (1)(b)  
(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 finger in the vagina [or urethra] [or penis] [or rectum] of another person causing physical injury to such person and such person is incapable of consent.<sup>1</sup>

Conduct performed for a valid medical purpose does not violate the provisions of this law. <sup>2</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: “physical injury,” and “incapable of consent.”

PHYSICAL INJURY means impairment of physical condition or substantial pain.<sup>3</sup>

It is an element of this crime that the insertion of a finger take place without consent.<sup>4</sup> Such insertion takes place without a person's consent when that person is deemed by law to be

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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 §130.65-a(1)(b). 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 § 130.65-a(2).

<sup>3</sup>Penal Law §10.00(9).

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

INCAPABLE OF CONSENT. Under our law, a person is deemed incapable of consenting to such insertion when he or she is:

*[NOTE: Select appropriate alternative:*

mentally disabled.<sup>5</sup>

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.<sup>6</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>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

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<sup>5</sup>Penal Law 130.05(3)(b).

<sup>6</sup>Penal Law §130.00(5).

<sup>7</sup> See Penal Law § 130.00(4). See Domestic Relations Law § § 15 and 15-a.

<sup>8</sup>Penal Law §130.00(3)(c).

consent).<sup>9</sup>

*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

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<sup>9</sup>Penal Law §130.00(6).

<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).

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>

*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 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 conduct occurs during a treatment session, consultation, interview, or examination,<sup>25</sup> and, such conduct was not

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<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).

<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).

performed for a valid medical or mental health care purpose.<sup>26</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>27</sup>]

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

Thus, insertion of a finger 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 finger into the vagina [or urethra] [or penis] [or rectum] of (complainant's name) causing him/her physical injury; [and]
2. That (complainant's name) was incapable of

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<sup>26</sup> Penal Law § 130.10(2).

<sup>27</sup> See Penal Law § 130.00(4). See Domestic Relations Law § § 15 and 15-a.

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/and) 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 / any 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 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.*