

SODOMY THIRD DEGREE
(E Felony)
(Incapacity to Consent other than Age, Mental Disability or
Incapacity, or Physical Helplessness)
PENAL LAW 130.40(1)
(Committed on or after February 1, 2001)

The _____ count is Sodomy in the Third Degree.

Under our law, a person is guilty of Sodomy in the Third Degree when he or she engages in deviate sexual intercourse with another person who 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: "deviate sexual intercourse" and "incapable of consent."

DEVIATE SEXUAL INTERCOURSE means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.²

It is an element of this crime that the deviate sexual intercourse takes place without consent.³ Deviate sexual intercourse takes place without a person's consent when that person is deemed incapable of consent.

Under our law, a person is deemed **INCAPABLE OF CONSENTING** to deviate sexual intercourse 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 §130.40(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 Penal Law § 130.00(2). For the definition of "not married," see Penal Law § 130.00(4).

³ See Penal Law § 130.05(1).

[NOTE: Select appropriate alternative ⁴:

committed to the care and custody of the state department of correctional services or a hospital,⁵ and the actor is an employee,⁶ not married to such person,⁷ who knows or reasonably should know that such person is committed to the care and custody of such department or hospital.⁸

or

committed to the care of a local correctional facility,⁹ and the actor is an employee,¹⁰ not married to such person,¹¹ who

⁴ “Mentally disabled” and “mentally incapacitated” have been omitted here because they are also separately included in the crime of Sodomy in the Second Degree [Penal Law § 130.45(2)]. Thus, if necessary, the charge for Sodomy in the Second Degree can be modified to charge the instant crime as applied to a person who is “mentally disabled” or “mentally incapacitated.” Likewise, “physically helpless” has been omitted here because it is also separately included in the crime of Sodomy in the First Degree [Penal Law § 130.50(2)]. Thus, if necessary, the charge for Sodomy in the First Degree can be modified to charge the instant crime as applied to a person who is “physically helpless.”

⁵ If in issue, the definition of “hospital” is set forth in Correction Law §400(2).

⁶ If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(e).

⁷ If in issue, the definition of “not married” is set forth in Penal Law §130.00(4).

⁸ Penal Law §130.05(3)(e).

⁹ If in issue, the definition of “local correctional facility” is set forth in Correction Law §40(2).

¹⁰ If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(f).

¹¹ If in issue, the definition of “not married” is set forth in Penal Law §130.00(4).

knows or reasonably should know that such person is committed to the care and custody of such facility.¹²

or

committed to or placed with the office of children and family services and in residential care, and the actor is an employee,¹³ not married to such person,¹⁴ 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.¹⁵

or

a client or patient and the actor is a health care provider¹⁶ or mental health care provider¹⁷ and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination,¹⁸ and, such conduct was not performed for a valid medical or mental health care purpose.¹⁹

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

¹²Penal Law §130.05(3)(f).

¹³ If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(g).

¹⁴ If in issue, the definition of “not married” is set forth in Penal Law §130.00(4).

¹⁵Penal Law §130.05(3)(g).

¹⁶ If in issue, the definition of “health care provider” is set forth in Penal Law §130.00(12).

¹⁷ If in issue, the definition of “mental health care provider” is set forth in Penal Law §130.00(13).

¹⁸Penal Law §130.05(3)(h).

¹⁹ Penal Law § 130.10(2).

charge:

Thus, deviate sexual intercourse 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 elements:

1. That on or about (*date*), in the county of (*county*) the defendant (*defendant's name*), engaged in deviate sexual intercourse with (*complainant's name*); and,
2. That (*complainant's name*) 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 Sodomy 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 Sodomy in the Third Degree as charged in the _____ count.

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